No. 12-632

IN THE

Supreme Court of the United States

AMANDA BEECH, INDIVIDUALLY AND
ON BEHALF OF HER MINOR CHILD, J.D.B.,

Petitioners,

v.

HERCULES DRILLING COMPANY, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit correctly ruled that, in a Jones Act, 46 U.S.C. § 30104, claim, where one crew member negligently injures another crew member, for the employer to be held vicariously liable under a theory of *respondeat superior*, the tortfeasor crew member must have been acting in the course and scope of his employment at the time he caused the injury, specifically that he was engaged in an act that was undertaken in furtherance of the employer's business?

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Supreme Court Rule 29.6, Hercules Drilling Company, L.L.C. is a wholly owned subsidiary of Hercules Offshore, Incorporated.

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STATEMENT OF THE CASE

This action under the Jones Act, 46 U.S.C. § 30104, arises from the accidental and fatal shooting of crane operator, Keith Beech, by his co-worker driller, Michael Cosenza, on the jack-up drilling rig, the HERCULES 101. Both Mr. Beech and Mr. Cosenza were Jones Act seaman employed by Respondent, Hercules Drilling Company, L.L.C. ("Hercules").

Mr. Cosenza accidentally brought a small firearm aboard the HERCULES 101, in violation of well-known Hercules safety policies, rules, and regulations. Several days later on December 13, 2009, while Mr. Cosenza and Mr. Beech were both in the television room on the HERCULES 101, Mr. Cosenza accidentally shot Mr. Beech, mortally wounding him while they were discussing whether Mr. Beech was interested in purchasing the firearm. Mr. Beech was off duty at the time of the fatal injury. Mr. Cosenza was technically on duty but had no tasks to carry out. Mr. Cosenza knew that firearms were prohibited on Hercules' rigs and it was undisputed that the possession, use, or discharge of a firearm were in no way related to Mr. Cosenza's employment as a driller by Hercules or the tasks he was undertaking on the evening of this incident.

At trial, Mr. Beech's widow, Amanda Beech, for herself and on behalf of her minor son JDB, asserted that Hercules was vicariously liable under the Jones Act for the acts of Mr. Cosenza that resulted in Mr. Beech's death under a theory of *respondeat superior*, arguing that Mr. Cosenza was a more senior employee, was on duty at the time of the incident and was subject to the call of duty.

The district court had previously dismissed Mrs. Beech's claims that Hercules, itself, was negligent and that the HERCULES 101 was unseaworthy. Hercules claimed that Mr. Cosenza's acts were in violation of its well-known policies, outside the course and scope of Mr. Cosenza's employment as a driller, and were neither subjectively intended to, nor objectively did, further the interests of the employer or the mission of the HERCULES 101.

The district court found that because Mr. Cosenza was on duty at the time of the incident, any acts he undertook, short of an intentional tort, were in furtherance of the employer's business and, therefore, Hercules was vicariously liable for Mr. Cosenza's actions. Damages were awarded to Mrs. Beech in the amount of approximately $1.2 million.

The Fifth Circuit reversed the district court, holding that Hercules was not vicariously liable for Mr. Cosenza's actions that resulted in the death of Mr. Beech. The Fifth Circuit noted that while the Jones Act is construed in favor of seamen, it does not create a strict liability scheme. Therefore, in order for the employer to be liable under a theory of *respondeat superior*, the negligent act of the tortfeasor must have occurred within the course and scope of employment. Relying on well settled jurisprudence of the Supreme Court, Fifth Circuit, Seventh Circuit and other courts, the Fifth Circuit concluded that regardless of whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act seaman was acting within the course and scope of his employment was whether his actions at the time of the injury were in furtherance of the employer's business. Under this test, Mr. Cosenza's actions clearly were not in furtherance of

Hercules' business interests. In fact, the Fifth Circuit found his actions were inimical to Hercules' business interests.

The Fifth Circuit noted that even the application of the test Petitioners now claim should have been applied, namely that the employer is vicariously liable so long as the act was incidental to the employee's duties, would not lead to a different result, as this would mean that Hercules would be liable for anything and everything the employee did while on duty. This Petition for a Writ of Certiorari followed. For the following reasons, the Petition should be denied.

ARGUMENT

This Court should deny Mrs. Beech's request for review of this case. There is no clear split in authority among and within various federal circuit courts. Rather, there is near unanimous agreement among the circuits that a Jones Act employer's liability for the tortious acts of its employee is considered under the traditional common law concept of *respondeat superior*, which has never been eroded by the Jones Act, itself, or subsequent jurisprudence. The Jones Act is not a strict liability statute. The negligent (or intentional) acts of the employee must have been in furtherance of the employer's business interests in order to hold the employer vicariously liable.

The reasons for this limitation in the test are obvious. To hold otherwise would be to create the functional equivalent of strict liability under the Jones Act, which is neither included in the Jones Act nor developed jurisprudentially. Petitioners seek to conflate and confuse

the meaning of a Jones Act seamen being in the "course and scope of employment" and "being in the service of the ship," arguing that there is no difference between the two. This is not the law and no federal circuit court decisions support the position that these terms are synonymous. Rather, it is settled law that just because a Jones Act seaman is in the service of the ship (as he almost always will be while the vessel is at sea), his actions on that vessel must be in the course and of scope of employment for his employer to be vicariously liable for such acts.

Notwithstanding Petitioners' claims of a sharp and clear split among the circuits, Petitioners' real reliance is in on one rogue Sixth Circuit case, which has been heavily criticized and also effectively overruled. Moreover, even if this Court were to accept the test for *respondeat superior* that Petitioners now urge, the Fifth Circuit was express in its opinion that this would not change the result of this case. In other words, even if this Court were to grant Petitioners' request for review and apply the erroneous standard they demand, the result would be the same.

I. *RESPONDEAT SUPERIOR* AND COMMON LAW AGENCY PRINCIPLES ARE INTEGRAL TO THE JONES ACT

Petitioners misrepresent the ruling of the Fifth Circuit in an effort to create the impression of a deep and clear split of authority on the application of *respondeat superior* and vicarious liability when no such division exists. Since its inception, the doctrine of *respondeat superior* has been entrenched in the jurisprudence relating to claims by Jones Act seamen.

The Jones Act, 46 U.S.C. § 30101, which was incorporated in to the Federal Employer's Liability Act ("FELA," 45 U.S.C. § 51, *et seq.*) provides a cause of action in negligence for a seaman injured in the course and scope of his employment. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). The doctrine of *respondeat superior* applies in Jones Act cases. *Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299, 303 (5th Cir. 1984). However, the standard of *respondeat superior* is no broader in Jones Act cases than under common law. *See Sobieski v. Ispat Island, Inc.*, 413 F.3d 628 (7th Cir. 2005). "Although FELA dispenses with certain common law defenses, nothing in its express terms (or the terms of the Jones Act) indicates Congress's intent that we set aside common law principles of *respondeat superior*, and most courts have continued to apply traditional rules of *respondeat superior* for both negligence and intentional tort cases." *Id.* at 633.

Perhaps most importantly, *respondeat superior* was not among the common law doctrines that Congress repudiated when it enacted the FELA or incorporated the Jones Act. On the contrary, as this Court noted in *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930), the FELA abrogated the fellow servant rule and "applie[d] the principle of *respondeat superior*." *Id.*, *accord Lancaster v. Norfolk and Western Ry. Co.*, F.2d 817-18 (7th Cir. 1985) (holding that the purpose of adopting amendments to 45 U.S.C. § 51 was not to broaden the doctrine of *respondeat superior*, but to eliminate the fellow servant rule). Moreover, under *respondeat superior*, the Court held that the employers of FELA workers or Jones Act seamen are only liable for an employee's negligence or intentional torts that are "committed in the course of the discharge of his duties and in furtherance of the work of the employer's

business." *Jamison*, 281 U.S. at 641; *see also Slaughter v. Atl. Coast Line R.R. Co.*, 302 F.2d 912, 916 (D.C. Cir. 1962) (holding, "Of course no recovery may be had unless the tort was 'committed in the course of the discharge of the (the inspector's) duties and in the furtherance of the work of the employer's business.'")(quoting *Jamison*, 281 U.S. at 641).

As the Fifth Circuit correctly recognized in this case, in order for the employer to be held vicariously liable for its employee's negligence, the employee's tortious act must have been performed in the course and scope of his employment. *See also Stoot v. D&D Catering Service, Inc.*, 807 F.2d 1197, 1199 (5th Cir. 1987); *Landry*, 731 F.2d at 303; *Offshore Logistics, Inc. v. Astro-Marine, Inc.*, 482 F. Supp. 1119, 1121 (E.D. La. 1980); *Sobieski* 413 F.3d at 631-2. Further, the tortious conduct must have been performed with the intent to act on the Jones Act employer's behalf. *Stoot*, 807 F.2d at 1199.

While a Jones Act employer may sometimes be held vicariously liable, a Jones Act employer is not liable for every tortious act of its employees under the doctrine of *respondeat superior. Offshore Logistics, Inc.*, 482 F. Supp. at 1122. Courts in this context have expressly declined to adopt an expanded construction of the doctrine of *respondeat superior* that would render a Jones Act employer "the guarantor of the good behavior of seamen, and strictly liable for the damage caused by every kind of their tortious misconduct." *Id.* In this case, the Fifth Circuit correctly declined to create such guarantee.

Rather, the Fifth Circuit has held that the test for determining whether an actual or borrowing employer is

vicariously liable for negligence injuring a seaman is whether "at the moment [the tortfeasor employee] was doing the work that led to [the seaman's] injury, [the tortfeasor employee] was acting in the business of and under the control of [the actual employer] or [the borrowing employer]." *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 455 (5th Cir. 1980) (emphasis added). In this case, even the district court expressly held: "It is true that Mr. Cosenza was not tending to the vessel or engaged in the typical duties of driller at the precise moment his handgun discharged." *Beech v. Hercules Drilling Co., LLC*, 786 F. Supp. 2d 1140, 1148 (E.D. La. 2011) (emphasis added.) As the Fifth Circuit held, that finding should have been dispositive of the issue and the inquiry should have ended there, noting that: "if Cosenza's conduct aboard the HERCULES 101 did not take him outside the course of his employment, it is unclear what would have." *Beech v. Hercules Drilling Co.*, 691 F.3d 566, 576 (5th Cir. 2012).

While Petitioners stress that the Jones Act has been liberally construed in favor of seamen as wards of the courts, seamen are not entitled to any greater protections with respect to the imposition of vicarious liability than any other employees. In *Hall v. Diamond M Co.*, 635 F. Supp. 362, 366 (E.D. La. 1986), the court held that, "[T]he question of vicarious liability is an issue which does not turn on the plaintiff's unique relationship with the court, and should be determined without reference to the plaintiff's status as a seaman." *Hall v. Diamond M Co.*, 635 F. Supp. at 366. "To define 'scope of employment,' a federal court should apply common law principles, as interpreted by other federal courts." *Wilson v. Chicago, Milwaukee, St. Paul, and Pac. R.R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988) (citing *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44 (1931)).

In this case, the Fifth Circuit stressed its earlier jurisprudence and that of other circuits noting that whether a Jones Act seaman is acting in the course and scope of his employment is determined according to agency law principles. *Stoot*, 807 F.2d at 1200; *Guidry*, 614 F.2d at 455. A tortious act is performed during a seaman's course and scope of employment if it "was committed while furthering the employer's (or ship's) business." *Sobieski*, 413 F.3d at 632; *see also Landry*, 731 F.2d at 303. The fact that the injury occurs during the continuance of employment alone is not enough to impose vicarious liability. *Brailas v. Shepard S.S. Co.*, 152 F.2d 849, 850 (2d Cir. 1945). The Fifth Circuit recognized that it is irrelevant and the jurisprudence makes no distinction as to whether vicarious liability is predicated upon intentional or negligent acts of a Jones Act employee, stressing that "[t]oday we make clear that we agree with the Seventh Circuit that regardless of whether the underlying conduct is negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in the furtherance of his employer's business interests." *Beech,* 691 F.3d 574.

II. PETITIONERS MISREPRESENT HOLDINGS TO SUPPORT A FALSE CLAIM OF A "DEEP SPLIT" BETWEEN FEDERAL CIRCUIT COURTS AND STATE COURTS OF LAST RESORT

There is no "deep split" in authority on this test used to determine whether an employee is acting within the course and scope of his employment for the purposes of vicarious liability, as Petitioners urge. Petitioners misrepresent the holdings on which they rely to create a picture of division

on an issue where there is in fact near unanimity. All cases cited by Petitioners hold that an action that falls within the course and scope of employment can include acts incidental to employment, however the act must still be in furtherance of interstate commerce. A private act or something unrelated to employment would still not be covered under any of the cases on which Petitioners rely.

Petitioners recognize that at least five appellate courts have held that the correct test for vicarious liability is that an act must be in furtherance of the employer's business. *See* Petitioners' Brief, pp. 16-17. However, the claim that there are nine appellate courts that require that the negligent act be only incidental to the employment relies on an incomplete analysis of the cases cited and a strained reading to create the result that Petitioners prefer when no such conclusion was generally reached. In addition, Petitioners improperly focus on the acts of the injured employee in these cases instead of the acts of the co-employee tortfeasor to create a purported split in authority where none exists.

(1) The Second Circuit has not Adopted Petitioners' Test

Petitioners cite to *Rostocki v. Consolidated Rail Corp.*, 19 F.3d 104, 106-07 (2d Cir. 1994) as authority for the principle that an act which is incidental to one's duties will implicate vicarious liability. In *Rostocki*, the Second Circuit merely noted that an employee must be acting in furtherance of interstate commerce or directly, closely or substantially affecting interstate commerce. However, the Second Circuit made it clear that vicarious liability would not attach to the employer for the acts of its employees that were for a purely private purpose.

In order to meet the requirement of vicarious liability for the acts of its employees under FELA, the Second Circuit held that an employee need not have been "actually on the job" at the time of injury. *Rostocki*, 19 F.3d at 106, citing *Morris v. Pennsylvania R.R.,* 187 F.2d 837, 841 (2d Cir. 1951). This means only that the FELA (and the Jones Act) covers injuries suffered during activities necessarily incidental to employment. It does not extend to injuries suffered during activities undertaken "for a private purpose and having no causal relationship" with the employment. *Rostocki*, 19 F.3d at 106, citing *Atchison, T. & S.F. Ry. v. Wottle,* 193 F.2d 628, 630 (10th Cir. 1952), *cert. denied,* 344 U.S. 850, 73 S. Ct. 89, 97 L. Ed. 661 (1952).

The Second Circuit further observed that the plaintiff was not acting "for a private purpose" at the time of injury when he was injured in a car accident that occurred when he entered the rail yard to pick up his paycheck. *Rostocki*, 19 F.3d at 106. His employer, Conrail, required employees to pick up their paychecks at the rail yard. Clearly, picking up one's paycheck is an act that could be in the course and scope of employment or incidental to it. It is not a purely private act. In addition, it is irrelevant to the question of whether the employer is vicariously liable for acts committed by another employee.

In *Beech*, the Fifth Circuit accepted that Mr. Beech was still in the course and scope of his employment, even though he was off duty. It was Mr. Cosenza, the tortfeasor, who was not acting in the course and scope of his employment at the time of the injury even though he was on duty. The Fifth Circuit noted that the possession, handling and accidental discharge of a firearm could

not conceivably be said to be in the course and scope or even incidental to the employment. *Beech*, 691 F.3d 576. Accordingly, there is no inconsistency between the Fifth Circuit's ruling in *Beech* and the Second Circuit's ruling in *Rostocki*.

(2) The Third Circuit's Opinion in *Carney* and the Fourth Circuit's Opinion in *Early* are Irrelevant

(i) The Focus in *Carney* was on the Injured Employee's Actions

Petitioners rely on the Third Circuit's opinion in *Carney v. Pittsburgh & Lake Erie Railroad Co.*, 316 F.2d 277, 278 (3d Cir. 1963) for the proposition that the employer is essentially liable for anything and everything that happens to the FELA or Jones Act employee while at work.

In *Carney*, the employee was injured while he was asleep and off-duty at the YMCA. The Third Circuit held the YMCA was liable for the negligent maintenance of the bed from which the plaintiff fell and was injured, on the basis that the YMCA was an agent of the railroad for the services it provided in taking care of its employees.

The Third Circuit's ruling in *Carney* does not evidence a split in authority on the subject of vicarious liability and does not support Petitioners' argument that the employer is strictly liable for the actions of its employees. The issue of vicarious liability is only mentioned in passing in this opinion, and the court only focuses on whether the injured employee was acting within the course and scope of his

employment at the time of the injury. The act in which the plaintiff was engaged at the time of injury could be seen as either incidental to, or in the course and scope of, his employment. In such context, it is a distinction without a difference. There is a significant difference between an employee being injured due to a faulty bed on which he was sleeping between shifts and an employee being injured as a result of the prohibited actions of another employee, when the actions of the other employee were wholly unrelated to that employee's employment.

(ii) The Focus in *Early* is also on the Injured Employee's Actions

Petitioners rely on *Virginian Railway Company v. Early,* 130 F.2d 548, 549 (4th Cir. 1942) for the proposition that acts undertaken which are incidental to the employment are still covered under the FELA and, by extension, the Jones Act. In *Early*, the railroad employee was injured when he was hit with steam escaping from a railroad car when he was walking through the rail yard from the restaurant and boarding house where he got his coffee to report for duty. The *Early* court focuses on whether or not the injured employee was acting within the course and scope of his employment. The opinion does not focus on what the co-employee tortfeasor was doing and whether the joint employer should be vicariously liable. *Early* is irrelevant to the case at hand and is not inconsistent at all with the Fifth Circuit's ruling in *Beech*.

(3) The Fifth Circuit's Opinion in *Smith* is Consistent with its Opinion in *Beech*

In *Smith v. Medical & Surgical Clinic Ass'n*, 118 F.3d 416, 419 (5th Cir. 1997), the Fifth Circuit addressed whether an injured employee was within the course and scope of his employment at the time of his injury. As Petitioners note, the Fifth Circuit did consider whether the injured employee was engaged in acts that were "a necessary incident of the day's work." *Smith*, 118 F.3d at 419. In making this determination, it explained that "the proper test for scope of employment in a [ ] FELA case [is] whether the act was one which the employer might reasonably have foreseen and which the employee might reasonably have thought necessary in the interest of or in the benefit of the employer." *Smith*, 118 F.3d at 419, quoting *Fowler*, 638 F.2d 17 (5th Cir. 1981). The Fifth Circuit emphasized that "[i]t obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment." *Smith*, 118 F.3d at 419.

This reasoning is consistent with the reasoning of the Fifth Circuit in *Beech* – the Fifth Circuit stated that the possession, handling, and accidental discharge of the prohibited firearm was clearly unrelated to Hercules' business interests and was actually contrary to Hercules' business interests. *Beech*, 691 F.3d at 576. Accordingly, an act that is totally unrelated to Mr. Cosenza's employment with Hercules cannot be an incident of the day's work.

Smith might be a relevant consideration if the question was whether Mr. Beech was acting in the course and scope of his employment at the time he was shot. However, the

Fifth Circuit accepted that he was. The central issue is whether Mr. Cosenza also was acting in the course and scope of his employment. In that respect, the Fifth Circuit in *Beech* correctly concluded that he was not because, in the words of the Fifth Circuit in *Smith*, he was engaged in "purely private activity totally unrelated to employment." *Smith*, 118 F.3d at 419.

(4) None of the Other Cases Cited By Petitioners Show any Deep Split

All the cases relied on by Petitioners for the artificial construct of some sort of split in authority are ultimately concerned with the actions of the injured employee and not those of the co-worker who injured him.

Courts have broadly construed the actions of injured employees in determining they were acting within the course and scope of employment, bringing them within the protection of the Jones Act or the FELA. Such considerations are wholly irrelevant to the question of whether the co-employee who caused the injury was acting in the course and scope of his employment at the time of injury

A good example of the issue that Petitioners seek to confuse can be seen in *Atchison, Topeka & Santa Fe Railway Co. v. Wottle*, 193 F.2d 628, 630 (10th Cir. 1952). In *Atchison*, the employee was killed while he was driving from the grocery store back to his bunkhouse. The Tenth Circuit held that FELA extends to and covers not only the actual work performed, but those acts which can be said to be necessarily incident thereto. Thus, an employee is working in commerce while going to and from his actual

place of work after reporting for duty. *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057; *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 48 S. Ct. 221, 72 L. Ed. 507; *New York Central & Hudson River R.R. Co. v. Carr*, 238 U.S. 260, 263, 35 S. Ct. 780, 59 L. Ed. 1298; *Lukon v. Pennsylvania R.R. Co.*, 131 F.2d 327 (3d Cir. 1942); *Young v. New York, N.H. & H.R. Co.*, 74 F.2d 251 (2d Cir. 1934); *Morris v. Pennsylvania R.R. Co.,* 187 F.2d 837 (2d Cir. 1951). However, such analysis is irrelevant here since it does not address the actions of the employee who caused the injury and whether those actions implicate the employer.

Similarly, in *Holsapple v. Union Pacific Railroad Co.,* 776 N.W.2d 11, 17 (Neb. 2009), the employee was injured while walking toward the yard office of the railroad to report for duty approximately fifteen minutes before his shift was supposed to start but while he was on the company parking lot. In holding the employer liable, the Supreme Court of Nebraska determined that the employee was injured while in the course and scope of his employment, because at the time of his injury, the plaintiff was within close proximity to the yard office and was on his way to report for duty. Therefore, it was a necessary incident of the workday for the plaintiff to walk from his car to the yard office to report for duty.

All of this may be relevant to the case at hand if the Fifth Circuit had held that because Mr. Beech was off duty at the time of injury, he was not in the course and scope of his employment. However, it did not. Rather, it correctly held that that even though Mr. Cosenza was technically on duty at the time, his actions were so unrelated to his employment (and actually expressly forbidden), that it was

inconceivable that he was acting in the course and scope of his employment. *Beech,* 691 F.3d at 575.

III. THE FIFTH CIRCUIT'S HOLDING IS FULLY IN ACCORDANCE WITH PRECEDENT

Petitioners' claim that the Fifth Circuit's ruling in *Beech* departs sharply from this Court's precedents is patently false. Petitioners again distort the distinction between what activities the injured seaman was engaged in at the time of injury and what activities the co-employee tortfeasor was engaged in. Only the latter are relevant to this case. Similarly, Petitioners seek to use the term "being in the service of the ship" as synonymous with "being in the course and scope of employment," while they are completely different concepts. Being in the service of the ship simply because one is onboard does not mean that any and all actions undertaken on board are in the course and scope of employment, such that the employer is vicariously liable.

There is no such split in circuit courts and state courts of last resort when the focus of the course and scope of employment analysis is properly on the actions of the co-employee tortfeasor and not the actions of the injured employee. Virtually every court to address this issue either in the context of the Jones Act or the FELA, has found that *respondeat superior* applies and that *respondeat superior* requires that the act of the tortfeasor employee must be done in furtherance of the employer's business. These courts have all recognized that the doctrine of *respondeat superior* is a necessary limitation on the employer's liability for injuries resulting

from a co-employee's negligence. As discussed below, the only exception is the *Baker* decision.

In *Beech*, the Fifth Circuit approvingly discussed the test applied by the Seventh Circuit in *Sobieski v. Ipat Island, Inc.*, 413 F.3d 628 (7th Cir. 2005), and its rejection of the broad theory of liability advocated by the Sixth Circuit in *Baker v. Baltimore & Ohio Railroad Co.*, 502 F.2d 638 (6th Cir. 1975). The Seventh Circuit followed the "traditional doctrine of *respondeat superior*," and held that the course of employment test for establishing *respondeat superior* in Jones Act cases requires a plaintiff to show "that the employee's tort was committed in furtherance of the employer's business." *Sobieski.*, 413 F.3d at 631-33, citing *Lancaster v. Norfolk and Western Ry. Co.*, F.2d 807, 817-18 (7th Cir. 1985).

The Seventh Circuit did not find the *Baker* opinion persuasive, stating that *Baker* "read FELA's statutory language and liberal purpose too broadly." *Sobieski*, 413 F.3d at 632. It rejected the plaintiff's request for a "broad theory of vicarious liability" under which all acts committed by seamen aboard a vessel would be deemed to be within the course and scope of their employment, because it could "not ignore common law principles of negligence unless Congress expressly indicates otherwise." *Sobieski*, 413 F.3d at 632 (citing *Gottshall*, 512 U.S. at 543-44). The Seventh Circuit did not find anything in FELA's express terms that demonstrated that Congress intended to discard common law principles of *respondeat superior* and observed that "most courts have continued to apply traditional rules of *respondeat superior* for both negligence and intentional tort cases." *Id.* at 633 (citing *Lancaster*, 773 F.2d at 817-18).

The *Sobieski* court further noted that the rule proposed by the plaintiffs in that case (and also here) would effectively make employers the insurers of their employees' safety, which is not part of the Jones Act. *Id.* at 632 (citing *Gottshall*, 512 U.S. at 543); *accord Gallose v. Long Island R.R. Co.*, 878 F.2d 80, 83 (2d Cir. 1989) (holding that, "Under the FELA, not only must the injured employee be acting within the scope of employment at the time of injury, but the employee whose conduct causes the injury must also be acting within the scope of his employment")(quoting *Copeland v. St. Louis-San Francisco Railway Co.*, 291 F.2d 119, 120 (10th Cir. 1961)); *McClure v. U.S. Lines Co.*, 368 F.2d 197, 199 (4th Cir. 1966) (holding it was not within the scope of his employment for a seaman to aid an intoxicated member of the same crew in returning to their ship); *Copeland*, 291 F.2d at 122 (holding railroad was not liable for the "prankish" act of a fellow employee that was "wholly outside the scope of his employment, intended only to further his own interests, and not those of his employer, and were not chargeable to his employer.").

The Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have all similarly applied *respondeat superior* principles in FELA and Jones Act cases and rejected attempts by plaintiffs to subject defendants to a broader standard of vicarious liability. *See Gallose v. Long Island R.R. Co.*, 878 F.2d 80, 83 (2d Cir. 1989) (affirming district court's application of *respondeat superior*); *Trost v. American Hawaiian S.S. Co.*, 324 F.2d 225, 227 (2d Cir. 1963), *cert. denied*, 376 U.S. 963 (1964); *Howard v. New Jersey Transit Rail Operations, Inc.*, 78 F. App'x 842, 843 (3d Cir. 2003) (citing *Brooks v. Washington Terminal Co.*, 593 F.2d 1285, 1288 (D.C.

Cir. 1979) and recognizing applicability of *respondeat superior* in FELA cases); *McClure v. U.S. Lines Co.*, 368 F.2d 197, 199 (4th Cir. 1966) (recognizing applicability of *respondeat superior* principles in Jones Act cases); *Sheaf v. Minneapolis, St. P. & S.S.M.R. Co.*, 162 F.2d 110, 115 (8th Cir. 1947) (holding "test of the master's liability for a fellow servant's act is the fellow servant's purpose to further the master's business. Otherwise the act was not committed in the discharge of his duties and was not within the scope of his employment"); *Francisco v. Burlington Northern R.R. Co.*, 204 F.3d 787, 789 (8th Cir. 2000) (following *Sheaf* and recognizing *respondeat superior* test of liability); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1362 (9th Cir. 1995) (citing *Taylor v. Burlington Northern R.R.*, 787 F.2d 1309, 1314-15 (9th Cir. 1986)) (holding that, under FELA, employee can hold employer liable for intentional or criminal acts by fellow employees under *respondeat superior* if employee's actions were in furtherance of the employer's business); *Copeland v. St. Louis-San Francisco Railway Co.*, 291 F.2d 119, 120 (10th Cir. 1961) (affirming district court's application of *respondeat superior*).

IV. *BAKER* DOES NOT SUPPORT THE CONCLUSION THAT THERE IS A SIGNIFICANT SPLIT AND WOULD STILL YIELD THE SAME RESULT

(1) The Sixth Circuit's Holding in *Baker* is a Criticized Outlier

Central to the argument in Beech's Petition is the Sixth Circuit's much criticized opinion in *Baker v. Baltimore & Ohio Railroad Co.*, 502 F.2d 638 (6th Cir. 1974). In *Baker*, an employee accidentally dropped a pistol from his coat

pocket while in route to an inspection job. The Sixth Circuit concluded that because this was incidental to the employee's duties, the FELA employer could be vicariously liable under the doctrine of *respondeat superior*. *Id.*

The Fifth Circuit in *Beech* expressly rejected the Sixth Circuit's test in *Baker* stating that "whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer's business interests." *Beech*, 691 F.3d at 574. The Fifth Circuit further noted that "no other circuit has relied on *Baker*'s course of employment standard." *Id.*, note 3.

The Fifth Circuit noted that in *Sobieski* the Seventh Circuit specifically addressed and rejected the *Baker* decision explaining that "the *Baker* court read FELA's statutory language and liberal purpose too broadly in the *respondeat superior* context, and we decline to follow suit." *Sobieski,* 413 F.3d at 633. The plaintiffs in *Sobieski* urged the court to adopt a rule that would expand the scope of Jones Act vicarious liability so that there would be no need to show that the employees' actions were in furtherance of the ship's business to hold the employer vicariously liable. The court reaffirmed its previous statement that "regardless of how individual courts have stated the tests, in order for an activity to qualify as being within the scope of employment, it must be a necessary incident of the day's work or be essential to the performance of the work." *Id.* at 634.

The Second Circuit has taken the identical view. In *Gallose v. Long Island Railroad Co.*, the plaintiff, a FELA employee, sought damages for bite injuries inflicted by a dog a fellow employee had brought to work. 878 F.2d 80 (2d Cir. 1989). The Second Circuit explained:

> Under the FELA, not only must the *injured employee* be acting within the scope of employment at the time of injury, but *the employee whose conduct causes the injury* must also be acting within the scope of his employment. Thus, under the FELA employers are liable for the negligence of their employees only if it occurs within the scope of employment, and no liability attaches when an employee acts "entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the defendant employer."

Id., 878 F.2d at 83 (quoting *Copeland v. St. Louis-San Francisco Ry. Co.*, 291 F.2d 119, 120 (10th Cir. 1961)) (emphasis in original)(citations omitted).

The Fifth Circuit correctly held that the same considerations should apply here. Mr. Cosenza's actions in retrieving, handling and accidentally discharging the prohibited gun can be accurately described as actions undertaken "entirely on his own impulse" or "for his own amusement" and were certainly "for no purpose of or benefit to" Hercules.

It is worth noting that one of the few cases which cite *Baker* approvingly is irrelevant to this case. In *Mills v. CSX Transportation, Inc.,* 300 S.W.3d 627, 632 (Tenn.

2009), the Supreme Court of Tennessee quoted the following language from *Baker*: "In a FELA claim, the scope of employment includes both actual work and acts that are necessarily incidental to actual work." In *Mills*, the injured employee was engaged in safety-certification training. During a break between sessions, he left the meeting room to retrieve medication from his truck. He fell down three stairs, injuring his neck, back and shoulder. The Tennessee Supreme Court reversed the summary judgment granted for CSX because the employer could not prove that its negligence had no part in the cause of the fall. However, the case did not involve negligence of a co-employee, questions of vicarious liability or the doctrine of *respondeat superior*. In other words, the reliance which the Supreme Court of Tennessee placed on *Baker* in its ruling in *Mills* is immaterial to the question in this case.

(2) Even if the Test in *Baker* is Applied, the Result is the Same in this Case

Notwithstanding its rejection of the Sixth Circuit's test in *Baker*, the Fifth Circuit was clear that even if that test were to be applied, it would not avail the plaintiffs. *Beech v. Hercules Drilling Co.*, 691 F.3d 566, 576 (5th Cir. 2012). The Fifth Circuit stated that "[t]he fact that Cosenza's job duties were broad and relaxed does not mean that anything and everything he might chose to do while watching television is incidental to those job duties. Far from incidental to his job duties, Cosenza's behavior was inconsistent with them." *Id.* The Fifth Circuit noted that one of Cosenza's duties on the night in question was to "report suspicious activities or problems." *Beech*, 691 F.3d at 576. A person with a loaded weapon sitting in the vessel's break room is exactly the type of suspicious

activity or problem that Hercules was relying on Cosenza to report. Instead of comporting with his duty and reporting the problem, he created the suspicious activity and subsequently "disaster struck." *Id.* Simply put, Mr. Cosenza's actions did not further Hercules' business interests, and in fact, they were a detriment to them.

Petitioners' claim that the Fifth Circuit's analysis that either test would yield the same result is nonsensical. Petitioners claim that Mr. Cosenza's negligent act, which caused Mr. Beech's injury, was Mr. Cosenza's "act of sitting down on the TV room's couch." *See* Petition at p. 31. This is absurd. Sitting down on a couch may be incidental to one's employment but the reality here is that the act complained of is Mr. Cosenza's accidental discharge of a firearm while sitting down. To ignore the possession and discharge of the firearm by Mr. Cosenza is to ignore undisputed facts that underpinned the Fifth Circuit's holding. The Fifth Circuit agreed that the distinction between "showing off the firearm" and "sitting down on the couch" was irrelevant, because neither showing off a loaded weapon nor sitting down on the couch while holding a loaded weapon furthered Hercules' business interests. Both were contrary to Hercules' business interests. *Beech*, 691 F.3d 576. Accordingly, there would be little point in granting the Petition if the result would be the same even if the test the Petitioners urge were applied.

V. PETITIONERS' CLAIM THAT THE FIFTH CIRCUIT'S HOLDING WILL IMMUNIZE JONES ACT EMPLOYERS FROM LIABILITY IS ABSURD

Petitioners claim that the Fifth Circuit's opinion in this case will "have broad repercussions for another reason not necessarily apparent on its face." Petition at p. 32. Petitioners ominously maintain that employers of Jones Act seamen will now be able to claim that violation of a company policy by their employees will immunize them from liability. This is simply an exaggeration and mischaracterization of the Fifth Circuit's holding.

In *Beech*, the Fifth Circuit anticipated such future argument and addressed it squarely:

> It may be true that not every violation of safety policy automatically casts an employee outside the course of his employment … But that does not mean that no violation of safety policy can ever take an employee out of the course and scope of employment. The safety policy violation in this case is not dispositive of the course and scope of employment issue, but it is relevant because it gives guidance regarding what employee conduct furthers Hercules' business interests.

Beech, 691 F.3d at 576. In other words, Petitioners' worry that the simple fact that one employee's violation of a safety policy that injures a co-employee will automatically protect the employer from liability is groundless.

The claim by the Petitioner is also groundless, because the Fifth Circuit would have found such behavior by Mr. Cosenza, leaving the break room to retrieve a loaded firearm when he was supposed to be monitoring the generator and watching out for suspicious behavior, was so contrary to Hercules' business interests that it would have made the same determination even if there had not been a policy in place specifically forbidding this sort of behavior. *Beech,* 691 F.3d at 576.

VI. THIS COURT HAS ALREADY DENIED A PETITION IN ANOTHER CASE RAISING SIMILAR ISSUES

Petitioners urge that the Court should take this opportunity to resolve the issue at hand because a pending petition presents the same issue under the FELA. The case of *Cluck v. Union Pacific Railroad Co.*, 367 S.W.3d 25 (Mo. 2012), *cert. denied*, 12-410, 2013 WL 141179 (U.S. Jan. 14, 2013) raised a similar question as to the meaning of the phrase "course and scope of employment" in the context of vicarious liability under the FELA, which mirrors the Jones Act in this context.

However, both the Missouri Supreme Court and the United States Court of Appeals for the Fifth Circuit decided these cases in the exact same way, determining that an employee must be acting in furtherance of his master's business in order to hold that master vicariously liable for an action of the employee. *See Beech v. Hercules Drilling Co.,* 691 F.3d 566, 576 (5th Cir. 2012); *see also Cluck v. Union Pac. R.R. Co.*, 367 S.W.3d 25, 27 (Mo. 2012), *cert. denied*, 12-410, 2013 WL 141179 (U.S. Jan. 14, 2013). The consistency between the Fifth Circuit and the

Supreme Court of Missouri underscores that this is not a divided issue of law.

Moreover, the Petition for a Writ of Certiorari was denied on January 14, 2013. In denying the Petition, this Court has recognized that this is not an issue of law on which there is a substantial split of authority. The Petition in this matter should also be denied.

CONCLUSION

For the foregoing reasons, Defendant-Respondent Hercules Drilling Company, L.L.C. respectfully requests that the Court deny Beech's Petition.

Respectfully submitted,

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