Affirmed in Part, Reversed and Remanded in Part and Majority and Concurring Opinions filed June 18, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00573-CV

ROBIN BLAINE ANDREWS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF GARLAND DALE PEPPER, DECEASED, AND GARLAND PEPPER, JR., SUSAN ANDREWS, KIMBERLY BROWN AND CAROLYN WALKER, Appellants

V.

JOHN CRANE, INC., Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2014-02782-ASB

MAJORITY OPINION

Appellants, Robin Blaine Andrews, Individually and as the Personal Representative of the heirs and estate of Garland Dale Pepper, deceased, and Garland Pepper, Jr., Susan Andrews, Kimberly Brown, and Carolyn Walker, appeal from a take-nothing judgment signed after the trial court granted a partial

summary judgment on the question of the damages recoverable by appellants, and a subsequent bench trial on stipulated evidence. Concluding that the trial court correctly determined that maritime law applied but it erred when it granted the partial summary judgment on the damages recoverable by appellants, we affirm in part, reverse in part, and remand the case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

The facts in this case are undisputed. This is a products liability action based on decedent Garland Pepper's contracting pleural mesothelioma after allegedly being exposed to appellee John Crane, Inc.'s (JCI) asbestos-containing sheet gasket material during his service in the United States Navy. While Pepper served in the Navy, he worked on the high seas, in territorial waters, and in dry dock. Pepper estimated that eighty percent of his work was done while the ship was underway, either in territorial waters or on the high seas, and twenty percent was performed in dry dock.

The only sheet-gasket material Pepper recalled using was JCI style 2150. Pepper testified that there was dust created whenever he cut JCI asbestos sheets for steam-valve gaskets. JCI's corporate representatives concede that JCI's 2150 gaskets were sold to the Navy during all relevant time periods. Style 2150 contained seventy to eighty percent asbestos and was recommended for both high-pressure and low-pressure steam systems.

This case was transferred to the asbestos multi-district litigation court in Harris County where it was initially set for trial on September 7, 2015. Pepper died in 2014 and the case was amended to substitute appellants and add claims for wrongful death. JCI moved for summary judgment in July 2015 arguing that appellants could not satisfy the causation element of their claims against JCI.

While JCI moved for summary judgment under Texas law, it also stated in the motion that "we have not asked that the Court apply any other law than Texas law, however a motion to apply maritime law may be filed." JCI continued "regardless of whether the Court applies Texas law or maritime law, [appellants] cannot satisfy the causation element of their claims against [JCI]." In addition, JCI included a section in the motion arguing that appellants could not "satisfy the causation element of their claims against [JCI] under maritime law." Appellants responded to JCI's motion for summary judgment arguing against summary judgment under Texas law.

Appellants subsequently filed an amended petition on August 3, 2015, just over a month before the case was originally scheduled to go to trial. Eleven days later, JCI formally moved for the first time for the application of maritime law. JCI followed this up a few days later with special exceptions to several of appellants' causes of action based on its interpretation of the application of maritime law and the Death On the High Seas Act (DOHSA). *See* 46 U.S.C. § 30301 et. seq. Then, on August 20, 2015, JCI filed its second amended answer adding the defense that maritime law preempted the application of Texas law on appellants' claims.

The case did not go to trial as originally scheduled. Instead, the trial court signed an order staying the case based on section 90.055 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 90.055 (permitting a defendant to request a stay of proceedings to allow a claimant to make a claim against an asbestos or silica trust). The case remained stayed until May 24, 2016 when the trial court signed an order setting a new trial date of January 23, 2017. The record establishes that the case was reset again when the trial court granted JCI's motion for continuance. The new trial setting was

February 6, 2017. While the case did not go to trial that day, the record does not explain the reason it did not do so.

Once the question of the application of maritime law was introduced into the case, the briefing on the applicability of maritime law dominated the remainder of the case. The parties did extensive briefing on the subject spanning hundreds of pages in the appellate record. The trial court eventually determined that maritime law applied to appellants' claims and that maritime law precluded the recovery of non-pecuniary damages, specifically Pepper's pre-death pain and suffering. Based on the parties' stipulation that, with non-pecuniary damages precluded by the trial court's ruling, the amount of prior settlements exceeded the maximum possible recovery of pecuniary damages, the trial court signed a take-nothing final judgment for JCI. This appeal followed.

ANALYSIS

I. JCI did not waive the application of maritime law.

Appellants argue in their first issue that JCI waived the application of federal maritime law in this case because JCI did not plead preemption in its original answer. Then, recognizing that JCI added preemption in an amended answer, appellants argue that the trial court abused its discretion when it allowed JCI to add the defense. JCI responds that it did not waive the application of maritime law because it timely filed its amended answer. It further responds that the trial court did not abuse its discretion because appellants cannot show they were prejudiced by the amended answer. We agree with JCI.

A party may waive the defense that a claim is preempted by federal law. *See Hollis v. Acclaim Physician Group, Inc.*, No. 02-19-00062-CV, 2019 WL 3334617, at *4 (Tex. App.—Fort Worth July 25, 2019, no pet.) (mem. op.) (holding party

waived choice-of-law preemption argument by failing to raise it in the trial court). Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). "There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right." *Id.*

The general rule regarding pleading amendments is that the parties may freely amend if the amended pleading is filed at least seven days before trial. *See* Tex. R. Civ. P. 63; *Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam). The amended pleading may not, however, act as a surprise to the other party. *See* Tex. R. Civ. P. 63. A trial court may strike an amended pleading if the opposite party objects and shows surprise. *See Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990) (stating burden for showing surprise is on party opposing the amendment).

We turn first to appellants' contention that JCI's failure to include maritime law in its original answer waived the application of maritime law in this case. Appellants have cited no authority supporting their contention that preemption must be pleaded in a defendant's original answer or it is waived. *See PHI, Inc. v. LeBlanc*, No. 13-14-00097-CV, 2016 WL 747930, at *9 (Tex. App.—Corpus Christi Feb. 25, 2016, pet. denied) (mem. op.) ("Thus, in the absence of any authority supporting a conclusion that under these circumstances a party waives the application of maritime law, we cannot conclude that the trial court abused its discretion by determining that LeBlanc had not waived it."). We therefore reject

appellants' contention that JCI's failure to include maritime law as a defense in its original answer, standing alone, demonstrates JCI waived maritime law as a defense.

Appellants next argue that JCI's delay in adding the preemption defense demonstrates waiver. In this situation appellants must show that this delay by JCI clearly demonstrates an intent to not rely upon maritime law. *Jernigan*, 111 S.W.3d at 156. In an effort to make this showing appellants point out that JCI (1) specifically mentioned Virginia and Alabama law, but not maritime law, in its original answer; (2) invoked Texas law in both its original and first amended answers; and (3) delayed until after it filed a motion for summary judgment and motion to exclude experts under Texas law to add maritime law as a defense in its second amended answer. We conclude that none of these actions clearly demonstrates JCI's intent to not rely upon maritime law. *See id.* at 157–58 (stating that waiting more than 600 days after receiving medical expert report to file motion to dismiss was insufficient to establish waiver even though doctor engaged in discovery, filed a motion for summary judgment on other grounds, and filed an amended answer during that time period); *Niche Oilfield Servs., LLC v. Carter*, 331 S.W.3d 563, 577 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding plaintiff adequately raised application of maritime law in his first amended petition); *cf. Hollis*, 2019 WL 3334617 at *4 (holding appellant waived preemption argument by failing to raise it in the trial court). Our conclusion is reinforced by the fact that JCI included maritime law arguments in its motion for summary judgment, which demonstrates JCI did not intend to waive reliance on maritime law as a defense.

Next, appellants argue that the trial court abused its discretion when it allowed JCI to add maritime law as a defense because doing so surprised and

prejudiced appellants. Appellants, quoting from *Bagwell v. Ridge at Alta Vista Invs. I, LLC*, 440 S.W.3d 287, 293 (Tex. App.—Dallas 2014, pet. denied), argue that the addition of maritime law surprised and prejudiced them because the assertion of a new defense is "prejudicial on its face." In making this argument, appellants ignore the fact that in *Bagwell* the court of appeals was addressing the addition of a new defense after the pleading deadline had passed. *Id.* at 291–93. That is not the situation we are presented with here because it was undisputed that JCI's second amended answer was filed more than seven days before trial and appellants have not pointed out any scheduling order instituted by the trial court imposing some other deadline. Even if that was the situation here, the mere fact that an amended pleading asserts a new defense does not prejudice the opposing party as a matter of law. *See Tanglewood Homes Ass'n, Inc. v. Feldman*, 436 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (addressing trial amendment).

Appellants offer no explanation on how they were surprised by JCI's amended answer adding maritime law as a defense. Even if they had, we conclude the amended pleading did not operate as a surprise because JCI had previously asserted maritime law in its motion for summary judgment and appellants could have anticipated the maritime law defense in light of Pepper's service in the Navy where he was regularly exposed to asbestos-containing products. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("The question is whether the opposing party could have anticipated the newly asserted matter as revealed by the record of the case."); *cf. First State Bank of Mesquite v. Bellinger & DeWolf, LLP*, 342 S.W.3d 142, 146 (Tex. App.—El Paso 2011, no pet.) (stating that even though parties had been litigating for several years, because the bank waited until after the pleading deadline to add claims, the

trial court could have reasonably found that the late amendment was calculated to surprise bank's opponent).

Appellants assert that they were prejudiced by the delay in JCI pleading the application of maritime law. Appellants initially argue they were prejudiced because JCI did not plead maritime law prior to Pepper's deposition and, since he had subsequently died, they were deprived of the opportunity to question him about the time he spent working with JCI gaskets on land, in dry dock, in territorial waters, and on the high seas. Pepper's entire deposition appears in the appellate record. The transcript makes clear however, that Pepper was questioned about these subjects during his deposition. We therefore conclude that appellants have not established they were prejudiced by the addition of maritime law to the case after Pepper's deposition.

Finally, appellants assert they were prejudiced because, "had JCI pleaded its affirmative defense in a timely fashion, [appellants] would have developed this case differently and sought an early determination on the choice of law." Appellants offer no specifics on what procedures or discovery mechanisms they would have used, but could not, as a result of the delay in the addition of maritime law to the case.[1] We therefore conclude appellants have not shown they were prejudiced by the addition of maritime law to the case. We overrule appellants' first issue.

II. The trial court did not err when it determined that maritime law applied to appellants' claims.

Appellants argue in their second issue that the trial court erred when it determined that maritime law applied to appellants' claims because JCI identified a

[1] In making this argument, appellants do not mention the fact that the case did not go to trial in 2015, in fact extended into 2018, and the parties had every opportunity to fully brief the maritime law issue for the trial court.

conflict between Texas law and maritime law only on the availability of punitive damages. JCI responds that the trial court correctly determined that state law was preempted because, when it is properly "invoked, maritime law becomes the exclusive remedy under which a party may proceed, preempting all state law grounds of recovery." *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 919 (Tex. 1993); *see E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) (stating that the applicability of maritime jurisdiction results in federal maritime law displacing state law.). We once again agree with JCI.

As the Texas Supreme Court stated in *General Chemical*, "there is little question that the facts of this case come within the purview of maritime law," a fact that appellants recognized during the litigation in the trial court.[2] *Gen. Chem. Corp.*, 852 S.W.2d at 919. *Conner v. Alfa Laval, Inc.*, 799 F.Supp.2d 455, 458 (E.D. Pa. 2011), addresses cases with similar facts to this appeal. There, the district court was called upon to determine the applicability of maritime law in several cases where some of the asbestos-exposure plaintiffs alleged they were exposed to asbestos-containing products in and around U.S. Navy ships. *Id.* The court applied the test announced in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995), which states that "a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity." *Id.* at 463, 466–69. The locality portion of the test requires that the tort occur on navigable waters, or, for injuries suffered on land, that the injury be caused by a

[2] For example, in their response in opposition to JCI's supplemental motion to apply maritime law and motion to reconsider regarding DOHSA, appellants stated:

> The Court has indicated that general maritime law will apply in this case, but that the Death on the Highs Seas Act ("DOHSA") will not apply because neither Mr. Pepper's death, nor [JCI's] wrongful conduct occurred on the high seas. The court's resolution of those issues was correct and need not be revisited.

vessel on navigable waters. *Id.* at 463. The connection with maritime activity part of the test contains two inquiries: (1) whether the incident has a potentially disruptive impact on maritime commerce, and (2) whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. *Id.*

The *Conner* court initially determined "that the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." *Id.* at 466. The court then found that three of the plaintiffs at issue met the locality test because they were sailors performing their service aboard Navy ships at sea. *Id.* The court then examined whether the incidents at issue, which it described as "exposure to allegedly defective products on or around Navy ships," had a potentially disruptive impact on maritime commerce when characterizing the incidents generally. *Id.* at 467. The court determined the incidents did have the potential to disruptive maritime commerce for the same three plaintiffs. *Id.* Finally, the court examined whether the tortfeasors' conduct at issue in the cases was so closely related to activity traditionally subject to maritime law that the reasons for applying special maritime rules would apply to the pending cases. *Id.* at 469. The court determined that the defendants in three of the pending cases were engaged in the manufacture of products for use in ships and therefore their defective products had a substantial relationship to traditional maritime activity. *Id.* The *Conner* court then held that maritime law applied to the three plaintiffs' claims. *Id.* We find the *Conner* court's reasoning persuasive and adopt it here.

Appellants allege that Pepper was exposed to asbestos-containing products manufactured by JCI while serving in the Navy on two Navy ships. It is undisputed that JCI manufactured, marketed, and sold gasket material containing asbestos to the Navy. It is also undisputed that JCI's products were used on the

ships where Pepper served and that he used those products while performing his duties. Like the *Conner* court before us, we conclude that appellants' claims meet the *Grubart* test for the application of maritime law. We hold that the trial court did not err when it concluded that federal maritime law preempted state law on appellants' claims. We overrule appellants' second issue.

III. The trial court erred when it denied appellants the opportunity to recover pre-death pain and suffering damages.

Appellants argue in their third and fourth issues that the trial court erred when it determined that "it is appropriate to look to DOHSA in this case regarding the award of damages, as such plaintiff may not recover non-pecuniary damages." In appellants' view, DOHSA does not apply directly or indirectly, and it therefore does not limit their "ability to recover damages for the pain and suffering of Mr. Pepper." We agree with appellants.

As with appellants' second issue, we are not the first court to trod this path. Both the Virginia Supreme Court and the Southern District of Florida addressed, and rejected, the same arguments JCI raises here in previous litigation involving JCI. *See Hays v. John Crane, Inc.*, 2014 WL 10658453, at *2 (S.D. Fla. Oct. 10, 2014); *John Crane, Inc. v. Hardick*, 732 S.E.2d 1, 3 (Va. 2012), *cert. denied,* 568 U.S. 1161 (2013). JCI responds that both courts simply got it wrong. We disagree.

In a well-reasoned opinion, the Virginia Supreme Court determined that DOHSA did not apply in a comparable case involving a former-Navy sailor who developed mesothelioma. *See Hardick*, 732 S.E.2d at 3. JCI made similar arguments in *Hardick* to those it makes here. *Id.* The Virginia Supreme Court briefly traced the history of survival actions in maritime law. Then, citing the Supreme Court's opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990), it

observed that, "for the purposes of this case, in deciding whether an estate can recover particular damages 'in a general maritime action surviving the death of a seaman,' the Supreme Court looked to the Jones Act for guidance even though the decedent seaman's estate was not seeking recovery for such damages under the Jones Act." *Hardick*, 732 S.E.2d at 2 (quoting *Miles*, 498 U.S. at 33). The Virginia Supreme Court continued

> [t]he Supreme Court held in *Miles* that, because the Jones Act survival provision 'limits recovery to losses suffered during the decedent's lifetime,' a similar limitation should apply under the general maritime law. Similarly, '[b]ecause this case involves the death of a seaman,' as was the case in Miles, 'we must look to the Jones Act.'
>
> Accordingly, we hold that, while the recovery of nonpecuniary damages is not permitted in actions for the *wrongful death* of a seaman, 'whether under [the Death on the High Seas Act], the Jones Act, or general maritime law,' such damages may be recovered in a general maritime *survival action,* provided they represent damages suffered during the decedent *seaman's* lifetime—as the award of damages for Hardick's pre-death pain and suffering does in this case.
>
> JCI argues that the Supreme Court's decision in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 S. Ct. 1890, 141 L. Ed. 2d 102 (1998), forecloses Mrs. Hardick's survival action for Hardick's pre-death pain and suffering, and that DOHSA governs the outcome of this case because Hardick's mesothelioma was the result of his cumulative asbestos exposures during his service in the Navy, both in territorial waters and on the high seas, and that mesothelioma is an indivisible disease. We do not agree that DOHSA applies.

Id. at 3 (internal citations omitted).

The Virginia Supreme Court then examined *Dooley* in which the Supreme Court held "DOHSA precluded the plaintiffs in that case from bringing a survival action for pre-death pain and suffering under general maritime law" because "'Congress provided the exclusive recovery [through DOHSA] for deaths that occur on the high seas.'" *Id.* at 3 (quoting *Dooley*, 524 U.S. 123–24). The

Virginia Supreme Court then observed that the Supreme Court declared in *Dooley* that it was not deciding "whether general maritime law *ever* provides a survival action." *Id.* at 3 (quoting *Dooley*, 524 U.S. 124, n.2) (emphasis in original). Instead, according to the Virginia Supreme Court, it explicitly recognized that a survival action was still available, separate and apart from DOHSA, when the decedent is a seaman. *Id.* The court then distinguished *Dooley* because it "did not involve the death of a seaman, as *Miles* did, and as this case does." *Id.* at 3–4. The Virginia Supreme Court held "that a decedent seaman's estate may recover damages for the decedent seaman's pre-death pain and suffering in a general maritime survival action." *Id.* at 4. Finally, it concluded that because "the Jones Act permits recovery for the losses suffered during a decedent seaman's lifetime in a survival action, including pre-death pain and suffering, Hardick's estate may recover for his pre-death pain and suffering under general maritime law." *Id.*

Similarly, the Southern District of Florida has also held that DOHSA does not apply to the claims of a Navy seaman who was exposed to asbestos on both the high seas, in territorial waters, and on land. *See Hays*, 2014 WL 10658453 at *2. The court held that it rejected

> JCI's attempt to apply DOHSA to the facts of this case. By its terms, DOHSA applies solely to the deaths caused on the high seas. The Court is unaware of any case that has held that DOHSA restricts recoverable damages for an indivisible injury in a case where some of the exposure to asbestos-containing products occurred on the high seas and some occurred in territorial waters.

Id. The district court then concluded that the plaintiff could not "recover non-pecuniary damages; however, the estate may recover damages for the decedent's pre-death pain and suffering in the general maritime action." *Id.* at *5.

Like those courts did before us, we conclude that DOHSA does not apply to appellants' claims and that, while appellants may not recover non-pecuniary

damages under federal maritime law, they may recover damages for Pepper's pre-death pain and suffering.[3] We therefore sustain appellants' third and fourth issues.

CONCLUSION

We affirm the trial court's determination that maritime law applies. Having sustained appellants' third and fourth issues, we reverse the trial court's take-nothing final judgment to the extent it was based on the trial court's determination that appellants' could not recover damages for Pepper's pre-death pain and suffering, and remand to the trial court for further proceedings consistent with this opinion.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer (Jewell, J., concurring).

[3] Appellants assert in their Reply brief that they are also eligible to recover punitive damages. We need not reach that question because we conclude that appellants waived the issue of punitive damages when they conceded on page 13 of their opening brief "that maritime law would not support the recovery of punitive damages in this case." In addition, we conclude they waived consideration of punitive damages when they did not raise an issue regarding punitive damages in their opening brief. Tex. R. App. P. 38.1(f); *see Marsh v. Livingston*, No. 14-09-00011-CV, 2010 WL 1609215, at *4 (Tex. App.—Houston [14th Dist.] April 22, 2010, 2013, pet. denied) (mem. op.) (stating Texas Rules of Appellate Procedure do not allow an appellant to add a new issue in a reply brief that was not discussed in its opening brief).