

SCOMM

101A:19

FAX 206-0289
340-0289
To: Mike Barcott

April 11, 1997

Fm: Jim Sourant

Dear Mike:

Welcome home! I suggested to Brian Porter that the best way to deal with unmitigated sun seekers like you is to give you a minor assignment. We hope that you can help us.

1. I enclose a letter from Mr. Cowan and Brian's response. If you have no conflict anywhere, can you please give me your reading of the Hughes case? I am faxing a marked up copy to assist you.
2. I also enclose the statutory intent language of HB 58, paragraphs 11 and 12. Will paragraph 12 create any problems?

Big thanks for your help. Hope you had a restful break.

Best regards,


PS: HB 58 hits the Senate floor Wednesday of this coming week.

LAW OFFICES OF
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April 14, 1997

via FAX (907) 465-3834

Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: Tort Reform/Maritime Law

Dear Representative Porter:

I have had the opportunity to consider the impact of changes in the availability of punitive damages under Alaska state law as it impacts claims under federal maritime law. It is my opinion that changes in Alaska law would have no impact on federal maritime claims.

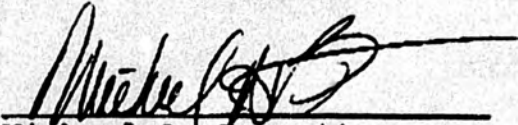
As you are aware, federal maritime claims are primarily governed by federal law. When there are gaps in federal law, states are allowed to fill in the interstices provided that this "filling in" does not fundamentally alter established maritime law principles. The Alaska State Supreme Court's decision in Hughes v. Foster Wheeler Company, allowing the application of Rule 82 in a maritime claim is an example of such a case. While I may disagree with the result reached by the Supreme Court in this case the court very carefully considered whether the application of Rule 82 would do violence to establish maritime law. Unlike this relatively minor matter, however, the availability or unavailability of punitive damages represents a major policy consideration which I do not believe would be left to the states to determine in a maritime case. In my view, the body of federal maritime law must be uniform on this issue and I think there is little likelihood that any state rules would impact punitive damages in a federal claim.

Finally, to the extent there may have been any possibility that the Tort Reform legislation would impact maritime law that possibility - however slight - is surely cured by the statement of intent to the contrary.

Representative Brian S. Porter
April 14, 1997
Page 2

I hope this is of assistance to you.

Very truly yours,


Michael A. Barcott

MAB:mb

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
HOUSE JUDICIARY COMMITTEE
HOUSE RULES COMMITTEE
HEALTH, EDUC. & SOCIAL SERVICES COMMITTEE
LEGISLATIVE COUNCIL JOINT COMMITTEE



DISTRICT 20

April 11, 1997

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Robert Merle Cowan
Cowan Gerry & Aaronson
909 Cook Avenue
Kenai, Alaska 99611

Re: HB 58 Tort Reform

Dear Mr. Cowan:

I am in receipt of your letter dated April 9, 1997. For the record, while I appreciate your point of view, I cannot join in your conclusions.

I am in the process of having legal counsel take a thorough look at the Alaska Supreme Court decision in *Hughes v. Foster Wheeler Company*. In the meantime, I have tentatively concluded that the case simply does not stand for the proposition for which you cite it. While my reading is that of a layman, it is clear to me that the issue before the court had absolutely nothing to do with punitive damages. The issue squarely before the court was whether Rule 82 attorney fees and costs could be imposed when an admiralty case was dismissed on a basis of forum non conveniens, without ever getting to the merits of the admiralty claims. Additionally, it seems logical to me that only the federal courts will have the final say over the scope and applicability of federal admiralty law, rather than the Alaska Supreme Court. If I am advised by our counsel of any different reading, I will let you know.

As to the remaining assertions in your letter, I guess we must agree that we disagree over your other interpretations, including your reading of *Cummings v. Sea Lion Corporation*. In any event, our differences are probably meaningless, since HB 58 will likely be amended to clarify what the Alaska Supreme Court has already determined to be the standard for punitive damages.

Thank you for your interest,

Sincerely yours,
A handwritten signature in cursive script that reads "Brian S. Porter".
Brian Porter

cc: Majority Legislators
cc: Governor's office

LAW OFFICES OF
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Richard F. Gerry*
of Counsel
*not admitted in Alaska

April 9, 1997

MEMORANDUM

TO: Representative Brian Porter
FROM: Robert M. Cowan, Exxon Plaintiffs Committee
SUBJECT: H.B. 58, Tort Reform and Rep. Porter's memo of April 4, 1997 on said subject.

Dear Representative Porter:

I received a copy of your April 4, 1997 memorandum to all majority Representatives and Senator's regarding H.B. 58 and have been asked to respond to some of the legal contentions contained therein. First, we would like to state that we do not adopt the governors advisory Task Force Bill either. The Exxon plaintiffs feel that it is unneeded and unnecessary legislation. Secondly we would note that we do not believe this task force was dominated by trial lawyers, in as much as no Exxon attorneys were even invited to participate. Nor were any fisherman or other of our clients invited to participate and Bill Allen, Judith Brady & Mike Burns were members of the task force. We also disagree with its recommendations as going too far and doing too much.

You also state in your memorandum that H.B. 58 would not apply to an Exxon Valdez situation, because Federal Maritime law preempts Alaska law. Someone has provided you with absolutely incorrect legal advise regarding this issue. The Alaska Supreme court on March 7, 1997 of this year handed down a decision in Hughes v. Foster Wheeler Company, (Supreme Court Number S-6928) [No. 4790 - March 7, 1997], which clearly stated that Alaska state law would be applied in a Federal Maritime law context, such as the Exxon Valdez, so long as there was no direct federal maritime or admiralty law with which it conflicted. In this case, there is none, that H.B. 58 directly conflicts with. Therefore, H.B. 58 could in fact be applied in a future Exxon Valdez situation unless it is re-written.

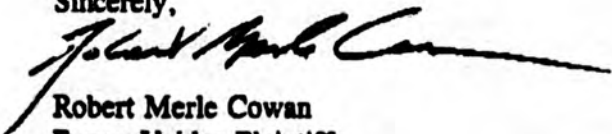
Your memorandum also indicates that under the terms of H.B. 58 that damages in an Exxon Valdez situation would be not affected. Once again we believe that you have been given incorrect legal advice regarding this issue. H.B. 58 would not allow for the inclusion of any settlements, such as those the State of Alaska entered into. Take away the 50% that would go to the State of Alaska, the leftover balance under H.B. 58 for the Exxon Valdez case would be significantly less than you project!

The next thing we would like to take issue with is what we have called the "Hazelwood Exception" in H.B. 58. This is section 09.17.020, which requires malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought". We again believe that you have been given incorrect legal advice regarding what the Alaska Supreme Court's holding was in the case of, Cummings v. Sea Lion Corporation, 924 P.2d 1011 (Alaska 1996). That case clearly stands for the proposition that malice and reckless indifference are two separate concepts and are treated as such by the Alaska Supreme Court. If it is your contention that H.B. 58 stands for that proposition, then there should be no objection to amending that Bill to clearly state that malice includes reckless indifference to the rights of others.

The Exxon Valdez plaintiffs respectfully request you seek additional and supplementary legal advice relating to the issues we have raised in our memorandum. H.B. 58 is presently structured to be potentially disastrous to not only the pending appeals in the Exxon Valdez litigation, but to any future similar disaster that may occur. By the way, there are over 400 attorneys involved in the Exxon case and over 60 law firms.

Thank you for your consideration.

Sincerely,



Robert Merle Cowan
Exxon Valdez Plaintiffs

cc: All Representatives
All Senators
Governor's Office

Distributed by
Robert Cowan

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 264-0878.

(contact:
283-7187
Cindy)

THE SUPREME COURT OF THE STATE OF ALASKA

JOHN R. HUGHES, BLAND L. CASTANO,))
ERLING O. TRONNES, FLOYD KING,) Supreme Court No. S-6928
HARRY DIVESTEIN, CARSTEN HJELLE,))
EDDIE T. OVERTON, ROBERT L.) Superior Court No.
REYNOLDS, ROBERT P. BERGH, SAMUEL) 1JU-92-1855 CI
DERIKRAVA, ROQUE P. NAVARRO,))
ZENON J. PINTO, ANDREW S.) O P I N I O N
MARSHALL, RUBEN GUERRA,))
FELICIANO SALCIDO, CREIGHTON E.) [No. 4790 - March 7, 1997]
MILLER, Administrator of the))
Estates of Pok Tung Lee, William))
C. Anderson, Allan F. Berlund,))
Warren J. Henry, Edward T.))
Kusman, Peter J. Corvia, Leroy L.))
Mcbley, James I. Payne, Robert))
Cranston, Malcolm Rogers, Lloyd))
Borland, Lucius McCall, James M.))
Goo, Alfred W. Franklin, and))
Frank W. Barber,))
Appellants,))
v.))
FOSTER WHEELER CO., CROWN CORK &))
SEAL CO., INC., GARLOCK, INC.,))
ACandS, INC., MOBIL OIL CORP.,))
PHILLIPS PETROLEUM CO., GATKE))
CORP., POPE & TALBOT CO., GENERAL))
ELECTRIC CO., FIBREBOARD CORP.,))
PLIBRICO CO., TIDEWATER OIL CO.,))
TEXACO INC., JOHN CRANE-))
HOUDAILLE, INC., UNITED STATES))
STEEL CORP. a/k/a USX CORP.,))
OWENS-ILLINOIS, INC., ANCHOR))
PACKING CO., ALASKA STEAMSHIP))
CO., and THE SO-CALLED "CCR))
DEFENDANTS": A.P. GREEN REFRAC-))
TORIES CO., ARMSTRONG WORLD))
INDUSTRIES, INC., CERTAINTIED))
CORP., FLEXITALLIC, INC., GAF))
CORP., NATIONAL GYPSUM CO., U.S.))
GYPSUM CO., and UNION CARBIDE))
CORP.,))
Appellees.))

Appeal from the Superior Court of the State of
Alaska, First Judicial District, Juneau,
Larry R. Weeks, Judge.

Appearances: Leonard C. Jaques and Robert J.
Allen, The Maritime Asbestosis Legal Clinic, A
Division of the Jaques Admiralty Law Firm

Division of the Jacques Admiralty Law Firm,
Detroit, Michigan, for Appellants. Jennifer
M. Coughlin, Preston, Gates & Ellis,
Anchorage; Jean L. Bertrand, Morgenstein &
Jubelirer, San Francisco, California; Rogert
Holmes, Biss & Holmes, Anchorage; and Thomas
M. Peterson and Michael B. Green, Brobeck,
Phleger & Harrison, San Francisco, California,
for Appellees.

Before: Compton, Chief Justice, Rabinowitz,
and Fabe, Justices. [Matthews and Eastaugh,
Justices, not participating.]

RABINOWITZ, Justice.

I. INTRODUCTION

Thirty merchant mariners filed complaints against various shipowners and asbestos manufacturers alleging personal injuries and wrongful deaths caused by exposure to asbestos while they served aboard various vessels. The cases were dismissed on grounds of forum non conveniens. This is an appeal from the superior court's award of attorney's fees and costs under Alaska Civil Rule 82 entered in conjunction with its forum non conveniens dismissal.

II. FACTS AND PROCEEDINGS

The attorneys for the thirty merchant mariners filed thirty similar complaints in three different superior courts of the State of Alaska, naming multiple defendants. The suits alleged personal injuries and wrongful deaths caused by exposure to asbestos and other substances while the seamen were in the merchant marine. Appellees (Foster) removed twenty-eight of the thirty cases to federal district court, which remanded the cases to state court. On motion of the mariners, the superior court consolidated all thirty cases for the "purposes of hearing [Foster's] motion to dismiss on personal jurisdiction and forum non conveniens" grounds.

The superior court granted the motion to dismiss on forum non conveniens grounds. (EN1) The superior court then awarded Foster \$134,905.46 in attorney's fees and \$106,782.36 in costs, (EN2) finding Foster the "prevailing party" pursuant to Civil Rule 82. The mariners appeal the superior court's award of attorney's fees and costs. (EN3)

III. DISCUSSION

A. The Superior Court Correctly Applied Civil Rule 82.

The mariners argue that admiralty law does not provide for awards of attorney's fees and costs, and therefore the superior court erroneously awarded costs and attorney's fees to Foster pursuant to Civil Rule 82. (EN4)

1. Since the case was dismissed pursuant to the doctrine of forum non conveniens, any prohibition on the award of attorney's fees pursuant to admiralty law is irrelevant.

These consolidated cases were dismissed pursuant to the doctrine of forum non conveniens. The United States Supreme Court recently held that the doctrine of forum non conveniens is not a part of admiralty law. American Dredging Co. v. Miller, 510 U.S. 443 (1994). The court wrote, "[T]he doctrine of forum non conveniens neither originated in admiralty nor has exclusive application there. To the contrary, it is and has long been a doctrine of general application." Id. at 450.

Even if the mariners are correct in arguing that cases decided pursuant to federal admiralty law cannot support awards of attorney's fees and costs, that argument is inapplicable to a case resolved by a dismissal pursuant to the doctrine of forum non

conveniensi. Accordingly, we hold that the superior court did not err in finding that attorney's fees and costs could be awarded pursuant to Civil Rule 82. (EN5)

Holding

2. Admiralty law does not prohibit the superior court from awarding attorney's fees and costs pursuant to Civil Rule 82.

Even assuming that admiralty law applies to an admiralty case dismissed in the superior court pursuant to a forum non conveniens motion, admiralty law does not prohibit the award of attorney's fees and costs in admiralty cases decided in state courts under the savings to suitors jurisdiction.

The United States Constitution provides that the federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const., art. III, sec. 2, cl. 1. However, federal courts do not have exclusive jurisdiction over maritime and admiralty cases. 28 U.S.C. sec. 1333 provides in part that [t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

The United States Supreme Court has interpreted this language to allow state courts to entertain admiralty and maritime cases. See, e.g., American Dredging Co., 510 U.S. at 442-43. However state courts may not

"attempt to make changes in the 'substantive maritime law.'" That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

Id. at 447 (citations omitted).

The mariners make two arguments as to why Alaska Civil Rule 82 would violate "substantive maritime law." First, they claim that, historically, attorney's fees and costs have been prohibited in admiralty cases, and that any award thereof would "work[] material prejudice to the characteristic features of the general maritime law." Second, the mariners argue that allowing an award of attorney's fees and costs is an improper intrusion of a state into "substantive maritime law" when viewed from a policy perspective. Specifically they argue that awarding attorney's fees and costs would "interfere[] with the proper harmony and uniformity of [admiralty] law in its international and interstate relations[.]"

We note as a preliminary matter that, if the mariners are to prevail, Williams v. Eckert, 643 P.2d 991 (Alaska 1982), must be overruled. In Williams, we held that federal admiralty law did not prohibit the application of Civil Rule 82 in awarding attorney's fees in admiralty cases heard in our superior courts. We stated: Eckert sued in state court to recover his vessel. One of the remedial adjuncts of that suit was the right to recover attorney's fees under Alaska Civil Rule 82, if he prevailed. Congress has not prohibited such an award in state actions arising out of the admiralty jurisdiction of the United States. Moreover, an award of attorney's fees in a state court

does not frustrate or displace the essential features of substantive maritime law. It is merely remedial in nature.

Id. at 997. The mariners claim that Williams v. Eckert conflicts with federal law.

a. The "American Rule" regarding attorney's fee awards is not "characteristic" of admiralty law.

The mariners claim that federal admiralty law historically has prohibited awards of attorney's fees and therefore the award of attorney's fees was error. We disagree.

The mariners cite no federal statute, but rely on the federal and admiralty common law to support their argument that awards of attorney's fees are prohibited in admiralty cases. (EN6) None of the cases cited by the mariners are relevant to this case because the cited cases involve situations where federal admiralty law is litigated in federal court. In general, all federal courts (and all state courts with the exception of Alaska) follow the "American rule," pursuant to which neither party is entitled to an award of attorney's fees. See Home Savings Bank v. Gillam, 952 F.2d 1152, 1162 (9th Cir. 1991) ("Since the Supreme Court's decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240; 44 L. Ed. 2d 141 (1975), the rule in federal courts has been that, absent an express statutory command, attorney's fees will not be awarded in civil cases.").

The prohibition against awarding attorney's fees in admiralty cases stems not from admiralty law itself, but rather from the fee-shifting rules used in most American courts. In The Baltimore, 75 U.S. 377 (1869), the United States Supreme Court refused to allow attorney's fees. However, the Court did not rely upon admiralty law, but relied on a generally applicable law passed by Congress in 1853. More recently, in Vaughn v. Atkinson, 369 U.S. 527 (1962), the Court allowed attorney's fees to be awarded in admiralty cases where equity demands it. As equity must be invoked in order to award attorney's fees, the decision implies that attorney's fees may not be awarded in the majority of admiralty cases; (EN7) however, the case does not state that the prohibition is a part of admiralty law itself.

Finally, the United States Supreme Court discussed the history of fee awards in American law in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). From the late 1700s until 1800, Congress provided for attorney's fee awards in admiralty cases. Id. at 240-49. In 1853 Congress passed a statute, applicable to all federal litigation, which abolished awards of attorney's fees and costs to the prevailing parties in federal courts. Id. at 251-52. This statute appears to be the basis for the tradition in federal courts prohibiting awards of attorney's fees and costs.

Thus, the mariners correctly argue that attorney's fees historically have been denied in admiralty cases in federal courts. However, this prohibition on attorney's fees results more from coincidence than design. The vast majority of admiralty cases in America have been heard in jurisdictions (usually federal, but sometimes state) that do not provide for awards of attorney's fees to the prevailing party. The mariners have not shown that admiralty law itself prohibits awards of attorney's fees.

~~Therefore, we disagree with the mariners that it is characteristic of admiralty law to prohibit attorney's fees. Rather, it is characteristic of the "American Rule" which predominates in most courts where admiralty cases are tried.~~

b. Civil Rule 82 need not yield in order to protect the uniformity required by admiralty law.

The mariners can prevail if they can show that a prohibition on attorney's fees is necessary to maintain "the proper harmony and uniformity of [admiralty] law in its international and interstate relations." *American Dredging Co.*, 510 U.S. at 447.

The mariners rely on the "reverse-Erie doctrine" which the United States Supreme Court has applied when deciding whether to apply state or federal law in admiralty cases. The doctrine "requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207, 222 (1986). *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), directs federal courts sitting in diversity to apply state substantive law and federal procedures. Conversely, the mariners argue that the "reverse-Erie doctrine" directs state courts hearing admiralty cases to apply state procedural law and federal substantive law. The mariners also contend that a regular Erie analysis would hold rules regarding awards of attorney's fees to be substantive law. They thus conclude that federal rather than state fee rules should be applied here.

This analysis, however, misconstrues the "reverse-Erie doctrine." A post-Tallentire case, *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), overruled on other grounds by *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), contains an instructive discussion of the doctrine. Directly addressing an argument similar to that made by the mariners, the Fifth Circuit stated:

We reject this facile syllogism; drawing conclusions from metaphors is dangerous. The reason that state court procedures are not preempted by maritime law is that they almost never . . . conflict with it. When they do, however, it is clear that they must yield.

Because the Erie diversity doctrine and the "reverse-Erie" maritime doctrine spring from distinct principles and policies, there is no reason to expect a perfect symmetry between them. In the Erie context, the substance/procedure dichotomy is simply shorthand for distinctions that must be drawn on the basis of policies underlying the doctrine. The "reverse-Erie" question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law.

Exxon, 817 F.2d at 319 (emphasis added, footnotes omitted).

According to the Fifth Circuit, it is irrelevant whether the disputed doctrine is substantive or procedural. The United States Supreme Court, since Tallentire, also has repudiated any suggestion that the relevant analysis turns solely on whether the disputed doctrine is procedural or substantive. In *American Dredging Co.*, Justice Scalia, writing for the Court, said that states are prohibited from any "attempt to make changes in the 'substantive maritime law.'" That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

510 U.S. at 447 (citations omitted.) The Court did proceed to discuss whether forum non conveniens was a procedural or substantive doctrine; however, the court used the distinction merely as a guide. Id. at 453-55. Equally important to the analysis was whether the disputed doctrine is likely to produce "uniform results." Id. at 453. Justice Souter makes this point in his concurrence:

I join in the opinion of the Court because I agree that in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

Id. at 457-58 (Souter, J., concurring).

We think the relevant question is whether Alaska's Civil Rule 82 regarding attorney's fees and costs interferes with the uniformity traditionally required in admiralty law. The majority opinion in American Dredging Co. articulates that the state law must yield if it "interferes with the proper harmony and uniformity of that law in its international and interstate relations." Elsewhere in its opinion, the Court says that state laws generally must yield when they are unlikely to produce "uniform results." Justice Souter's concurrence phrases the question as "whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce." (EN8)

American Dredging Co. distinguishes between state laws that influence "primary" behavior and "secondary" behavior of litigants. "Primary behavior" involves out-of-court conduct, or "how to manage their business and what precautions to take." Id. at 454. "Secondary behavior" involves decisions relating to "where to sue or where one is subject to being sued." Id. In the majority's view, the doctrine of forum non conveniens does not influence either primary or secondary behavior.

Resolution of the forum non conveniens issue in any given case is within the discretion of the trial court. As parties cannot predict in advance the trial court's decision, the issue can have little or no influence on secondary behavior.

With respect to primary behavior, it is highly doubtful that parties -- either mariners or owners of vessels -- will alter their business regimes or take different precautions due to the risk that partial attorney's fees and costs can be awarded in favor of the prevailing party against the losing party. Owners of vessels already have sufficient reason to take precautions to safeguard mariners working on their vessels, since they can and are sued for unseaworthiness, personal injury, wrongful death, and other causes of action when mariners are injured on-board. The fact that Civil Rule 82 would allow a vessel owner, if successful on the merits, to recoup partial attorney's fees and costs is not a sufficient incentive for shipowners to scrimp on safety or change their business management techniques. Similarly, the prospect that mariners might recover partial attorney's fees and costs if they successfully prosecute a suit hardly seems to be sufficient incentive for them to carry out their duties in such a way that would cause them to suffer injury.

The analysis of secondary behavior is more involved. First, Civil Rule 82 will not substantially affect where plaintiffs

file suit. In all jurisdictions there is a chance that attorney's fees and costs will be awarded. A plaintiff in an admiralty suit who sues in courts of the State of Alaska knows that there is a probability that partial attorney's fees and costs will be awarded to the defendant if the defendant prevails. A plaintiff who files suit in another jurisdiction (federal or state) knows only that, pursuant to Vaughn, there is a possibility that attorney's fees will be awarded in the exercise of the admiralty court's equity power. While the likelihood of a fee award is higher in Alaska than in other jurisdictions, the difference is not so great that it would influence plaintiffs in their decision concerning where to file suit. (EN9)

Any difference between state and federal law in admiralty cases increases the risk of forum shopping to some degree. Even so, courts have allowed the use of state wrongful death laws in place of generally recognized federal maritime wrongful death law. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996). Courts also have upheld state laws regarding the partition and sale of ships, the specific performance of arbitration agreements, and the effect of breach of warranty under contracts of maritime insurance. *American Dredging Co.*, 510 U.S. at 452 (quoting *Romero*, 358 U.S. at 373-74). The mere existence of a difference between state and federal law does not dictate that the state law must yield. Here Civil Rule 82 would be more likely to induce forum shopping than any of these rules.

We conclude Civil Rule 82 regarding attorney's fees need not yield to federal law. We therefore reaffirm *Eckert*, and hold that the superior court was correct in applying Civil Rule 82 in conjunction with its dismissal of the mariners' claims on the basis of *forum non conveniens*.

B. The Superior Court Correctly Held that the Defendants Are Prevailing Parties.

The mariners argue that, since the case was dismissed pursuant to the doctrine of *forum non conveniens*, the case was not resolved on the merits, and Foster therefore cannot be the prevailing party within the terms of Civil Rule 82. (EN10) We recently considered the same argument in *Bromley v. Mitchell*, 902 P.2d 797 (Alaska 1995). We wrote:

[T]he trial court's award is legally supported by our precedents and logically supported by the fact that Mitchell has obtained a judgment, binding on all Alaska courts, that the claims against him must be resolved in another forum. Under these circumstances, we cannot conclude that the trial court abused its discretion in determining that Mitchell was the prevailing party.

Id. at 894. While the mariners ask us to reconsider and overrule *Bromley*, they have not offered any new or persuasive arguments that warrant reversal. The superior court did not abuse its discretion by determining that Foster is the prevailing party within the terms of Civil Rule 82.

C. The Superior Court Correctly Determined that the Mariners Are Jointly and Severally Liable for the Attorney's Fees.

In imposing its award of attorney's fees, the superior court wrote:
Where consolidation was granted at the request of plaintiffs' counsel, and briefing on behalf of the plaintiffs was "global," treating all plaintiffs as one entity, joint and several responsibility for attorney's fees is appropriate.

The mariners argue that the imposition of joint and

several liability for the award of attorney's fees and costs is impermissible in Alaska. Specifically, they argue that AS 09.17.080(d) prohibits the imposition of joint and several liability. We disagree. (EN11)

Alaska Statute 09.17.080(d) states in relevant part: The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

The statute applies to findings of fault, whereas awards of attorney's fees and costs pursuant to Civil Rule 82 are not indicative of or dependent upon findings of fault. Civil Rule 82(e) states, "In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault." The clear implication is that, in types of litigation where AS 09.17.080 is not invoked, attorney's fees need not be apportioned by fault. Here there were no damages awarded pursuant to 09.17.080, and it follows that the statute is inapplicable to the award of attorney's fees and costs in this case.

Moreover, since the statute's passage in 1987, this court has suggested that awards of attorney's fees and costs for which the non-prevailing parties are jointly and severally liable can stand. In *In re Soldotna Air Crash Litigation*, 835 P.2d 1215, 1223 (Alaska 1992), we discussed our findings in *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979):

[W]e held that when a defendant prevails against multiple defendants who jointly moved for consolidation of their cases, the trial court could impose joint and several liability for fees and costs. Such a ruling was within the trial court's discretion.

In *re Soldotna*, 835 P.2d at 1223 (citation omitted). Additionally we said:

In *McGarvey*, we indicated that the trial courts have great discretion to adapt awards of costs and fees to the unique circumstances of a particular case.

Id. In *Moses v. McGarvey*, 614 P.2d 1363 (Alaska 1980), we said: In *Stepanov*, the trial court imposed joint and several liability on losing plaintiffs even though they filed separate claims. We affirmed because the same issue was involved in each claim. It was thus within the trial court's discretion to allocate the costs and fees against the losing parties jointly and severally.

McGarvey, 614 P.2d at 1367 n.5.

This reasoning applies to the instant case. "[T]he same issue was involved in each claim," namely, the issue of whether the doctrine of *forum non conveniens* would perhaps further prosecution of the case in the superior court. Therefore, the superior court did not abuse its discretion by holding the mariners jointly and severally liable for the award of attorney's fees. Neither this court's precedents nor AS 09.17.080 mandate a contrary result.

(EN12)

D. The Superior Court Correctly Calculated the Size of the Attorney's Fee Award Pursuant to Civil Rule 82.

The mariners argue that the award of attorney's fees of \$134,905.46 is unwarranted because "merchant seaman [sic] are the wards of the Court, to be treated with great solicitude." (EN13)

They also maintain that the award is too large for them to satisfy without suffering great distress in light of their indigency.

An award of attorney's fees will only be reversed for an abuse of discretion, which exists if the award is arbitrary, capricious, manifestly unreasonable, or the result of an improper motive. *Mt. Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829, 834 (Alaska 1995). The superior court found:

[T]he appropriate award of attorney's fees in this case is 20% of the actual attorney's fees necessarily incurred, up to \$10,000. Pursuant to Civil Rule 82 (b) (3), the court sets a limit of \$10,000 in fees awarded to each defendant. The court bases its decision on the fact that the case consisted entirely of motion practice. In addition, the complexity of the litigation, the attorney's efforts to minimize fees, and the equities of the case justify setting a maximum fees award of \$10,000. The court does not find the factors in Civil Rule 82 (b) (3) A-K applicable to enhance the award above 20%. [(EN14)]

The attorney's fees awarded by the superior court were not an abuse of discretion. The superior court set a limit of \$10,000 on the amount of attorney's fees awarded per defendant, in effect departing downward from the Rule 82 schedule. The total amount of the award of attorney's fees and costs is reflective of the fact that the thirty mariners elected to sue a total of twenty-six defendants in thirty separate actions. The award was therefore proper.

IV. CONCLUSION

The superior court's award of attorney's fees and costs is AFFIRMED.

ENDNOTES:

1. The mariners do not appeal this ruling.
2. The superior court excluded from its calculation attorney's fees and costs incurred while the cases were removed to federal court.
3. Subsequent to the filing of this appeal, the mariners sought both a stay of execution and a waiver of the requirement that a bond be posted. The superior court refused to waive the bond requirement. Chief Justice Compton then ordered the superior court to rule on the issue of whether the mariners were indigent. The superior court found that the mariners were, as a class, indigent, and waived the bond requirement.
4. The mariners did not argue before the superior court that Civil Rule 82 does not apply to this case. Nonetheless, we have previously stated that "if the alleged error is likely to result in a miscarriage of justice, we will consider such error even though not raised below." *Holiday Inns of America v. Peck*, 520 P.2d 87, 90 (Alaska 1974). Here the mariners would suffer injustice -- being forced to pay approximately \$250,000 --if Rule 82 is inapplicable. Therefore, we will review the decision below for plain error.

Whether the superior court misapplied the applicable law is a question of law. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 356 n.5

(Alaska 1992). We review questions of law de novo. *Langdon v. Champion*, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

5. Our holding that attorney's fees and costs are awardable in conjunction with a forum non conveniens dismissal necessarily implies a rejection of the mariners' procedural-substantive reading of *American Dredging Co. v. Miller and Exxon Corp. v. Chick Kam Choc*, 817 F.2d 307 (5th Cir. 1987). See *infra* at section III.A.2.(b).

6. We have upheld the application of a Congressionally-mandated attorney's fees rule governing a claim based on federal law, even when the federal attorney's fees rule differs from Alaska's Civil Rule 82. See, e.g., *Fairbanks Correctional Center Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979) (holding that federal attorney's fees statute applies to a claim based on 42 U.S.C. sec. 1983 brought in state court); *Ferdinand v. City of Fairbanks*, 599 P.2d 122 (Alaska 1979) (same).

7. Attorney's fees are awarded in federal admiralty actions for maintenance and cure. In *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 520 (Fla. App. 1992), the court said:

[W]e find no conflict between Florida's rules of law regarding offers of judgment and federal maritime law. In federal admiralty actions, an award of attorney's fees as a component of maintenance and cure is traditionally within the equitable jurisdiction of the courts. Awards of attorney's fees made pursuant to Florida law regarding offers of judgment are intended to deter unnecessary litigation and encourage timely settlement of claims. . . . Because Florida's rules relating to offers of judgment are an integral part of this state's management of its courts' proceedings and do not conflict with federal admiralty law, we reverse the order denying attorney's fees.

8. Justice Scalia warns that no bright-line rule can be applied:

It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.

American Dredging Co., 510 U.S. at 452.

A previous United States Supreme Court case stated that state laws may be applied to admiralty law even "when they conflicted with a rule of maritime law which did not require uniformity." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 374 (1959).

9. We note that Vaughn only addresses attorney's fees where they are being awarded in favor of the plaintiff, while Rule 82 addresses fees being awarded in favor of either the defendant or the plaintiff. However, there is nothing in the reasoning in Vaughn that prohibits admiralty courts, using their equity powers, from awarding attorney's fees in favor of defendants should the proper case arise.

10. Decisions regarding awards of fees and costs are reviewed for

an abuse of discretion. Stepanov v. Gavrilovich, 594 P.2d 30, 36 (Alaska 1979).

11. The question of whether a statute is applicable to a given case is a question of law. Harp v. Arco Alaska, Inc., 831 P.2d 352, 356 n.5 (Alaska 1992). Therefore, this court reviews the issue on a de novo basis.

12. The mariners further argue that holding them jointly and severally liable for the award of fees and costs would violate their due process rights, since some plaintiffs would be liable to defendants who were not named in individual suits. The mariners cite a single case in support of their argument, but do not explain how it applies to the present case, nor do they elaborate in any way on this argument. Therefore, the argument is waived for lack of sufficient briefing.

13. The special status of seamen is relevant when they sue their employers; however, here the plaintiffs sued third parties. Brown v. State, 816 P.2d 1368, 1371 (Alaska 1991).

14. Civil Rule 82(b)(2) and (3) provide:

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

Civil Rule 79 provides for the taxation of costs in favor of "a party entitled to costs." The prevailing party standard of Civil Rule 82 is used to determine the party entitled to costs.

MEMORANDUM

Date: March 20, 1997
To: Representative Brian Porter
From: Mark D. Boudreaux
Exxon Company, U.S.A.
Subject: Exxon Valdez Oil Spill Litigation

In response to your request regarding the Exxon Valdez oil spill litigation, the jury awarded \$287 Million in compensatory damages to private parties and \$5 Billion in punitive damages.

In addition, attached is an excerpt from Exxon Corporation's 1995 annual report which describes Exxon Valdez litigation.

MDB:dgo
Attachment



1995 ANNUAL REPORT

14. Litigation and Other Contingencies

A number of lawsuits, including class actions, have been brought in various courts against Exxon Corporation and certain of its subsidiaries relating to the accidental release of crude oil from the tanker Exxon Valdez in 1989. Most of these lawsuits seek unspecified compensatory and punitive damages. Several lawsuits seek damages in varying specified amounts.

A civil trial in the United States District Court for the District of Alaska commenced on May 2, 1994 on punitive damage claims made by a class composed of all persons and entities seeking punitive damages from the corporation as a result of the Exxon Valdez grounding. On September 16, 1994, the jury returned a verdict awarding the class punitive damages of \$5 billion. The verdict is not final. The corporation plans to appeal this verdict following entry of a final judgment by the District Court. The corporation believes that this verdict is unjustified and should be set aside or substantially reduced by the District Court or appellate courts.

Many of the claims of individuals have been dismissed by the courts but have been appealed. A number of claims have been settled. With respect to the remaining compensatory damage claims against the corporation arising from the grounding, many of these claims have been or will be addressed in the same federal civil trial proceeding, which is still ongoing. On August 11, 1994, the jury returned a verdict finding that fisher plaintiffs were damaged in the amount of \$286.8 million. On August 31, 1995, the District Court issued an order that reduced this verdict to about \$70 million to reflect payments already made to the plaintiffs by the corporation and others. The corporation expects this lesser amount to be further reduced. Additional claims for compensatory damages, scheduled for determination in the final phase of the trial, have been settled. The remaining class action claims are included in a \$3.5 million settlement of this final phase. The class settlement is subject to approval by the court. The total amount of the settlement will be satisfied by recognition of prior payments made to the plaintiffs by the corporation and others. If the settlement is approved, the federal trial will be concluded. There are a number of additional cases pending in state court in Alaska where the compensatory damages claimed have not been fully specified.

The ultimate cost to the corporation from the lawsuits arising from the Exxon Valdez grounding is not possible to predict and may not be resolved for a number of years.

German and Dutch affiliated companies are the concessionaires of a natural gas field subject to a treaty between the governments of Germany and the Netherlands under which the gas reserves in an undefined border or common area are to be shared equally. Entitlement to the reserves is determined by calculating the amounts of gas which can be recovered from this area. Based on the final reserve determination, the German affiliate has lifted more gas than its entitlement. Arbitration proceedings, as provided in the agreements, have commenced to determine the manner of resolving the imbalance in liftings between the German and Dutch affiliated companies. Financial effects to the corporation related to resolution of this imbalance would be influenced by

different tax regimes and ownership interests. The net impact of the ultimate outcome is not expected to have a materially adverse effect upon the corporation's operations or financial condition.

The U.S. Tax Court has decided the issue with respect to the pricing of crude oil purchased from Saudi Arabia for the years 1979 to 1981 in favor of the corporation. This decision is subject to appeal. Certain other issues for the years 1979-1982 remain pending before the Tax Court. The ultimate resolution of these issues is not expected to have a materially adverse effect upon the corporation's operations or financial condition.

Claims for substantial amounts have been made against Exxon and certain of its consolidated subsidiaries in other pending lawsuits, the outcome of which is not expected to have a materially adverse effect upon the corporation's operations or financial condition.

The corporation and certain of its consolidated subsidiaries were contingently liable at December 31, 1995 for \$1,463 million, primarily relating to guarantees for notes, loans and performance under contracts. This includes \$1,109 million representing guarantees of non-U.S. excise taxes and customs duties of other companies, entered into as a normal business practice, under reciprocal arrangements. Not included in this figure are guarantees by consolidated affiliates of \$1,175 million, representing Exxon's share of obligations of certain equity companies.

Additionally, the corporation and its affiliates have numerous long-term sales and purchase commitments in their various business activities, all of which are expected to be fulfilled with no adverse consequences material to the corporation's operations or financial condition.

The operations and earnings of the corporation and its affiliates throughout the world have been, and may in the future be, affected from time to time in varying degree by political developments and laws and regulations, such as forced divestiture of assets; restrictions on production, imports and exports; price controls; tax increases and retroactive tax claims; expropriation of property; cancellation of contract rights and environmental regulations. Both the likelihood of such occurrences and their overall effect upon the corporation vary greatly from country to country and are not predictable.

15. Annuity Benefits

Exxon and most of its affiliates have defined benefit retirement plans which cover substantially all of their employees. Plan benefits are generally based on years of service and employees' compensation during their last years of employment.

Assets are contributed to trustees and insurance companies to provide benefits for many of Exxon's retirement plans and are primarily invested in equity and fixed income securities. All funded U.S. plans meet the full funding requirements of the Department of Labor and the Internal Revenue Service as detailed in the table at the end of this note. Certain smaller U.S. plans, and a number of non-U.S. plans, are not funded because of local tax conventions and regulatory practices which do not encourage funding in these plans. Book reserves have been established for these plans to provide for future benefit payments.

Facsimile Cover Sheet

To: Jim Sourant
Fax: (907) 465-3834

From: Mark D. Boudreaux
Company: Exxon Company, U.S.A.
Phone: (907) 564-3778
Fax: (907) 564-3603
Date: 3/20/97
Page(s): 3

Comments:

Please call Donna Outlaw at (907) 564-3683 if you should have any problems with this transmission.

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