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United States District Court,
W.D. Pennsylvania.
Stephen GROSS, Plaintiff,
v.
TONOMO MARINE, INC., Defendant.
No. 02-1317.

May 25, 2004.

Dennis M. O'Bryan, O'Bryan Baun Cohen Kuebler, Birmingham, MI, for Plaintiff.

Leonard Fornella, Marilyn Larrimer, Heintzman, Warren, Wise & Fornella, P.C., Pittsburgh, PA, for Defendant.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

LENIHAN, Magistrate J.

I. *RECOMMENDATION*

***1** It is respectfully recommended that the Motion to Dismiss filed by Defendant be denied without prejudice.

II. *REPORT*

This case involves a personal injury action filed by Plaintiff, Stephen Gross, against Defendant, Tonomo Marine, Inc., alleging injuries incurred during the unloading of bundles of iron or steel, by crane, from a river barge onto a flatbed truck on June 13, 2000. Plaintiff's Complaint, filed on July 29, 2002, was a filed as a Complaint in Admiralty pursuant to Fed.R.Civ.P. 9(h). Defendant has moved to dismiss the Complaint for lack of subject matter jurisdiction, asserting that Plaintiff has met neither (a) the "locality" nor (b) the "connection" requirement applicable to general admiralty jurisdiction, as enunciated by the Supreme Court in *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) . [FN1] More specifically, Defendant asserts that (a) Plaintiff's alleged injuries were not "caused by a vessel on navigable water" as required by the Admiralty Extension Act, 46 U.S.C. § 740 (1948), and (b) the type of incident involved neither had a potentially disruptive impact on maritime commerce nor bore a substantial relationship to traditional maritime activity.

FN1. In *Grubhart*, the Supreme Court concluded the district court had admiralty jurisdiction over a case involving damage to an under-river freight tunnel caused by the use of a crane on a barge to drive piles into

the riverbed above the tunnel. *See* 513 U.S. 527.

First, review of the parties' pleadings, and the brief Affidavits provided therewith, indicates that the barge to which the crane was permanently mounted falls within the broad definition of "vessel" as set forth in the applicable statute, *i.e.*, 1 U.S.C. § 3. Although some jurisdictions have recognized a "work platform exception" holding certain types of marine-related barges or equipment to fall, under particular factual circumstances, outside the meaning of "vessel", no such exception has been recognized by either this Court or the Third Circuit. Moreover, even if this Court were to allow such an exception, the facts before it are presently clearly insufficient to overcome the classification of Defendant's crane barge as a "vessel" within the plain language of the statute.

Second, the "connection" element of *Grubart'* s two-part test is met, in that the nature of the incident is injury, owing to negligent operation of equipment on the river, to an individual allegedly assisting in the Defendant's work of unloading heavy metal cargo from a large barge in the river, by floating crane, onto a flatbed truck for further transportation. Such negligence clearly has the potential to disrupt, and the unloading of a vessel is an activity integral to, maritime commerce.

Accordingly, Defendant's Motion to Dismiss should be denied without prejudice.

A. *Statement of Facts and Procedural History*

This is a civil action seeking recovery for personal injuries allegedly sustained on June 13, 2000. Plaintiff alleges that he was then, as an employee of Richard Lawson Excavating ("Lawson"), assisting Defendant's employees in the transference of iron ingots from a large river barge onto a truck owned by his employer. Plaintiff was knocked from the flatbed of the truck, sustaining injuries, when he was struck by the spreader beam of the floating crane, located on a barge in the river and being operated by Defendant's employees.

***2** The Complaint was filed with this Court on July 29, 2002, more than two years after the alleged incident, and asserts negligence in violation of general maritime law obligations. It was amended by leave on November 13, 2003. Defendant filed its Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction under 46 U.S.C. § 740 on January 13, 2003.

Defendant's Motion attaches as an exhibit the Affidavit of its President, Ed McGavitt, attesting that its flat-bottomed platform crane was hired to unload steel billets approximately 30' long and weighing approximately one ton each from a jumbo barge at Mon Valley Transportation Company ("Mon Valley"); that the crane platform, which is not self-propelled, was towed approximately 500 yards to Mon Valley's seawall, where it was moored and "spudded down"; [FN2] and that the crane was moved from its "primary" location at Defendant's seawall only when hired to perform its function of loading/unloading cargo at another work site. The Affidavit also attests that Defendant had a crane operator and four employees

present at the Mon Valley work site to transfer the cargo; that Plaintiff was employed as a driver for Lawson, which was hired only to truck the cargo from the Mon Valley site to a steel company in Glassport; and that the flatbed truck was situated approximately forty to fifty feet from the edge of the seawall at the time of the alleged incident.

> FN2. Spuds are long metal legs that project down from the barge and anchor it. *See Grubart,* 513 U.S. at 1046.

The parties have subsequently exchanged responses\replies and sur responses\ replies to Defendant's Motion to Dismiss.

B. *Standard of Review*

In considering a Motion to Dismiss pursuant to Rule 12(b)(1) presented as a factual attack, a court may look to evidence outside the face of the Complaint and determine its jurisdiction by weighing the evidence. *See Gould Electronics Inc. v. United States,* 220 F.3d 169, 176-177 (3d Cir.2000).

Moreover, as the Supreme Court has noted, "the truth of jurisdictional allegations" need not "always be determined with finality at the threshold of litigation;" to the contrary, "[n]ormal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements." *Grubart,* 516 U.S. at 537 (holding that court need not decide merits of party's interpretation of statutory language to resolve challenge to jurisdiction under Extension of Admiralty Jurisdiction Act) (citing, as example, *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 285 (1993); *Bell v. Hood,* 327 U.S. 678, 682-83 (1946)). [FN3]

> FN3. *See also id.* at 537-38 (noting that any litigation of a contested subject-matter jurisdictional fact issue occurs in a comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisidictional objection)); *id.* at 538 n. 3 (further explaining that "Constitutional difficulties need not arise when a court defers final determination of facts upon which jurisdiction depends" and citing standing context case in which Court held that "the Constitution does not require that the plaintiff offer ... proof [of the facts showing that the plaintiff sustained actual injury] as a threshold matter in order to invoke the District Court's jurisdiction") (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 66 (1987)).

C. *Subject Matter Jurisdiction*

A federal court's authority to hear cases in admiralty flows initially from the Constitution. *See* U.S. Const., Art. III, § 2. Congress has embodied that power in 28 U.S.C. § 1333(1), giving federal district courts "original jurisidiction ... of ... [a]ny civil case of admiralty or maritime jurisdiction...."

Prior to 1948, the traditional test for admiralty tort jurisdiction was simply whether the incident occurred on navigable waters. *See*, e.g., *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13902) (CC Me. 1813) (Story, J., on Circuit). With enactment of the Admiralty Extension Act, however, jurisdiction was extended to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C.App. § 740 (1948). As the parties acknowledge, the criteria for this Court's exercise of general admiralty jurisdiction is governed by the two-part test enunciated by the Supreme Court in *Grubart v. Great Lakes Dredge & Dock Company*, 513 U.S. 527 (1995):

***3** [A] party seeking to invoke federal admiralty jurisdiction ... over a tort claim must satisfy conditions of both location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. 46 U.S.C.App. § 740. The connection test raises two issues. A court, first, must 'assess the general features of the types of incident involved' ... to determine whether the incident has 'a potentially disruptive impact on maritime commerce'.... Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'

513 U.S. at 534 (quoting *Sisson v. Ruby*, 497 U.S. 358, 363-65 (1990)).

D. *Analysis*

1. *Locality Test--"Caused by a Vessel on Navigable Waters"*

Plaintiff asserts that he was injured by a crane on a barge in navigable waters and that Defendant's "crane barge" constitutes a "vessel" for purposes of subject matter jurisdiction under general admiralty law. Defendant's position is that the "work platform" to which the crane is permanently afixed does not constitute a "vessel" because it is not a "structure designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters"; rather, its transportation function is merely incidental to its purpose as a work platform. *See* Defendant's Motion to Dismiss at 6-7 (quoting *Bernard v. Bins Construction Company, Inc.*, 741 F.2d 824, 829, 831 (5th Cir.1984)). [FN4]

FN4. The structure in question in *Bernard* was a 16' x 4' work punt stationed alongside the shore of a canal and being used to break up cement surrounding pilings at a condomium construction site, and the decision was expressly founded on the structure's similarity to a floating dry dock. *See Bernard*, 741 F.2d at 830. *See also infra* note 6.

The applicable statute broadly defines "vessel" for purposes of admiralty jurisdiction as "includ[ing] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transport on water." 1 U.S.C. § 3. *See also Calhoun v. Yamaha Motor Corp., USA*, 216 F.3d 338, 345 (3d Cir.2001) (quoting this statute as authority for its determination of admiralty jurisdiction and adding additional emphasis to the word *"every"*). [FN5]

FN5. *Cf. Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 629-30 (1887) (noting that "the terms 'ships and vessels' are used, in a very broad sense, to include all navigable structures intended for transportation" and, after surveying British admiralty law, concluding that their transportation purpose was the common thread binding together maritime craft classified as vessels).

Defendant is, of course, correct in asserting that the mere fact that an object floats on water does not make it a ship or vessel. *See Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627 (1887) (fact that dry-dock floated on water did not make it a vessel where dock was permanently moored in place and could only be raised or lowered to receive vessels for repair). [FN6] The criteria looked to by the Third Circuit in considering when a floating barge is *not* a vessel are, however, more stringent than those advocated by Defendant. *See, e.g., United States v. West Indies Transport, Inc.*, 127 F.3d 299, 309 (3d Cir.1997) ("Floating structures are not classified as vessels ... if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate .") (quoting with approval *Katriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir.1992)). [FN7] In concluding that the barge at issue was not a vessel, the Third Circuit found it significant that it was permanently moored to shore and *could not* "have been used for transport", as the barge was half-submerged in a bay, with part of its hull resting on the bottom and water visible below its decks. [FN8] *See id.* [FN9]

FN6. Dry dock analogies founded on the Supreme Court's seminal decision in *Cope* have traditionally provided a basis for non-vessel status. *See*, e.g., *Johnson v. John V. Beasley Construction Co.*, 742 1054, 1063 n. 8 (7th Cir.1984) (distinguishing, as the few "floating structures unable to act as a means of transport on water", and therefore outside the meaning of "vessel", off-shore drilling platforms and "dry docks or floating docks that are regarded as nothing more than extension of land"). Such decisions typically emphasize the structure's inability to be used for transportation and its limitation to the "perpendicular and lateral" movements necessarily part of the regular operation of floating dry docks. *See*, e.g., *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001- 02 (5th Cir.1973) (holding work platform physically similar to dry dock, used for construction of concrete barges, and secured to land or dock legally indistinguishable from dry dock). *See also Manuel v. P.A.W. Drilling & Well Service*, 135 F.3d 344, 350 (5th Cir.1998) (noting that the Fifth Circuit's work platform cases originated from *Cook*).

FN7. In *Kathriner*, the Ninth Circuit addressed whether a former ship converted into a fish processing plant could qualify as a vessel in navigation. The Court concluded that because it had been permanently anchored to a dock for 17 years, had been hooked up to city utility lines, had all navigational equipment removed, and had a large hole cut into its hull to allow for dock traffic, it was not a vessel. *See* 975 F.2d 657.

FN8. Although the *West Indies* Court was considering whether a particular barge was a vessel for purposes of the Clean Water Act, it looked to the "long-standing interpretation of 'vessel' in other contexts", most particularly, in general admiralty law. *See id.*

FN9. *See also* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, 33 (2d ed.1975) (commenting that while "a single clear test is hard to discern[,] perhaps the best approximation would be to say that the term 'vessel' is applied to floating structures capable of transporting something over the water"). *Cf . Evansville & Bowling Green Packet Co. v. Coca-Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (concluding that vessel's transportation function is what differentiates it from its land-based counterpart and concluding wharfboat serving as office and attached to city utilities was not a vessel under maritime law where "[i]t performed no function that might not have been performed as well by an appropriate structure on the land and by a floating ... platform permanently attached to the land").

***4** In comparison, Defendant refers this Court to a line of cases in which some other Courts have adopted what is known as the "work platform exception", holding that certain structures, including some barges, do not constitute "vessels" in certain circumstances. The criteria applied in these cases generally look to the purpose and use of the structure in question, and have originated from the Supreme Court's observation that, in determining "vessel" status, "neither the size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged." *Robert W. Parsons*, 191 U.S. 17, 30 (1903) . *See*, e.g., *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 831 (5th Cir.1984) (holding that structure is not a vessel as a matter of law if (1) it was constructed and used primarily as a work platform; (2) it was moored or otherwise secured at the time of the accident; and (3) although capable of movement and sometimes moved across navigable waters, any transportation function was incidental to its primary purpose of serving as a work platform). [FN10]

FN10. While recognizing that it has some support, this Court is nonetheless unpersuaded by Plaintiff's characterization of the cases cited to by Defendant as inapposite because they involve, for the most part, claims brought under the Jones Act. Although applicability of the Jones Act turns, in part, on "a vessel in navigation" rather than "a vessel in navigable waters", the Act contains no definition for the word "vessel" and Jones Act case analysis of what constitutes a "vessel" is frequently regarded as part of the general admiralty doctrine. *See*, e.g., Wright & Miller, *Sources and Scope of Admiralty Jurisdiction*, 14A Fed. Prac. & Proc. Juris.3d § 3671 (noting that "[u]nder maritime law, jurisdiction over a particular dispute may hinge on the question of what constitutes a 'vessel" ' and discussing Jones Act cases without distinction in context of federal court's determination of admiralty jurisdiction); *Lash v. Ballard Construction Co.*, 707 F.Supp. 461 (W.D.Wash.1989) (noting that "[t]he 'vessel' issue is a

jurisdictional issue whether the matter is being considered in the context of the Jones Act or [otherwise]"); *Great Lakes Dredge & Dock Co. v. Chicago*, 3 F.3d 225 (7th Cir.1993) (citing to Jones Act case definition as authority for its holding that crane barge was a "vessel" for purposes of general admiralty jurisdiction); *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir.1975) (asking, in Jones Act case, whether appellant "was associated with any 'vessel' as that term has been defined by maritime law" and citing, *e.g.*, 7A Moore's Federal Practice § 215(4)). Indeed, the general maritime definition set forth in 1 U.S.C. § 3 is almost identical to the language of the Shipping Acts of 1916 and 1918, which were later incorporated into the Merchant Marine Act of 1920, of which the Jones Act was part. *See* Act of Sept. 7, 1916, ch. 451, §§ 1- 44; Act of June 5, 1920, ch. 250 §§ 33, 37. Finally, this Court is unaware of any case considering vessel status for purposes of the Jones Act and general maritime law which undertakes separate analysis or reaches differing results; to the contrary, the many cases undertaking a vessel analysis for dual purposes make no such distinction. *See*, e.g., *Cook*, 472 F.2d at 1000-01 (seeking damages under the Jones Act and general maritime law).

Three other Courts of Appeals have adopted modified versions of the Fifth Circuit's tripartite approach. *See Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2d Cir.1996) (replacing first prong with "whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident"); [FN11] *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir.1992) (*en banc*) (looking to whether barge or other float's purpose or primary business is navigation or commerce); [FN12] *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir.1990) (following *Leonard v. Exxon Corp*, 581 F.2d 522 (5th Cir.1978) as its own Circuit precedent in holding spud barge moored to quay wall was not a vessel). [FN13]

FN11. In *Tonnesen*, the Second Circuit held that genuine issues of material fact existed, precluding summary judgment, on whether floating crane barge in use at bridge construction site and spudded down was "vessel in navigation" where its primary purpose was to serve as work platform but it was not clear whether any transportation function performed by it was merely incidental to that use. *See id.* at 32-33. *See also id.* at 36- 37 (noting that record did not then reveal "full extent or purpose" of crane's movement and contrasting cases in which "permanently moored" barges were held to lack vessel status) (citing *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir.1995) ; *Ducrepont v. Baton Rouge Marine Enters., Inc.*, 877 F.2d 393 (5th Cir.1989)).

FN12. The majority in *DiGiovanni*, over a vigorous dissent, quoted *Bernard* but "applied the Fifth Circuit's test far more restrictively than the Fifth Circuit or, for that matter, any circuit, ever had." *Tonnesen*, 82 F.3d at 34 (declining to follow *DiGiovanni*) (citing *DiGiovanni*, 959 F.2d at 1128 (Torruella and Bownes, JJ., dissenting)). It held that a crane barge being used in bridge construction was not a vessel because it was not used

primarily for transportation, nor was it engaged in navigation at the time of the injury. As the Second Circuit succinctly notes, the First Circuit thus "essentially substituted actual navigation as the sole requirement for vessel status." *Id. See also* Brett D. Wise, *Vessel Classification and the Work Platform Exception,* 70 Tul. L.Rev. 691, 712 (1995) (noting that "[t]he First Circuit's test was ... entirely new in its scope"); *DiGiovanni,* 959 F.2d at 1128-29 & Appendix (Torruella and Bownes, JJ., dissenting) (explaining that the rule adopted by the majority was at odds with general maritime law, as seen from the definition of the term "vessel" in the 24 maritime-related statutes cited in the dissent's Appendix, all of which would encompass the barge in question).

FN13. Following reorganization of the Circuit Courts, in 1981, the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981. *See Hurst,* 896 F.2d at 507. It is important to note that in its most recent pronouncement on the question of vessel status, the Fifth Circuit has distinguished both *Leonard* and *Watkins v. Pentzien, Inc.*, 660 F.2d 604 (5th Cir.1981), the second case cited as authority in *Hurst,* as involving a barge that was merely an extension of a dock and thus exempt from vessel status by extension of *Cope. See Manuel,* 135 F.3d at 349 (describing *Watkins* as "holding that two barges fastened together, moored to bank of river, and used to weld pipeline together were not vessels" and *Leonard* as "holding that platform consisting of four flat-deck barges moored to banks of Mississippi River 'more or less permanently' by steel cables was not a vessel"). *See also supra* note 6; James A. George, *When is a Watercraft a Vessel,* 35 Trial 74 (July 1999) (noting that *Manuel* surveyed the Fifth Circuit's previous lines of cases and emphasized that "when transporting passengers, cargo or equipment was an important part of the [craft's] business ..., the courts have found the craft to be a vessel, even if it also served as a work platform" and concluding that *Manuel* and *Tonnessen* are at odds with *Hurst* and *DiGiovanni*); Wise, *Vessel Classification,* 70 Tul. L.Rev. at 705-06 (1995) (describing *Hurst* as at odds with "a long line of cases holding that craft with transportation functions no more incidental than that in *Hurst* were in fact vessels).

Neither this Court nor the Third Circuit, however, has recognized a work platform exception for certain structures otherwise constituting "vessels" under the broad language of 1 U.S.C. § 3. To the contrary, our limited case law suggests an intent to adhere to a correspondingly broad application of the term. *See West Indies Transport, supra* at 7-8 (adopting the Ninth Circuit's criteria for non-vessel status, as set forth in *Kathriner*); *see also Martinez,* 303 F.3d at 1136-37 (rejecting defendants' urging to adopt a test similar to the Fifth Circuit's, noting that the Ninth Circuit "ha[d] never adopted such a test, which would be in tension with" its prior case holdings as to what constitutes a vessel, and noting that the Fifth Circuit test "is considerably more restrictive than the standard articulated in *Kathriner*").

Moreover, it appears that both (a) the applicable statutory definition enunciated by Congress in 1947 and (b) the "purpose and use test" previously articulated by the Supreme Court at the turn of the century and still underlying the work platform exception, should encompass as a "vessel" a crane barge utilized to transport equipment, *i.e.*, its 50-ton crane, [FN14] across navigable rivers and presumably constructed, acquired and/or maintained for the performance of work facilitated by its water-transport capabilities. *See Martinez*, 303 F.3d at 1137 (noting that even if Ninth Circuit "were to adopt the Fifth Circuit's approach, the [barge] would not be precluded from vessel ... status as a matter of law" where fact that it was constructed to operate at different locations "could lead to a reasonable inference that ... its value derives from the fact that it is a mobile barge capable of transporting [its permanent equipment] from place to place"); [FN15] *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 351 (5th Cir.1998) (noting that evaluation of transportation function is key to determination of vessel status and concluding that flat-deck barge equipped with studs was used to transport rig and attendant equipment from place to place across navigable waters to service wells, thus transportation was essential rather than "incidental" in that mobility allowed barge rig to provide services in various places). [FN16] *Compare Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 563-64 (5th Cir.1995) (holding that barge "constructed ... for the express purpose of supporting a floating restaurant" and "never ... used as a seagoing vessel to transport passengers, cargo or equipment across navigable waters" was a work platform not a vessel and its relocation was movement "incidental" to the barge's primary purpose of supporting a dockside casino); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353 (5th Cir.199) (holding structure to be work platform, rather than vessel, where it would not be moved from oil field for approximately 15 years and it was secured to ocean floor by elaborate system whose movement would be difficult and expensive; mobility was thus extremely limited and purely incidental). *Cf. Manuel*, 135 F.3d at 351 n. 9 (observing that "in the vast majority of [the Fifth Circuit's] work platform cases, the structure at issue was moored or otherwise fastened in a more or less permanent manner to either the shore or the water bottom") (citations omitted).

FN14. *See Hiatt v. Mutual Life Ins. Co.*, 12 F. Cas. 93 (D.C.N.Y.1876) (holding that structure used as platform for elevating apparatus used to transfer grain from one vessel to another, though without motive power of its own or capacity for cargo other than its elevator, is nevertheless a "vessel"); *Charles Barnes Co. v. One Dredge Boat*, 169 F. 895 (D.C.Ky.1909) (holding that navigable structure without motive power and intended for transportation of permanent cargo is a vessel); *Mosser v. City of Pittsburgh*, 45 F. 699 (W.D.Pa.1891) (citing with approval *The Pioneer*, 30 Fed. Rep. 206, which held that a flat-bottomed river dredge moved by tug was a vessel because it was "adapted to be an instrument of transportation on navigable water, and was used in naval transportation when she transported from place to place the steam shovel and engine, and maintained the same afloat on navigable water").

FN15. *See also id.* at 1136 (fact that flat-bottomed barge's transportation

function was "incidental" to primary purpose of serving as floating fish processing factory did not preclude finding that it was vessel).

FN16. *See also id.* at 350 & n. 7 (distinguishing *Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803 (5th Cir.1990) as case in which "any transportation function was incidental" in part because flotilla of four floating barges used in constructing offshore platform was built solely for purpose of that job and did no traveling to other locations).

***5** Here, as in *Grubart*, the crane at issue "sat on a barge stationed in the ... river", which barge was towed to its location and secured with spuds for the duration of the work. *See Grubart*, 513 U.S. at 534-35. "The place in the river where the barge sat, and from which workers directed the crane, [was] in the 'navigable waters of the United States." ' *Id.* at 534. And "[e]ven though the barge was fastened to the river bottom and was in use as a work platform at the times in question, at other times it was used for transportation." *Id.* at 535 (citing *Great Lake Dredge & Dock Co. v. Chicago*, 3 F.3d 225, 229 (7th Cir.1993)). [FN17] Petitioners in *Grubart* therefore "did not seriously dispute the conclusion of each court below that the Great Lakes barge [was], for admiralty tort purposes, a 'vessel" '. *Id.* [FN18]

FN17. The Circuit Court held, in the case below, that the Great Lake's barge was a "vessel" subject to admiralty jurisdiction although "being used as a stationary platform" because its purpose was "to some reasonable degree the transportation of passengers, cargo or equipment from place to place across navigable waters." 3 F.3d at 229. *Cf. id.* ("There is no doubt that [Defendant]'s barges are capable of, and have performed, such transportation functions. Accordingly, they are 'vessels." '); *Elizabeth River Terminals, Inc. v. U.S.*, 509 F.Supp. 517 (C.I.T.1981) (barge, which was purchased for use as a crane platform, was a "vessel" where, despite evidence that it was previously permanently moored, it was clearly "capable of being used as a means of transportation in water"); *West Indies Transport, supra* at 8. The "reasonable degree" test was adopted by the Seventh Circuit from the First Circuit's decision in *Bennett v. Perini Corp*, 510 F.2d 114, 116 (1st Cir.1975) (holding that trial court erred in concluding as a matter of law that crane barge towed for construction projects in navigable waters and used as work platform was not a "vessel") (quoting *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 647 (1st Cir.1973)). *See also Brunet v. Boh Bros. Constr. Co., Inc.*, 715 F.2d 196, 198 (5th Cir.1983) (reversing summary judgment as to "vessel" status of crane barge moved to job site by tug and moored, where "barge by necessity [was] designed to transport a pile-driving crane across navigable waters to jobsites that [could] not be reached by land-based pile-drivers" and while Court "agree[d] that the barge was used more often to support the crane than to transport it, [it could] not agree that the transportation function was so 'incidental' as to warrant a conclusion that the barge was not a vessel as a matter of law"); *Martinez v. SignatureSeafoods, Inc.*, 303 F.3d 1132 (9th Cir.2002) (question of vessel status raised as to seaworthy barge used as fish processing plant but

designed to be transported and towed across navigable waters twice yearly) (citing *Brunet*); *Sharp v. Johnson Brothers Corp.*, 917 F.2d 885, 888-89 (5th Cir.1990) (reversing summary judgment for defendants where plaintiff was injured by barge-mounted crane moored at jobsite and holding that transporting crane to and around jobsites was sufficient evidence to support a jury finding that transportation function was not merely incidental to its work platform function). *Cf. Koernschild v. W.H. Streit, Inc.*, 843 F.Supp. 711 (D.N.J.1993) (citing 1 U.S.C. § 3 as authority in considering whether structure qualified as vessel under the Longshore and Harbor Workers' Compensation Act, noting that its "language ... could hardly be more expansive", and holding that "[w]here the object is used in part as a work platform and in part as a means of transporting men and machinery across the water to a job site, [the Court] can not say as a matter of law that it is not a vessel"). *But see DiGiovanni, supra* at 10 & n. 12. *Compare Daniel v. Ergon, Inc.*, 892 F.2d 403 (5th Cir.1990) (holding that floating barge moored to shore, remaining in same place for approximately seven years and used as work platform was not a vessel) *with The O'Boyle No. 1*, 64 S. Fupp. 378, 382 (S.D.N.Y.1945) (floating crane hired out to perform work was "undoubtedly, a vessel within the admiralty jurisdiction of the court").

FN18. The Supreme Court noted that it made no difference that the injury was caused by the crane because maritime law "ordinarily treats an 'appurtenance' attached to a vessel in navigable waters"--such as the crane--"as part of the vessel itself." *Id.* at 535 (citations omitted).

As discussed above, this Court need not determine the crane barge's status as a "vessel" with finality at this time. Rather, it is sufficient to overcome Defendant's jurisdictional challenge on this issue that the crane barge's constructed and use encompassed the transportation its equipment across navigable waters to other job sites. [FN19] *See supra* page 4-5 (quoting *Grubhart*, 516 U.S. at 537-38). [FN20]

FN19. The Second Circuit has assessed the "transportation function" of the structure at issue in terms of the crane's transportation of cargo, as well as the barge's transportation of the crane. *See Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755-56 (2d Cir.1975) (holding that mobile floating crane barge being used to unload scrap metal from freighter was vessel for purposes of action for breach of warranty of seaworthiness and noting that barge "by means of its crane was transporting goods over water"). This Court finds that reasoning additionally persuasive.

FN20. *Cf. The Barbara Cates*, 8 F.Supp. 470, 471 (E.D.Pa.1934) (noting that jurisdiction of admiralty court depends on locality of tort and nature of structure and its use, and that question of jurisdiction over subject matter in dispute may be raised at any time and may be reserved for further ruling); *Bennett*, 510 F.2d at 116 (noting that "[w]hether a marginal structure is a vessel is [appropriately reserved] unless the craft is clearly outside any permissible understanding of the term" and holding that

district court erred in reaching its conclusion as a matter of law); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991) (affirming Ninth Circuit reversal of district court's grant of summary judgment and holding genuine issues of material fact existed regarding whether floating platforms, including crane barge, were vessels).

2. *Connection Test--Disruptive Impact and Substantial Relationship*

The second element of *Grubart*' s two-part test for jurisdiction, *i.e.*, the connection inquiry, is broadly applied and will not be found, absent exceptional circumstances, to defeat this Court's subject matter jurisdiction over a claim alleging injury caused by a vessel in navigable waters. Indeed, the Supreme Court has instructed that "[a]lthough the existing case law tempers the locality test with the added requirements looking to potential harm and traditional activity, it reflects customary practice in seeing *jurisdiction as the norm when the tort originates with a vessel in navigable waters*, and in treating departure from the locality principle as the exception." *See Grubart*, 513 U.S. at 547 (emphasis added). Our Court of Appeals has similar held that the connections test is to be interpreted broadly and has expressly noted that although not every tort meeting the location requirement "falls within the scope of admiralty jurisdiction *no matter what, ... ordinarily that will be so.*" *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3d Cir.1995) (citing *Grubart*) (emphasis added). *See also* id. at 180 n. 9 (noting that case lacked "any exceptional circumstances that could take it out of the ordinary run" and observing that the Supreme Court has not "departed far from the situs test [as the sole test] for admiralty jurisdiction"); *Calhoun v. Yamaha Motor Corp., USA*, 216 F.3d 338 (3d Cir.2001) (concluding that the Supreme Court's "recent jurisprudence ... indicates that so long as the incident in question, and the vehicles utilized therein, bears *some* relation to traditional maritime activity and could, *in any way*, impact upon the flow of maritime commerce, admiralty jurisdiction is proper") (emphasis added). Thus, the lenient and encompassing perspective of this standard must, of course, inform this Court's analysis of connection in the case at hand.

(a) *Potentially Disruptive Impact*

***6** The first aspect of the connection inquiry is whether the general features of the type of incident involved would have a potentially disruptive impact on maritime commerce. *See Grubart*, 513 U.S. at 538. The Supreme Court has been careful to note that this prong goes "to potential effects, not to the 'particular facts of the incident" ' and the question to be asked is "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." *Id.* at 538-39. In *Grubart*, the Supreme Court described the general features of the incident as "damage by a vessel in navigable water to an underwater structure" and concluded that, "[s]o characterized, there [was] little question that [it was] the kind of incident that has a 'potentially disruptive impact on maritime commerce." ' *Id.* at 539.

Following the Supreme Court's directive that the description be "at an

intermediate level of possible generality", the alleged incident before this Court is best characterized as personal injury to a individual assisting in unloading cargo by a crane barge in navigable water. Clearly, an incident of this type poses more than a "fanciful risk" of impeding or otherwise disrupting maritime commerce. *See White v. United States*, 53 F.3d 43, 47 (4th Cir.1995) (injury to security guard disembarking ship docked during repairs posed "a more than fanciful risk to a variety of activities essential to maritime commerce" and could potentially disrupt commercial activities such as loading). Injury to a worker participating in offloading a barge may certainly delay the unloading of that vessel (and thus its subsequent commercial engagements), as well as the unloading of other vessels to which the worker was subsequently assigned (or to which the injured worker's replacement was assigned). In addition, negligence and/or unsafe working conditions in the offloading of a barge and operation of a floating crane may impact proximate commercial activity in a myriad of ways. *See*, e.g., *Coats v. Penrod Drilling Corp.*, 61 F .3d 1113, 1119 (5th Cir.1995) (*en banc*) ("Without a doubt, worker injuries, ..., can have a disruptive impact on maritime commerce by stalling or delaying the primary activity of the vessel."); *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064-65 (11th Cir.1996) (injury to carpenter had potential to disrupt further repairs to vessel, vessels being worked on at the same dock, or vessels waiting to be worked upon); *id.* (noting that unsafe working conditions can inhibit maritime commerce of vessel involved and other vessels as well); *Neely*, 63 F.3d at 179 (injury to scuba instructor could lead to restrictions on navigable waterway during necessary investigations into accident and need to replace injured worker could delay commercial activity); *Poret v. Louisiana Life & Equipment, Inc.*, 2003 WL 1338726, *2 (E.D.La.2003) (personal injury sustained during unloading of steel piping onto adjacent barge had a potentially disruptive impact) (citing *Hall v. Environmental Chem. Corp.*, 64 F.Supp.2d 638, 640 (S.D.Tex.1999) in which that Court recognized that an injury involving a barge crane "could delay the transfer of goods, material and cargo"). [FN21]

> FN21. *Cf. Sisson*, 497 U.S. at 362 (holding that fire on docked pleasure vessel "plainly satisf[ied]" first requirement because it could have "spread to nearby commercial vessels or ma[d]e the marina inaccessible to [them]"). The Seventh Circuit has observed that because it was unlikely that any commercial vessel would ever be docked at the *Sisson* recreational marina, the potential to disrupt maritime traffic found sufficient for admiralty jurisdiction in that case was "rather remote." *Great Lakes Dredge & Dock Co. v. Chicago*, 3 F.3d 225, 228 (7th Cir.1993)

(b) *Substantial Relationship*

***7** The second aspect of the *Grubart* connection inquiry is whether the general character of the activity giving rise to the incident bears a substantial relationship to traditional maritime activities. *See Grubart*, 513 U.S. at 539. [FN22] Whether or not Plaintiff was engaged in assisting in the unloading of the cargo from the river barge at the time he fell from the flatbed truck, and whether or not he was acting within the scope and course of his employment and/or Lawson's

contract with Defendant in so doing, it is enough for purposes of subject matter jurisdiction that the Defendant was so engaged. *See Grubart,* 513 U.S. at 541 (holding that so long as a putative tort-feasor was engaged in a traditional maritime activity, such activity was "invovle[d]" and the second nexus prong is met); *Alderman,* 95 F.3d at 1065- 66 ("The work of the injured plaintiff does not determine whether there is a substantial relationship to maritime activity. The important question is 'whether a *tortfeasor's* activity [is sufficiently related]." ') (quoting *Grubart*). The work of unloading cargo from a river barge, which Defendant contracted to perform and in which it was engaged, is an integral part of maritime commerce. *See,* e.g., *Edynak v. Atlantic Shipping, Inc.,* 562 F.2d 215, 221 (3d Cir.1977) (noting that the unloading of cargo is a traditional maritime activity); *Drachenberg v. Canal Barge Co* ., 571 F.2d 912, 917 (5th Cir.1978). *Cf. Alderman,* 95 F.3d at 1065 (distinguishing *Penton v. Pompano Const. Co.,* 976 F .2d 636 (11th Cir.1992), in which crane was mounted on barge for use in construction of 150-foot long jetty and barge was thus platform for water-side construction, and plaintiff's injury during post-work transference of crane from barge back to land was not comparable, for purposes of "substantial relationship" prong, "to the unloading of cargo from a vessel"); *Sisson,* 497 U.S. at 367 (describing the activity in question--the marina storage and maintenance of boats--as a "common, if not indispensable, maritime activity"). [FN23]

FN22. *See also id.* at 541 ("The test turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity in a given case....").

FN23. Defendant asks this Court to apply, in cases involving land-based parties and injuries, the conditions of jurisdiction articulated by the Fifth Circuit in *Kelly v. Smith. See* 485 F.2d 520, 525 (5th Cir.1973) (adopting a four-factor test that looks to "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law"). Defendant's protestations to the contrary notwithstanding, the Supreme Court has expressly found similar arguments to be unpersuasive. *See Grubart,* 513 U.S. at 544-48 (discussing at length its reasons for "rejecting" a land-based case distinction and the *Kelly* multi-factor test). *See also Great Lakes Dredge & Dock Co.,* 3 F.3d at 228-229 (rejecting district court's reliance on *Kelly* test and stating that "following *Sisson* ... [a] court may not engage in [that type] of policy analysis" but must adhere to the three questions recognized by the Supreme Court: locality, potential hazard, and substantial relation).

Accordingly, the tort underlying this litigation, Defendant's alleged negligence, is within this Court's admiralty jurisdiction.

III. *CONCLUSION*

It is therefore recommended that the Motion to Dismiss filed by Defendant be denied without prejudice. *See Grubart,* 513 U.S. at 537-38. [FN24] In accordance

with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

FN24. *See also id.* at 527 (concluding district court erred in granting 12(b)(1) motion to dismiss for lack of admiralty jurisdiction).

Not Reported in F.Supp.2d, 2004 WL 2093457 (W.D.Pa.), 2004 A.M.C. 1358

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