No. 16-420

In the

Supreme Court of the United States

CHANTICO ENERGY PRODUCTION CO.,

Petitioner,

v.

HERMES SHIPPING LINES, INC.,

Respondent.

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

COMPETITION PACKET FOR THE
TWENTY-FOURTH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2017

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Table of Contents

MATERIAL THAT CAN BE CITED IN THE BRIEFS AS "APPENDIX TO THE PETITION FOR CERTIORARI":

Opinion of the United States Court of Appeals for the Fifth Circuit 1a

Order of the United States Court of Appeals for the Fifth Circuit denying rehearing 4a

Opinion of the United States District Court for the Eastern District of Louisiana 5a

ADDITIONAL MATERIAL INCLUDED IN THE PACKET:

Selected Chronology of the Case 1b

CHANTICO ENERGY PRODUCTION CO., Plaintiff-Appellant,

v.

HERMES SHIPPING LINES, INC., Defendant-Appellee.

No. 14-12345

United States Court of Appeals,
Fifth Circuit

May 30, 2016

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

This case arises out of the allision between the *M/V Djehuty*, owned and operated by defendant-appellee Hermes Shipping Lines, Inc. ("Hermes"), and a gas and condensate producing platform that is owned and operated by plaintiff-appellant Chantico Energy Production Co. ("Chantico"). The allision damaged a gas riser owned and operated by Aztec Pipeline Co. ("Aztec"), which filed a separate action against Hermes. That action was subsequently consolidated with the present action in the district court, but Aztec is not a party to this appeal.

In the current procedural posture of the case, we must accept that the willful, wanton, and reckless misconduct of the *Djehuty*'s captain and crew caused the allision; that Chantico suffered certain physical losses as a result of the allision (the gas that it was forced to flare in order to prevent the loss of its wells); and that Chantico also suffered certain economic losses as a result of the allision (the revenue that it lost while its wells were shut in when the riser was being repaired).

We must decide two questions. First, may Chantico recover for economic loss that was not caused by physical damage to its property? Second, is Hermes subject to a claim for punitive

damages based on the actions of its employees when the company neither authorized nor ratified those actions?

I

In a split decision, this Court in *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 1996 AMC 543 (5th Cir. 1995), held that there can be no recovery for negligently inflicted economic losses that were not caused by physical damage to the plaintiff's property. That was a close call, and the dissenting opinion made a strong point. But *Corpus Christi* is squarely on point, and it is binding precedent.

II

This Court has already decided "that the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent." *In re: P&E Boat Rentals, Inc.*, 872 F.2d 642, 650, 1989 AMC 2447, 2459 (5th Cir. 1989). In *P&E Boat Rentals*, we vacated a $16 million punitive damages award against Chevron that had been based on a finding that "Chevron's acts [were] grossly negligent and reckless," 872 F.2d at 646, 1989 AMC at 2451, and that its "conduct was willful and wanton," 872 F.2d at 646, 1989 AMC at 2452. We concluded that the actions justifying an award of punitive damages had been committed by two of Chevron's field foremen, and that those acts could not be imputed to the corporation to render it liable for punitive damages. "Neither of these foremen exercised policymaking authority." 872 F.2d at 652, 1989 AMC at 2462.

We noted that "[t]he courts are sharply divided over whether, and under what circumstances, a principal is liable for punitive damages for the conduct of an agent or servant when a principal has neither authorized nor ratified its servant's acts," 872 F.2d at 650, 1989 AMC at 2458, and acknowledged that the majority rule recognized full vicarious liability for punitive damages, even without authorization or ratification. We also acknowledged that § 909 of the

Restatement (Second) of Torts adopted a "managerial agent" rule under which a corporation is liable in punitive damages for the acts of an "'agent . . . employed in a managerial capacity and . . . acting in the scope of employment.'" 872 F.2d at 650 n.3, 1989 AMC at 2458 n.3 (quoting *Restatement Second* § 909(c)). But we followed what we saw as the majority rule in admiralty "that the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent." 872 F.2d at 650, 1989 AMC at 2458.

Our prior decision in *P&E Boat Rentals* is binding on us now.

III

The judgment of the district court is affirmed.

JUSTINIAN, Circuit Judge, concurring:

I agree with the panel's decision to apply *Corpus Christi Oil & Gas* here. In the present context, we can do nothing else, for we are as bound by that decision as the district court was. In my view, however, the dissent had much the stronger argument in *Corpus Christi Oil & Gas*, and I therefore believe that the time has come to reconsider that decision. I urge my colleagues to grant en banc review in this case if Chantico petitions for rehearing.

HAMMURABI, Circuit Judge, concurring:

I agree with the panel's decision to apply *P&E Boat Rentals* here. In the present context, we can do nothing else, for we are as bound by that decision as the district court was. In my view, however, the time has come to reconsider *P&E Boat Rentals*. There is no reason why the rule should be different under the general maritime law than it is on dry land, and our rule is very much the outlier when compared to both state and federal rules on land. I therefore urge my colleagues to grant en banc review in this case if Chantico petitions for rehearing.

CHANTICO ENERGY PRODUCTION CO., Plaintiff-Appellant,

v.

HERMES SHIPPING LINES, INC., Defendant-Appellee.

No. 14-12345

United States Court of Appeals,
Fifth Circuit

July 7, 2016

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

JUSTINIAN and HAMMURABI, Circuit Judges, dissenting:

For the reasons expressed in our concurring opinions to the panel decision, we would grant the petition for rehearing and set the case for argument en banc.

United States District Court
for the Eastern District of Louisiana

CHANTICO ENERGY PRODUCTION CO., Plaintiff,

v.

HERMES SHIPPING LINES, INC., Defendant.

No. 13-Civ-6838

August 3, 2015

PORTIA, J.:

Plaintiff Chantico Energy Production Co. ("Chantico") has filed the present action against Defendant Hermes Shipping Lines, Inc. ("Hermes") to recover various damages allegedly caused when Hermes' vessel, the *M/V Djehuty*, allided with Chantico's gas and condensate producing platform off the coast of Louisiana. Now pending before the Court is Hermes' motion for partial summary judgment seeking dismissal of two counts — count 2, which seeks damages for economic losses, and count 3, which seeks punitive damages. Because controlling decisions of the Fifth Circuit deny Chantico's entitlement to both categories of damages, Hermes' motion is granted. But the Court certifies this interlocutory order for immediate appeal under 28 U.S.C. § 1292(b).

Factual Background[1]

On the evening of October 1, 2012, Hermes' Panamax[2] container ship, the *M/V Djehuty*, was sailing westbound in the Gulf of Mexico, bound for the port of Houston, Texas. With a

[1] The parties agree on the basic outline of the relevant events, but some of the details are still disputed. Fortunately, the Court need not resolve those disputes here. For purposes of ruling on Hermes' motion for partial summary judgment, the facts as alleged by Chantico must be accepted as true. This statement of the facts is accordingly based on the allegations in Chantico's complaint.

[2] A "Panamax" vessel is the largest that can transit the Panama Canal.

gross tonnage of 40,542, the *Djehuty* is 249 meters long, and is capable of carrying 4,250 twenty-foot containers. The captain, Johnny Moss, and the second officer, Amarillo Slim, were on the bridge, along with two crewmen. David "Chip" Reese was assigned to the helm and Stu Ungar was supposed to be serving as the lookout. Unfortunately, none of those mariners was performing his assigned tasks. Captain Moss had instead ordered Reese to put the ship on autopilot and the four men were drinking beer and playing poker. The autopilot settings were incorrect, the *Djehuty* sailed outside the normal shipping channel, and the men were so intent on their game that no one noticed the error.

At approximately 2230 hours (10:30 p.m.), Second Officer Slim happened to glance up and see some lights directly ahead. They were the lights of a gas and condensate producing platform owned by Chantico. Captain Moss immediately ordered evasive action, but it was too late. The crew's last-minute efforts avoided a direct hit on the platform at full speed, but the *Djehuty* still registered a glancing blow to one leg of the platform. The force of the allision was sufficient to cause substantial damage to a gas riser[3] that was attached to that platform leg. That riser was owned not by Chantico but by an independent company, Aztec Pipeline Co. ("Aztec"), which has filed a separate action against Hermes to recover its damages.[4]

Workers on Chantico's platform saw the *Djehuty* bearing down on them, and — fearing an allision — temporarily shut down operations on the platform to prevent a fire or explosion. After the riser damage, Chantico was required to shut in its wells so that Aztec could inspect the riser and replace the damaged section. That repair took two weeks. During the shut-in period,

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[3] A "riser" is a vertical pipe through which gas and gas condensate flow from the well on the ocean floor to the platform. Aztec's riser connects to a pipeline (also owned by Aztec) that runs from the platform to the Louisiana coast. Although the risers on the platform were fitted with riser guards to prevent damage from allisions, the *Djehuty* hit the riser with such force that the riser guard was inadequate to prevent the damage. But the guard and riser sufficed to protect the platform leg, which sustained no damage.

[4] A motion to consolidate the Chantico and Aztec actions against Hermes is pending. The resolution of that motion does not affect the Court's decision on Hermes' present motion.

Chantico was unable to use the riser to transport its gas. It was also forced to flare gas to prevent the loss of its wells.[5]

Chantico brought the present action against Hermes, claiming damages for the loss of the gas that had to be flared while the riser was being repaired (count 1); damages for the revenue lost while its wells were shut in for the repair of Aztec's riser (count 2); and punitive damages based on the gross dereliction of duty by Captain Moss and the crew (count 3). Hermes' motion does not challenge its liability under count 1, but seeks partial summary judgment dismissing counts 2 and 3.

Legal Analysis

Binding Fifth Circuit precedent covers both of these issues. *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 1996 AMC 543 (5th Cir. 1995), which has remarkably similar facts, requires dismissal of count 2. *In re: P&E Boat Rentals, Inc.*, 872 F.2d 642, 650-53, 1989 AMC 2447, 2458-62 (5th Cir. 1989), requires dismissal of count 3.

A. Economic Loss

Chantico's action for the loss of the flared gas and condensate is not problematic; this was property damage — physical harm to Chantico's property (the gas and condensate) — that proximately resulted from Hermes's tortious conduct. But the two-week loss of production did not constitute physical property damage; instead, it was what is typically called "pure economic loss," which roughly means financial or pecuniary harm that does not result from physical damage to the plaintiff's tangible property.

[5] Gas and condensate had to be flared — *i.e.*, vented into the air and burned — in order to prevent the wells from being lost due to a process called "water loading." Water loading occurs when wells such as those at issue here stop flowing; the water normally carried out of the well bore with the gas collects in the well bore. As the weight of the column of water becomes greater than the formation pressure, the water traps the gas and shuts off the flow.

The controlling "pure economic loss" doctrine in the Fifth Circuit is set forth in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (en banc). Basing its decision on *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 1928 AMC 61 (1927), the *Testbank* Court held that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort." 752 F.2d at 1020, 1985 AMC at 1522. In the present context, there is no relevant dispute about the meaning of "proprietary interest": It means an ownership interest in tangible property.[6]

But the *Testbank* Court's term "prerequisite" — the meaning of which was clear enough in *Testbank* itself, in which none of the plaintiffs before the Court had sustained any physical property damage — soon began revealing its ambiguity in subsequent Fifth Circuit panel decisions. Must a plaintiff show that the economic damages in suit were *caused by* tortiously-inflicted physical damage to plaintiff's property? Or is it enough that the plaintiff sustained compensable physical property damage in the same accident that produced the sought-after economic damages? In his dissenting opinion in *Lloyd's Leasing Ltd. v. Conoco*, 868 F.2d 1447, 1450-51, 1989 AMC 1552, 1555-57 (5th Cir. 1989), Judge Higginbotham (the author of the Court's opinion in *Testbank*) seemed to pointedly avoid answering that question, under circumstances in which answering it (by saying that *Testbank* requires causation) would have been much the easiest way to explain the result that he advocated.

Then came the split panel decision in *Corpus Christi Oil & Gas*. The majority described the *Testbank* ambiguity as follows:

> [A]lthough *Testbank* suggests an association between recovery sought and damage to the plaintiff's property, it left undecided the degree of association required. . . . [T]he question [is] whether the principle of *Testbank* . . .

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[6] *Cf.* the Fifth Circuit panel decision in *Testbank*, 728 F.2d at 749-50 ("[A] plaintiff cannot recover consequential economic losses if the alleged negligence has not caused any physical damage to the person or property of the plaintiff.").

> requires that recoverable economic damages have some direct tie to the plaintiff's specific physical loss or damage, or whether the *Testbank* principle simply requires a showing of damage to some proprietary interest of the plaintiff in order to open the door to recovery for *all* purely economic damages that were foreseeable from the initial tort.

71 F.3d at 202, 1996 AMC at 549. The majority then resolved the ambiguity:

> *Testbank* strongly suggests that recoverable losses [must] somehow be tied to the damage to the *plaintiff*'s property . . . . To insure that the principles underlying *Testbank* are preserved, we hold that simply meeting the requirement or showing physical damage to a proprietary interest does not automatically open the door to all foreseeable economic consequences.

71 F.3d at 202-03, 1996 AMC at 550. Judge Benavides's dissent provided a competing analysis of *Testbank* that seems at least equally plausible. *See* 71 F.3d at 205, 1996 AMC at 553. But of course this Court is required to follow the *Corpus Christi* majority. Count 2 is accordingly dismissed.

B. Punitive Damages

The courts have used various formulations to describe the standard for imposing punitive damages. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 480, 2008 AMC 1521, 1525 (2008), for example, the Supreme Court upheld an award of punitive damages based on "reckless acts." Later in the opinion, however, the Court also quoted other formulations of the punitive damages standard — " 'outrageous,' . . . 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' " 554 U.S. at 493, 2008 AMC at 1535, and "egregious conduct," 554 U.S. at 510, 2008 AMC at 1548. In its most recent punitive damages case — also a maritime case — the Supreme Court held that punitive damages are available for "the willful and wanton disregard of the maintenance and cure obligation." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424, 2009 AMC 1521, 1538 (2009). The Court twice used the phrase "wanton, willful, or outrageous conduct." 557 U.S. at 409, 415 n.4, 2009 AMC at 1529. The Court characterized the prior general maritime law, which was a primary justification for the result in the case, as permitting

punitive damages "for tortious acts of a particularly egregious nature." 557 U.S. at 411, 2009 AMC at 1526. Quoting an earlier opinion, the *Townsend* Court also used two other formulations — "the 'callous' and 'willful and persistent' refusal to pay maintenance and cure," 557 U.S. at 417, 2009 AMC at 1531 (quoting *Vaughan v. Atkinson*, 369 U.S. 527, 529-31, 1962 AMC 1131, 1134-35 (1962), and " 'wanton and intentional disregard of the legal rights of the seaman,' " 557 U.S. at 417, 2009 AMC at 1532 (quoting *Vaughan*, 369 U.S. at 540, 1962 AMC at 1141 (opinion of Stewart, J.)).

Fortunately, this Court need not decide which of these formulations to apply here. Not only would that be premature, but it seems likely that the alleged conduct of Captain Moss and the crew would satisfy any of these standards. Their misconduct was in blatant violation of numerous regulations.[7] When people are responsible for navigating a massive steel structure through sensitive waters, drinking beer and playing poker while it sails full speed ahead untended would meet anyone's definition of "willful, wanton, and reckless indifference for the rights of others." Not even Hermes denies that their conduct was outrageous and egregious. Indeed, it seems likely that each of the men will be subject to Coast Guard and internal company discipline.

Captain Moss and the crew, however, are not the defendants in this action. The issue before this Court is whether Hermes is vicariously liable for the misconduct of its employees. Once again, courts have used various formulations to describe the standard for vicarious liability. *See*, *e.g.*, *American Society of Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14

[7] The governing rules for navigation in the Gulf of Mexico are the International Regulations for Preventing Collisions at Sea (COLREGS). Some of the rules that appear to have been violated range from the obvious, *see*, *e.g.*, COLREGS rule 5 ("Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision."), to the obscure, *see*, *e.g.*, COLREGS rule 27(a)(i) ("A vessel not under command shall exhibit . . . two all-round red lights in a vertical line where they can best be seen . . . .").

(1982) ("A majority of courts . . . have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification."); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 702-705, 1996 AMC 467, 482 (1st Cir. 1995) (holding vessel owner liable for punitive damages when it was "culpab[le] in failing to supervise" the captain who was guilty of egregious behavior); *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385-87, 1986 AMC 56, 63-66 (9th Cir. 1985) (adopting the "managerial agent" standard of *Restatement (Second) of Torts* § 909).

It is also unnecessary for this Court to decide which of these formulations applies here. The Fifth Circuit has unambiguously declared "that the principal is liable in punitive damages *only* if it authorizes or ratifies wanton actions of an agent." *In re: P&E Boat Rentals, Inc.*, 872 F.2d 642, 650, 1989 AMC 2447, 2459 (5th Cir. 1989) (emphasis added). Chantico does not contend that Hermes authorized or ratified the wanton actions of Captain Moss and the crew; it instead argues that a different standard should apply. But that is an argument for a higher court. It is not an argument that this Court can entertain.

Because Hermes is not vicariously liable for the misconduct of Captain Moss and the crew under the standard established by the Fifth Circuit in *P&E Boat Rentals*, and because this Court is bound by that decision, Hermes' motion must be granted. Count 3 is accordingly dismissed.

C. Interlocutory Appeal

Although it is clear that Hermes' motion must be granted, the Court is nevertheless "of the opinion that [the present] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). *P&E Boat Rentals* has settled the punitive damages issue in this circuit (at least for the time being), but

other circuits have expressed different opinions and the Supreme Court in *Exxon Shipping v. Baker* indicated interest in resolving the conflict. Thus the Fifth Circuit may wish to reconsider its decision. Because the availability of punitive damages plays such a significant role in the parties' ability to settle the case, it would "materially advance the ultimate termination of the litigation" to know before trial whether punitive damages are available here. This Court therefore (1) certifies this interlocutory order for immediate appeal under 28 U.S.C. § 1292(b) and (2) stays all proceedings in this Court until the Court of Appeals has either denied permission to appeal or finally acted on the appeal.

If the Fifth Circuit accepts the interlocutory appeal under 28 U.S.C. § 1292(b), it will have authority to review the entire case. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-205, 1996 AMC 305, 308-09 (1996). Thus the Court of Appeals would also have the opportunity to revisit the question that divided it in *Corpus Christi Oil & Gas Co.*

Conclusion

For the reasons set forth above, Hermes' motion for summary judgment is granted, counts 2 and 3 of Chantico's complaint are dismissed, and the case is certified for immediate appeal under 28 U.S.C. § 1292(b).

Selected Chronology of the Case*

Oct. 1, 2012	Defendant Hermes Shipping Lines' vessel, the *M/V Djehuty*, allides with plaintiff Chantico Energy Production Co.'s gas and condensate producing platform
Sept. 6, 2013	Chantico files present action in the United States District Court for the Eastern District of Louisiana
Aug. 3, 2015	District court grants Hermes' motion for partial summary judgment with an opinion; question certified for interlocutory appeal under 28 U.S.C. § 1292(b) (reported as *Chantico Energy Production Co. v. Hermes Shipping Lines, Inc.*, 2015 AMC 3335 (E.D. La. 2015))
Aug. 12, 2015	Chantico files petition for permission to appeal the interlocutory order
Sept. 21, 2015	Court of appeals grants permission to appeal
May 26, 2016	Court of appeals affirms the district court's judgment with an opinion (reported at 824 F.3d 1383, 2016 AMC 3333)
July 7, 2016	Court of appeals denies petition for rehearing over the dissent of Judges Justinian and Hammurabi
Oct. 3, 2016	Chantico files petition for certiorari filed raising only (1) the economic loss issue and (2) the punitive damages issue (docket number 16-420)
Dec. 5, 2016	Supreme Court grants petition for certiorari

* 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.