HEADNOTE:

William S. Dize v. Association of Maryland Pilots, No. 26, Sept. Term, 2010.

JONES ACT; SEAMAN STATUS; SUMMARY JUDGMENT

The Jones Act permits any seaman who suffers a personal injury in the course of his employment to pursue a direct negligence claim against his or her employer. 46 U.S.C. § 30104. It provides "heightened legal protections . . . [to] seamen . . . because of their exposure to the 'perils of the sea.'" *Chandris, Inc., v. Latsis*, 515 U.S. 347, 354 (1995). To prevail on a negligence claim under the Jones Act, "a seaman must show: (1) that he is a seaman under the Act; (2) that he suffered injury in the course of his employment; (3) that his employer was negligent; and (4) that his employer's negligence caused his injury at least in part." *Martin v. Harris*, 560 F.3d 210, 216 (4th Cir. 2009).

The Jones Act does not define the term "seaman," charging courts with the task of distinguishing sea-based and land-based maritime employees. *Chandris*, 515 U.S. at 355. In *Chandris*, the Court articulated a two-part test to determine seaman status under the Jones Act. First, the worker's "duties must contribute to the function of the vessel or the accomplishment of its mission." 515 U.S. at 368. Second, the worker "must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Id.* The Court explained that the substantial connection requirement was intended to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore[,] whose employment does not regularly expose them to the perils of the sea." *Id.* at 368. In determining what fraction of time is appropriate for separating land-based workers from sea-based workers, the Court adopted the "rule of thumb" set forth by the United State Court of Appeals for the Fifth Circuit, *i.e.*, that "[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371.

The circuit court here looked to all of Mr. Dize's activities in assessing whether Mr. Dize was a seaman under the Jones Act. It properly focused on the activities on board a vessel that actively subjected Mr. Dize to "the perils of the sea." There is no dispute that Mr. Dize's time aboard a pilot launch was less than 30% of his time. The circuit court properly granted summary judgment in favor of the Association.

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OF MARYLAND

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WILLIAM S. DIZE

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Graeff,
Hotten,
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(Retired, Specially Assigned),

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Opinion by Graeff, J.

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Opinion by Graeff, J.

Filed: May 31, 2012

William S. Dize, appellant, filed a claim in the Circuit Court for Baltimore City against his employer, the Association of Maryland Pilots (the "Association"), appellee, pursuant to the Jones Act, 46 U.S.C. § 30104 (2006),[1] after he was diagnosed with silicosis of the lungs. In his claim, Mr. Dize attributed his condition to the Association's negligence in failing to provide him with adequate protective equipment to safely perform a sandblasting project that took place in 2007. Both parties filed motions for summary judgment, and the court granted summary judgment in favor of the Association.

On appeal, Mr. Dize presents two questions for our review,[2] which we have consolidated and rephrased as follows:

> Did the circuit court err in granting the Association's motion for summary judgment after finding, as a matter of law, that Mr. Dize was not a seaman under the Jones Act?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

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[1]Appellant cited to the Jones Act as 46 U.S.C.A. § 688 (1920) in his claim. This portion of the United States Code was recodified in 1983 and again in 2006 as 46 U.S.C. § 30104.

[2] The questions presented as they appear in Mr. Dize's brief are as follows:

> 1. Whether the Circuit Court for Baltimore City erroneously granted summary judgment on the issue of whether Appellant was entitled to "seaman status" under the Jones Act, by misapplying the elements constituting Appellant's time spent in service of a fleet of vessels in navigation?
>
> 2. Alternatively, whether the Circuit Court for Baltimore City erred as a matter of law, by improperly excluding any inquiry into Appellant's "seaman status" from a jury's consideration of additional creditable time in support of a fleet of vessels in navigation?

William S. Dize, appellant, filed a claim in the Circuit Court for Baltimore City against his employer, the Association of Maryland Pilots (the "Association"), appellee, pursuant to the Jones Act, 46 U.S.C. § 30104 (2006),1 after he was diagnosed with silicosis of the lungs. In his claim, Mr. Dize attributed his condition to the Association's negligence in failing to provide him with adequate protective equipment to safely perform a sandblasting project that took place in 2007. Both parties filed motions for summary judgment, and the court granted summary judgment in favor of the Association.

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2. Alternatively, whether the Circuit Court for Baltimore City erred as a matter of law, by improperly excluding any inquiry into Appellant's "seaman status" from a jury's consideration of additional creditable time in support of a fleet of vessels in navigation?

On May 22, 2008, Mr. Dize filed a claim against the Association in the Circuit Court for Baltimore City pursuant to the Jones Act.[3] He alleged that, during the first week of June 2007, while employed by the Association, he was "assigned to sandblast old paint from the bottom of the Annapolis Pilot" while the boat was dry-docked. The Association provided him and the other crew members with safety equipment, including safety suits, masks, and helmets to perform the task, but Mr. Dize was unable to wear the safety equipment because he was claustrophobic. The Association was aware of his condition, but the Association insisted that he participate in the sandblasting project or be terminated. Mr. Dize wore the mask and helmet "as much as possible during the work, which went on for approximately one week."[4]

Mr. Dize was diagnosed with silicosis of the lungs on January 14, 2008. He maintained that the Association negligently caused his injuries by: (1) failing "to provide [a] safe place in which to work"; (2) failing "to properly provide adequate safety equipment and/or facilities to prevent [his] exposure to harmful agents from sandblasting"; (3) failing

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[3] An individual pursuing a claim under the Jones Act may choose to do so in either state or federal court; the opposing party may not deprive the plaintiff of his or her preferred forum by removing the claim to federal court. 28 U.S.C. § 1333(1) (2006) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001) ("the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims[,]" including claims brought under the Jones Act).

[4] Mr. Dize noted that, on June 15, 2007, the Maryland Department of the Environment ordered the Association to cease and desist the sandblasting operation because "coal dust was polluting the nearby waterways and spreading black soot all over a nearby private marina."

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to warn him of the dangerous conditions associated with performing his duties; (4) failing "to conduct proper inspections of the pier and/or appurtenant facilities aforesaid in order to discover and remedy said hazardous condition"; (5) failing "to condemn the Pier as appropriate"; (6) failing "to provide adequate lighting to allow [him] to perform his job in a safe and reasonable manner"; (7) providing him "an unseaworthy vessel"; (8) failing "to provide adequate manpower to allow [him] to perform his job in a safe and reasonable manner"; and (9) engaging in conduct that was otherwise "careless, reckless and negligent." Mr. Dize asserted that, as a result of the Association's negligence, he sustained injuries to his "lungs, neck, mouth, nose, airways and other internal organs." Additionally, he alleged damage to his nervous system, as well as great physical pain and mental anguish. Mr. Dize estimated that his lost earning potential was between $48,000 and $62,000 annually, and he sought $5,000,000 in damages.

On July 16, 2008, the Association filed its answer to Mr. Dize's claim. It asserted that the circuit court lacked subject matter jurisdiction because Mr. Dize was not a seaman for purposes of the Jones Act, but rather, Mr. Dize's injuries were covered by the Longshore and Harbor Workers' Compensation Act or the Maryland Workers' Compensation Act. It further denied any negligence on its part and alleged that any injuries sustained by Mr. Dize were caused by his own contributory negligence, insubordination, a preexisting condition, or the acts of others.[5]

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[5] On March 31, 2009, the Association filed a Third-Party Complaint against Harsco (continued...)

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On November 30, 2009, Mr. Dize filed an amended claim, in which, among other things, he alleged that the Association had "failed to adhere to federal and state occupational safety standards" and that it had wilfully failed to pay "maintenance and cure at the rate of fifteen dollars ($15.00) a day as required." He demanded $10,000,000 in compensatory damages, $5,000,000 in punitive damages, and reasonable attorneys' fees.

On December 14, 2009, the Association filed a motion to strike Mr. Dize's amended complaint, arguing that it would be unduly prejudicial to allow Mr. Dize to add a maintenance and cure claim more than a year after litigation had commenced. The court ultimately granted the motion to strike the amended complaint.

On January 15, 2010, the Association filed a Motion for Summary Judgment, alleging that Mr. Dize did not spend 30% of his time working onboard a vessel, as required to qualify as a seaman under the Jones Act. It asserted that there was no dispute of material fact that Mr. Dize did not qualify as a Jones Act seaman, and the Association was entitled to judgment as a matter of law. In support, the Association submitted an affidavit signed by James Merryweather, Mr. Dize's supervisor, which described Mr. Dize's responsibilities as follows:

> Mr. Dize's duties included running the office at [the Association's Pilot Transfer Station ("PTS")], enforcing Association policies and work rules,

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[5](...continued)
Corporation ("Harsco"), a Delaware corporation with its principal place of business in Pennsylvania. The Association stated that Reed Minerals, a division of Harsco, manufactured and distributed "Black Beauty," the blasting abrasive used during the sandblasting project, and it asserted that, if Mr. Dize's injuries were sustained as a result of his participation in the sandblasting project, it was a result of Harsco's negligence.

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> dealing with local vendors, managing the shop, dispatching pilots and boat operators, making runs on (operating) the pilot launches, supervising the housekeeping crew, and overseeing routine and special projects that occurred during his one-week watch. Mr. Dize was a salaried employee who worked one week on, one week off. During the week he was on, Mr. Dize was on duty twenty-four hours a day, seven days a week. During his week on, Mr. Dize was the sole manager at the Station and was supervising other employees.

Mr. Merryweather's affidavit detailed the hours that Mr. Dize spent operating pilot launches. It further stated:

> When he was not on the water, Mr. Dize spent no more than half of an hour a day on average . . . while ashore in the service of vessels he operated, doing such things as maintenance, repairs, fueling, supplying, and other duties relating to his work as a launch operator. The rest of his time on duty was spent doing . . . other tasks . . . that did not relate to his work as a launch operator. According to the records of the Association, Mr. Dize worked 26 weeks, seven days a week, in 2006 and 2007. Accordingly, Mr. Dize worked no more than a total of 91 hours each of those years while ashore in the service of the vessels he operated.

On February 2, 2010, Mr. Dize filed his motion opposing the Association's Motion for Summary Judgment. Despite filing his own motion for summary judgment several weeks earlier, he alleged that "[t]here are genuine issues as to material fact to be submitted to the jury as to whether [Mr. Dize] is a Jones Act seaman for the purposes of this act." Mr. Dize stated that he had been a Pilot Launch Operator or crew member for 21 years prior to his injury in 2007, and he "was required to ride, operate and maintain the [Association's] pilot

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launch (or group of launches)."[6] Mr. Dize provided percentages of his time spent on the water for 1994 through 2007; these percentages varied, but the average was well under 20%.[7]

Mr. Dize described his maintenance duties as Assistant Station Manager as including "general maintenance of the buildings on the station property itself as well as painting boats, sanding them, filling them in, painting them and changing their props, replacing worn zincs, changing rotors and shafts, changing rub rails and the fueling of all the launches." In the affidavit attached to his motion, Mr. Dize stated that he spent at least three to four hours each day "performing these shoreside support tasks."[8] Mr. Dize asserted that he "did not have a passive desk job as a shore-side manager." He explained:

> Our longest days, over four (4) or more hours a day, would be spent working on the boats when they were pulled out of the water and drydocked in the spring and the fall for Re-Fit projects. My regular maintenance duties were sanding, puttying, painting and re-gelling the boats. The most time consuming tasks [were] pulling off and installing rub rails on the sides of these boats. . . . Sometimes we would pull out engines and overhaul them, as well as re-deck the boats and gut and rebuild the cabins.

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[6] Mr. Dize explains in his brief, consistent with the deposition testimony of Mr. Merryweather, that a Pilot Launch Operator transports pilots to and from large commercial ships. Mr. Dize worked alternating weeks, 24 hours per day, sleeping at the Solomons Island Pilot Transfer Station/Maintenance & Repair Facility at night.

[7] The percentages ranged from approximately 3% in 1994 to 22.48% in 2001.

[8] In his brief on appeal, Mr. Dize points to deposition testimony where he said that he worked "5 to 6 hours per day" on maintenance to the boats, which he asserts was 42% to 50% of his time. Mr. Dize's counsel below, however, did not point out this testimony or make that argument to the circuit court. As explained in more detail, *infra*, however, that dispute is not relevant to the ultimate resolution of the case.

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The affidavit stated that, "in addition to my time on the water and the fleet support activities I participated in as recorded by the maintenance logs for each of the pilot launches," Mr. Dize spent considerable time on the re-fit of various pilot launches: 110 hours in the fall of 2002 through the spring of 2003; 210 hours through January 2004; an additional 148 hours through December 2004; 219 hours from January to August 2005; 200 hours from October of 2005 through the spring of 2006; and 100-150 hours on a repair project in 2005, which involved painting and hull work. Mr. Dize stated that his work was "in support of the fleet of pilot launches in navigation," and he "spent practically 100% of his time in the service of the fleet of pilot launches."

On February 4, 2010, the Association filed its opposition to Mr. Dize's Motion for Summary Judgment. It alleged that there was no dispute that Mr. Dize spent only "a small fraction of his working time on board a vessel," the relevant inquiry for a determination of seaman status. It noted that, although its calculations of Mr. Dize's "times on the water" in 2006 and 2007 did not "exactly match" Mr. Dize's calculations, even using Mr. Dize's calculations, "the average percentage of his working time aboard a vessel in navigation over the last 14 years . . . was only 12.81 percent." It asserted that there was no dispute that his time working on a vessel did not approach 30%, as required for seaman status under the Jones Act.

On February 24, 2010, the circuit court held a hearing on the motions. Counsel for the Association argued that, in determining whether Mr. Dize qualified as a seaman under the Jones Act, the court should consider only the time Mr. Dize spent on the water. Even if

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the court considered the time that Mr. Dize spent "off the water in service of the vessel . . . he still doesn't get anywhere close to 30[%]." Counsel argued that, even if Mr. Dize spent 16.06% of his time working on the water in 2006 and 2007, and even if the time Mr. Dize spent refitting the vessel were added to that total, he would have worked only 20.64% of his time in service to the vessel.[9] Although counsel agreed that Mr. Dize had contributed to the function of the vessel or the accomplishment of its mission, counsel maintained that there was "no evidence that would allow a reasonable juror to find that the duration test has been met in this case," stating that Mr. Dize was "a shoreside worker."

Counsel for Mr. Dize responded that the 30% rule was merely a "rule of thumb," and it was appropriate to depart from the rule in certain cases. He maintained that departing from the 30% rule would be consistent with the Supreme Court's holding in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), which determined that a marine engineer who spent no more than 10% of his time on the vessels was a seaman under the Jones Act because he had a substantial connection to a fleet of vessels in navigation. Counsel argued that Mr. Dize similarly had a substantial connection to a fleet of vessels in navigation given his role in facilitating the launches. He concluded:

> [T]he facts in *Chandris* are clear on this, that even if you have a substantial connection duration and we, again, argue . . . that practically a hundred percent

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[9] In its brief, the Association notes that it initially had calculated the amount of time Mr. Dize spent in service to the vessel "on the water to be 18.99% of his work time in 2006 and 19.79 of his work time in 2007." During preparation for trial, "the Association determined that it had counted certain launch trips twice, thereby incorrectly inflating those figures." After adjusting the figures to correct its error, the Association concluded that Mr. Dize had spent 16.06% of his time on the water in both 2006 and 2007.

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he still doesn't get anywhere close to 30[%]." Counsel argued that, even if Mr. Dize spent 16.06% of his time working on the water in 2006 and 2007, and even if the time Mr. Dize spent refitting the vessel were added to that total, he would have worked only 20.64% of his time in service to the vessel.9 Although counsel agreed that Mr. Dize had contributed to the function of the vessel or the accomplishment of its mission, counsel maintained that there was "no evidence that would allow a reasonable juror to find that the duration test has been met in this case," stating that Mr. Dize was "a shoreside worker."

Counsel for Mr. Dize responded that the 30% rule was merely a "rule of thumb," and it was appropriate to depart from the rule in certain cases. He maintained that departing from the 30% rule would be consistent with the Supreme Court's holding in Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), which determined that a marine engineer who spent no more than 10% of his time on the vessels was a seaman under the Jones Act because he had a substantial connection to a fleet of vessels in navigation. Counsel argued that Mr. Dize similarly had a substantial connection to a fleet of vessels in navigation given his role in facilitating the launches. He concluded:

[T]he facts in Chandris are clear on this, that even if you have a substantial connection duration and we, again, argue . . . that practically a hundred percent

9 In its brief, the Association notes that it initially had calculated the amount of time Mr. Dize spent in service to the vessel "on the water to be 18.99% of his work time in 2006 and 19.79 of his work time in 2007." During preparation for trial, "the Association determined that it had counted certain launch trips twice, thereby incorrectly inflating those figures." After adjusting the figures to correct its error, the Association concluded that Mr. Dize had spent 16.06% of his time on the water in both 2006 and 2007.