No. 14-259

In the

Supreme Court of the United States

OUTER BANKS FISHING, INC.,

Petitioner,

v.

PETER GLAUCUS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

COMPETITION PACKET FOR THE
TWENTY-SECOND ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2015

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Table of Contents

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-2318

PETER GLAUCUS,
Plaintiff-Appellant,

v.

OUTER BANKS FISHING, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Elizabeth City
Michele Y. Portia, District Judge.
(6:12-cv-00945-MYP)

Argued: March 3, 2014

Decided: May 5, 2014

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

Reversed and remanded by published opinion. Judge Hammurabi wrote the majority opinion, in which Judge Justinian joined. Judge Solomon wrote a dissenting opinion.

HAMMURABI, Circuit Judge:

Plaintiff-appellant Peter Glaucus was employed by defendant-appellee Outer Banks Fishing, Inc. (OBF) when he stumbled and fell, striking his jaw against the rail of the docked fishing vessel on which he was repairing some damaged gear. He woke up sick the next day, went to a hospital emergency room, and has been unable to resume work since then. About two months after the fall, he was diagnosed with aplastic anemia, a rare and serious condition that occurs when the body stops producing enough new blood cells. He filed the present action seeking the ancient maritime remedy of "maintenance and cure," which is available only to seamen.

In bringing the present action, Glaucus relies primarily on the Second Circuit's recent decision in *Messier v. Bouchard Transportation*, 688 F.3d 78, 2012 AMC 2370 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1586 (2013). The district court, however, never reached the *Messier* issue. It instead dismissed the action on the ground that Glaucus was not entitled to maintenance and cure because he did not qualify as a "seaman" under the Supreme Court's decision in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995). The district court reasoned that he spent only five percent of his time on vessels in motion (as opposed to vessels that were secured to the dock or hauled out of the water entirely). Glaucus spent about half of his work time on docked vessels, about a third of his work time on vessels that had been removed from the water entirely, and about ten percent of his work time doing assigned tasks on land.

We disagree with the district court's analysis. In our view, Glaucus qualifies as a "seaman" because he spent almost 90 percent of his time in the service of a fleet of vessels "in navigation." The *Chandris* Court did not require a putative seaman to do anything more. Even if the Court in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 1997 AMC 1817 (1997), required that a putative seaman actually "go to sea," Glaucus satisfied that requirement during the five percent of his work time spent on fishing vessels while they sailed on the Albemarle Sound or the Pamlico Sound.

Because we conclude that Glaucus was a "seaman" when he worked for OBF, we must reach the *Messier* issue that the district court did not address. Once again, we agree with Glaucus and hold that he has pleaded a valid claim for maintenance and cure.

We accordingly reverse the decision below and remand the case for further proceedings consistent with this opinion.

I
Facts and Proceedings

Defendant-appellee Outer Banks Fishing, Inc. (OBF) operates eight shrimp fishing vessels from a small shipyard in Dare County, North Carolina. In October 2008, OBF hired

plaintiff-appellant Peter Glaucus to serve as the "vessel maintenance supervisor" at the shipyard. His primary responsibility was the maintenance and repair of the eight vessels in the OBF fleet. He spent about half of his time working on the vessels while they were moored to one of OBF's docks. For more significant maintenance and repairs, the vessels needed to be placed in drydock or hauled out of the water entirely. Glaucus spent about a third of his time working on vessels that had been removed from the water (although they were still "in navigation," *see infra* note 4). In addition to the time that Glaucus spent on vessels that were dockside or ashore, he spent about five percent of his time working on vessels when they were in transit on the waters of the Albemarle Sound or the Pamlico Sound in the general vicinity of OBF's shipyard.[1] Finally, he spent about ten percent of his working time performing tasks on land that were not directly related to the vessels. These tasks ranged from preparing reports and ordering supplies to mowing the grass at the shipyard.

While working to repair some damaged gear on a docked vessel in the early afternoon of May 18, 2011, Glaucus stumbled and fell, striking his jaw against the vessel's rail and sustaining a laceration inside his mouth. The laceration produced only mild discomfort and no significant bleeding, and Glaucus completed work for the day. When he awoke the next morning he was dizzy, weak, and nauseated. His wife took him directly to a hospital emergency room. He was hospitalized for about a month before he was discharged in late June 2011, and then readmitted to a different hospital about a week later because of continuing symptoms. There he was diagnosed with aplastic anemia, a rare and serious condition that happens when the body stops producing enough new blood cells.

Glaucus, invoking the district court's admiralty jurisdiction under 28 U.S.C. § 1333(1), sued OBF in the United States District Court for the Eastern District of North Carolina seeking

[1] Although these sounds are more sheltered than the open waters of the Atlantic Ocean on the east side of the Outer Banks, OBF concedes that these voyages were "at sea" as that phrase is used in maritime law, and that the marine perils faced on these sounds were "perils of the sea" as that phrase is used in maritime law.

only maintenance and cure.[2] OBF moved to dismiss the action under Fed. R. Civ. P. 12(b)(6), arguing that Glaucus did not qualify for maintenance and cure because he was not a "seaman." The district court granted OBF's motion on the ground that Glaucus did not reach the 30% threshold established by the Supreme Court in *Chandris*, 515 U.S. at 371, 1995 AMC at 1858. The district court held that time spent maintaining and repairing vessels moored at the dock or on shore for repairs did not count toward satisfying the 30% requirement. Because the district court agreed with OBF that Glaucus was not a seaman, he was not entitled to maintenance and cure. It was accordingly unnecessary to consider the validity of Glaucus's argument under *Messier*.

II
Analysis

OBF's motion to dismiss Glaucus's suit was based on two arguments. First, OBF argued that Glaucus did not qualify for maintenance and cure because he was not a "seaman." Second, OBF argued that Glaucus would not have qualified for maintenance and cure on these facts even if he had been a seaman because he does not allege that his aplastic anemia was caused or aggravated by his employment, originated during his employment, or manifested itself (*i.e.*, showed symptoms) during his employment. Indeed, it is undisputed that neither Glaucus nor anyone else knew that he had aplastic anemia until it was diagnosed almost two months after his employment had ended. The district court agreed with OBF on the first point; it did not address the second. Under our view of the case, both points must be resolved.

[2] The record does not reveal why Glaucus did not sue under the Jones Act, 46 U.S.C. § 30104, or for unseaworthiness.

A. Seaman Status

Only a "seaman" — the master or a member of a vessel's crew — can claim maintenance and cure.[3] In a trio of 1990s cases, particularly *Chandris*, the Supreme Court refined the concept, defining a "seaman" as a maritime worker who has "a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Chandris*, 515 U.S. at 368, 1995 AMC at 1856. The *Chandris* Court also provided a rule of thumb: "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, 1995 AMC at 1858.

Our sister circuits disagree about which job-related tasks should be counted when determining the percentage of time that a worker spends "in the service of a vessel." The Fifth Circuit, for example, credits tasks performed on "moored, jacked up, or docked" vessels to reach the 30-percent threshold. *E.g.*, *Naquin v. Elevating Boats, LLC*, 744 F.3d 927, 930, 2014 AMC 913, 915 (5th Cir. 2014); *see also, e.g.*, *Keller Foundation/Case Foundation v. Tracy*, 696 F.3d 835, 841-843, 2014 AMC 804, 811-814 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2825 (2013); *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 1999 AMC 147 (3d Cir. 1998). The Eleventh Circuit, in contrast, refuses to credit any work done while a vessel is "on land or, at least, while tethered to a land base." *Clark v. American Marine & Salvage, LLC*, 494 F. App'x 32, 35 (11th Cir. 2012) (per curiam).

In evaluating Glaucus's claim to seaman status, we are guided by the Supreme Court's decisions. In *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 353-354, 1991 AMC

[3] Similarly, only a seaman can sue under the Jones Act, 46 U.S.C. § 30104, or for unseaworthiness. The parties agree that the standard for seaman status is the same regardless of which of the three remedies a plaintiff seeks. *See, e.g.*, DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 215 & n.1 (2d ed. 2008). Thus we rely heavily on prior cases concerning seaman status under the Jones Act to hold that Glaucus is a seaman for purposes of claiming maintenance and cure.

913, 925 (1991), the Court clarified that seaman status depends upon "the employee's connection to a vessel in navigation"[4] and disavowed prior cases requiring a seaman to "aid in navigation" of the vessel. "It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id*. at 355, 1991 AMC at 927.

The *Chandris* Court articulated the seaman-status inquiry as a two-part test that ascertains what "'employment-related connection to a vessel in navigation' . . . [is] required for an employee to qualify as a seaman . . . ." 515 U.S. at 368, 1995 AMC at 1856 (quoting *Wilander*, 498 U.S. at 355, 1991 AMC at 926). First, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission." *Id*. (internal quotation marks omitted). "But this threshold requirement is very broad: '[A]ll who work at sea in the service of the ship' are *eligible* for seaman status." *Id*. (quoting *Wilander*, 498 U.S. at 354, 1991 AMC at 926). Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id*. Although "seaman status is not *merely* a temporal concept, . . . it necessarily includes a temporal element." *Id*. at 371, 1995 AMC at 1858. The Court then endorsed "an appropriate rule of thumb for the ordinary case: 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 . . . ." *Id.* Because the *Chandris* employee had performed some of his service to the vessel while it was in drydock, the Court remanded the case for a determination of whether that vessel had remained "in navigation" during its extended time in drydock. *Id*. at 376-77, 1995 AMC at 1862-63.

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[4] The phrase "in navigation" is a term of art in maritime law. A vessel may remain "in navigation" even when it is neither moving nor on open water. Generally, "vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be 'in navigation.'" *Chandris*, 515 U.S. at 374, 1995 AMC at 1861. OBF concedes that all of the fishing vessels in its fleet were "in navigation" at all relevant times.

Finally, *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 1997 AMC 1817 (1997), embellished the reference in the second prong of the *Chandris* test to "'an identifiable group of . . . vessels' in navigation." 520 U.S. at 550, 1997 AMC at 1818 (quoting *Chandris*, 515 U.S. at 368, 1995 AMC at 1854) (ellipsis in *Papai*). To qualify as a seaman, an employee may point to "a substantial connection to a vessel or a *fleet of vessels*." *Id*. at 560, 1997 AMC at 1825 (emphasis added). This "latter concept requires a requisite degree of common ownership or control" of the vessels that allegedly make up the "fleet." *Id.* The *Papai* Court also declared that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Id*. at 555, 1997 AMC at 1821.

In the present case, the only disputed issue is whether Glaucus satisfied the 30-percent requirement. OBF concedes that (1) its eight shrimp fishing vessels constitute a fleet with the "requisite degree of common ownership or control," *Papai*, 520 U.S. at 560, 1997 AMC at 1825; (2) all of the fishing vessels in the fleet were "in navigation" (*see supra* note 4) throughout the entire period of Glaucus's employment with OBF; and (3) Glaucus's work maintaining and repairing the fishing vessels in the fleet contributed to the fleet's function and the accomplishment of its mission.

The dispositive issue, therefore, is whether Glaucus's time spent maintaining and repairing vessels moored at the dock or on shore for repairs counts toward satisfying the 30-percent requirement. OBF concedes that Glaucus's time spent on vessels while they navigated the waters of the Albemarle Sound or the Pamlico Sound would properly count toward *Chandris*'s 30-percent requirement, but Glaucus spent only about five percent of his time on vessels in motion. Similarly, Glaucus concedes that the time he spent doing work on land not directly related to the vessels (such as mowing the lawn) does not count toward *Chandris*'s 30-percent requirement, but that was only about ten percent of his work time.

Applying the test established by the Supreme Court to the facts that we must accept as true here, we have little difficulty concluding that Glaucus qualifies as a seaman. *Chandris* does not require a putative seaman to spend at least 30 percent of his time on a vessel at sea, as the district court apparently believed. The test articulated by the *Chandris* Court requires simply that a seaman must spend at least "30 percent of his time in the service of a vessel in navigation." 515 U.S. at 371, 1995 AMC at 1858. Under *Papai,* the test may instead permit the seaman to spend at least 30 percent of his time in the service of a fleet of vessels in navigation. There is no doubt that Glaucus was still serving the vessels in the fleet while they were dockside or ashore. He accordingly passes the *Chandris* 30-percent threshold.

B. Maintenance and Cure for Asymptomatic Illness

The Shipowners' Liability Convention (which was made effective by Proclamation of the President on October 29, 1939, 54 Stat. 1693, 1704) provides in article 2, section 1(a), that a seaman's employer owes maintenance and cure for "sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement." In *Warren v. United States,* 340 U.S. 523, 526-528, 1951 AMC 416, 418-420 (1951), the Supreme Court confirmed that the Convention expresses and reflects U.S. law.

U.S. jurisprudence has repeatedly and consistently confirmed the principles embraced by Convention article 2, section 1(a). The employer's obligation is not limited to sickness and injury caused by the employment or to "risks . . . arising in the actual performance of the seaman's duties." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731, 1943 AMC 451, 457-458 (1943). It extends to all instances of "seamen becoming ill or injured during the period of their service." *Id.* at 730, 1943 AMC at 456. The right to maintenance and cure "arises not only when the seaman is injured while actually at work . . . , but also when his injury occurs during off-duty

periods. And it arises when he is taken ill *from whatever cause* during" his employment as a seaman. *Haskell v. Socony Mobil Co.*, 237 F.2d 707, 709, 1956 AMC 2277, 2278 (1st Cir. 1956) (emphasis added). The Second Circuit's *Messier* opinion provides a succinct summary:

> [M]aintenance and cure has been called a kind of nonstatutory workmen's compensation. The analogy to workers' compensation, however, can be misleading, because maintenance and cure is a far more expansive remedy. First, although it is limited to the seaman who becomes ill or is injured while in the service of the ship, it is not restricted to those cases where the seaman's employment is the cause of the injury or illness. . . . Second, the doctrine is so broad that negligence or acts short of culpable misconduct on the seaman's part will not relieve the shipowner of the responsibility. Third, the doctrine may apply even if a seaman is injured or falls ill off-duty . . . . Fourth, a seaman may be entitled to maintenance and cure even for a preexisting medical condition that recurs or becomes aggravated during his service.

688 F.3d at 82, 2012 AMC at 2374-75 (citations, emphasis, and paragraph break omitted).

Building upon this foundation, the *Messier* court articulated a clear rule for cases of asymptomatic illness, defined as illness that existed during the seaman's term of employment but showed no symptoms until after the employment. Under the *Messier* rule, a seaman who establishes that he was ill during his term of employment — *i.e.*, that the disease from which he presently suffers *existed* (albeit without symptoms) during his term of employment — is entitled to maintenance and cure unless the employer can prove that the seaman had the disease before the employment began.[5]

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[5] The *Messier* court articulated its holding as follows:

> The rule of maintenance and cure is simple and broad: a seaman is entitled to maintenance and cure for *any* injury or illness that occurs or becomes aggravated while he is serving the ship. It does not matter whether he is injured because of his own negligence. It does not matter whether the injury or illness was related to the seaman's employment. It does not even matter, absent active concealment, if the illness or injury is merely an aggravation or recurrence of a preexisting condition. This well-established rule does not permit an exception for asymptomatic conditions — so long as the illness occurred or became aggravated during the seaman's service, he is entitled to maintenance and cure. . . . [T]he only evidence submitted at summary judgment establishes [that] Messier had lymphoma during his maritime

The facts in this case[6] put it on all fours with *Messier*. Glaucus started working for OBF during the last week of October, 2008. His last day at work was the date of his injury — May 18, 2011. One of his treating physicians avers that Glaucus's aplastic anemia "existed for at least several months prior to my July 13, 2011, report, which would include at least January-May 2011." This shows that Glaucus had the asymptomatic disease during his service as a seaman with OBF. Therefore, Glaucus has set forth a prima facie case for maintenance and cure under the *Messier* rule. OBF argues that the illness probably pre-existed Glaucus's term of service, but it has offered no proof to that effect. All of the medical evidence indicates that Glaucus's aplastic anemia is of "unknown etiology," which means that "the cause of his aplastic anemia simply cannot be determined."

Our dissenting colleague insists on characterizing *Messier* — and thus this Court's decision — as radically revolutionary. The characterization is hyperbolic. The law of maintenance and cure has continually evolved in response to technological changes in the maritime industries, *see, e.g., Williamson v. Western-Pacific Dredging Corp.*, 304 F. Supp. 509, 515 (D. Ore. 1969), and progress in medical science, *see, e.g., Haney v, Miller's Launch, Inc.*, 773 F. Supp. 2d 280, 291-293, 2011 AMC 1931, 1945-49 (E.D.N.Y. 2010); *Jackson v. Murphy Exploration & Production Co.*, 2013 WL 6244189 (E.D. La. Dec. 3, 2013). This Court chooses to recognize and

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> service. Although Messier's doctor's testimony that Messier's condition "existed" during his service does not rule out the possibility that it also existed *before* his service, the Supreme Court has instructed us to resolve ambiguities or doubts in favor of the seaman. . . . The "manifestation" of symptoms has never been the touchstone for a seaman's entitlement to maintenance and cure. The actual rule is much simpler — maintenance and cure covers any injury or illness that *occurs* while in the service of the ship. All that matters is when the injury occurred, not when it started to present symptoms.

688 F.3d at 83-85, 2012 AMC at 2377-79 (citations omitted).

[6] The facts set forth in this paragraph are taken from a detailed stipulation prepared by the parties and presented to the district court. As such, they are undisputed.

participate in evolution rather than to rigidly resist it. And the prospect that a maritime employer can be responsible for illnesses and injuries that predate the employment is neither unique to the arena of ill and injured seamen nor in any way new; the longstanding "last employer" rule of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, provides an entirely apt analogy. *See, e.g., Albina Engine & Machine v. Director, OWCP,* 627 F.3d 1293, 2011 AMC 406 (9th Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 2001 AMC 1247 (4th Cir. 2001); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 1995 AMC 1667 (2d Cir. 1955).

III
Conclusion

For the foregoing reasons, the decision below is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

SOLOMON, Circuit Judge, dissenting:

Because I cannot agree with the analysis in Part II-B of the Court's opinion, I respectfully dissent. Although I agree with the majority that plaintiff-appellant Peter Glaucus qualifies as a "seaman," in my view even a seaman could not recover maintenance and cure in the circumstances of this case.

The *Messier* decision is an extreme outlier in the law of maintenance and cure, and it is demonstrably unwise. Indeed, it is almost shocking. It would convert the employers of seamen into health-care insurers by imposing responsibility for illness that arose long prior to a worker's period of employment, caused no problems and showed no symptoms during the employment, and became symptomatic only after the employment had ended. Prior to *Messier*, no one had even *contended* that maintenance and cure should cover seamen's pre-employment illnesses.

In order to protect seamen's employers from general exposure to responsibility for pre-employment illnesses, courts have regularly required workers seeking maintenance and cure for

illness to show that the illness was caused or aggravated by the employment, originated during the employment, or at least *manifested* symptoms during the employment. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-530, 1938 AMC 341, 343-345 (1938) (holding that while the maintenance and cure obligation is not "restricted to those cases where the seaman's employment is the cause of the injury or illness," an illness must "manifest[] itself during [the] employment" in order to be covered.) *Calmar*'s *manifestation* requirement is an absolute minimum; "[t]he injury or illness need not originate during the voyage [but it is] necessary that it assert itself at some point during the voyage." John B. Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046, 1049 (1980).

In one fell swoop, *Messier* jettisoned both the *origination* and *manifestation* rules by taking medical evidence that the worker's disease *existed* during the employment as *ipso facto* sufficient to establish that the disease *occurred* during the employment. John J. Walsh, *The Changing Contours of Maintenance and Cure*, 38 TUL. MAR. L.J. 59, 70 (2013) ("The Second Circuit found that 'existed' was synonymous with the disease having 'occurred' aboard the tug"). "*Messier*'s discard of the manifestation limitation departs from the traditional recognition that the shipowner is not the insurer of every disease seafarers contract." *Id.* at 71-72.[1]

Calmar established a clear rule that an employer of seamen does not owe maintenance and cure respecting illnesses that neither originated nor manifested themselves during the employment. The Court's subsequent dicta have been entirely faithful to that aspect of *Calmar*.[2]

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[1] For additional attention in the academic literature to the radical nature of *Messier*, *see* Yaakov Adler, Note, *Come One, Come All: The Second Circuit's* Messier *Approach to Maintenance and Cure*, 37 TUL. MAR. L.J. 605 (2013).

[2] In the quotations in this note, all emphasis is supplied. *Vella v. Ford Motor Co.*, 421 U.S. 1, 3, 1975 AMC 563, 565 (1975) (shipowner must "provide maintenance and cure for the seaman who *becomes ill* or is injured while in the service of the ship"); *Vaughan v. Atkinson*, 369 U.S. 527, 531, 1962 AMC 1131, 1134 (1962) (maintenance and cure are owed a seaman who "*becomes sick* or injured in the ship's service"); *id.* at 535-536 & n.2 ("*taken* ill," "*falling* ill") (Stewart J., dissenting); *Farrell v. United States*, 336 U.S. 511, 515, 1949 AMC 613, 615 (1949) ("duty of a shipowner to provide maintenance and cure for a seaman *falling ill* . . . while in its employ"); *id.* at 522 ("disease which *manifested itself* during the seaman's employment") (Douglas, J., dissenting); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730, 1943 AMC 451, 456 (1943) ("liability for the maintenance and cure of seamen *becoming ill* . . . during the period of

And of course the courts of appeals (including the Second Circuit in its pre-*Messier* decisions) have followed suit.[3] *See Wills v. Amerada Hess Corp.*, 379 F.3d 32, 2004 AMC 2082 (2d Cir. 2004); *Whitman v. Miles*, 387 F.3d 68, 2005 AMC 120 (1st Cir. 2004); *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1999 AMC 1831 (9th Cir. 1999); *Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 1997 AMC 944 (1st Cir. 1996); *LeBlanc v. B.G.T. Corp.*, 992 F.2d 394, 1994 AMC 291 (1st Cir. 1993); *Smith v. Transworld Drilling Co.*, 773 F.2d 610 (5th Cir. 1985); *Shaw v. Ohio River Co.*, 526 F.2d 193, 1976 AMC 1164 (3d Cir. 1975); *Selh v. Moore-McCormack Lines, Inc.*, 362 F.2d 541, 1966 AMC 1563 (2d Cir. 1966); *Sammon v. Central Gulf Steamship Corp.*, 442 F.2d 1028, 1971 AMC 1113 (2d Cir. 1971); *Stewart v. Waterman Steamship Corp.*, 409 F.2d 1045, 1969 AMC 1648 (5th Cir. 1969); *Miller v. Lykes Bros.-Ripley S.S. Co., Inc.*, 98 F.2d 185, 1938 AMC 1228 (5th Cir. 1938).

In addition to being completely at odds with the controlling jurisprudence,[4] *Messier* is deeply flawed on the policy level. Judge McMahon's opinion for the district court, 756 F. Supp.

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their service"); *id.* at 735 n.23 (discussing "liability for sickness innocently *contracted* on shore leave"); *id.* at 737 n.24 (quoting the Shipowners' Liability Convention's language respecting "sickness and injury *occurring*" during the employment).

[3] It has been suggested that *Stevens v. McGinnis, Inc.*, 82 F.3d 1353, 1996 AMC 1922 (6th Cir. 1996), can be read to hold that the *existence* of an asymptomatic disease during the employment suffices for maintenance and cure responsibility. *See* Kenneth G. Engerrand, *Primer on Maintenance and Cure*, 18 U.S.F. MAR. L.J. 41, 54-55 (2005). The suggestion seems mistaken. *See Stevens*, 82 F.3d at 1359 n.5 ("[S]everal . . . [district] courts have awarded maintenance and cure based solely on the presence of an insidious disease during a seaman's employment. We need not go quite so far, however, because in this case the district court found that Stevens suffered from symptoms of the tumor while employed by the company. . . . Thus, we need not decide the question of whether the mere existence of an insidious disease during a seaman's voyage entitled him to maintenance and cure from the shipowner, no matter how long it takes for the seaman to discover the disease.").

[4] Aside from *Messier*, the only reported cases imposing maintenance and cure liability on the sole basis of a disease's *existence* during the employment seem to be *George v. Chesapeake & Ohio Ry.*, 348 F. Supp. 283, 287 (E.D. Va. 1972), and *In re United States*, 303 F. Supp. 1282, 1311 (E.D.N.C. 1969), *aff'd per curiam*, 432 F.2d 1357 (4th Cir. 1970). To its credit, the majority does not rely on these district court decisions. Nor does it make any claim that this Court's *per curiam* affirmance in *In re United States* has any present significance or relevance. Plainly it does not; *In re United States* involved a massive explosion with many deaths and injuries, huge property damage, and multiple issues. The maintenance-and-cure

2d 475 (S.D.N.Y. 2010), is eloquent and thorough on both those levels. The decision of the *Messier* appellate panel is a large step in the direction of radical change. If followed, *Messier* will mean that employers will regularly owe maintenance and cure for long-term diseases (*e.g.*, lung cancers in lifelong smokers) that had *no* employment connection other than being brought into the workplace by the afflicted worker. The majority's suggestion that an employer will occasionally escape this onerous obligation by proving that the disease pre-existed the worker's employment only makes matters worse. This is an intrinsically difficult burden that, as was true here, will be exceedingly difficult to meet. And even the *Messier* court acknowledged that the introduction into maintenance and cure law of such a burden — entailing judicial inquiry into "when, exactly, a disease first began" — will "without a doubt" greatly complicate the law. 688 F.3d at 88, 2012 AMC at 2384.

I respectfully dissent. The district court's judgment should be affirmed.

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aspect of the case was minuscule, and the fact that the affirmance was *per curiam* guarantees that the Court gave no attention to it.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-2318

PETER GLAUCUS,
Plaintiff-Appellant,

v.

OUTER BANKS FISHING, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Elizabeth City
Michele Y. Portia, District Judge.
(6:12-cv-00945-MYP)

June 26, 2014

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SOLOMON, Circuit Judge, dissenting:

For the reasons expressed in my dissenting opinion, I would grant the petition for re-hearing and set the case for argument en banc.

United States District Court for the Eastern District of North Carolina

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PETER GLAUCUS,
Plaintiff,

v.

OUTER BANKS FISHING, INC.,
Defendant.

No. 6:12-cv-00945-MYP

March 12, 2013

PORTIA, J.:

Defendant Outer Banks Fishing, Inc. ("OBF") moves under Fed. R. Civ. P. 12(b)(6) to dismiss plaintiff Peter Glaucus's suit for maintenance and cure on the ground that he is not a "seaman." For the reasons stated below, OBF's motion is granted.

A motion to dismiss for failure to state a claim upon which relief can be granted filed pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a complaint. *See*, *e.g.*, *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). The court must accept the allegations in the complaint as true, and all reasonable factual inferences must be drawn in favor of the party opposing the motion. *See*, *e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

I. Relevant Facts

1. Defendant Outer Banks Fishing, Inc. (OBF) is a North Carolina corporation that operates eight shrimp fishing vessels from a small shipyard in Dare County, North Carolina.

2. OBF employed plaintiff Peter Glaucus as the "vessel maintenance supervisor" at its shipyard from 2008 until he was unable to work in 2011. OBF also employs a number of fishermen who serve as crew members on its shrimp fishing vessels, and various other managerial and support employees.

3. Glaucus lived with his wife and children in a house in Manteo, North Carolina, and commuted to and from the OBF shipyard each workday.

4. Glaucus generally worked eight-hour shifts, five days a week, and was paid an hourly rate. When he worked more than 40 hours per week, he was paid a higher "overtime" rate.

5. Glaucus's primary responsibility was the maintenance and repair of the eight vessels in the OBF fleet, but he also had other duties that were not directly related to the vessels.

6. On average, Glaucus spent about 20 hours of a typical 40-hour week working on the fishing vessels while they were moored to one of OBF's docks.

7. On average, Glaucus spent about 13-14 hours of a typical 40-hour week working on vessels that had been removed from the water. Glaucus's duties varied considerably according to the season. Some weeks, none of the fleet's vessels were removed from the water; other weeks, he spent almost all of his time on vessels that had been removed from the water. But 13-14 hours per week represents the average time spent on vessels that had been removed from the water over the course of his employment with OBF.

8. On average, Glaucus spent about two hours of a typical 40-hour week working on vessels when they were in transit on the waters of the Albemarle Sound or the Pamlico Sound in the general vicinity of OBF's shipyard. That work included test runs of vessels that had been repaired, diagnostic trips to identify repairs that needed to be completed, and occasional voyages to the mainland to pick up parts or supplies. During those voyages, Glaucus did not perform a sailor's traditional navigational functions.

9. Glaucus spent about four hours of a typical 40-hour week performing tasks on land that were not directly related to the vessels. Those tasks included office work (such as preparing reports and ordering supplies), general maintenance work around the shipyard (including painting and minor repairs on the buildings, unloading trucks, and mowing the lawns), and running off-site errands away from the shipyard (such as driving to and from the post office).

10. Glaucus's overtime work time was divided among dockside, onshore, and at-sea work in similar proportions. Thus he spent about half of his overtime hours working dockside,

about a third of his overtime hours working on vessels that had been removed from the water, about five percent of his overtime hours working on vessels in transit, and about ten percent of his overtime hours working on tasks that were not directly related to the vessels.

11. All eight of OBF's vessels remained "in navigation" throughout the period that OBF employed Glaucus.

II. Conclusions of Law

1. This Court has admiralty jurisdiction over this matter under 28 U.S.C. § 1333(1).

2. OBF moves to dismiss Glaucus's suit for two independent reasons, but this Court need address only OBF's first argument. Glaucus appropriately concedes that only "seamen" are entitled to maintenance and cure, and that if he does not qualify as a "seaman" (as that term is used in the Jones Act, 46 U.S.C. § 30104) then his suit must be dismissed.

3. In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371, 1995 AMC 1840, 1858 (1995), the Supreme Court declared 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." The key issue here is whether Glaucus satisfies that requirement; OBF admits that Glaucus's work contributed to the function of the fleet and the accomplishment of its mission.

4. The parties have not cited any decisions of the Fourth Circuit or the Supreme Court addressing which tasks count when calculating the percentage of time that a worker spends in the service of a vessel, and this Court has also been unable to find any binding authority. The Eleventh Circuit, however, does not count work done while a vessel is "on land or, at least, while tethered to a land base." *Clark v. American Marine & Salvage, LLC*, 494 F. App'x 32, 35 (11th Cir. 2012) (per curiam).

5. About a third of Glaucus's work on the fishing vessels was done while they were "on land," and half of his work was done while the vessels were "tethered to a land base." Applying the *Clark* test, only five percent of Glaucus's work was properly "in the service of a vessel in navigation." He therefore fails to meet *Chandris*'s 30-percent threshold.

6. The conclusion that this Court reaches under *Clark* is further supported by a state-court decision in Maryland, which is within the geographic reach of the Fourth Circuit. *See Dize v. Association of Maryland Pilots*, 205 Md. App. 176, 44 A.3d 1033 (2012). This Court finds the Maryland court's reasoning persuasive. Indeed, Glaucus presents a much weaker case for seaman status than did the plaintiff in *Dize*.

III. Conclusion

Defendant's motion to dismiss is *granted*.

It is so ordered.

Selected Chronology of the Case[*]

Oct. 27, 2008	OBF hires Glaucus
May 18, 2011	Glaucus's injury
July 13 2011	Glaucus diagnosed with aplastic anemia
May 11, 2012	Glaucus's complaint filed
Mar. 12, 2013	OBF's motion to dismiss Glaucus's suit granted, with an opinion reported as *Glaucus v. Outer Banks Fishing, Inc.*, 950 F. Supp. 2d 1359 (E.D.N.C. 2013)
Mar. 22, 2013	Glaucus's notice of appeal filed
Mar. 3, 2014	Oral argument in the court of appeals
May 5, 2014	Court of appeals opinion (reported as *Glaucus v. Outer Banks Fishing, Inc.*, 751 F.3d 1382, 2014 AMC 3333 (4th Cir. 2014)) filed and judgment entered
May 12, 2014	OBF's petition for rehearing filed
June 26, 2014	OBF's petition for rehearing denied
Sept. 2, 2014	OBF's petition for certiorari filed presenting two issues: (1) the seaman status issue, and (2) the asymptomatic illness issue.
Dec. 1, 2014	OBF's petition for certiorari granted

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.