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SUPREME COURT
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No. 87407-7

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**IAN DEAN
Petitioner/Appellant
v.
THE FISHING COMPANY OF ALASKA, INC.
and
ALASKA JURIS, INC.
Respondents/Appellees**

**PETITIONER/APPELLANT'S ANSWER TO
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION'S AMICUS CURIAE MEMORANDUM IN
SUPPORT OF REVIEW**

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ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT.....1

II. CONCLUSION5

III. DECLARATION OF ELECTRONIC SERVICE.....7

IV. APPENDIXA-1

1. McCarthy v. Seafreeze Alaska, 2004 A.M.C. 2107,
2110 (W.D. Wash. 2004)

TABLE OF AUTHORITIES

Cases

Dean v. Fishing Co. Of Alaska, Inc.,
166 Wn.App 893, 272 P.3d 268 (2012) review pending4

McCarthy v. Seafreeze Alaska,
2004 A.M.C. 2107 (W.D. Wash. 2004)5

Vaughan v. Atkinson,
369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)5

Vella v. Ford Motor Co.,
421 U.S. 1, 1975 A.M.C. 563 (1975)4

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I. ARGUMENT

Petitioner/Appellant Ian Dean here answers the Memorandum in Support of Review filed by Amicus Curiae, Washington State Association for Justice Foundation (WSAJ). Dean supports the "material fact" formulation of the issue presented. WSAJ's Memorandum In Support of Review at p. 1. Dean has previously defined the issue in terms of shifting burdens of proof, after a seaman has initially established his entitlement to maintenance and cure.

Alternatively, Dean has described the issue as: The burden of proof should be borne by whomever attempts to change the 'status quo'. See, e.g., Dean's Petition for Review at p.11.

The ultimate question underlying the petition for review and answer is what facts are material for summary judgment purposes in resolving a claim for maintenance and cure benefits pending trial.

WSAJ Memorandum in Support of Review at p. 1 (emphasis in original). WSAJ goes on to more clearly shape the issue presented:

Assuming a seaman establishes the threshold requirements for entitlement to maintenance and cure, may a ship owner terminate such benefits in the absence of agreement or court order based upon its consulting physician's opinion that maximum cure has been reached, even though the seaman's physician's opinion is to the contrary?

WSAJ Memorandum in Support of Review at p. 4. In other words, does the opinion of the seaman's attending physician trump that of a consulting physician hired by the ship owner? "The answer to this substantive question (of law) may well resolve uncertainties about summary judgment practice in this context." WSAJ Memorandum in Support of Review at p. 8. If a conflicting opinion from the ship owner's

consulting physician does not create a material issue of fact for purposes of summary judgment, the Court need go no further.

Dean's Petition for Review necessarily encompasses the assumption that Dean established an entitlement to maintenance and cure for his neck injury prior to the time that Respondent Fishing Company of Alaska (FCA) sent Dean to its consulting doctor. In opposing Dean's motion for summary judgment to the trial court, for the first time in over three years, FCA opportunistically argued that Dean's neck injury was a 'new' claim which had never been previously accepted by FCA. This case is not about a seaman's initial entitlement to maintenance and cure. It is about the standard to be applied when a seaman seeks to reinstate a maintenance and cure entitlement that has already been accepted by the vessel owner. This was recognized by Division I, at least initially.

In this case of first impression, we must decide whether the usual summary judgment standard applies to a seaman's pretrial order to reinstate maintenance and cure.

Dean v. Fishing Co. Of Alaska, Inc., 166 Wn.App 893, 895, 272 P.3d 268 (2012) review pending (emphasis added). Dean complained of neck pain from the outset of his claim in 2006. Complaint CP 1-5. FCA never challenged the entitlement to maintenance and cure for the neck problem -- along with Dean's other ailments -- until Dr. Williamson-Kirkland was paid to say that Dean was at maximum cure for everything. CP 40-41. FCA paid for Dean's cure without question, including examination for the neck complaints. See, e.g., Dr. Timothy Daly's report at CP 62: "I am not certain that there is any curable recommendations for the neck." Maintenance and cure go together. If a seaman get one, he gets both.

In addition, defendants' decision to pay for cure, but not maintenance, throws its entire theory of the case into doubt. If defendants truly believed that plaintiff's symptoms after September 19, 2001, were not their responsibility, they presumably would have refused to pay cure as well as maintenance. The Supreme Court has noted that maintenance and cure obligations are co-extensive (Vella v. Ford Motor Co., 421 U.S. 1, 6, 1975 A.M.C. 563, 564 n.2 (1975)), so defendants' continued payment of medical bills could be seen as admission that their decision to deny maintenance was not sound.

McCarthy v. Seafreeze Alaska, 2004 A.M.C. 2107, 2110 (W.D. Wash. 2004)(Judge Lasnik). A copy of the McCarthy case is attached in the Appendix.

It is noted that FCA cut off Dean's cure in June of 2009, CP 69, but didn't cut off maintenance until September 2009. CP 9. FCA cannot belatedly try to wiggle out of the fact that Mr. Dean's neck condition arose while in the service of the ship, when they accepted that for over three years.

WSAJ's novel approach to framing this issue seems the best. WSAJ correctly notes at p. 6 of its Memorandum in Support of Review that: "Both state and federal courts have commented on the perceived tension between the substantive law of maintenance and cure (including the Vaughan canon) and the summary judgment principle that sets over for trial controversies involving genuine issues of material fact....Resolving this seeming tension is at the heart of the issue presented for review here." Id.

II. CONCLUSION

This Court should accept review of this case and decide the issue as best expressed by WSAJ. To do so would

greatly ease the task of judges and maritime practitioners in this state, as well as provide persuasive guidance to federal trial judges.

Respectfully submitted this 13th day of August 2012.

LAW OFFICE OF JOHN MERRIAM

s./J. Merriam

JOHN MERRIAM, WSBA #12749
Attorney for Petitioner/Appellant Ian Dean

III. DECLARATION OF ELECTRONIC SERVICE

Pursuant to the laws of the state of Washington, John Merriam declares as follows:

On August 13, 2012, I caused to be filed and served true and correct originals and/or copies of Appellant's Petitioner's Answer to Washington State Association for Justice Foundation's Amicus Curiae Memorandum in Support of Review submitted herein, by electronic service to:

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Dated this 13th day of August 2012, at Seattle,
Washington.

LAW OFFICE OF JOHN MERRIAM

s./J. Merriam
JOHN MERRIAM, WSBA #12749
Attorney for Petitioner/Appellant Ian Dean

IV. APPENDIX

[2004 AMC]

MCCARTHY v. SEAFREEZE ALASKA

2107

GENEVA MCCARTHY

v.

F/T SEAFREEZE ALASKA, ET AL.

United States District Court, Western District of Washington at Seattle, August 9, 2004
No. C03-1189L

DAMAGES — 124. Maintenance and Cure — 172. Attorneys' Fees.

Maintenance and cure are coextensive and so the continued payment of medical bills during a year can be seen as an admission that denial of maintenance during the same year was not sound and, without an effort of the employer to explain the discrepancy, the seaman may recover his legal fees in securing an order for maintenance.

Gordon C. Webb (Webb Law Firm) and Anthony Ginster *for McCarthy*
James P. Moynihan (Bauer Moynihan and Johnson) *for Seafreeze Alaska*

ROBERT S. LASNIK, D.J.:

Plaintiff seeks partial summary judgment regarding her right to maintenance from September 19, 2001, through April 30, 2003. Defendants Seafreeze Alaska L.P., United States Seafoods L.P., and Trinity Seafoods, L.L.C. maintain that there is a genuine issue of fact regarding the cause of the injuries for which plaintiff was being treated after September 19, 2001, which precludes summary judgment.¹

FACTS

On July 5, 2000, plaintiff was injured while working as a seaman on the *F/T Seafreeze Alaska*. During a black-out on the vessel, plaintiff grabbed a door frame to keep from falling down a stairway. Unfortunately, the steel door in that frame slammed shut, crushing her left hand and leaving plaintiff flailing back and forth as the vessel pitched and rolled. Plaintiff filled out a personal injury report, stating that her left hand was swollen and that she was experiencing "pins and needles" in her right hand and soreness in

1. Defendants have moved to strike the declaration of plaintiff's counsel because it was not made under penalty of perjury. Although the information contained in and attached to the declaration is inadmissible in its current form, the assertions regarding attorney's fees are based on Mr. Webb's personal knowledge and it appears that plaintiff would be able to establish a proper foundation for the attached exhibits at trial. Fed. R. Civ. P. 56(e) does not require that evidence be presented in admissible form as long as it would be admissible at trial (for example, testimony of available witnesses may be presented by affidavit in the context of a motion for summary judgment even though the affidavit would not be admissible at trial). Defendants' motion to strike is denied.

her neck and shoulder area on the right side. Despite the injury to her left hand, plaintiff was put to work using a jack hammer, which required extensive use of her right arm. Plaintiff was seen by a doctor on August 21, 2000, at which point she again complained about neck pain and numbness on her right side. Although there is no indication that she repeated these complaints at her August 30, 2000, visit, the doctor apparently evaluated her neck, finding it "supple without meninges." Plaintiff returned to work on the vessel until mid-October, 2000, at which point she went home.

During the next eleven months, plaintiff was without medical insurance and simply hoped that rest would alleviate the soreness in her neck and right shoulder area. On September 19, 2001, however, plaintiff went to see an orthopedic surgeon and was diagnosed with a herniated nucleus pulposus with chronic neck, right shoulder, and arm pain. Plaintiff's treating physician is of the opinion that her cervical disk herniation is, on a more probable than not basis, causally related to the events of July 2000. Between September 19, 2001, and April 30, 2003, plaintiff underwent treatment for symptoms related to her herniated nucleus pulposus. Although defendants paid a substantial portion of the medical costs incurred during that time frame, plaintiff's requests for maintenance were ignored until April 21, 2003, when they were denied. Defendants assert that plaintiff did not injure her neck while on the *Seafreeze Alaska* and suggest that these symptoms were related to an earlier car crash. At defendants' request, a second orthopedic surgeon reviewed plaintiff's medical records and has concluded that "it is not possible to state, on a more-probable-than-not-basis, that her current symptomatology and MRI abnormalities can be attributed to the injury in question.

MAINTENANCE PAYMENTS

Maritime law places on the shipowner the burden of paying maintenance (cost of room and board that would have been provided had the seaman remained on the ship) and cure (medical costs) if a seaman is injured or becomes ill while in the ship's service. The justifications for this rule have been

enumerated in the classic passage by Mr. Justice Story in *Harden v. Gordon*, [11 F.Cas. 480, 2000 AMC 893 (C.C.D. Me. 1823)]: The protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant

marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.

Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528, 1938 AMC 341, 343-44 (1938). In order to promote broad coverage and to avoid uncertainties regarding the right to maintenance and cure, the Supreme Court has determined that if there are any ambiguities or doubts regarding a shipowner's liability, they must be resolved in favor of the seaman. *Vaughan v. N.J. Atkinson*, 369 U.S. 527, 532, 1962 AMC 1131, 1135 (1962); *Farrell v. United States*, 336 U.S. 511, 516, 1949 AMC 613, 617 (1949). The obligation to pay maintenance and cure continues until the seaman has reached "maximum cure," generally defined as a return to health or the attainment of a state from which he will not get any better. *See, e.g., Farrell*, 336 U.S. at 517-519, 1949 AMC at 618-20. For purposes of this motion, neither side has argued that plaintiff reached maximum cure before April 30, 2003.

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds that there is no genuine issue of material fact that would preclude a declaration of liability for the payment of maintenance between September 19, 2001, and April 30, 2003. It is undisputed that plaintiff was engaged as a seaman and that she was injured while in the ship's service. Defendants argue that the herniated disc from which plaintiff is currently suffering was not caused by the July 5, 2000, incident (or, presumably, her use of a jackhammer immediately thereafter), but provides no evidence in support of that argument. Defendants' expert testified that he is unable to identify the cause of plaintiff's neck and shoulder problems; the fact that Dr. Ricketts has nothing to say on causation does not create a factual dispute. Mr. Corulli, plaintiff's ex-boyfriend, testified that although plaintiff complained about her neck and right arm, she told him that she had injured it in a car accident at some point before July 2000.² Assuming this version of the facts is true, the record is clear that the events of July 2000 aggravated whatever injuries plaintiff already had and that her current disc problems manifested themselves while in the service of the ship. Immediately after her encounter with the steel door, plaintiff reported soreness in her neck and right shoulder area to both the vessel and her treating physician. There is no evidence of any other causative event.

2. This testimony is inconsistent with statements made by Mr. Corulli during a telephone interview with plaintiff's counsel, which were reaffirmed under oath during his deposition. At the time of the interview, Mr. Corulli stated that plaintiff's neck and arm problems were caused by the July 5, 2000, accident and the subsequent use of a pneumatic hammer.

Defendants have not, therefore, raised a genuine issue of material fact regarding plaintiff's entitlement to maintenance.

In addition, defendants' decision to pay for cure, but not maintenance, throws its entire theory of the case into doubt. If defendants truly believed that plaintiff's symptoms after September 19, 2001, were not their responsibility, they presumably would have refused to pay cure as well as maintenance. The Supreme Court has noted that maintenance and cure obligations are coextensive (*Vella v. Ford Motor Co.*, 421 U.S. 1, 6, 1975 AMC 563, 564 n.2 (1975)), so defendants' continued payment of medical bills could be seen as an admission that their decision to deny maintenance was not sound.

ATTORNEY'S FEES

Plaintiff has requested attorney's fees related to the filing of this motion in the amount of \$2,500. Despite having access to sufficient medical records to justify the payment of a substantial portion of plaintiff's medical treatments during the relevant period, defendants' ignored plaintiff's request for maintenance for over a year and have made no effort to explain how they could reasonably have thought that plaintiff was entitled to cure but not maintenance. As the Supreme Court noted in *Vaughan*, 369 U.S. at 530-31, 1962 AMC at 1134:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

Plaintiff's counsel testified that he spent ten hours preparing plaintiff's motion at the rate of \$200 per hour. There being no evidence to support his claim for an additional \$500, plaintiff's request for an award of attorney's fees is granted in part.

For all of the above reasons, plaintiff's motion for maintenance is granted. Defendants shall pay plaintiff maintenance at the rate of \$20 per day for the period of September 19, 2001, through April 30, 2003, within ten days of the date of this Order. Plaintiff will be permitted to seek a higher per diem rate of maintenance at trial. Plaintiff's request for an award of attorney's fees

is granted in part. Defendants shall pay \$2,000 in fees within ten days of the date of this Order.



OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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To: 'John Merriam Esq.'
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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: John Merriam Esq. [<mailto:john@merriam-maritimelaw.com>]
Sent: Monday, August 13, 2012 2:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Michael A. Barcott, Esq.; Bryan Harnetiaux; George Ahrend
Subject: Dean v. Fishing Co. of Alaska - Petitioner/Appellant's Answer to WSAJ's Amicus Curiae Memorandum in Support of Review

Case Name: Dean v. Fishing Company of Alaska, Inc.

Case Number: 87407-7

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Dear Clerk,

Attached to this email please find Petitioner/Appellant's Answer to Washington State Association for Justice Foundation's Amicus Curiae Memorandum in Support of Review, Declaration of Electronic Service and Appendix.

Sincerely,

John W. Merriam, Esq.
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