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No. 87407-7

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

IAN DEAN,

Petitioner/Appellant,

v.

THE FISHING COMPANY OF ALASKA, INC.

and

ALASKA JURIS, INC.,

Respondents/Appellees

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENT

Respondents the Fishing Company of Alaska, Inc. and Alaska Juris, Inc. (collectively "FCA"), appellees/defendants below, hereby answer the Petition for Review filed by Ian Dean.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Dean has provided a correct citation to the decision of Division One of the Court of Appeals and to that court's denial of Mr. Dean's Motion for Reconsideration.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Dean's Petition satisfies the criteria for discretionary review of the Court of Appeals' March 5, 2012 decision.

IV. STATEMENT OF THE CASE

Mr. Dean alleged that he sustained an injury while working onboard FCA's vessel the ALASKA JURIS. CP 2. Mr. Dean worked for less than two weeks in a variety of positions on the vessel before quitting on June 2, 2006. CP 24-25. He departed the vessel on June 14, 2006, at which time he complained of problems with his left wrist and right ankle. CP 25. He had no complaints related to his head or neck at that time.

Following his departure from the vessel, Mr. Dean was paid the general maritime remedies of maintenance and cure, as well as unearned

wages. Maintenance and cure are “no-fault” remedies that are designed to provide a seaman with food, lodging and medical care when he becomes sick or injured while in the ship’s service. See *The OSCEOLA*, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760 (1903); *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962). Maintenance is a daily stipend, and cure is the payment of medical bills. *Berg v. Fourth Shipmor Assoc.*, 82 F.3d 307, 309 (9th Cir. 1996). Maintenance and cure are payable while the seaman is undertaking curative treatment. *Id.*

During the course of Mr. Dean’s medical treatment following his departure from the vessel, he was diagnosed with an unusual genetic neurological condition called myotonia congenital. CP 10.¹ Much of the medical treatment paid for by FCA between 2006 and 2009 consisted of evaluations and diagnostic tests to determine which of Mr. Dean’s complaints were attributable to his myotonia and which might have been caused by his work aboard the vessel. CP 46-69. This process included evaluation by six different physicians, as well as multiple EMGs, MRIs, and nerve conduction studies. *Id.*

The only medical condition at issue before the trial court in the

¹ The physicians involved in this case opined that this progressive, degenerative condition was genetic in origin, and was not caused by Mr. Dean’s service aboard the ALASKA JURIS.

motion practice that gave rise to this appeal was Mr. Dean's alleged neck pain. Mr. Dean first complained of neck pain in June 2006. CP 46. No treatment or diagnostic studies were recommended for his neck at that time. CP 46-47. In October 2006, he again complained of neck pain, and was diagnosed with muscle strain and prescribed Tylenol and Motrin. CP 53.

Mr. Dean's complaints of neck pain were few and far between over the course of the next two years, and even after raising the issue of neck pain and learning in May of 2008 that physical therapy might relieve some of his neck symptoms, Mr. Dean did not attend physical therapy or pursue any other treatment for his neck. Later in 2008, Mr. Dean was seen by Dr. Timothy Daly, who opined that his neck symptoms were due to cervical strain and intermittent paravascular muscle spasm. CP 62. Dr. Daly recommended light massage, soaks, and gentle range of motion to maintain mobility, but felt that there were no curative treatments for Mr. Dean's neck. *Id.* Mr. Dean did not undertake the action recommended by Dr. Daly to alleviate his neck symptoms.

Nine more months passed without reference to Mr. Dean's neck complaint, until he transferred his care to Dr. Alfred Aflatooni, a family friend, who agreed to see Mr. Dean as a "favor." CP 37. Dr. Aflatooni

concluded that Mr. Dean suffered from “cervical radiculopathy, bilateral, with weakness of the neck and arms, and muscle spasm associated with severe headaches since 2006.” CP 68. Dr. Aflatooni ordered additional diagnostic studies, but made no treatment recommendations for Mr. Dean’s neck. CP 68.

In August 2009, Mr. Dean was evaluated by Dr. Williamson-Kirkland at FCA’s request. Dr. Williamson-Kirkland indicated that Mr. Dean had a “normal neck examination” and found “no evidence of any really significant disease in his neck that was caused at any time.” CP 41. He opined that while Mr. Dean could have sustained a neck strain aboard the vessel, any such strain would have resolved within several months. *Id.* Finding Mr. Dean’s neck to be normal, Dr. Williamson-Kirkland had no recommended treatment for Mr. Dean’s neck.

Based upon Dr. Williamson-Kirkland’s opinions, the lack of evidence tying Mr. Dean’s neck condition to his service aboard the vessel, and the absence of curative treatment undertaken for his alleged neck condition, FCA discontinued payment of maintenance and cure as of September 9, 2009. CP 27. Mr. Dean did not undertake any curative treatment for his neck following the issuance of Dr. Williamson-Kirkland’s report.

On November 3, 2009, Mr. Dean filed a motion to reinstate maintenance and cure, arguing his neck condition was related to his service on the vessel and that further curative treatment for his neck complaints was warranted, based solely on the opinion of Dr. Aflatooni. The parties disagreed about the proper standard to be applied to such a motion, with FCA maintaining that the only mechanism for obtaining a pre-trial award of maintenance and cure was summary judgment, which required that Mr. Dean show there were no disputed issues of material fact regarding his entitlement to these maritime remedies. The trial court agreed, applied the Rule 56 summary judgment standard, and based on the conflicting medical evidence, determined that disputed issues of material fact surrounding Mr. Dean's neck complaints precluded a pre-trial award of maintenance and cure. CP 76-77.

By separate motion dated July 14, 2010, Mr. Dean sought to compel FCA to answer an interrogatory stating whether or not it had undertaken surveillance of him. CP 78-81. FCA took the position that its strategic decision whether or not to conduct surveillance of Mr. Dean was protected from disclosure by the attorney work product doctrine. CP 101-105. Moreover, in its response to the motion to compel, FCA unequivocally stated that it did not intend to introduce any surveillance

material as evidence at trial, making discovery of the existence of surveillance improper because it would not lead to the discovery of admissible evidence. CP 103. The trial court denied the motion to compel. CP 113.

Mr. Dean's claims then went to arbitration, after which the parties stipulated to an Order of Entry of Judgment in favor of FCA in lieu of a trial de novo, with the understanding that the prevailing party would ultimately be determined on appeal. CP 118-22. In addition to appealing the question of the proper legal standard to be applied to a pre-trial motion for maintenance and cure, the parties stipulated to appellate review of the discoverability of the existence of surveillance films. CP 120.

At oral argument before Division One, undersigned counsel drew a distinction between the burdens of proof and persuasion and the presumptions that apply at trial, and the standard to be applied on summary judgment. *See* Transcript of Oral Argument, attached hereto in Appendix, at A1.6-1.8. Undersigned argued that where there is credible conflicting medical evidence on the issue of maintenance and cure at trial, the presumption that all doubts should be resolved in favor of the seaman applies, but noted that the presumption does not apply at the summary judgment stage, citing *Johnson v. Marlin Drilling*, 893 F.2d 77 (5th Cir.

1990) and *Tuyen Thanh Mai v. Am. Seafoods Co.*, 160 Wn. App. 528, 249 P.3d 1030 (2011). *Id.* Finally, undersigned counsel advocated the use of bifurcation as provided by Rule 42(b) to resolve pre-trial maintenance and cure disputes, which would allow for the conduct of a separate, earlier trial on the sole issue of maintenance and cure.² A1.9-1.13.

When given the opportunity to rebut these arguments, counsel for Mr. Dean stated, "I actually agree with everything Mr. Barcott said and what Judge Appelwick said too." A1.14.

Division One issued its decision on March 5, 2012. The Court of Appeals held that the trial court correctly applied the summary judgment standard to Mr. Dean's pre-trial motion for maintenance and cure and affirmed its denial of the motion. In reaching that conclusion, the panel looked to several unpublished decisions from the United States District Court for the Western District of Washington on the issue of the proper standard to be applied to a pre-trial motion for maintenance and cure, given that there is no authority on this question from either the United States Supreme Court or the Ninth Circuit. Specifically, the Court of

² The Court of Appeals and counsel for the parties also discussed the possibility of using the existing preliminary injunction procedure for resolving such disputes, but acknowledged that it carries with it certain risks and disadvantages in the context of a maintenance and cure claim. A1.4-1.5 and 1.9.

Appeals followed the approach adopted in *Buenbrazo v. Ocean Alaska, LLC*, 2007 U.S. Dist. LEXIS 98731 (W.D. Wash. Feb. 28, 2007) and *Mabrey v. Wizard Fisheries, Inc.*, 2007 WL 1556529 (W.D. Wash. May 24, 2007), where seamen seeking maintenance and cure were held to the summary judgment standard, and rejected the approach of *Gouma v. Trident Seafoods, Inc.*, 2008 WL 2020442 (W.D. Wash. January 11, 2008), where the summary judgment standard was not applied.

The Court of Appeals recognized that because Mr. Dean brought his seaman's claims in state court, they were governed by substantive federal maritime law and state procedural law. Opinion at p. 5 and 11. The court held that under state procedural rules, a seaman seeking a pre-trial award of maintenance and cure "has a limited number of procedural mechanisms at his disposal," including a preliminary injunction under CR 65(a), summary judgment under CR 56, and a bifurcated trial under CR 42(b). *Id.* at p. 11. The court concluded that in this case, the trial court properly applied the summary judgment standard to Mr. Dean's motion for maintenance and cure, noting that the principle articulated in *Vaughan* that calls for resolving doubts in favor of the seaman was not meant to "torpedo the well-established summary judgment procedure," particularly in state court, where the court cannot exercise the equitable

powers available to federal courts sitting in admiralty.³ *Id.* at p. 12.

Division One did not reach the issue of the discoverability of surveillance, finding the question to be moot in light of the parties' stipulated judgment in favor of FCA.

On March 26, 2012, Mr. Dean filed a Motion for Clarification or Reconsideration of the Court of Appeals' decision. In that motion, Mr. Dean asserted that though Division One had "correctly held that a summary judgment standard should apply for maintenance and cure motions," there remained unresolved questions as to which party bears the burden of proof on summary judgment. He further asserted that while he did not disagree with the Court's opinion, it was "not clear from the Opinion ... how it will affect cases in the future." The motion for reconsideration was denied by Division One on April 5, 2012.

V. ARGUMENT

Review by this Court of a decision of the Court of Appeals is discretionary. RCW § 2.06.030; RAP 13.1(a). The criteria for granting a petition for review are set forth in RAP 13.4(b). The rule explicitly states

³ In *Endicott v. Icicle Seafoods, Inc.*, this Court acknowledged that seamen may bring maritime claims in state court only where such claims are brought at law and not in admiralty, as federal courts are given exclusive jurisdiction over admiralty cases under the United States Constitution. 167 Wn. 2d 873, 878-79, 224 P.3d 761 (2010), *cert. denied*, 130 S. Ct. 3482 (2010).

that review will be granted only where it is established that the decision below falls into one of the following four categories:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In the present case, the petition fails to meet any of the criteria above, and review should therefore be denied.

As the Court of Appeals noted at the outset of its decision below, this was a case of first impression. The parties are unaware of any other published decision by any division of the Court of Appeals or by the Supreme Court that addresses the question of the proper legal standard to be applied to a pre-trial motion for maintenance and cure, and believe this to be the first such case. As such, there is no possibility of conflict with another decision of the Court of Appeals or the Supreme Court, and review is not warranted under RAP 13.4(b)(1) or (2).

The question of the proper legal standard to be applied to a pre-trial motion for maintenance and cure does not implicate any provision of the Washington State constitution or the United States constitution;

therefore, review is not warranted under RAP 13.4(b)(3).

Finally, the petitioner has made no showing that the petition involves an issue of “substantial public interest” that should be determined by the Supreme Court. It is true that Division One’s decision will reach beyond the parties in this particular case and have implications for other seamen and maritime employers in state court cases involving pre-trial motions for maintenance and cure. Yet contrary to the petitioner’s suggestion, the decision in this case sets forth clearly and unequivocally the proper legal standard to be applied to such motions. It does not create confusion or potential conflict, but instead provides guidance where there previously was none.

Counsel for Mr. Dean asserts that Division One did not answer what he considers the “basic question” that triggered this appeal, which he frames as follows: “Should the shipowner/employer have the same burden of proof at the pre-trial stage, in summary judgment motions to reinstate maintenance and cure, after the shipowner hires a doctor to pronounce ‘maximum cure’ and then cuts off the seaman’s benefits?” Petition at p. 6. He then goes on to state that Division One ruled that “a summary judgment standard applies to motions to reinstate maintenance and cure,” and says that the petitioner “has no quarrel with that holding.” *Id.* at pp. 6-

7. But he asserts a question remains as to who has the burden of proof on summary judgment. *Id.* at p. 7.

The question presented by this appeal was, in fact, answered by Division One, when it held that the trial court properly applied the summary judgment standard to Mr. Dean's pre-trial motion for maintenance and cure. The question of who bears the burden of proof was not before the Court of Appeals, and was not disputed by the parties, given that burdens of proof and persuasion are trial concepts, not summary judgment concepts. As undersigned counsel pointed out at oral argument, where there is credible conflicting evidence presented at trial as to a seaman's entitlement to maintenance and cure such that a credibility determination must be made, doubts are construed in favor of the seaman, under the United States Supreme Court's holding in *Vaughan*.

Such credibility determinations are not made at the summary judgment stage, however. Rather, a straightforward standard established by Rule 56 applies, under which the moving party must show that there is no genuine issue of material fact that precludes judgment as a matter of law. CR 56(c); *Doherty v. Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). The nonmoving party may defeat such a motion by putting forth evidence of disputed material issues of fact. *Id.* This is the

standard that Division One held applies to pre-trial motions for maintenance and cure, given the limited procedural mechanisms available under state procedural law.⁴

The so-called distinctions described by petitioner among the seemingly disparate opinions from the Western District of Washington on this issue are neither meaningful nor relevant to the issue. Whether a maintenance and cure dispute involves a seaman's entitlement to maintenance and cure, or the reinstatement of maintenance and cure, or the termination of maintenance and cure, the legal standard to be applied is the same – the summary judgment standard outlined above and adopted by Division One. What matters is not the parties' current status vis à vis maintenance and cure, but the procedural status of the maintenance and cure issue, i.e., whether it is being presented in the context of a preliminary injunction, a summary judgment motion, or at trial.

Moreover, both Division One and the parties to this action agreed that there exists a procedural mechanism under the Washington Civil Rules for resolving maintenance and cure disputes outside the summary

⁴ As Division One acknowledged, by choosing to file his action in state court, a seaman subjects his maritime claims to state procedural law under *Endicott*. 167 Wn. 2d at 878. He remains free to bring his claims in federal courts, which unlike state courts, may exercise equitable remedies sitting in admiralty. *Id.* at 878-79.

judgment framework, which is a bifurcated trial on maintenance and cure only under CR 42(b). This procedure was identified by undersigned counsel at oral argument, and agreed to at that time by counsel for Mr. Dean. A1.14. The Court of Appeals likewise referenced it in its decision. Opinion at p. 11.

Contrary to his agreement with this procedure at oral argument, counsel for Mr. Dean now asserts that a bifurcated trial under CR 42 would be “unduly burdensome” for seamen who seek to reinstate maintenance and cure, but would be appropriate for a seaman seeking to initiate maintenance and cure or for an employer seeking to terminate maintenance and cure. But again, this is a distinction without a legal difference. The same legal standard must apply to all maintenance and cure actions based on the procedure being applied (preliminary injunction, summary judgment, or trial) and not on whether or not the seaman is already receiving maintenance and/or cure.

Mr. Dean’s final challenge to Division One’s decision as to the proper legal standard for pre-trial maintenance and cure disputes has to do with the court’s ability to fashion equitable remedies. The Court of Appeals noted in its decision that state courts are without power to exercise the equitable powers available to federal admiralty courts.

Opinion at p. 12. Mr. Dean calls this a “fatal mistake,” citing this Court’s recent decision in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn. 2d 70, 272 P.3d 827 (2012). In *Clausen*, this Court affirmed the trial court’s post-trial award of attorney’s fees in maintenance and cure case and characterized the fee award as an equitable remedy. *Id.* at 79 and 88, n.6.

Icicle maintains that even if a Washington trial court is able to fashion equitable remedies in a maritime personal injury action, it is nevertheless constrained by the Washington rules of civil procedure. CR 1 (“These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity [. . .]”); *see also Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 418-19, 191 P.3d 866 (2008) (reviewing application of Rule 56 summary judgment standard to claims for equitable contribution and subrogation). As such, the trial court is not free to disregard the procedural rules outlined in CR 42(b), 56(c) and 65(a), but must instead follow the proper procedure in each case and apply the appropriate legal standard for each type of proceeding. Thus, contrary to Mr. Dean’s assertion, the mere fact that a court may have the ability to act in equity does not dispense with applicable procedural rules, and this Court’s decision in *Clausen* does not contradict or undermine Division One’s holding in this matter.

Finally, Mr. Dean requests that this Court review the ancillary issue of whether the existence of surveillance materials (as opposed to the surveillance materials themselves) is discoverable where the defense has no intent to introduce the materials at trial. As noted, the parties did stipulate to having the Court of Appeals resolve this question, despite the fact that they had agreed to forego trial de novo. *Icicle* does not take a position regarding Division One's decision not to reach this question, but notes that since review of the court's decision on this issue is not required under RAP 2.4, 2.5 or 12.1(b), and review of the court's decision on the summary judgment standard is not warranted under RAP 13.4(b) for the reasons set forth herein, the Court should decline to exercise its discretion to review the surveillance issue.

VI. CONCLUSION

Mr. Dean fails to demonstrate that his petition satisfies the criteria for discretionary review set forth in RAP 13.4(b). For the reasons stated herein, discretionary review is not warranted in this case and the petition should therefore be denied.

RESPECTFULLY SUBMITTED this 6th day of June, 2012.

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APPENDIX

1. *Dean v. The Fishing Co. of Alaska*, Case No. 66076-6,
Transcript of Oral Argument, September 13, 2011..... A1.1-1.16

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STATE OF WASHINGTON
DIVISION I

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IAN DEAN,)	
)	
Plaintiff,)	Trial Court No.:
)	09-2-19037-2 SEA
vs.)	
)	Court of Appeals No.:
)	66075-6
THE FISHING COMPANY OF ALASKA,)	
INC., and ALASKA JURIS, INC.,)	
)	
Defendants.)	

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BEFORE THE HONORABLE

MARLIN J. APPELWICK, C. KENNETH GROSSE, and J. ROBERT LEACH

9:30 A.M.

September 13, 2011

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1 PROCEEDINGS

2 9:30 A.M.

3

4 MR. MERRIAM: Good morning.

5 THE COURT: Good morning.

6 MR. MERRIAM: John Merriam for Ian Dean. My left
7 arm shakes sometimes whether I want it to or not as a
8 result of an old motorcycle accident. It's not because
9 I'm nervous. Well, I'm nervous too, but that's not why
10 my arm's shaking.

11 THE COURT: Do you want to reserve some time for
12 rebuttal?

13 MR. MERRIAM: Yeah. Could I have two minutes,
14 please.

15 THE COURT: You may.

16 MR. MERRIAM: I assume the panel has read the
17 brief, so I really have nothing to add except the
18 decision that came out from this tribunal two days
19 after I submitted my reply brief, Mai vs. American
20 Seafoods --

21 THE COURT: Well, I'm the author of that opinion,
22 and I don't think it provides us much guidance with
23 your issue.

24 But let me ask you a question: Was any
25 consideration given to making a motion for a temporary

1 injunction instead of a summary judgment because it has
2 a different standard of proof?

3 MR. MERRIAM: I did not think of that, in candor,
4 Your Honor. I've been doing this for a while.

5 THE COURT: I know you're an experienced admiralty
6 lawyer. Would that remedy solve the problem in this
7 case if it were pursued?

8 MR. MERRIAM: If the court allowed that, if the
9 trial court had allowed that, yes. I'm quite confident
10 that Mr. Barcott would have objected to that, and I
11 don't know what the result would have been.

12 THE COURT: Well, some other jurisdictions have
13 used that vehicle to avoid the summary judgment problem
14 which you are presented with.

15 MR. MERRIAM: That is an interesting approach, and
16 one I have never tried, I confess.

17 THE COURT: All right.

18 Well, do you have any questions you want to ask?
19 We won't make you stand here --

20 MR. MERRIAM: Okay. Thank you.

21 THE COURT: Yeah, you've walked us into a hell of
22 an issue, to be blunt, and I think we fairly understand
23 the quandary we're in. It's a mess.

24 THE COURT: But thank you.

25 THE COURT: Not that you did it or he did it; it's

1 just where we are.

2

3

ORAL ARGUMENT

4

MR. BARCOTT: Good morning. Mike Barcott, Fishing
5 Company of Alaska. And I won't use your precise quote
6 Judge Grosse, but it is an issue that --

7

THE COURT: I've probably said worse.

8

MR. BARCOTT: So have I.

9

-- that plagues the trial courts. And an answer
10 to this issue would be very, very helpful. And we
11 certainly agree with Mr. Merriam's recitations of the
12 burdens of proof and burdens of persuasions, and that
13 is, of course, not what's at issue here.

14

Your Honor, I actually think your decision in the
15 Mai case provides a great deal of support, and it
16 provides it for FCA. And here is why. Mai came to
17 this court after a trial, and that is important. The
18 Court discussed the various burdens of proof and the
19 presumptions that apply after a trial.

20

The Court concluded in Mai that if there is
21 conflicting, credible medical evidence under the
22 burdens of persuasion, the plaintiff wins. Probably a
23 correct statement of the law, but the key word is
24 credible. And credibility determinations are made in
25 trial. They're not made on summary judgment motions.

1 So that is the hinge for Mai that, before you can
2 apply that rule of law, there needs to be a credibility
3 determination.

4 THE COURT: Well, let me ask a question. Mr. Dean
5 initially received maintenance and cure for one
6 condition?

7 MR. BARCOTT: Yes.

8 THE COURT: The condition for which he now seeks
9 maintenance and cure is a different condition; is that
10 a correct understanding?

11 MR. BARCOTT: It's -- that's a correct
12 understanding. The neck condition was out of the case
13 for months and months and months.

14 THE COURT: Did he ever receive maintenance and
15 cure for the condition for which he currently seeks it?

16 MR. BARCOTT: For a brief period of time.

17 THE COURT: When was that?

18 MR. BARCOTT: Just before it was discontinued,
19 after the opinion of Dr. Williams in Kirkland, there
20 was a request for payment. And the decision not to pay
21 maintenance and cure is one that is not made lightly.
22 The Supreme Court --

23 THE COURT: I understand the potential for
24 punitive damages. How long before this lawsuit was
25 filed by Mr. Dean was maintenance for the condition for

1 which he now seeks maintenance terminated?

2 MR. BARCOTT: Your Honor, I don't have the answer
3 to that.

4 THE COURT: Can you give me a ballpark? I mean,
5 is it months? Is it a year?

6 MR. BARCOTT: It is months, at most.

7 THE COURT: Months at most?

8 MR. BARCOTT: It's a fairly short period of time.
9 When the neck condition cropped up, things started
10 happening very fast.

11 The other -- other key from the Mai case is, for
12 the proposition that there needs to be credible -- if
13 there is credible conflicting medical evidence,
14 plaintiff wins, that presumption, this Court cited a
15 United States Court of Appeals for the Fifth Circuit
16 decision, Johnson vs. Marlin Drilling. It's in
17 footnote 15 of the Mai case.

18 And if you look at Johnson, that case actually
19 came to the Fifth Circuit after summary judgment rule,
20 and the Fifth Circuit sent it back and said, "You have
21 to hold an evidentiary hearing on this issue."

22 So precisely what we said in this case should
23 occur is precisely the case that this Court cited in
24 Mai.

25 THE COURT: In view of the deference given to

1 seamen, would a seaman be entitled to an expedited
2 evidentiary hearing on the issue of maintenance only
3 when there's also a Jones Act claim in the case?

4 MR. BARCOTT: Yeah. It's an -- it's an
5 interesting procedural issue, and I believe the answer
6 is yes. And I think the mechanism is a bifurcation
7 under Rule 42(b). That issue should be bifurcated
8 if -- given that deference and the potential
9 seriousness of this.

10 The preliminary injunction issue -- the
11 preliminary injunction procedure could also be used.

12 THE COURT: Well, that has a downside to it in
13 that if it's improvidently granted, there is exposure
14 to attorneys' fees.

15 MR. BARCOTT: I'm sorry. I didn't understand the
16 question.

17 THE COURT: If a preliminary injunction is granted
18 requiring payment of maintenance, and then at trial
19 maintenance is not obtained, the plaintiff is exposed
20 to a request for attorneys' fees. That's an expensive
21 gamble for a seaman.

22 MR. BARCOTT: That's an expensive gamble, and that
23 is why I do believe the Rule 42(b) bifurcation
24 procedure, if there is some emergency about this, is
25 the appropriate procedure to use.

1 THE COURT: Does it require the showing of an
2 emergency or just --

3 MR. BARCOTT: Substantial need, serious -- serious
4 issue that -- it's a very vague standard under the
5 rule. It does not require an emergency, but if the
6 claimant can prove or plaintiff can prove, "I really
7 need this money," that would be a reason why a trial
8 court would grant a bifurcated hearing on this issue
9 only.

10 THE COURT: Should this question of the summary
11 judgment standard be viewed differently where the
12 seaman has undisputedly been injured on the job? It
13 was acknowledged. Maintenance and cure has been paid.
14 Should it be presumptively continued until the Court
15 terminates it by order?

16 Whereas a new claim, you know, let's take the
17 wrist injuries. Undisputed. Employer acknowledges it.
18 The employer is paying it. Should there be a different
19 burden to now terminate that pending adjudication,
20 then, for a new claim, the neck pain, which wasn't
21 acknowledged by the employer, for which maintenance and
22 cure wasn't previously paid?

23 MR. BARCOTT: I understand the concept, and it's
24 an issue that, of course, some courts have grappled
25 with. Is this a "this kind" of maintenance issue or a

1 "that kind" of maintenance issue? Unfortunately,
2 there's no place in the rules that draws those
3 distinctions.

4 And our view is: The rules are the rules. And
5 when cases are reviewed on appeal, if it is a
6 preliminary injunction order, there is a set of rules
7 that apply. If it's a summary judgment, there's a set
8 of rules that apply. This is a very fuzzy concept that
9 finds no support in the rules, possibly in the federal
10 courts under their equitable jurisdiction for admiralty
11 cases, they can weed down that --

12 THE COURT: The State Court doesn't have that
13 equitable jurisdiction.

14 MR. BARCOTT: It does not. It does not.

15 THE COURT: Because we don't hear admiralty cases.

16 MR. BARCOTT: That's right. And I argued that
17 case to the Supreme Court two years ago, and in
18 Endicott the Supreme Court specifically so concluded
19 that.

20 So in the State Court, we've just got the rules.
21 And if you get outside of those rules, then what
22 standards apply on appeal?

23 THE COURT: Yeah. I guess I'm framing it as not
24 as the burden on which party is seeking the relief, but
25 which party is changing the status quo from the agreed

1 or the disagreed, the consensus status quo?

2 MR. BARCOTT: Your Honor, this -- I've heard the
3 tip of the iceberg mentioned several times this
4 morning. This case is the tip of the iceberg. There
5 are hundreds of maintenance and cure cases that never
6 go to court. They are handled like workers' comp
7 claims. They are paid routinely.

8 If you change up the rules for the ones where
9 litigation is filed, it's another, "We'd sort of like
10 to help the seamen," but there's no authority for that.

11 This system self-administers very well on a
12 day-to-day basis. And then sometimes lawsuits are
13 filed. The maintenance and cure, the entitlement and
14 the discontinuation, should go on just as it does in
15 the unlitigated cases.

16 THE COURT: So you're telling us it's not broke,
17 so don't fix it?

18 MR. BARCOTT: It's not broke. This piece is not
19 broke. It works very, very well. And the fix --

20 THE COURT: How long does it take Mr. Dean to get
21 a trial date?

22 MR. BARCOTT: In the Superior Court, it's about 15
23 months in King County unless a court were to grant an
24 expedited trial.

25 THE COURT: So how does he live during that 15

1 months if it turns out he was entitled to maintenance
2 and he really was hurt?

3 MR. BARCOTT: He faces the same problem that the
4 injured seaman who has filed a trial -- or a case whose
5 case is progressing through the adjusting process. He
6 faces the same problem any personal-injury plaintiff
7 faces who may not be able --

8 THE COURT: But we don't have the same deference
9 for protecting the personal-injury plaintiff that the
10 law has mandated courts provide to seamen.

11 MR. BARCOTT: And that would be a very good reason
12 for a trial court to grant an expedited hearing on this
13 issue and this issue only. And I can't tell you what
14 that would be, but I would imagine in three months you
15 could get to a trial court on a motion to bifurcate.

16 Most defendants want to know the answer to this as
17 well as the plaintiffs. If we're supposed to be paying
18 maintenance and cure, we want to know that.

19 So I would think within the confines of the
20 existing rules, it would not be a long time with some
21 guidance from this Court that, in an appropriate
22 circumstance, a Rule 42(b) bifurcation might be
23 appropriate.

24 Thank you.

25 THE COURT: Thank you. Counsel, do you wish to

1 use some rebuttal time? You have up to seven minutes.

2

3

REBUTTAL ARGUMENT

4

MR. MERRIAM: I actually agree with everything

5

Mr. Barcott said and what Judge Appelwick said too.

6

THE COURT: You're screwing up the adversary

7

process here.

8

MR. MERRIAM: Judge Dwyer, before he died, would

9

typically suggest an expedited hearing on the issue of

10

maintenance alone because, obviously, the seaman lives

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on that, and it's not like cutting off insurance

12

benefits after a car crash.

13

The question then is who -- what happens before

14

the expedited hearing? And I suggested the burdens of

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proof you set forth in the Mai case should apply

16

until -- and to concur with Judge Appelwick -- to the

17

status quo, first, no maintenance.

18

Once the seaman establishes entitlement to

19

maintenance, that's the status quo. To disentitle him

20

is to interfere with the status quo. And I think under

21

a strict Rule 56 analysis, you could say that the

22

shipowner then has the burden to change the status quo.

23

THE COURT: So let me explore that a little bit.

24

Is it the status quo on the day the seaman's lawsuit is

25

filed? Or is it the status quo in the sense that the

1 employer recognized that there was an injury,
2 recognized that there was an entitlement to maintenance
3 for this particular condition, and paid it for a period
4 of time?

5 MR. MERRIAM: The latter.

6 I have nothing more.

7 THE COURT: Very good. Thank you. You've
8 presented us with a challenging issue. We'll be in
9 recess.

10 THE CLERK: All rise. The Court is in recess.

11 [Proceedings concluded.]

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To: Megan E. Blomquist
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Case Name: Dean v. The Fishing Company of Alaska, Inc.

Case Number: 87407-7

Identity of person filing documents:
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Attached please find The Fishing Company of Alaska's Answer to the Petition for Review, the Appendix thereto, and the Certificate of Service.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IAN DEAN,

Petitioner,

v.

THE FISHING COMPANY OF ALASKA,
INC., and ALASKA JURIS, INC.,

Respondents.

Supreme Court No.: 87407-7

NOTICE OF ERRATA

Respondents The Fishing Company of Alaska and Alaska Juris, Inc. ("FCA") hereby issue this Notice of Errata concerning their recently filed Answer to Mr. Dean's Petition for Review.

On page 15 of the Answer, in the first full paragraph, the sentence that reads, "Icicle maintains that even if a Washington trial court is able to fashion equitable remedies in a maritime personal injury action, it is nevertheless constrained by the Washington rules of civil procedure." should instead read, "FCA maintains that even if a Washington trial court is able to fashion equitable remedies in a maritime personal injury action, it is nevertheless constrained by the Washington rules of civil procedure."

Similarly, on page 16 of the Answer, the last sentence before the Conclusion that reads, " Icicle does not take a position regarding Division One's decision not to reach this question, but notes that since review of the court's decision on this issue is not required under RAP 2.4, 2.5 or 12.1(b), and review of the court's decision on the summary judgment standard is not warranted under RAP 13.4(b) for the reasons set forth herein, the Court should decline to exercise its discretion to review the surveillance issue." should instead read, "FCA does not take a position regarding Division One's decision not to

reach this question, but notes that since review of the court's decision on this issue is not required under RAP 2.4, 2.5 or 12.1(b), and review of the court's decision on the summary judgment standard is not warranted under RAP 13.4(b) for the reasons set forth herein, the Court should decline to exercise its discretion to review the surveillance issue."

FCA asks that the Court make the changes outlined above, and apologizes for any confusion these errors may have caused.

DATED this 19th day of June, 2012.

HOLMES WEDDLE & BARCOTT, P.C.

s/ Megan E. Blomquist
Michael A. Barcott, WSBA #13317
Megan E. Blomquist, WSBA #32394
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2012, I caused a true and correct copy of the Respondents' Notice of Errata to be served on the following in the manner indicated below:

*Via Electronic Mail
and U.S. Mail*

Counsel for Petitioner:
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john@merriam-maritimelaw.com
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Seattle, WA 98199

/s Megan E. Blomquist

Megan E. Blomquist

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Case Number: 87407-7

Identity of person filing documents:

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Attached please find The Fishing Company of Alaska's Notice of Errata with respect to its recently filed Answer to Petition for Review.

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