IN THE SUPREME COURT OF TEXAS

NO. 10-0435

WEEKS MARINE, INC., PETITIONER,

v.

MAXIMINO GARZA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued October 4, 2011

JUSTICE GUZMAN, joined by JUSTICE MEDINA and JUSTICE LEHRMANN, dissenting.

In maritime law, an ill or injured seaman is entitled to cure from his employer, which the Court and the Fifth Circuit have defined as the provision of "necessary medical services."[1] __ S.W.3d __, __; *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499 (5th Cir. 1995). Today, the Court effectively construes the right to necessary medical services to mean only the right to diagnosis—regardless of whether necessary medical services were provided. It is well settled in maritime jurisprudence that when an employer fails to provide cure to a seaman for an on-the-job injury and that failure prolongs or aggravates the original injury, the seaman suffers an additional

[1] The Fifth Circuit has expounded that cure is the employer's obligation "to reimburse the seaman for medical expenses he incurs" and to "take all reasonable steps to insure that the seaman who is injured or ill receives proper care and treatment." *Guevara*, 59 F.3d at 1499–1500. The Court has expounded that a "shipowner is required 'not only to pay for the seaman's maintenance and cure but to take all reasonable steps to make sure that the seaman, when he is injured or becomes sick, receives proper care and treatment.'" __ S.W.3d at __ (quoting GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-13, at 310 (2d ed. 1975)).

injury. The well-established mechanism for recovery for that additional injury is a failure to cure claim. The Court accurately sets forth this framework but then misapplies it. The evidence here shows a three-month delay from the time the employer's doctor offered a diagnosis but failed to provide necessary medical services until the seaman initiated treatment with his own physician. After the employer failed to treat his condition, the seaman's pain and related suffering and mental anguish led him to seek medical treatment on his own. The evidence of this pain and suffering and mental anguish during this three-month period is some evidence that the employer's failure to provide necessary medical services (*i.e.*, "cure") prolonged the original injury, and because the Court holds otherwise, I respectfully dissent.

The Court observes that a seaman such as Garza can have four claims against his employer: (1) a Jones Act negligence claim; (2) an unseaworthiness claim; (3) a claim for unpaid maintenance and cure; and (4) a claim based on failure to provide maintenance and cure (hereinafter a "failure to cure claim"). __ S.W.3d at __. Here, Garza brought all four claims, but only his failure to cure claim is at issue. Weeks Marine argues that Garza obtained a double recovery when the jury awarded damages for both the Jones Act negligence claim and the failure to cure claim. Specifically, Weeks Marine asserts that there is no evidence that its failure to provide cure to Garza prolonged or aggravated his injury.

The Court recites the settled rule that if there is only one injury, the seaman may recover damages under either a Jones Act negligence claim or a failure to cure claim—but the seaman is entitled to only one recovery because he suffered only one injury in that circumstance. *Id*. at __. If the failure to cure prolongs or aggravates the original injury, the seaman may recover under both

claims (*e.g.*, the Jones Act negligence claim for the original injury and the failure to cure claim for the additional injury). *Id*. at __; *Stevens v. Seacoast Co.*, 414 F.2d 1032, 1040 (5th Cir. 1969) (noting that recovery may be had if failure to pay maintenance and cure "contributed in any degree to additional pain or disability or prolonged the recovery period").

To illustrate how recovery under this rule operates, I invoke two hypothetical examples. First, assume that a seaman is injured and: (1) the employer fails to provide cure; (2) it is a year before the seaman is able to obtain medical care; (3) he takes another year to reach maximum cure; and (4) that initial year delay aggravated the injury, requiring a second surgery. A Jones Act negligence claim should compensate the seaman for the initial injury: the medical expenses not including the second surgery and the pain and suffering and mental anguish for the second year. A failure to cure claim should compensate the seaman for the second injury (the employer's failure to provide cure): the second surgery and the first year of pain and suffering and mental anguish.

Now assume the same facts but that no second surgery is required. The employer's failure to provide cure did not increase the medical expenses, but the seaman nonetheless has a claim for failure to cure. The original injury satisfied any physical impact requirement for Jones Act or maritime cases. *See Gough v. Natural Gas Pipeline Co. of Am.*, 996 F.2d 763, 766 (5th Cir. 1993) (describing physical injury requirement for Jones Act and maritime cases); *Stevens*, 414 F.2d at 1040. In that circumstance, the failure to cure claim would compensate the seaman for the first year of pain and suffering and mental anguish (as there are no additional medical expenses).

The facts of this case closely align to the facts of the second hypothetical example. Weeks Marine hired Dr. Montet to treat Garza. Dr. Montet performed a CT scan and diagnosed Garza as

having a contused cranium with a mild concussion and a cervical sprain, but he released Garza back to work that day with no restrictions. Approximately one month later, Dr. Montet performed an MRI on Garza but again released him to work with no restrictions. The Court characterizes these two visits and accompanying diagnostic scans as treatment. Regardless of the accuracy of that characterization, it is irrelevant. The relevant inquiry is whether the two visits and diagnosis alone were the necessary medical services (*i.e.*, cure) for Garza's condition. The record clearly indicates that diagnosis alone here was not providing necessary medical services to Garza for two reasons. First, the record is devoid of any evidence that Dr. Montet provided any necessary medical services to Garza that would improve his condition, such as recommending rest, returning Garza to work with some restrictions, prescribing medication or physical therapy, or performing spinal injections or surgery.[2] Second, the jury determined that Dr. Montet's diagnosis did not result in maximum cure. The charge defined maximum cure as "the point at which no further improvement in the seaman's medical condition may reasonably be expected." As explained *infra*, the jury only found that Garza would reach maximum cure several months after a 17-month treatment regimen from another doctor. That is to say the jury did not believe that Dr. Montet provided necessary medical services to Garza.

Unsurprisingly, Garza's condition worsened because the medical care Weeks Marine provided during the three months following his injury wholly consisted of diagnostic scanning and a work release with no restrictions. The Court acknowledges this, noting during this time that "[e]ventually, the pain became severe." __ S.W.3d at __. Garza then saw Dr. Perez, who initially

[2] Of course, there may be instances where diagnosis alone without even rest or work restrictions is appropriate. But because the jury found that Garza reached maximum cure only after surgery and a regimen of lesser treatments, Garza's case required more than a diagnosis alone to result in maximum cure.

recommended a neurological consult, therapy and exercise and prescribed medications. After several rounds of spinal injections provided only temporary relief, Dr. Perez performed surgery on Garza after he had been under his care for 17 months. The jury found that Garza reached maximum cure only several months after the culmination of Dr. Perez's medical care.

The facts here align with the facts of the second hypothetical example addressed *supra*. The original injury caused Garza's medical expenses and the 17 months of pain and suffering and mental anguish. The second injury was the 3-month delay in Garza obtaining necessary medical services caused by Weeks Marine's failure to provide cure.[3] Accordingly, legally sufficient evidence supports some of the damages for his failure to cure claim.

The Court believes this outcome untenable because (1) the jury was not asked to find Dr. Montet negligent, and (2) the failure to cure claim was based on Weeks Marine's failure to pay for cure, which Weeks Marine claimed it paid. Neither argument supports overturning the jury's finding for Garza on the failure to cure claim. Although the jury was not asked, and under the causes of action at issue here should not have been asked, to find Dr. Montet negligent, it was asked to determine when Garza reached maximum cure. The jury found Garza reached maximum cure only after the 17 months of treatment by Dr. Perez. Maritime jurisprudence sets out the parameters of our

[3] Garza's pain and suffering and mental anguish during his three months he was not receiving treatment to improve his condition were attributable to Weeks Marine's failure to provide cure—not the original injury. Initially, one must assume that if Weeks Marine had enabled Garza to reach maximum cure, the treatment and ultimate surgery would have occurred the same way Dr. Perez treated Garza because there is no evidence in the record to suggest otherwise. *See* __ S.W.3d at __ ("And there is no evidence that Garza's treatment or recovery would have proceeded differently had Weeks Marine paid for it . . . ."). Had Weeks Marine treated Garza as Dr. Perez did, he would have reached maximum cure three months earlier than he actually did because he would not have had three months without necessary medical services (*i.e.*, the three months of no treatment and 17 months of treatment when Weeks Marine failed to provide cure would have been 17 months of treatment if Weeks Marine had provided cure).

inquiry in this appeal: whether Weeks Marine—through Dr. Montet—enabled Garza to reach the point of no further reasonable improvement, not whether Dr. Montet was negligent.

Likewise, the Court's position that Weeks Marine satisfied its duty to provide cure by simply paying for Dr. Montet's diagnosis is misguided. Weeks Marine's payment for Dr. Montet's diagnosis did not improve Garza's condition, nor did it result in the rendition of necessary medical services in and of itself. Rather, Dr. Perez's treatment—which Weeks Marine did not pay for—did improve Garza's condition. Under even the most generous interpretation, Weeks Marine's payment for diagnosis alone is not maximum cure. Garza's condition only improved when he sought and obtained medical treatment on his own. The Court's focus on "pay" drives its conclusion that this is cure. Granted, the jury was asked whether Weeks Marine "acted unreasonably in failing to pay maintenance and cure." But the charge instructed the jury that it may award damages for failure to pay maintenance and cure if:

1. The plaintiff was entitled to maintenance and cure;
2. It was not provided;
3. The defendants acted unreasonably in failing to provide maintenance and cure; and
4. The failure to provide the maintenance and cure resulted in some injury to the plaintiff.

As the jury necessarily found: (1) Garza was entitled to maintenance and cure; (2) it was not provided; (3) Weeks Marine acted unreasonably in failing to provide it; and (4) that failure resulted in some injury to Garza. There is some evidence in the record that Garza's injury was the three-month delay in his treatment.

I agree with the Court that there is no legally sufficient evidence here to support the failure

to cure claim during Garza's 17-month treatment process. The treatment during this time period was attributable to the original injury and recoverable under the Jones Act negligence claim—not the failure to cure claim. But this should not detract from the simple fact that in the three months Dr. Montet was not providing treatment to improve Garza's condition, Garza's pain and suffering and mental anguish were attributable to the failure to provide cure. There is legally sufficient evidence supporting some of the damages for Garza's failure to cure claim.

The question then is what the disposition should be. In situations where legally sufficient evidence supports some but not the full amount awarded, we have: (1) remanded for the court of appeals to suggest a remittitur, *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); (2) remanded for the trial court to determine the issue, *Ford Motor Co. v. Garcia*, __ S.W.3d __, __ (Tex. 2012); or (3) remanded for a new trial, *see Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 740 (Tex. 1997). The most appropriate course here would be for the court of appeals to suggest a remittitur of the amount of damages in the failure to cure claim not supported by legally sufficient evidence. *See Guevara*, 247 S.W.3d at 670. Because the Court holds there is legally insufficient evidence to support the failure to cure claim, I respectfully dissent.

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Eva M. Guzman
Justice

OPINION DELIVERED: June 22, 2012