THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MEG DEAVILLA FOX, Plaintiff, v. HOLLAND AMERICA LINE, INC., *et al.*, Defendants.	CASE NO. C14-1081-JCC ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the motion for summary judgment by Defendants Holland America Line, Inc.; HAL Antillen N.V.; HAL Maritime Limited; and Holland America Line, N.V. (Dkt. No. 33). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES in part the motion for the reasons explained herein.

I. BACKGROUND

In July 2011, Plaintiff Meg Deavilla Fox worked as a cast member on the M/S ZANDAAM, a Dutch cruise ship. (Dkt. No. 37-4 at 2; Dkt. No. 35-6 at 3.) On July 19, Plaintiff planned to take a crew-only spin class with instructor Tammerin Du Preez. (Dkt. No. 37-4 at 2; Dkt. No. 34 at 1.) Prior to class, Du Preez was setting up the bikes, which are stored without seats for safety purposes. (Dkt. No. 34 at 2.) Du Preez walked along and placed a seat on each of

the bikes. (Dkt. No. 34 at 2.) While she did so, the crew members, including Plaintiff, stood nearby talking. (Dkt. No. 34 at 2; Dkt. No. 37-2 at 3.)

Unbeknownst to Plaintiff, her bike seat was not yet fastened. (Dkt. No. 37-2 at 3.) When Plaintiff attempted to mount her bike, the seat slid backward and the metal post penetrated Plaintiff's vulva, lacerating her right vagina. (Dkt. No. 37-2 at 3; Dkt. No. 37-6.) Plaintiff was overcome with pain. (Dkt. No. 37-4 at 2.)

The ship's infirmary staff examined Plaintiff and decided against suturing her wound. (Dkt. No. 37-4 at 2.) They discharged her with ice, a topical analgesic, pain medication, and antiseptic wipes. (Dkt. No. 36-2 at 2; Dkt. No. 37-4 at 2.) Plaintiff asserts that the infirmary staff provided her no further treatment for her injuries on July 19 or 20, 2011. (Dkt. No. 37-4 at 3.)

Plaintiff experienced continued pain and sought treatment at Bartlett Regional Hospital in Juneau, Alaska on July 21, 2011. (Dkt. No. 37-4 at 3.) According to Plaintiff, the emergency physician told her that her wound should have been sutured but that it was too late to do so at that point. (Dkt. No. 37-4 at 3.) The Bartlett staff gave Plaintiff narcotic pain medication and antibiotics. (Dkt. No. 36-4 at 2.)

Plaintiff returned to the ship, where she twice saw the infirmary staff to address a golf-ball sized growth that had formed in her vagina. (Dkt. No. 36-5 at 2-3; Dkt. No. 37-4 at 4.) Plaintiff maintains that the infirmary staff told her that the growth needed to be drained, but that the head office would not allow that to happen on the vessel. (Dkt. No. 37-4 at 4.) Instead, Plaintiff asserts, she was told she could bathe her wound in a bath at the infirmary, but she found that bathing did not help with the growth or her pain. (Dkt. No. 37-4 at 4.)

Still in considerable pain, Plaintiff departed the vessel in Alaska on July 30, 2011 and returned home to Boston, Massachusetts. (Dkt. No. 37-4 at 4.) There, she sought treatment from Dr. Gloria Korta, an obstetrician and gynecologist. (Dkt. No. 37-5 at 6.) Dr. Korta incised the growth and inserted a catheter to drain it. (Dkt. No. 37-4.) On August 18, 2011, Dr. Korta removed the catheter and told Plaintiff she could return to work full duty with no restrictions in

10-14 days. (Dkt. No. 37-4 at 5.)

Plaintiff returned to the ZANDAAM on September 17, 2011 and finished out her contract, which ended in February 2012. (Dkt. No. 37-4 at 5; Dkt. No. 36-8 at 2.) Plaintiff received her unearned wages at the end of her contract. (Dkt. No. 37-4.)

On August 17, 2014, Plaintiff brought the instant suit against Defendants Holland America Line, Inc.; HAL Antillen N.V.; HAL Maritime Limited; and Holland America Line, N.V., asserting that that all Defendants employed her and owned the ZAANDAM. (Dkt. No. 1 at 1, 3-4.) She alleged four causes of action against each Defendant: Jones Act negligence, unseaworthiness, failure to provide maintenance and cure, and punitive damages for the failure to pay maintenance and cure. (*See, e.g.*, Dkt. No. 1 at 6-8.)

Defendants now move to dismiss all claims on summary judgment. (Dkt. No. 33.)

II. DISCUSSION

A. Summary Judgment Standard

The Court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party must present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

B. Motions to Strike

Plaintiff's Exhibits 1-6

Defendants move to strike Plaintiff's Exhibits 1-6, asserting that they violate Local Civil Rule 10(e)(10). (Dkt. No. 38 at 2.) Rule 10(e)(10) provides that "[a]ll exhibits must be marked to designate testimony or evidence referred to in the parties' filings." This is not an issue here; on the first page of each of Plaintiff's exhibits, there is a clear marker designating the number of the exhibit. Defendants' motion to strike Exhibits 1-6 is DENIED.

Dr. Rice's Report

Defendants move to strike Exhibit 6, the report of gynecologist Dr. James Rice. (Dkt. No. 38 at 2.) Defendants first argue that the report is unauthenticated. (Dkt. No. 38 at 2.) To satisfy the authentication requirement, the evidence's proponent must provide sufficient evidence to support a finding that the item is what the proponent claims it is. Fed. Evid. R. 901(a). This can include testimony of a witness with knowledge or the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Fed. Evid. R. 901(b)(1), (4). Both methods are present here. Plaintiff's counsel submitted a declaration averring that the exhibit is a true and correct copy of Dr. Rice's report. (Dkt. No. 37-6 at 2.) And, the appearance, contents, and characteristics demonstrate that this is a medical record. The Court is satisfied as to the report's authenticity.

Defendants next argue that the report contains hearsay, such as Plaintiff's statements about what happened. (Dkt. No. 38 at 2-3.) But, Plaintiff does not offer Dr. Rice's report to establish how she was injured. Rather, she offers Dr. Rice's report to introduce his opinion on the level of her damages and his opinion that Defendants' response contributed to those damages. (*See* Dkt. No. 37 at 8-9, 13.) His opinions on those points are not hearsay. And, an expert may rely on inadmissible facts and data if such facts and data would be reasonably relied upon by experts in the particular field. Fed. R. Evid. 703. Here, there is no suggestion that a doctor would not rely on a patient's statements about how she was injured or her subsequent

treatment. Thus, Dr. Rice was entitled to rely on Plaintiff's statements to that effect.

Finally, Defendants argue that the report lacks foundation to attest to the sufficiency of cure. (Dkt. No. 38 at 3.) But again, Plaintiff does not offer the report for that purpose. Dr. Rice's report goes to Plaintiff's medical condition, not Defendants' legal obligation.

Defendants' motion to strike Dr. Rice's report is DENIED.

Defendants' Exhibit 10

Plaintiff moves to strike Defendants' Exhibit 10 to the Declaration of James P. Coldwell, because it was never previously disclosed or provided to Plaintiff. (Dkt. No. 42 at 1.) Fed. R. Civ. P. 37(c)(1) states that, if a party "fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Exhibit 10 is an income and expense report stating that Holland America Line paid Plaintiff $1320.00 in maintenance. (Dkt. No. 40-1 at 2.) The report was never disclosed in Defendants' Rule 26(a)(1) disclosures. (Dkt. No. 42-1 at 3.) Given that payment of maintenance is a core issue in this case, and that Plaintiff explicitly requested documentation detailing all maintenance payments (Dkt. No. 42-1 at 2), exclusion of the document is appropriate. Plaintiff's motion to strike Exhibit 10 is GRANTED. The Court will not consider Exhibit 10 in ruling on the motion for summary judgment. The Court reserves judgment on whether Exhibit 10 may be offered at trial.

Agent Argument

Plaintiff moves to strike Defendants' argument that Du Preez was not Defendants' agent. (Dkt. No. 42 at 2.) Defendants made this argument for the first time in their reply brief. (Dkt. No. 38 at 3-4.) Arguments not raised in an opening brief are deemed waived. *United State v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006). Plaintiff's motion to strike that argument is GRANTED.

C. Jones Act Negligence Claims

Defendants assert that Plaintiff's Jones Act negligence claims should be dismissed. (Dkt.

No. 33 at 15.) However, they did not present any analysis on this issue. (*See* Dkt. No. 33 at 13-15.) Instead, they discussed whether punitive damages are available under the Jones Act. (Dkt. No. 33 at 15.) But, Plaintiff does not seek punitive damages in conjunction with her Jones Act claims.[1] (*See, e.g.*, Dkt. No. 1 at 6.) Defendants' motion to dismiss Plaintiff's Jones Act claims is DENIED.

D. Unseaworthiness Claims

Defendants assert that Plaintiff's unseaworthiness claims should be dismissed, because Plaintiff's injuries arose from an isolated act of operational negligence, rather than an unseaworthy condition of the ship. (Dkt. No. 33 at 17.)

The United States Supreme Court has "repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971). In *Usner*, the petitioner was injured while loading cargo aboard a vessel with his fellow employees. *Id.* at 494-95. The winch operator lowered the fall too far and too fast, striking the petitioner. *Id.* at 495. The petitioner alleged that his injuries had been caused by the ship's unseaworthiness. *Id.* at 495. The Court disagreed, distinguishing between a "defective condition of a physical part of the ship itself" amounting to unseaworthiness, and an "isolated, personal negligent act," which is what occurred in that case. *Id.* at 499-500.

As Plaintiff points out, however, Ninth Circuit authority establishes that a negligent act can give rise to a defective condition. *See Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (9th Cir. 1964). Specifically, "[l]iability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. It does attach if the negligent act has terminated and an appliance has been left in an unsafe condition." *Id.* at 109-10. For example, in *Beeler*, a longshoreman was injured while climbing a

[1] Nor does she seek punitive damages in conjunction with her unseaworthiness claims. (*See, e.g.*, Dkt. No. 1 at 6-7.)

ladder on the deck of a barge:

> When Brown, one of Beeler's fellow longshoremen, reached the third or fourth rung from the bottom of the ladder, Beeler mounted the ladder and started to descend. As Brown reached the deck, the walking boss, believing that Brown would stand by or would hold the ladder, walked away. Brown, having received no instruction of this kind, failed to hold or guard the bottom of the ladder. The ladder slipped and Beeler fell to the deck.

Id. at 109. The *Beeler* court reasoned that the negligent actions consisted of "failing to act prior to the accident by stepping forward to hold or watch the ladder." *Id.* at 110. By the time the accident occurred, both other longshoremen had walked away. *Id.* Thus, the court concluded, their negligence had terminated, rendering the ladder an unseaworthy condition. *Id.*

Here, Du Preez placed the seat onto the bike and moved on to the next bike before Plaintiff mounted the bike. (Dkt. No. 34 at 2.) Du Preez asserts that it is her practice to demonstrate to the class participants how to fasten and adjust their seats to avoid injury, but that Plaintiff mounted the bike before Du Preez could stop her. (Dkt. No. 34 at 2.) Plaintiff's account varies: she states that no instructions were given and that she had been standing there for five to ten minutes before mounting the bike. (Dkt. No. 37-2 at 3.) Thus, there is a dispute of material fact as to whether Du Preez's failure to secure the bike seat was a negligent action that terminated prior to Plaintiff's accident. Defendants' motion to dismiss Plaintiff's unseaworthiness claims is DENIED.

E. Failure to Provide Maintenance and Cure Claims

Defendants argue that Plaintiff's failure to provide maintenance and cure claims should be dismissed, because the evidence shows that Defendants paid all of Plaintiff's maintenance and cure benefits. (Dkt. No. 33 at 10.) Plaintiff responds that there is a dispute of material fact as to whether Defendants paid any maintenance. (Dkt. No. 37 at 15.)

Vessel owners have unique obligations to injured or ill employees. *Berg v. Fourth Shipmor Assocs.*, 82 F.3d 307, 309 (9th Cir. 1996). Irrespective of fault, a vessel owner must pay unearned wages, maintenance, and cure. *Id.* "Maintenance" is compensation for room and board

expenses incurred while the employee is recovering from the illness or injury. *Id.* "Cure" means medical care and attention, including the employee's medical expenses until he or she reaches maximum recovery. *Id.*; *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82, 85 (7th Cir. 1951).

Defendants maintain that they have paid Plaintiff all the maintenance and cure due to her. (Dkt. No. 38 at 5.) They submit an expense report indicating that they paid Plaintiff $620.30 in "Medical Expense[s]" and $1320.00 in "Maintenance and Medical Benefits." (Dkt. No. 36-9 at 2.) They also cite to Plaintiff's deposition testimony, stating that it is "undisputed" that Defendants paid all maintenance and medical bills. (Dkt. No. 38 at 5-6.) But, Plaintiff's testimony is that her medical bills were paid "as far as [she] know[s]," but that "[i]t didn't really have anything to do with [her], so [she] can't confirm that." (Dkt. No. 35-1 at 6.) She also testified that she received her "normal pay," but not that she received compensation for room and board expenses. (*See* Dkt. No. 37-2 at 26.) In her affidavit, Plaintiff states that she "was never provided with a daily stipend to cover my room and board while I was off the vessel and injured." (Dkt. No. 37-4 at 5.) Thus, there is a dispute of material fact as to whether Defendants paid the required maintenance and cure. Defendants' motion to dismiss Plaintiff's failure to provide maintenance and cure claims is DENIED.

F. Punitive Damages

Finally, Defendants move to dismiss Plaintiff's claims for punitive damages. (Dkt. No. 33 at 7.) First, they argue that there is no evidence of any willful or wanton conduct, because the "undisputed material facts demonstrate that there was no wrongdoing by any HAL employee or that HAL failed to provide Plaintiff with maintenance and cure." (Dkt. No. 33 at 10.) But, as discussed above, there is a dispute of material fact as to whether Defendant indeed paid the required maintenance and cure. Moreover, Plaintiff provided evidence that Defendants failed, or even refused, to provide proper medical care. (*See* Dkt. No. 37-6 at 10; Dkt. No. 37-4 at 2-4.) Thus, a jury could find that an award of punitive damages is appropriate in this case. *See Atlantic*

Sounding Co., Inc. v. Townsend, 557 U.S. 404, 414 (2009) (noting that failure of vessel owners to provide proper medical care can support an award for punitive damages).

Second, Defendants argue that punitive damages are unavailable under the applicable law in this case, which they assert is Netherlands law. (Dkt. No. 33 at 11-13.) Plaintiff responds that general maritime law applies and that *Atlantic Sounding* establishes that punitive damages are available in this type of case. (Dkt. No. 37 at 21.) In presenting their arguments, both parties rely on the choice-of-law factors established in *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

" 'In the absence of a contractual choice-of-law clause, federal courts sitting in admiralty apply federal maritime choice-of-law principles derived from [*Lauritzen* and its progeny]. But where the parties specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice.' " *Flores v. Amer. Seafoods Co.*, 335 F.3d 904, 916 (9th Cir. 2003) (quoting *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296-97 (9th Cir. 1997)). Here, there is a contractual choice-of-law clause seemingly ignored by the parties. The employment contract provides that the controlling law "shall be governed exclusively by the laws specified in the applicable Collective Bargaining Agreement or government-mandated contract. In the absence of any such Agreement or specification, such disputes shall be governed in all respects by the Laws of the British Virgin Islands." (Dkt. No. 35-6 at 37.) The Court finds no collective bargaining agreement or government-mandated contract in the record, nor do the parties point to any. In the event no such agreement exists, it would seem that the laws of the British Virgin Islands apply. Neither party explains why the *Lauritzen* factors are relevant in light of this provision.[2]

Moreover, if the *Lauritzen* factors do apply here, there is an important factual issue that is unresolved: which Defendant owned the vessel. Defendants argued in a footnote that Holland America Lines, Inc. did not own or operate the vessel or employ Plaintiff, and thus should be

[2] Plaintiff briefly addresses the employment contract, but does so in the context of her *Lauritzen* discussion. (*See* Dkt. No. 37 at 23.)

dismissed. (Dkt. No. 33 at 7 n.1.) "Relegating substantive arguments to footnotes is dangerous business." *F.D.I.C. v. Red Hot Corner, LLC*, 2014 WL 5410712 (D. Nev. Oct. 22, 2014). "If an argument is worth making, a party should put the argument in the body of its brief." *Bach v. Forever Living Prods. U.S., Inc.*, 473 F.Supp.2d 1127, 1132 (W.D. Wash. Feb. 13, 2007). Plaintiff did not explicitly address Defendants' argument, but asserts that Holland America Lines "was the owner of the vessel *pro hac vice* at the time of the injury." (Dkt. No. 37 at 22.) Without knowing which Defendant is the vessel's owner, the Court will be unable to determine the shipowner's allegiance and thus unable to fully consider the *Lauritzen* factors. *See Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1480-82 (9th Cir. 1986) (discussing the relative importance of the *Lauritzen* factors).

Accordingly, the Court ORDERS the parties to submit additional briefing limited to four issues: (1) whether there is an applicable collective bargaining agreement or government-mandated contract providing for a governing choice of law; (2) if there is no such agreement, why the Court should not apply the laws of the British Virgin Islands; (3) whether punitive damages are available under the laws of the British Virgin Islands; and (4) which Defendant is the owner of the vessel. **Defendants shall file their supplemental brief not to exceed 10 pages by Wednesday, February 3, 2016. Plaintiff shall file her supplemental brief not to exceed 10 pages by Friday, February 12, 2016.**

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment (Dkt. No. 33) is DENIED as to Plaintiff's negligence, unseaworthiness, and failure to provide maintenance and cure claims. The Court reserves judgment on Defendants' motion to dismiss Plaintiff's punitive damages claims and ORDERS the parties to provide supplemental briefing as directed above.

Additionally, given that the Court denies in part Defendants' motion, it is appropriate to set a new date for trial. Should the parties wish to, they may offer proposed trial dates, which the Court will consider in scheduling. If the parties have not offered proposed dates by Friday,

January 29, 2016, the Court will set the case for trial on its next available date.

DATED this 21st day of January 2016.

John C. Coughenour
UNITED STATES DISTRICT JUDGE