Opinion issued August 14, 2018.

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00629-CV

VINCENT PARTIN, Appellant

V.

SUPERIOR ENERGY SERVICES, INC., Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Case No. 2014-28506

MEMORANDUM OPINION

Appellant Vincent Partin is appealing the trial court's granting of appellee Superior Energy Services, Inc.'s motion for summary judgment on his Jones Act claim. In a single issue with multiple sub-parts, Partin argues that the trial court erred by granting summary judgment on his claim because (1) his seaman status had

already been resolved by a federal district court in a prior suit between him and Superior, (2) Superior did not conclusively prove that he was not a Jones Act seaman, and (3) there is a question of material fact as to whether Partin qualifies as a Jones Act seaman.

We reverse the trial court's order granting summary judgment on Partin's claims and remand this case to the trial court for further proceedings consistent with this opinion.

Factual Background

After the BP oil spill in 2010, the Bureau of Safety and Environmental Enforcement ("BSEE") passed new regulations requiring companies who drill off the Alaskan coast to have access to an emergency response vessel capable of responding to and capping offshore oil spills. Shell, who planned to drill off the Alaskan coast in 2012, contracted with Superior in 2011 to convert an ice class barge known as the *Arctic Challenger*[1] into a floating offshore installation vessel with an arctic containment system ("ACS") capable of quickly responding to and containing blowouts off the Alaskan coast.

Under the terms of the contract, Superior agreed to perform extensive work on the *Arctic Challenger*, including constructing and installing a containment dome

[1] The *Arctic Challenger*, which is owned by Crowly Marine Services and modified and operated by Superior, was being leased to Shell for a five-year term to serve in Alaskan waters.

that would be deployed to cap a leaking oil well, constructing and installing living quarters, developing the process flow diagrams, piping and instrumentation diagrams, utility flow diagrams, deck layouts, electrical one-lines and control system architecture diagrams, and developing detailed drawings and specifications for piping, electrical, controls, instrumentation, and structures, among other tasks. Superior was also required to transport the refurbished *Arctic Challenger* to Dutch Harbor, Alaska pursuant to the lease agreement. Superior would then operate the vessel and be prepared to respond to any "subsea well incident" under the direction of Shell.

According to a March 2013 report Shell submitted to the Department of the Interior, the *Arctic Challenger* began undergoing inspections, structural modifications, and repairs in Portland, Oregon in November 2011. The *Arctic Challenger* was moved to Bellingham, Washington in March 2012 "for the beginning of construction of the facilities that would allow the barge to perform as the surface support vessel of the ACS." According to Joe Dayton, Superior's former Vessel Manager, the "construction phase" of the project ended in September 2012.[2] Greenberry Industrial, LLC, the subcontractor who performed the initial work on the *Arctic Challenger*, transferred the vessel over to Superior in October 2012. The

[2] Dayton's testimony was given in a separate lawsuit. The transcript of his deposition is included as part of the summary judgment evidence in this case.

Arctic Challenger received its Certificate of Inspection ("COI") from the Coast Guard certifying it as a "floating outer continental shelf facility," and an interim Certificate of Classification from the American Bureau of Shipping in October 2012.

Partin worked on the *Arctic Challenger* as a welder for Greenberry until he was hired by Superior in the same capacity on October 1, 2012. According to Partin, most of his work with Superior consisted of welding to construct, modify, and repair the oil containment dome. Partin also testified that while he performed some work onshore when he was employed by Superior, "90 percent of the time it was on the vessel itself." According to Partin, Shell asked for major modifications to the dome's design during this time.

After Superior took over the work on the project, the *Arctic Challenger* went on two or three sea trials,[3] which are also referred to in the record as "deployment tests," to test the deployment of the dome. Partin's responsibilities during sea trials or deployment tests included "removing welding spots for the containment dome on the barge, which was welded so that it would not separate from the vessel when out at sea" and "anchor launching and mooring the vessel." According to Dayton, Partin

[3] Sea trials are preliminary trips made to determine what additional work needs to be completed on the vessel. *Reynolds v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264, 267 (5th Cir. 1986), *overruled on other grounds by Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496, 125 S. Ct. 1118, 1128 (2005).

was "part of the vessel crew," which was involved in "drills, [and] training . . . to operate the vessel."

In September 2012,[4] the *Arctic Challenger* went on its first sea trial, which lasted approximately ten days. The containment dome imploded during the sea trial and had to be removed from the *Arctic Challenger* for extensive repairs and modifications. Partin, who was onboard for this sea trial, testified that he did not specifically recall when the event occurred, but he believed that the dome had been damaged near the time Superior took over work on the vessel in 2012 because Greenberry employees were present for the sea trial. According to Partin, "the repairs for the implosion were done by Greenberry. I supervised them as the welding inspector for Superior."

In December 2012, the *Arctic Challenger* embarked on its second sea trial which lasted between eight to ten days. Partin was onboard. According to Superior's expert, Arthur Darden, "several dome deployments were attempted but failed due to control system communication issues."

The *Arctic Challenger* embarked on its third sea trial in February 2013. Partin was onboard for this sea trial as well. According to Darden, "[t]his sea trial was

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[4] In Exhibit N, Superior's expert states that the sea trial was conducted in September 2012. Darden testified that the Coast Guard issues Certificates of Inspection after a vessel has passed a sea trial. Others, however, testified that the *Arctic Challenger* would not have been able to leave the dock until it received its COI, which did not occur until October 11, 2012.

Superior's internal execution of the ACS dome deployment. . . . This sea trial was the first time the dome was successfully deployed on the sea floor and recovered."

The *Arctic Challenger*'s fourth sea trial in March 2013 was also successful. During this seven to ten-day trial, "[t]he ACS dome was successfully lowered to the sea floor, successfully demonstrated the flow of water (simulating oil) up to the [*Arctic Challenger*], and then retrieved." Partin was onboard for this sea trial as well, as were BSEE and Coast Guard representatives.

On August 28, 2013, Partin injured his left foot, ankle, and heel when he slipped exiting his intermodal shop container located onshore. According to Superior, Partin was repairing and modifying the dome as a result of the failed sea trial when the accident occurred. However, the record reflects that the dome had been successfully tested on two separate sea trials in February and March 2013, well before Partin's injury. Partin testified that the dome had been reconstructed by the time he was injured and that he was making some modifications and repairing minor damage inflicted to the dome by [a remotely operated vehicle] during the previous sea trial. According to Partin, these repairs were not related to the implosion. Partin explained that on the day of his accident Superior "could have put [the dome] right back on the boat and left. It wasn't damaged beyond repair."

After Partin's accident, Superior continued to work on the *Arctic Challenger* for over a year to bring the *Arctic Challenger* up to Shell's specifications. According

to Dayton, Shell had requested a full design review of all the systems on board the *Arctic Challenger*. The design review, which began before Partin's accident, was not completed until the fall of 2014. According to Dayton, the *Arctic Challenger* was moved to a local shipyard in January 2014 where it underwent a "significant amount of work."

The *Arctic Challenger* also went on one last sea trial in March or April 2015. According to Darden, "[s]everal deployments of the dome were successfully attempted."

On March 25, 2014, ABS issued a full-term Class Certificate, classifying the *Arctic Challenger* as a "Floating Offshore Installation." On April 2, 2014, the Coast Guard issued a second COI to the *Arctic Challenger* which still certified it as a "floating outer continental shelf facility."

Superior moved the *Arctic Challenger* to Alaska some time in 2015. The *Arctic Challenger* has never been deployed to respond to an oil spill off the Alaskan Coast.

Procedural History

On May 19, 2014, Partin filed suit against Superior asserting claims under the Jones Act. On July 11, 2014, Superior answered and asserted, among other defenses, that Partin did not qualify as a seaman for purposes of the Jones Act.

On January 20, 2016, Superior filed a motion for summary judgment seeking dismissal of Partin's claims because Partin was not a Jones Act seaman. Specifically, Superior argued that Partin was not a Jones Act seaman because the *Arctic Challenger* was not a vessel "in navigation" when Partin's alleged accident occurred, and Partin's work as a shore-based welder did not contribute to the mission of the vessel.

Partin filed a response to Superior's motion on February 15, 2016. Superior filed a reply in support of its motion on November 30, 2016 and attached Exhibits K through N as summary judgment evidence.[5]

The hearing on Superior's motion for summary judgment was held on December 5, 2016, after which the court took the motion under advisement. On the same day, Partin filed a motion for leave to file a written response to Superior's reply. The court granted Partin's motion for leave on December 19, 2016.

On May 11, 2017, the court granted Superior's motion for summary judgment and dismissed Partin's claims with prejudice.

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[5] Exhibit K is a transcript of Joseph Dayton's November 7, 2016 deposition. Exhibit L is the affidavit of Pat Bernard and a completed and signed version of the Arctic Containment System Contract executed by Superior and Shell Offshore, Inc. that Superior had previously submitted as Exhibit B. Exhibit M is a transcript of Kenneth C. Domorod's July 25, 2016 deposition. Exhibit N is the affidavit of Superior's naval architecture expert, Arthur Darden, Darden's expert report, the documents Darden reviewed, and Darden's curriculum vitae.

Partin filed a motion to reconsider and/or for a new trial, attaching the transcript of Darden's February 22, 2017 deposition.[6] The trial court held a hearing on the motion but did not rule; the motion was denied by operation of law.

Discussion

In his sole issue, Partin argues that the trial court erred by finding that he did not qualify as a "seaman" for purposes of the Jones Act.

A. Standard of Review

We review summary judgments de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). To prevail on a traditional motion for summary judgment, "a movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing TEX. R. CIV. P. 166a(c)). When a movant conclusively negates an essential element of a cause of action, the movant is entitled to summary judgment on that claim. *Grant*, 73 S.W.3d at 215.

In conducting our review, we take as true all evidence favorable to the nonmovant, indulge every reasonable inference in the nonmovant's favor, and resolve any doubts in the nonmovant's favor. *Provident Life & Accident Ins. Co. v.*

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[6] The parties do not appear to be arguing on appeal about whether the Darden deposition transcript is part of the summary judgment record—their dispute is whether Superior's Exhibits K–N are included in the record.

Knott, 128 S.W.3d 211, 215 (Tex. 2003). We cannot, however, disregard "conclusive evidence"—that evidence upon which "reasonable people could not differ in their conclusions." *City of Keller v. Wilson*, 168 S.W.3d 802, 815–16 (Tex. 2005). Typically, evidence is conclusive when "it concerns physical facts that cannot be denied" or "when a party admits it is true." *Id.* at 815. Once the movant shows it is entitled to judgment as a matter of law, the burden shifts to the nonmovant to present evidence raising a fact issue to defeat summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

B. Jones Act

The Jones Act, which provides a compensation scheme designed to mitigate the unique perils faced by "seaman," states that "[a] seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C. § 30104 (West Supp. 2014); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347, 357, 115 S. Ct. 2172, 2184 (1995). Because the Jones Act does not define the term "seaman," courts have been left to determine exactly which maritime workers are entitled to the special protections that the Jones Act provides. *See Chandris*, 515 U.S. at 354; *see also Helix Energy Sol. Grp., Inc. v. Gold*, 522 S.W.3d 427, 429 (Tex. 2017).

In *Chandris*, the Supreme Court held that, under the Jones Act, a "seaman" is a term of art for an employee whose duties "contribut[e] to the function of the vessel

or to the accomplishment of its mission" and who has "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." *Chandris*, 515 U.S. at 368, 115 S. Ct. at 2190. The purpose of this test is 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 [with] a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id*.

The Supreme Court reiterated in *Stewart v. Dutra Construction Company* that "[t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 543 U.S. 481, 489, 494–95, 125 S. Ct. 1118, 1124, 1128 (2005) (quoting 1 U.S.C. § 3 (West Supp. 2017)). Section 3 is the provision that generally defines the term "vessel" for purposes of the United States Code. 1 U.S.C. § 3. The Court also clarified that when it had "spoken of the requirement that a vessel be 'in navigation'" in *Chadris*, "the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time. . . . The Court did not mean that the 'in navigation' requirement stood apart from § 3, such that a 'vessel' for purposes of § 3 might nevertheless not be a 'vessel in navigation' for purposes of the Jones Act." *Stewart,* 543 U.S. at 496, 125 S. Ct. at 1128 (citations omitted). The Court further explained that "the 'in navigation' requirement is an

element of the vessel status of a watercraft. It is relevant to whether the craft is 'used, or capable of being used' for maritime transportation." *Id.* (citations omitted). The key question "remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* (citations omitted).

The Texas Supreme Court addressed the issue of whether a vessel that is undergoing a major overhaul remains in navigation. *See Helix*, 522 S.W.3d at 432–33. In *Helix*, the court recognized that although "the vessel-in-navigation issue is couched as a singular requirement," two types of issues fall under the "vessel-in-navigation umbrella." *Id.* at 433. The first issue "involves the type of structure" at issue, i.e., "is it designed to function in the manner of a seafaring 'vessel,' or does it merely happen to float?" *Id.* (citation omitted). The second issue is "is the principle that 'major renovations can take a ship out of navigation, even though its use before and after the work will be the same.'" *Id.* (quoting *Chandris*, 515 U.S. at 374, 115 S. Ct. at 2193). There was no dispute that the watercraft in *Helix* was a vessel; the issue addressed in that case was whether the movant had conclusively established as a matter of law that the vessel's overhaul was such that the watercraft was no longer in navigation. *Id.* at 439.

> In summary, all of the Supreme Court's indicators of the extensiveness of the overhaul reveal that the [ship]'s conversion warrants out-of-navigation treatment as a matter of law. So too does the [the ship]'s conversion warrant out-of-navigation treatment under *Stewart*'s

> capability-of-transportation standard. All in all, because Gold must have had a substantial connection to a vessel in navigation, and because he had no vessel in navigation upon which to connect, Gold is not a Jones Act seaman in this lawsuit.

Id. at 442. The *Helix* Court noted that *Stewart* "sanctioned out-of-navigation treatment for those major overhauls that render ships incapable of self-transportation." *Id.* at 435.

As the court in *Helix* noted, courts take various considerations into account when "evaluating the extensiveness of any conversion: (a) the significance of the work performed; (b) the cost of conversion relative to the value of the ship; (c) whether contractors exercised control over the work; (d) the duration of the repairs; and (e) whether the repairs took the ship out of service." *Id.* at 440. "And, of course, *Stewart* tells us that the overhaul must be one that renders the ship practically incapable of transportation." *Id.* (citing *Stewart*, 543 U.S. at 496, 125 S. Ct. at 1128).

"A plaintiff's status as a seaman under the Jones Act is a mixed question of law and fact" that usually presents a question of fact for the jury to decide. *Helix*, 522 S.W.3d at 435. However, summary judgment as a matter of law is possible where the facts and law support only one conclusion. *Id.* at 436. More specifically, "whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide." *Id.* (quoting *Chandris*, 515 U.S. at 373, 115 S. Ct. at 2192).

C. Summary Judgment Evidence

The parties disagree about whether Exhibits K through N, which are attached to Superior's reply in support of its summary judgment motion, are included in the summary judgment record. We will address this issue first because our resolution of this issue determines the evidence that we may consider for purposes of Partin's challenge to the trial court's grant of summary judgment.

Partin argues that Exhibits K through N[7] are not included in the summary judgment record because the exhibits were filed late, Superior did not request or obtain leave to file these exhibits, and the record does not affirmatively indicate that the trial court accepted or considered these exhibits. Superior responds that these four exhibits are part of the summary judgment record because the rules do not impose a deadline by which a party moving for summary judgment must file a reply to the non-movant's response to its motion. Superior further contends that the trial court properly considered these exhibits because Partin had access to the deposition transcripts attached as Exhibits K and M for the same amount of time as Superior, Exhibit L only amends a prior exhibit attached to its original motion,[8] and Exhibit

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[7] Partin claims that Superior withdrew Exhibit N (Darden's affidavit and expert report) during a subsequent hearing, but there is not a reporter's record of the hearing.

[8] Superior's Exhibit B is a portion of the Arctic Containment System Contract executed by Superior and Shell Offshore, Inc. Partin objected to Exhibit B claiming it was not authenticated. Partin did not obtain a ruling on his objection and he is not challenging the trial court's consideration of Exhibit B on appeal.

N, the affidavit and report of Superior's expert, was timely produced to Partin in August 2016 and its inclusion in the summary judgment record does not prejudice Partin.

Rule 166a, which establishes the procedure for summary judgment proceedings, does not impose a deadline by which a movant must file its reply to a non-movant's response. *See* TEX. R. CIV. P. 166a(c); *Shelton v. Sargent*, 144 S.W.3d 113, 119 (Tex. App.—Fort Worth 2004, pet. denied). Rule 166a does, however, impose deadlines for filing summary judgment evidence. *See* TEX. R. CIV. P. 166a(c).

Texas Rule of Civil Procedure 166a(c) provides, "[e]xcept on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." *Id.* Summary judgment evidence, whether supporting or opposing the motion, may be filed late, but leave of court is required. *See id.*; *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). We will treat late-filed evidence as part of the summary judgment record as long as the trial court affirmatively indicated in the record that it accepted or considered the evidence. *Stephens v. Dolcefino*, 126 S.W.3d 120, 133–34 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Exhibits K, L, M, and N, which were filed less than twenty-one days before the summary judgment hearing, are untimely and, therefore, Superior was required

to obtain leave of court to file these supplemental exhibits. *See* TEX. R. CIV. P. 166a(c); *Benchmark Bank*, 919 S.W.2d at 663. Superior does not dispute that it did not request leave to file Exhibits K, L, M, and N, and there is no order in the record granting leave or a transcript of the summary judgment hearing. The trial court's order granting summary judgment states that "[u]pon consideration, Defendant Superior Energy Services, Inc.'s Motion for Summary Judgment is GRANTED and Plaintiff Vincent Partin's claims against Defendant Superior Energy Services, Inc. are dismissed with prejudice." This language does not reflect that the trial court considered Superior's supplemental evidence. Nevertheless, the trial court granted Partin leave to file to a sur-reply which is some affirmative indication that the court was considering the reply and its exhibits.

Accordingly, we will consider Exhibits K, L, M, and N for purposes of this appeal.

D. Partin's Seaman Status - *Mead*

Partin and others filed suit in federal court against Superior to recover overtime wages under the Fair Labor Standards Act ("FLSA") for overtime work performed in connection with the *Arctic Challenger*'s transformation from a barge to a floating offshore installation vessel. 29 U.S.C. §§ 207 (West 2010), 213 (West Supp. 2017); *Halle v. Galliano Marine Serv., L.L.C.*, 855 F.3d 290, 293 (5th Cir. 2017). The FLSA's overtime pay requirements, however, do not apply to "any

employee employed as a seaman." 29 U.S.C. § 213(b)(6). Superior argued that Partin was not eligible for overtime pay because he was a seaman.

After a hearing on the parties' competing motions for summary judgment in the *Mead* litigation, the federal district court found that "the Arctic Challenger was a vessel in transportation for purpose of the FLSA's seaman exemption," and "that the plaintiffs[, including Partin] performed services in aid of the operation of the Arctic Challenger as a means of transport." Minute Entry, *Mead v. Superior Energy Servs., LLC,* No. 13-1808 (W.D. Wash. Apr. 2, 2015). However, we do not consider the federal district court's findings that Partin qualified as a seaman for purposes of the FLSA to be persuasive or outcome determinative in this Jones Act case because the FLSA and the Jones Act are separate statutes and have different tests for determining whether someone qualifies as a seaman.

E. Superior Did Not Conclusively Establish that Partin is Not a Jones Act Seaman.

Superior moved for summary judgment on Partin's Jones Act claim alleging that Partin was not a Jones Act seaman because the *Arctic Challenger* was not a vessel "in navigation" when Partin was injured, and Partin's work as a shore-based welder did not contribute to the *Arctic Challenger*'s mission.

1. The *Arctic Challenger* was a "vessel in navigation" when Partin's accident occurred in August 2013.

Superior argues that Partin does not qualify as a seaman because the *Arctic Challenger* was not a "vessel in navigation" for Jones Act purposes. They assert that the vessel must be in commercial use for its intended purpose to be a "vessel in navigation" and that because the *Arctic Challenger* had not been "delivered" to Shell in Alaska, it could not be a vessel "in navigation."

The U.S. Supreme Court addressed the definition of a vessel for Jones Act purposes in *Stewart. See id.* at 495–96, 125 S. Ct. at 1128. The Court pointed out that "vessel" is defined in 1 U.S.C. section 3 as a contrivance "used, or capable of being used, as a means of transportation on water." 543 U.S. at 495, 125 S. Ct. at 1128 (quoting 1 U.S.C. § 3). The Court addressed the question of whether or not there was a difference between that definition and the term "vessel in navigation" used in the Jones Act. *Stewart*, 543 U.S. at 496, 125 S. Ct. at 1128. The Court determined that there was no difference and "that at the time Congress enacted the Joes Act and the [Longshore and Harbor Workers' Compensation Act ("LHWCA")] in the 1920's, it was settled that § 3 defined the term 'vessel' for purposes of those statutes. It was also settled that a structure's status as a vessel under § 3 depended on whether the structure was a means of maritime transportation." *Id.* at 491, 497, 125 S. Ct. at 1125, 1129. The Court also clarified that when it had "spoken of the requirement that a vessel be 'in navigation'" in *Chandris*, "the point was that

structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time. . . . The Court did not mean that the 'in navigation' requirement stood apart from § 3, such that a 'vessel' for purposes of § 3 might nevertheless not be a 'vessel in navigation' for the purposes of the Jones Act or the LHWCA." *Id.* at 496, 125 S. Ct. at 1128 (citations omitted). Thus, the term "vessel in navigation" carries the same meaning as the term "vessel" in the general maritime law of the United States, i.e., whether or not the craft is "used, or capable of being used" for maritime transportation. 1 U.S.C. § 3. The key question "remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Stewart*, 543 U.S. at 496, 125 S. Ct. at 1128 (citations omitted).

There are many factors to consider in determining if the extent of work performed on a vessel takes it out of navigation. These factors include the significance of the work performed, the cost of the work performed, whether the repairs took the ship out of service, and who had control of the vessel during repairs—the operator or the contractor. *Helix*, 522 S.W.3d at 440. These factors present a mixed picture of the *Arctic Challenger*'s status. The vessel had been sitting idle for ten years prior to the conversion, so it cannot be said to have been in service in the first place. Superior was the contractor which entered into a contract with Shell to convert the *Arctic Challenger* from a cargo deck barge to a manned emergency

response vessel. However, Superior was also the operator of the vessel with a contract with Shell to respond to oil field emergencies off the coast of Alaska, therefore, the contractor factor is not conclusive. The cost of the conversion was substantial, but there is no evidence to establish the overall cost of conversion or the cost of conversion relative to the value of the ship. The scope of the work converting the *Arctic Challenger* from a cargo barge to a manned emergency response vessel was unquestionably extensive and took at least nine months before sea trials began. Thus, there is evidence to strongly suggest that the *Arctic Challenger* was removed from navigation for a period of time during its extensive overhaul and conversion. However, this is not necessarily dispositive of the question of whether Superior conclusively established that the *Arctic Challenger* was out of navigation when the accident occurred. For, if a vessel can be removed from navigation, it can also be returned to navigation. *Stewart*, 543 U.S. at 496, 125 S. Ct. at 1128.

In this case, the record reflects that the *Arctic Challenger*, with Partin aboard, had been on four sea trials before Partin's accident and that during two of them, the dome he had been working on was successfully deployed and retrieved. The *Arctic Challenger* had also received its COI from the Coast Guard certifying it was a "floating outer continental shelf facility" which fulfilled the requirements for a "safe manning document" with a crew of up to seventy-two persons. A Certificate of Classification was issued by the American Bureau of Shipping classifying it as a

"Floating Offshore Installation," which as Darden, Superior's expert, stated in his report, "means that the vessel [was] in compliance with the regulatory and classification society requirements for that type of vessel and [it's] intended service."

The summary judgment evidence before us does not conclusively establish that the *Arctic Challenger* was not "used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Although additional work was done after Partin's accident, including a "significant amount of work" performed at a local shipyard in January 2014, the record does not indicate how long the barge remained in the shipyard or the type of work that was done. Like the vessel in *Chandris*, there is at least a question of fact as to whether or not the *Arctic Challenger* was capable of transporting people or goods by sea when the accident occurred and, as the Court held in *Chandris*, the issue "should have been submitted to the jury." *Chandris*, 515 U.S. at 375–76, 115 S. Ct. at 2193. The fact that Superior was performing a design review of the barge's operational systems before and after the accident also does not indicate that the *Arctic Challenger* was not capable of transportation by sea during this time. *See Helix*, 522 S.W.3d at 443 (citing *Stewart*, 543 U.S. at 496, 125 S. Ct. at 1118). This is particularly true since the *Arctic Challenger* had been to sea both before and contemporaneous with Partin's accident and after acquiring a Coast Guard COI.

To what extent was the *Arctic Challenger*'s transformation complete prior to Partin's accident? Were the objective characteristics of the *Arctic Challenger* such that it was a "vessel in navigation" prior to the work on the dome that was underway when the accident occurred and, if so, were the repairs to the dome sufficient to remove it from navigation when the accident occurred? Was it capable of transporting people and goods when the accident occurred? The summary judgment evidence before us does not conclusively establish these facts. If the court's decision in *Helix* was a close call, the evidence in this case presents us with a vessel far more capable of navigation than that evaluated by the court in *Helix*.

Superior argues that *Williams v. Avondale Shipyards, Inc*., 452 F.2d 955, 958 (5th Cir. 1971) draws a bright line that will help determine when a vessel is in navigation. The facts of *Williams* lend themselves to such an argument. The *vessel* in that case was a Coast Guard cutter under construction at the Avondale Shipyards. *Id.* at 956–57. The plaintiff was an employee of the shipbuilder who was on board the cutter for two days as a gauge monitor during the final sea trial prior to delivery of the vessel to the U.S. Coast Guard. *Id.* at 957. He was injured during this sea trial. *Id*. The Court held that the vessel was not in navigation because "an incompleted vessel not yet delivered by the builder is not such a ship." *Id.* at 958.

However, the facts of this case are not such that we can draw bright lines. Superior was the contractor in charge of the conversion of the *Arctic Challenger*

from a barge to an emergency response vessel, but Superior was also contractually obligated to "maintain and operate an arctic subsea spill containment system." One of the requirements of the contract was that "[Superior] shall cross the Bering Strait with the CONTAINMENT SYSTEM under its own power by 1 July of each DRILLING SEASON or as specified in the SCHEDULE OF KEY DATES." Superior must "[m]aintain equipment and systems ready in the designated staging location(s) during the drilling season" and "[i]n the event of a subsea well incident, call up [Superior employees], move to the wellsite, and deploy equipment under the direction of [Shell]." While Superior may have been the construction contractor for the vessel, it was also the operator and end user of the vessel. The *Williams*'s[9] bright line is further dimmed by evidence from depositions taken in the *Mead* case. Kerric Peyton, Superior's Vice President for Maritime Technical Services testified:

> Q.) Mr. Peyton, earlier, if I understood your testimony, you said that the Challenger was fully operational and functional, ready to be deployed for spills sometime in the 2013, right?
>
> A.) Correct. That's correct.

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[9] The reasoning of the Fifth Circuit Court of Appeals' line of shipbuilding delivery cases, *Williams v. Avondale Shipyards, Inc*., 452 F.2d 955 (5th Cir. 1971), *Cain v. Transocean Offshore USA, Inc*., 518 F.3d 295 (5th Cir. 2008) and others, is difficult to reconcile with the vessel-capable-of-navigation reasoning of the U.S. Supreme Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995) and *Stewart.* But that, fortunately, is not our task here. "While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court." *Penrod Drilling Co. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (emphasis in original).

Thus, there is evidence in the record that the *Arctic Challenger*, at the time of the injury, was in the hands of its end user and operator and was fully functional and suitable for deployment for its intended purpose on the Outer Continental Shelf.

In summary, we conclude that reasonable people could disagree as to whether or not the *Arctic Challenger* was capable of transportation by sea when the accident occurred. The conflicting and, at times, ambiguous evidence presented here raises a question of material fact as to whether the *Arctic Challenger* was out of navigation when the accident occurred. Partin's seaman status, which includes evaluation of whether the *Arctic Challenger* was in navigation when he was injured, is a heavily fact-specific question that is normally left for a jury to decide. *See Chandris*, 515 U.S. at 362, 115 S. Ct. at 2187 (noting that "the question of seaman status is normally for the factfinder to decide"). Taking as true all evidence favorable to Partin, indulging every reasonable inference in his favor, and resolving any doubts in his favor, as we must, we hold that the trial court abused its discretion by granting summary judgment on Partin's Jones Act claim because a question of material fact exists that precludes such relief. *See Provident Life*, 128 S.W.3d at 215.

2. Partin's work contributed to the *Arctic Challenger's* mission.

Superior argues that it was entitled to summary judgment as a matter of law on Partin's Jones Act claim because the evidence conclusively established that Partin's work on the vessel did not contribute to the accomplishment of its mission—

oil spill containment off the Alaskan coast. *See Chandris*, 515 U.S. at 368, 115 S. Ct. at 2190. Despite its contrary position in *Mead*, Superior argues that it hired Partin as an onshore welder, not as a member of the vessel's marine crew, and that the accident and injury occurred in Superior's warehouse onshore, not onboard the vessel. Superior also notes that Partin did not have, and has never had, United States Coast Guard marine credentials, which were required for the crew of the *Arctic Challenger* when it was eventually delivered to Alaska in 2015, and he had no role in the vessel's navigation; he was "simply a member of the shoreside maintenance crew."

The record, however, also includes evidence that Partin participated in four sea trials, during which time he was responsible for "removing welding spots for the containment dome on the barge," and "anchor launching and mooring the vessel." Superior's Vessel Manager also testified that Partin was "part of the vessel crew" and, as such, he was involved in "drills, [and] training . . . to operate the vessel." We also note that Partin's work primarily involved the construction and maintenance of the dome, a critical component of the ACS and without which the vessel would not be able to carry out its mission of responding to oil spills. Based on this evidence, reasonable people could disagree as to whether Partin's work on the vessel contributed to the accomplishment of its mission. The conflicting evidence presented here raises a question of material fact as to Partin's seaman status, which is a heavily

fact-specific question that is normally left for a jury to decide. *See Chandris*, 515 U.S. at 362, 115 S. Ct. at 2187. We hold that the trial court erred by granting summary judgment on Partin's Jones Act claim because a question of material fact exists that precludes such relief. *See Provident Life*, 128 S.W.3d at 215.

We sustain Partin's sole issue.

Conclusion

We reverse the trial court's order granting summary judgment and remand this case for further proceedings consistent with this opinion.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.