268 F.3d 486, 2002 A.M.C. 587
(Cite as: 268 F.3d 486)

United States Court of Appeals,
Seventh Circuit.
Janet GREENWELL, Plaintiff, Cross-Appellant,
v.
AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino, Defendant,
Third-Party Plaintiff/Appellant, Cross-Appellant,
v.
Matthew B. Kern and Gregory J. Loomis, Third-Party Defendants/Appellees.

Nos. 00-3753, 00-3879.
Argued June 6, 2001.
Decided Oct. 4, 2001.
Rehearing and Rehearing En Banc Denied Nov. 16, 2001.

Employee, who suffered back pain while walking in a casino boat on which she was employed by owner, brought suit against owner, claiming fraud under state law and "medical malpractice" in steering her to doctors who mishandled her back injury, and basing federal jurisdiction for later claim on both Jones Act and admiralty doctrine of maintenance and cure. Boat owner impleaded doctors. The United States District Court for the Southern District of Indiana, Richard L. Young, J., dismissed malpractice portion of action without prejudice on ground of prematurity under Indiana's medical malpractice screening procedure and dismissed third-party claim. Both employee and employer appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) order dismissing "malpractice" claim against employer was not appealable under partial final judgment rule or special admiralty appeal statute; (2) employer's indemnity claim was immediately appealable; (3) doctrine of pendent appellate jurisdiction applied to permit consideration of "malpractice" claim against employer; (4) Indiana medical review statute did not apply to claim under federal law; (5) employer did not breach duty of maintenance and cure by steering employee to doctors; (6) employer did not violate Jones Act; and (7) failure of main claims precluded employer's indemnity claim against doctors.

Affirmed as modified.

West Headnotes

[1] Seamen 348 29(1)

348 Seamen
348k29 Personal Injuries
348k29(1) k. In General. Most Cited Cases

Jones Act applies the principles of the Federal Employers' Liability Act (FELA) to maritime workers. Jones Act, 46 App.U.S.C.A. § 688(a).

[2] Seamen 348 11(6)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(6) k. Extent and Duration of Liability. Most Cited Cases

Admiralty doctrine of maintenance and cure requires a seaman's employer to provide food, lodging, and medical services to a seaman injured while employed on the ship.

[3] Seamen 348 11(1)

348 Seamen
348k11 Medical Treatment and Maintenance of

Disabled Seamen
348k11(1) k. In General. Most Cited Cases

Duty of maintenance and cure is nonwaivable, perhaps out of fear of duress against seamen who are injured, or fall sick, far from land, and so are at the mercy of their employer.

[4] Labor and Employment 231H 2787

231H Labor and Employment
231HXVII Employer's Liability to Employees
231HXVII(A) In General
231HXVII(A)1 Nature and Scope of Employer's Duty
231Hk2787 k. Medical Attendance on Employee. Most Cited Cases
(Formerly 148Ak12 Employers' Liability)

Employee's claim that casino boat owner had either directed her to use incompetent third-party doctors or had fraudulently induced or otherwise improperly compelled her to use them for back pain which she experienced while on board ship, but which predated her maritime employment, raised possibility not of vicarious liability, but of direct liability of owner as negligent actor if it steered her to doctors it knew or should have known were incompetent.

[5] Health 198H 641

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(B) Duties and Liabilities in General
198Hk641 k. Referral of Patient. Most Cited Cases
(Formerly 299k16 Physicians and Surgeons)

Steering a patient to a doctor who commits malpractice is not itself malpractice or otherwise tortious unless the steerer believes or should realize that the doctor is substandard.

[6] Federal Courts 170B 660.20

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk660 Certification and Leave to Appeal
170Bk660.20 k. Multiple Claims. Most Cited Cases

Dismissals may be made appealable by entering partial final judgments only as to one or more but fewer than all of the claims or parties, with "claim" defined to include all legal grounds that are based on closely related facts. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[7] Federal Courts 170B 660.20

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk660 Certification and Leave to Appeal
170Bk660.20 k. Multiple Claims. Most Cited Cases

Employee's remaining fraud claim that casino boat owner fraudulently induced her to use incompetent doctors for back pain experienced while on board ship was too closely related to dismissed claim that owner committed "malpractice" by negligently directing her to use incompetent doctors to allow district court to make dismissal of negligence claim immediately appealable by entering partial final judgment. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[8] Federal Courts 170B 589

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170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk589 k. Dismissal and Nonsuit in General. Most Cited Cases

Entry of partial judgment upon dismissal of boat owner's third party claim against doctors who allegedly committed malpractice in treating employee was final and immediately appealable, where judgment had effect of letting doctors out of case as parties. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

[9] Admiralty 16 103

16 Admiralty
16XII Appeal
16k103 k. Decisions Reviewable. Most Cited Cases

Order dismissing claim of employee against boat owner for steering her to allegedly incompetent doctors for failure to exhaust administrative remedies under Indiana malpractice screening process was procedural order that did not fall within admiralty procedures allowing appeals for interlocutory orders determining rights and liabilities of parties. 28 U.S.C.A. § 1292(a)(3).

[10] Admiralty 16 103

16 Admiralty
16XII Appeal
16k103 k. Decisions Reviewable. Most Cited Cases

Purpose of the special admiralty appeal statute, allowing interlocutory appeals of determinations regarding rights and liabilities of parties, is merely to allow the determination of liability to be appealed without awaiting the determination of damages. 28 U.S.C.A. § 1292(a)(3).

[11] Federal Courts 170B 768.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk768.1 k. In General. Most Cited Cases

Doctrine of pendent appellate jurisdiction applied to allow court to consider appeal from otherwise nonappealable interlocutory dismissal of employee's malpractice claim against casino boat owner because it was closely entwined with immediately appealable dismissal of boat owner's indemnity claim against doctors, as employee was seeking to hold boat owner liable for doctors' actions, and indemnity depended on whether employee succeeded.

[12] Federal Courts 170B 433

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other Particular Matters. Most Cited Cases

Indiana medical review statute governs diversity suits under Indiana law in federal court, but not claims under federal law. IC 34-18-8-4.

[13] Admiralty 16 17.1

16 Admiralty
16I Jurisdiction

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16k17 Torts
16k17.1 k. In General. Most Cited Cases

Substantial relationship between the alleged tort and some traditional maritime activity must be shown to place the case within admiralty jurisdiction.

[14] Federal Courts 170B 29.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk29.1 k. In General. Most Cited Cases

Jurisdiction depends on the facts as they appear when the complaint is filed.

[15] Seamen 348 11(8)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(8) k. Mistaken Diagnosis, Neglect, or Improper Treatment. Most Cited Cases

Casino boat owner did not breach of duty of maintenance and cure owed to maritime employee by allegedly negligently steering her to doctors who further injured her with respect to back injury that predated her maritime employment.

[16] Seamen 348 11(8)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(8) k. Mistaken Diagnosis, Neglect, or Improper Treatment. Most Cited Cases

Casino boat owner was not liable under Jones Act for alleged malpractice of doctors in operating on back of maritime employee whose back injury predated her maritime employment, particularly where doctors were neither employees of boat owner, nor acting on behalf of boat owner, and where boat owner was not negligent in selecting them. Jones Act, 46 App.U.S.C.A. § 688(a).

[17] Seamen 348 29(1)

348 Seamen
348k29 Personal Injuries
348k29(1) k. In General. Most Cited Cases

Jones Act is limited to injuries that occur in the course of seaman's employment. Jones Act, 46 App.U.S.C.A. § 688(a).

[18] Admiralty 16 50

16 Admiralty
16III Parties, Process, Claims, and Stipulations or Other Security
16k50 k. Intervention and Bringing in New Parties. Most Cited Cases

In an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party. Fed.Rules Civ.Proc.Rule 14(c), 28 U.S.C.A.

[19] Admiralty 16 1.11

16 Admiralty
16I Jurisdiction
16k1.10 What Law Governs

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16k1.11 k. In General. Most Cited Cases

When claim for relief is within both admiralty jurisdiction and some other grant of federal jurisdiction, plaintiff must notify his opponent and court that he is invoking special admiralty procedures, by means of statement or otherwise, or case will proceed under ordinary civil rules. Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

[20] Admiralty 16 1.11

16 Admiralty
16I Jurisdiction
16k1.10 What Law Governs
16k1.11 k. In General. Most Cited Cases

If plaintiff in case arising under both admiralty jurisdiction and some other grant of federal jurisdiction foregoes use of admiralty rules of procedure, there is no reason to permit defendant to invoke them. Fed.Rules Civ.Proc.Rule 9(h), 28 U.S.C.A.

[21] Admiralty 16 50

16 Admiralty
16III Parties, Process, Claims, and Stipulations or Other Security
16k50 k. Intervention and Bringing in New Parties. Most Cited Cases

Ordinary impleader rule may be used in admiralty suits, in lieu of special admiralty rule in which plaintiff is treated as having directly sued impleaded party. Fed.Rules Civ.Proc.Rule 14(a), 28 U.S.C.A.

[22] Indemnity 208 68

208 Indemnity
208III Indemnification by Operation of Law
208k63 Particular Cases and Issues
208k68 k. Land, Premises, Highways, or Streets. Most Cited Cases
(Formerly 208k13.2(7))

Casino boat employer could not maintain indemnity claim against doctors who allegedly committed malpractice in treating maritime employee once it was determined that maritime employee's "malpractice" claim, founded on maintenance and cure and Jones Act, against boat owner for steering her to doctors was meritless.

[23] Federal Courts 170B 931

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk931 k. Modification. Most Cited Cases

Cross-appeal of maritime employer from dismissal without prejudice of one claim against it by maritime employee gave employer basis to request modification of judgment to reflect dismissal on merits rather than dismissal without prejudice.

***489** Dennis M. O'Bryan,O'Bryan Baun, Birmingham, MI, for Janet Greenwell.

Daryl F. Sohn (argued), Goldstein & Price, St. Louis, MO, for Aztar Indiana Gaming Corp.

Craig M. McKee (argued), Wilkinson, Goeller, Modesitt, Wilkinson & Drummy, Terre Haute, IN, for Matthew B. Kern.

Fred S. White, Bamberger, Foreman, Oswald & Hahn, Evansville, IN, for Gregory J. Loomis.

Before FAIRCHILD, BAUER, and POSNER, Circuit

Judges.

POSNER, Circuit Judge.

We have a threecornered dispute that raises a tangle of jurisdictional and procedural issues. The plaintiff, Greenwell, suffered back pain while walking in a casino boat on which she was employed by the owner, Aztar. (On the origins and popularity of modern riverboat gambling, see Lori Chapman, "Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely 'Fool's Gold?,' " 26 *U. Toledo L.Rev.* 387, 390-91 (1995); Ronald J. Rychlak, "The Introduction of Casino Gambling: Public Policy and the Law," 64 *Miss. L.J.* 291, 309 (1995).) The boat was afloat on a navigable waterway of the United States in Indiana. Aztar referred Greenwell to two doctors, Kern and Loomis, who operated on her back-negligently, she claims. Yet her suit, which charges both a work-related injury to her back and medical malpractice and related torts in the treatment of the injury, is not against the doctors but against Aztar. Aztar, however has impleaded the doctors, contending that they are the primary wrongdoers.

[1][2][3] Greenwell bases federal jurisdiction primarily on the Jones Act, which applies the principles of the FELA to maritime workers, 46 U.S.C.App. § 688(a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 877 (7th Cir.2001); *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 266 (2d Cir.1963), and on the admiralty doctrine of maintenance and cure, which requires a seaman's employer to provide food, lodging, and-what is relevant here-medical services to a seaman injured while employed on the ship. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993, 997, 148 L.Ed.2d 931 (2001); *Galveston County Navigation District No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 357 n. 8 (5th Cir.1996); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir.1971). The seaman is unlikely to have an alternative source of maintenance and cure when at sea; the doctrine thus formalizes and makes mandatory what, in its absence, would probably be a contractual undertaking by the employer. Cf. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730, 63 S.Ct. 930, 87 L.Ed. 1107 (1943); *Silmon v. Can Do II, Inc.*, 89 F.3d 240, 242 (5th Cir.1996). The duty is nonwaivable, perhaps out of fear of duress against seamen who are injured, or fall sick, far from land, and so are at the mercy of their employer.

[4] Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure, because the malpractice would have been committed by a fellow employee acting within the scope of his employment. ***490***De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665- 69, 63 S.Ct. 814, 87 L.Ed. 1065 (1943); *Fitzgerald v. A.L. Burbank & Co., supra*, 451 F.2d at 679-80. Even if the doctor had been an independent contractor hired by Aztar to discharge the "cure" part of Aztar's duty of maintenance and cure, rather than an employee, Aztar would have been liable, as explained in *id.* at 680. But after admitting in her deposition that she had been seeing a chiropractor about her back before experiencing back pain on board the ship, Greenwell amended her complaint to drop the charge that she had been injured at work and charged instead that Aztar had either directed her to use the incompetent doctors who operated on her or had fraudulently induced or otherwise improperly compelled her to use them. Under standard tort principles (see, e.g., *Reed v. Bascon*, 124 Ill.2d 386, 125 Ill.Dec. 259, 530 N.E.2d 417, 420-21 (Ill.1988)) that are equally applicable to maritime cases, Aztar would be liable, not vicariously but as a negligent actor, if it steered Greenwell to doctors who it knew or should have known were incompetent. *Fitzgerald v. A.L. Burbank & Co., supra*, 451 F.2d at 679; cf. *Barbetta v. S/S Bermuda Star*, 848

F.2d 1364, 1369 (5th Cir.1988).

[5] That's a big "if." Steering a patient to a doctor who commits malpractice is not itself malpractice or otherwise tortious unless the steerer believes or should realize that the doctor is substandard, and that is not claimed. Yet the district judge, instead of dismissing the malpractice claim on the merits and therefore with prejudice, dismissed it without prejudice. He thought it merely premature, because Greenwell hadn't completed the pre-complaint review procedure to which Indiana subjects claims of medical malpractice. Ind.Code § 34-18-8-4; *Hill v. Porter Memorial Hospital*, 90 F.3d 220, 222 (7th Cir.1996); *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 884 (Ind.App.2001). The judge also dismissed Aztar's third-party claim against the doctors.

[6][7][8] Both dismissals are interlocutory, because the remainder of Greenwell's complaint, consisting of fraud claims against Aztar that invoke the district court's supplemental jurisdiction, 28 U.S.C. § 1367, remains pending in the district court. The general rule in the federal system is that only final judgments are appealable. 28 U.S.C. § 1291. The judge purported to make the dismissals appealable by entering partial final judgments under Fed.R.Civ.P. 54(b). This was improper with respect to the dismissal of Greenwell's claims. Rule 54(b) can be used only to enter judgment "as to one or more but fewer than all of the claims or parties," with "claim" defined to include all legal grounds that are based on closely related facts. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441, 1444 (7th Cir.1988). The retained fraud claims overlap the dismissed claims too closely to satisfy this criterion. In contrast, the dismissal of the third-party claim let the doctors out of the case, thus satisfying the "fewer than all of the ... parties" provision of Rule 54(b) and making that dismissal a final, immediately appealable judgment. So their appeal is secure.

[9][10] Now it is true that interlocutory appeals are authorized in admiralty cases by 28 U.S.C. § 1292(a)(3), but this route isn't open to Greenwell either, and for two reasons. First, as we'll see, Greenwell failed to invoke admiralty procedures, *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 517 (7th Cir.1999), and second, the only interlocutory appeals that fall within section 1292(a)(3) are those that "determin[e] the rights and liabilities of the parties." This language has been interpreted to exclude procedural orders, ***491***Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 668-70 (7th Cir.1999) (per curiam); *Sea Lane Bahamas Ltd. v. Europa Cruises Corp.*, 188 F.3d 1317, 1321-22 (11th Cir.1999), such as the order in this case dismissing Greenwell's claim for failure to exhaust administrative remedies. It's a sensible interpretation. A rule allowing all interlocutory orders to be immediately appealable would flood us with appeals. Anyway the purpose of the special admiralty appeal statute is merely to allow the determination of liability to be appealed without awaiting the determination of damages, *Beluga Holding, Ltd. v. Commerce Capital Corp.*, 212 F.3d 1199, 1203 (11th Cir.2000), consistent with the historic admiralty practice (now of course widely imitated in ordinary civil cases as well) of trying liability and damages separately. *Wingerter v. Chester Quarry Co.*, *supra*, 185 F.3d at 670.

[11] That leaves only one route for Greenwell's appeal: the doctrine of pendent appellate jurisdiction. The dismissal of Aztar's third-party complaint against the doctors is appealable by virtue of Fed.R.Civ.P. 54(b), as we have said, and Greenwell's appeal is closely related to it. But after the Supreme Court questioned the existence of the doctrine in *Swint v. Chambers County Commission*, 514 U.S. 35, 43-51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), we turned skittish, describing it as a "controversial and embattled doctrine" in *United States v. Board of School Commissioners*, 128 F.3d 507, 510 (7th Cir.1997), and invoking it not once in the six years after *Swint* was decided. Yet the doctrine clearly still lives, for it has been invoked by the Supreme Court since *Swint*, in

Clinton v. Jones, 520 U.S. 681, 707 n. 41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), where the Court said that "the Court of Appeals correctly found that pendent appellate jurisdiction over this issue was proper." Cf. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 770 n. 2, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). It has also been invoked by our sister circuits. See *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir.2001); *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir.2001); *In re Stoltz*, 197 F.3d 625, 629 (2d Cir.1999); *Twelve John Does v. District of Columbia*, 117 F.3d 571, 574-75 (D.C.Cir.1997). This is an apt case for the use of the doctrine. Greenwell's malpractice claim against Aztar is entwined with Aztar's indemnity claim against the doctors (Greenwell is trying to hold Aztar liable for the doctors' acts, and indemnity depends on whether she succeeds), and since we must decide the latter, we might as well decide the former at the same time and head off a second appeal-so this is one of those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals, while if the liability and indemnity issues did not overlap there would be only a limited economy from deciding them in one rather than two appeals. And though the special admiralty appeal statute is not applicable, it reflects a relaxed view of finality hospitable to a doctrine that enables certain interlocutory orders to be brought up to the court of appeals earlier than they could be in an ordinary civil case. Pendent appellate jurisdiction is that doctrine.

[12] So we can proceed to the merits, where we first observe that the district judge erred in dismissing Greenwell's claim on the basis of the Indiana medical-review statute. The statute governs claims under Indiana law (thus including diversity suits, *Jones v. Griffith*, 870 F.2d 1363, 1367-68 (7th Cir.1989); *Hines v. Elkhart General Hospital*, 603 F.2d 646-47 (7th Cir.1979)), not claims under federal law, as correctly noted in ***492***Smith v. Indiana*, 904 F.Supp. 877, 879-80 (N.D.Ind.1995). The judge should have dismissed the claim, all right, but on the merits.

[13] There is an anterior question, however, of whether Greenwell successfully invoked federal admiralty jurisdiction. Her contention that Aztar violated its duty of maintenance and cure by steering her to the doctors who operated on her establishes a maritime connection: she's a maritime employee and Aztar a maritime employer. At one time no more would have been necessary to place the case within the admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-34, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); *The Plymouth*, 70 U.S. (3 Wall.) 20, 36, 18 L.Ed. 125 (1865). But now a substantial relationship between the alleged tort and some traditional maritime activity must also be shown. *Sisson v. Ruby*, 497 U.S. 358, 364-67, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990); *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673-75, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982); *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1545 (11th Cir.1994). That element is missing here, just as it would be if Greenwell were complaining that an employee of Aztar had broken into her house and poisoned her goldfish. Remember that it's not argued that Aztar knew or had reason to believe that the doctors were incompetent. The referral was innocent, and the alleged negligence of the doctors unforeseeable. *Jutzi-Johnson v. United States*, 263 F.3d 753, 756-58 (7th Cir.2001); *Beul v. ASSE International, Inc.*, 233 F.3d 441, 447 (7th Cir.2000). In any event, neither in the goldfish case nor in our case is there enough of a maritime flavor to warrant trundling out a body of law designed to regulate maritime accidents, which is the distinction (between an adventitious and an organic relation to maritime activity) that explains why the Supreme Court added the "substantial relationship" test for determining whether there is admiralty jurisdiction. *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir.1991); *In re Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759-60 (9th

Cir.1986). The ordinary law of medical malpractice is adequate to deal with the consequences of the operation by medical landlubbers on Greenwell's back for a condition that preexisted her maritime employment.

[14][15] But jurisdiction depends on the facts as they appear when the complaint is filed. *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993); *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154 (1824); *Chicago Typographical Union No. 16 v. Chicago Sun Times, Inc.*, 935 F.2d 1501, 1508 (7th Cir.1991). Remember that Greenwell initially charged that she had been injured at work. That would have brought the case within range, at least, of the doctrine of maintenance and cure. When she dropped that charge, her claim of maintenance and cure evaporated, because the duty of cure is limited to injuries and illnesses that occur on the job. But it evaporated because of a failure of proof, not because of a failure of jurisdiction.

[16][17] As for Greenwell's claim under the Jones Act, a claim within the federal-question jurisdiction of the district court, it too evaporated because of facts that emerged after the complaint was filed: that the doctors who operated on her were neither employees of the defendant nor acting on behalf of Aztar, thus eliminating any basis for vicarious liability, and that Aztar was not negligent in selecting them, ***493** thus eliminating any basis for holding it directly liable for the consequences of the operation on Greenwell's back. More fundamentally, the Jones Act, like the doctrine of maintenance and cure, *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 132-33, 80 S.Ct. 247, 4 L.Ed.2d 191 (1959), is limited to injuries that occur "in the course of [the seaman's] employment," 46 U.S.C.App. § 688(a), and Greenwell's did not.

[18] The district judge mistakenly thought that Greenwell had a viable federal admiralty or Jones Act claim, just one that was premature. Let us now consider whether he was also mistaken in believing that Aztar could not implead the doctors under the admiralty impleader rule, Fed.R.Civ.P. 14(c), a rule "designed to expedite and consolidate admiralty actions by permitting a third-party plaintiff to demand judgment against a third-party defendant in favor of the plaintiff." *Texaco Exploration & Production Co. v. AmClyde Engineered Products Co.*, 243 F.3d 906, 910 (5th Cir.2001). "In an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880, 882 (7th Cir.1993). The peculiar urgency of many admiralty cases explains the rule. Admiralty proceedings typically are in rem, meaning that, through the fiction that the ship itself is the defendant, the ship is made security for the payment of any damages assessed against its owner; it might be too difficult to obtain jurisdiction over the owner, who might be thousands of miles away. Oliver Wendell Holmes, Jr., *The Common Law* 28 (1881). But with the right to seize the ship to secure the payment of damages comes a correlative obligation on the part of the court to expedite the case so that the ship isn't held in port indefinitely with its cargo rotting or otherwise going to waste, or is allowed to sail away beyond the court's reach.

The district judge's ground for refusing to permit Aztar to use Rule 14(c) was that Greenwell had failed to designate her claim as an admiralty claim under Fed.R.Civ.P. 9(h). Rule 14(c) permits its special impleader procedure (as well as the special statute permitting certain interlocutory appeals in admiralty cases) only "when a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h)." The distinction is between a case being within the admiralty jurisdiction and the special admiralty procedures being applicable to the case.

[19][20] So we go to Rule 9(h) and discover there that a pleading which sets forth a claim for relief that is

within both the admiralty jurisdiction and some other grant of federal jurisdiction, as is the case here (where there is both a maintenance and cure claim and a Jones Act claim), "may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c) [and other special admiralty rules]." The purpose is to enable the plaintiff to notify his opponent and the court that he's invoking those rules, *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir.1988); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252-54 (5th Cir.1975), when, having another basis for federal jurisdiction, he could just rely on the ordinary civil rules. If he doesn't so indicate, by means of the statement or otherwise, *Wingerter v. Chester Quarry Co., supra*, 185 F.3d at 665-68; *Foulk v. Donjon Marine Co.*, 144 F.3d 252, 256 (3d Cir.1998); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 345 (5th Cir.1991) (per curiam), the case proceeds under the ordinary***494** civil rules. Since the plaintiff by thus forgoing the use of the admiralty rules surrenders whatever advantages he might derive from them, there is no reason to permit the defendant to invoke them either. See *Foulk v. Donjon Marine Co., supra*, 144 F.3d at 257 n. 4; *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir.1978).

[21] But all this is supremely unimportant in this case. For the significance of Rule 14(c) is that it permits the plaintiff to obtain relief directly from the third-party defendant, cutting out the middleman, the third-party plaintiff. If the third-party plaintiff, Aztar here, is not seeking to bow out, but is content to remain the middleman, paying the plaintiff if she obtains a judgment and then turning around and seeking reimbursement from the third-party defendants, rather than, as Rule 14(c) permits, substituting the third-party defendants (the doctors, in this case) for itself, it can use Rule 14(a), the ordinary impleader rule. Rule 14(c) drops out of the picture, see *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 913 (7th Cir.1983), and with it any concern related to Rule 9(h), to which Rule 14(a) naturally does not refer. And Rule 14(a) can be used in admiralty suits as well as in ordinary federal civil suits. *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042, 1045 (5th Cir.1985); *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1246 (9th Cir.1979).

[22][23] This point is academic too, however, because Greenwell's malpractice claim (maintenance and cure and Jones Act) has to be dismissed and with it goes any claim by the malpractice defendant (Aztar) against third parties. The remaining significance of the cross-appeal is that without it Aztar could not ask us to modify the judgment in its favor against Greenwell to make it a judgment on the merits dismissing her malpractice claim with prejudice rather than a procedural order dismissing it without prejudice. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999); *Conover v. Lein*, 87 F.3d 905, 908 (7th Cir.1996); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1104 (7th Cir.1990); *Engleson v. Burlington Northern R.R.*, 972 F.2d 1038, 1042 (9th Cir.1992).

The district court's judgment is modified to place dismissal of the malpractice claim on the merits, and as so modified is affirmed. Because the claims over which the district court had original jurisdiction have thus dropped out before trial, the court will almost certainly want to dismiss the plaintiff's supplemental claims as well. See 28 U.S.C. § 1367(c)(3). But that is a judgment for that court to make in the first instance.

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