

# Stephenson v. McLean Contracting Company United States Court of Appeals, Fourth Circuit, 23 December 1988 863 F.2d 340

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### **Nunley v. Dauntless (Cont.)**

claiming that his dewatering efforts were performed in an individual capacity not as a representative of ChemLink.

**ISSUES:** (1) Was Combi negligent in failing to conduct a good faith search for its barge prior to its decision to abandon it?

(2) Is the Coast Guard entitled to recover for its marking expenses?

(3) Does Captain Nunley have a valid salvage claim?

**ANALYSIS:** This court affirmed the district court and held that Combi used its best efforts to search for its sunken barge. The first day after the "barge breakaway" Combi joined the Coast Guard in a helicopter search. Subsequently it employed a skilled magnometer and fathometer reader to search under the water. The only option Combi did not employ was that of divers. However, river conditions were not conducive to a human search team. According to trial testimony, those river conditions lasted well into the summer of 1974, months after the breakaway.

As to the claim of abandonment by Combi, the district court noted that, "a valid abandonment occurs through the act of deserting the property without hope of recovery or intention of returning to it." In this case more than three years had elapsed since Combi ended its search and the Dauntless's accident. "In that interval Combi may safely be deemed to have abandoned the [Lash]."

In February, 1974 Combi notified its insurers that it had failed to locate the barge and stated its intent to abandon it. "Since Combi

was a non-negligent owner and had abandoned its vessel before the Dauntless collision . . . [Combi] was free from negligence."

The three prong test set out for determining a valid salvage claim includes "(2) voluntary service rendered when not required as an existing duty or from a special contract." *The Sabine*, 101 U.S. 384 (1880). The district court found that Nunley's actions were not voluntary but rather were required by the contract ChemLink had entered into to supply tugs, pumps, and manpower to remove oil and water from the Dauntless. ChemLink's agreement contemplated that the efforts of Nunley would be utilized. As vice president he was often required to be on call 24 hours a day. Thus his claim to be working independently as a salvor, as opposed to working as per his contract, failed.

The River and Harbor Act, 33 U.S.C. §409 (the Wreck Act), provides that, "when a vessel . . . is wrecked and sunk . . . accidentally or otherwise it shall be the duty of the owner . . . to immediately mark it with a buoy or beacon." On January 30, 1974, the buoy that the Coast Guard had initially placed on the vessel was reported missing and the Coast Guard replaced it with a second larger buoy. Less than one month later the second buoy was reported missing. After the Dauntless's accident the Coast Guard maintained another buoy at the site of the wreck. Because the Coast Guard's first set of marking expenses was within three weeks of the sinking of Lash and at that time Combi was not considered to have abandoned it, the Coast Guard was entitled to recover for the first two markings. However, there is no recovery for the last buoy. By 1977 Combi had abandoned the sunken vessel.

**Melanie A. Wood '90**

### **STEPHENSON v. McLEAN CONTRACTING COMPANY**

**United States Court of Appeals, Fourth Circuit, 23 December 1988  
863 F.2d 340**

**An individual injured while working on a crane barge to construct a bridge does not sustain his injury from an unseaworthy vessel in navigable waters nor does he qualify as a "seaman" under the Jones Act.**

**FACTS:** Stephenson, the plaintiff-appellant was an employee of the McLean Contracting Company (McLean) which was building a bridge across the Choptank River in Maryland. He was assigned to the Annapolis, a crane barge being used as a platform to construct the bridge's support columns. He was injured March 26, 1986 while using a cutting torch on pilings in a cofferdam, a box-like structure designed to keep the river's water from the work area. Stephenson lost his footing on some loose gravel, precipitating a fall to the bottom of the cofferdam, which was alongside another crane barge owned and used by McLean. The fall resulted in injuries for which he now sues.

Stephenson brought this action in the United States District Court for the District of Maryland under the Jones Act, 46 U.S.C. App. §688 (a), and the maritime doctrine of unseaworthiness. The district court granted defendant's motion for summary judgment because Stephenson did not meet the definition of a "seaman" as set forth in the three prong test of *Whittingham v. Sewer Construction Co.* 541 F.2d 427 (4th Cir. 1976) and additionally because the plaintiff was injured in the cofferdam which was not part of the vessel. The plaintiff appealed.

**ISSUE:** Does a crane barge used as a platform to aid in the construction of a bridge constitute an "unseaworthy appurtenance of a vessel in navigable water" which would allow recovery under the doctrine of unseaworthiness?

**ANALYSIS:** In affirming the dismissal, the Fourth Circuit examined the Jones Act, 46 U.S.C. App. §688 (a), which provides: "Any seaman who shall suffer personal injury in the course

of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . ."

The test the court of appeals used to determine if Stephenson met the definition of a "seaman" was first set out in *Whittingham v. Sewer Construction Co.* 541 F.2d at 436. There, the court determined under a three prong test that a worker must be a "permanently attached" crew member of a vessel in navigable waters to qualify as a "seaman" under the Jones Act. The court of appeals followed the district court's assumption that Stephenson was permanently attached to the Annapolis and that it was in navigation, satisfying the first prong of the *Whittingham* test. Stephenson's duties in constructing the framework of the bridge such as welding and cutting pilings did not serve "naturally and primarily as an aid to navigation" thus failing to meet the second prong of the *Whittingham* test. The court found that the plaintiff as a bridge construction worker, in performing functions unrelated to the tasks of transportation, failed to meet the test of a "seaman" as set forth in *Whittingham*.

The court also determined that Stephenson's unseaworthiness claim did not present a genuine issue of material fact to go to the jury. For recovery under the maritime doctrine of unseaworthiness, the court again looked to *Whittingham*, where the plaintiff must show he was "doing the work of a seaman" and that his injury was caused by an "unseaworthy appurtenance of a vessel in navigable waters." Deciding that plaintiff's claim was without merit, the court concluded that Stephenson was a bridge construction worker when injured, not a seaman, and also that he was not working on a vessel, but working on an independent work site, the cofferdam, when he was injured.

**Suzanne Remuzzi '90**