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## Jon Anthony Jauch v. Nautical Services, Inc. United States Court of Appeals for the 5th Circuit 470 F.3d 207 (Decided November 9, 2006)

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**THE MCCORPEN RULE IS APPLICABLE TO CLAIMS FOR MAINTENANCE AND CURE AND THE JONES ACT ACTION SURVIVES TO THE EXTENT INDICATED**

**The United States Court of Appeals for the Eleventh Circuit affirmed District Court's decision in regards to claim for maintenance and cure, and apportioning fault equally, and vacated and remanded with regard to past medical expenses and the denial of prejudgment interest**

Jon Anthony Jauch v. Nautical Services, Inc.  
United States Court of Appeals for the 5<sup>th</sup> Circuit  
470 F.3d 207  
(Decided November 9, 2006)

Nautical Services, Inc. ("Nautical") operated an oceangoing tug, the M/V LA MADDONNA. Nautical hired deckhands for the tug through a labor-supplier, Crew Services, Inc ("Crew"). Plaintiff, Jon Anthony Jauch ("Jauch") was hired by Nautical through Crew.

Nautical required each of its potential employees to undergo a pre-employment physical examination and complete a medical history questionnaire to check his or her fitness for service. Jauch hid his previous back troubles from both Crew and Nautical on his questionnaire. Relying on the truthfulness of the questionnaire, the physician that conducted the pre-employment physical examination cleared Jauch to work. After the examination, Crew notified Nautical that Jauch was fit for service and could begin immediately.

Jauch worked one week and was injured on duty trying to lower a johnboat. Jauch kept working through the day and felt good enough to go weightlifting after the day was finished. However, his condition worsened with time and eventually had to undergo lumbar disc fusion surgery.

Jauch filed his suit against Nautical for maintenance and cure under general maritime law and for damages under the Jones Act. At a bench trial, the court rendered a judgment in Jauch's favor, awarding him \$382,542.16 in total. The district court apportioned fault equally between Jauch and Nautical and awarded the plaintiff \$191,271.08 without prejudgment interest. Jauch appeals on the grounds that the court erred: (1) by misapplying the *McCorpen* rule to deny his claim for maintenance and cure benefits, (2) in finding that his failure to take proper care in lowering the johnboat rendered him 50% at fault for the accident, (3) in calculating the past medical benefits he paid, and (4) denying him prejudgment interest.

The Court of Appeals affirmed the district court's application of the *McCorpen* rule. Under the rule, a seaman who misrepresents or conceals any material facts risks forfeiture of his maintenance and cure benefits. 396 F.2d at 549. The court finds that Jauch's concealment of his prior medical history equates to a forfeiture under *McCorpen* because (a) his injuries were severe enough to be material to Nautical's decision to hire him and (b) the injuries sustained are almost exactly the same injuries that were concealed.

The court agreed with the district court's finding regarding apportionment of fault, and refused to find error. Clear error must be a "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The evidence submitted proved Jauch was negligent for failing to remain attentive while securing the johnboat, and that Nautical, through the tug's captain, failed to instruct Jauch

on the proper procedure for the task. This was deemed ample evidence to support the district court's decision to apportion Jauch with 50% of the fault. Additionally, the court stated that the district court was in a better position to assess the relative degree of fault between the parties. The court, due to the evidence presented and its position to weigh the facts, found that there had not been clear error. The district court's reduction in Jauch's damages because of his contributory negligence was correct.

The defendant claims that allowing Jauch to recover past medical expenses under the pretense of special damages rather than cure would allow him to get through the back door where what he could not get through the front door. However, the court finds that the plaintiff's entitlement to recover under the Jones Act for past medical expenses is not barred when he cannot recover under cure. The calculation used by the district court to award Jauch only a portion of the damages he was entitled to under the Jones Act is unexplainable. Likewise, prejudgment interest can be held for Jones Act cases tried in admiralty but is not automatic. *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 196 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995). The court did not give a reason for denying prejudgment interest. The judgment for the amount of past medical benefits paid by Jauch and the denial of prejudgment interest are vacated and remanded.

For the foregoing reasons, the district court's decision was affirmed insofar as Jauch's claim for maintenance and cure and apportioning fault equally and vacated and remanded with regard to past medical expenses and the denial of prejudgment interest.

**Kristopher R. Olin**  
**Class of 2009**

## **UNDER THE CIRCUMSTANCES HEREIN, UNDER CIMLA, A PREFERRED SHIP MORTGAGE IS SUPERIOR TO BUNKER SUPPLY NONLIENS**

**The Court of Appeals for the Eleventh Circuit affirmed in part, and reversed in part, and remanded when it found that any possible lien bunker supplier, in relation to its claims against the vessel, were subordinate to the banks' preferred ship mortgage but also that the district court erred and abused its discretion when it dismissed with prejudice, the supplier's in personam claim.**

**Dresdner Bank AG v. M/V Olympia Voyager**  
**United States Court of Appeals for the Eleventh Circuit**  
**463 F.3d 1233**  
**(Decided September 8, 2006)**

Plaintiff, Eko-Elda Anonymi Viomichaniki, Emporiki Eteria Petrelajoeidon Viomichaniki (Eko-Elda), supplied bunkers to the M/V OLYMPIA VOYAGER ("the Vessel"). Plaintiffs, Dresdner Bank AG in Hamburg, Kreditanstalt Fur Wiederaufbau, and Norddeutsche Landesbank-Girozentrale ("the banks") brought an action to foreclose on a lien on the Vessel