**CASE NO. 14-30422**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**JAMES JOHNSON,**
***Plaintiff - Appellant***

**VERSUS**

**GLOBALSANTAFE OFFSHORE SERVICES, INCORPORATED,**
***Defendant -Appellee***

***APPEAL FROM THE UNITED STATES DISTRICT COURT***
***FOR THE EASTERN DISTRICT OF LOUISIANA,***
***NO. 2:13-CV-2773***

# ORIGINAL BRIEF ON BEHALF OF APPELLANT, JAMES JOHNSON

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## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities are described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusal.

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Defendant/Appellee: GlobalSantaFe Offshore Services, Incorporated

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## STATEMENT REGARDING ORAL ARGUMENT

This case involves the maritime claims of Plaintiff/Appellant James Johnson against Defendant/Appellee GlobalSantaFe Offshore Services, LLC for the injuries sustained by Johnson when he was shot in the knee by Nigerian kidnappers who had boarded a Transocean oil rig which was working off the coast of Nigeria on November 8, 2010. This appeal involves (1) an issue of first impression in this Circuit and (2) a legal finding of the lower court based heavily on the facts of the case. Appellant, therefore, requests this Honorable Court to grant oral argument in this appeal so that the facts of the case and the issue of first impression may be properly addressed by the Court.

# TABLE OF CONTENTS

**PAGE**

# TABLE OF AUTHORITIES

**PAGE**

## CASES



## STATUTES

## JURISDICTIONAL STATEMENT

The District Court for the Eastern District of Louisiana had jurisdiction over this maritime law action pursuant to Federal Rule of Civil Procedure Rule 4 (k) 2. This is a timely appeal from the Court's judgment dated May 28, 2014 which dismissed Appellant's action pursuant to FRCP 56. This Court, therefore, has jurisdiction pursuant to 28 U.S.C. Section 1291.

## STATEMENT OF ISSUES

Whether the District Court erred in concluding that Defendant/Appellee GlobalSantaFe Offshore Services was a "paymaster" under the law.

Whether the District Court erred in holding that GlobalSantaFe Offshore Services as a "paymaster" was not an employer of the individuals to whom it issued payroll.

Whether the District Court's ruling was contrary to the holding in *Spinks v. Texaco*, 507 F.2d 216 (5th Cir. 1975).

## STATEMENT OF THE CASE

This is a general maritime law claim arising from improper security and safety measures aboard an oil rig off the coast of Nigeria, which resulted in Nigerian gunmen boarding the rig on November 8, 2010. While attempting to take hostages from the rig, the Nigerian gunmen shot the rig's drilling superintendent, Plaintiff/Appellant James Johnson, in his left knee with an AK-47 rifle. Several

other workers aboard the rig were then taken hostage and kept in the Nigerian jungle for 10 days. Plaintiff/Appellant Johnson ("Johnson"), a resident of Mississippi, then filed a Seaman's Complaint for Damages against various defendants including Defendant/Appellee GlobalSantaFe Offshore Services (GSF) on November 8, 2011 in the Eastern District of Louisiana, asserting claims under the Jones Act and the General Maritime Law.[1] Johnson alleged that GSF employed many of the rig hands who were negligence in failing to properly secure the rig and maintain proper security for the rig, which ultimately allowed the Nigerian gunmen to board the rig.

GSF filed a Motion for Summary Judgment on February 24, 2014 arguing that it was not the employer of various rig hands.

The District Court granted GSF's Motion for Summary Judgment and issued Order and Reasons dated April 3, 2014.[2] Plaintiff filed a Motion to Certify as Final Judgment under FRCP 54(b) on May 23, 2014.[3] The District Court issued a Partial Final Judgment on May 28, 2014.[4]

Johnson timely filed a Notice of Appeal on June 6, 2014, 2014, appealing the District Court's dismissal of his action by summary judgment.[5]

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[1] R. at 14-30422.63-71.
[2] R.E.3.
[3] R.E.6.
[4] R.E.4.
[5] R.E.2.

## STATEMENT OF THE FACTS

This matter presents the Court with an issue of great importance as the United States domestic oil exploration industry turns global in scope. American oil rig workers are traveling overseas more and more often as oil exploration continuously expands to the coastline of foreign countries. In turn, international corporations operating primarily in the United States seek to set up offshore corporations in an effort to achieve tax benefits such that the money earned by foreign drilling does not pass through the United States. Johnson alleges that GSF is one such offshore entity set up by "Transocean" which for all intents and purposes in this case operates out of Houston, Texas, despite bearing a Cayman Island incorporation designation. Johnson further alleges that GSF was the employer of the negligent rig hands and thus should be held liable for their negligent acts.

On November 8, 2010, Johnson was working as a drilling superintendent aboard the "Transocean" owned HIGH ISLAND VII as the rig operated off the coast of Nigeria. The rig was cantilevered over a fixed platform at the time and the stairs leading down from the rig to the fixed platform had been left down due to work that was being performed by the rig hands on the Blow Out Preventer (BOP). During the evening hours, numerous armed Nigerian gunmen paddled out to the platform from the nearby coastline and gained access to the rig through the rig

stairs that had been left in the lowered position. The rig hands at the time included the following individuals, all of whom received their paychecks and W-2 forms directly from GSF at that time: (1) Tim Ashley, the rig offshore installation manager (OIM), (2) Danny Ball, the barge master, and (3) James Robertson, the day tool pusher. On this paychecks and W-2 forms, GSF listed its operating address as 4 Greenway Plaza, Houston, Texas.

Johnson, a resident of Mississippi, was not employed by GSF nor any other Transocean related entity. Rather he was contracted through an unrelated company to serve as the rig's drilling superintendent overseeing the technical drilling aspects of the well being drilled. Johnson was earning more than $300,000 per year as a drilling superintendent. As a result of his gun shot injury, he spent 5 months in a London hospital during which he suffered from osteomyelitis of his leg, he has undergone more than a dozen knee surgeries including a knee replacement that became infected and needed to be removed and re-performed, and he has permanent limited mobility.

During his deposition testimony, James Robertson explained the details as to how the Nigerian hostiles were allowed to board the rig. Robertson explained that the security man working aboard the rig who wore "Transocean" coveralls and a "Transocean" hard hat announced in the early evening hours before the boarding

that he was going to leave the rig to go ashore.[6] This security man was named Andrew, and Robertson personally overheard a conversation between Andrew and OIM Tim Ashley during which Andrew announced he was going ashore and leaving no security representative aboard the rig. This occurred within hours of the rig subsequently being boarded by the Nigerian hostiles.

Next, Robertson further explained that the Nigerians were able to access the rig itself through the rig stairs which had been left lowered by the night crew. The stairs were left lowered because the night crew had moved the ball valve of the BOP in front of the stairs in order to nipple up the BOP, thus blocking the rig stairs from being pulled up to avoid a boarding incident.[7]

In regards to responsibility for security aboard the rig, Danny Ball explained that he and OIM Tim Ashley were responsible for such:

> Q. Who, in your opinion, what individuals or individual, in your opinion, were responsible for security on the HIGH ISLAND VII in 2010?
>
> A. Myself, the OIM. They did have an Afren security guy, but I wouldn't say he was in charge. He was a, I guess, a consultant or, you know, operating for Afren's interest.
>
> Q. Anyone else?
>
> A. No, I can't think of anyone.[8]

[6] R. at 14-30422.6574-6576.

[7] R. at 14-30422.6570-6573.

[8] R. at 14-30422.6583-6584.

The above evidence supports a finding that the rig hands working aboard the rig committed errors or omissions which caused or contributed to the successful boarding of the rig. The lower court correctly found such in its Order and Reasons:

> Therefore, because a reasonable jury could find that negligence occurred, it need only be determined if those committing the negligent acts were employed by GSF so as to make GSF liable for their negligence.[9]

Johnson alleged in his original suit that GSF was the employer of the rig hands, and thus GSF was responsible for any of their negligent acts including leaving the rig stairs in the lowered position and/or failing to remedy such error. GSF originally objected to jurisdiction, arguing that it was a Cayman Island company and therefore the United States Court could not exercise jurisdiction over it. The lower court denied GSF's Motion to Dismiss on jurisdictional grounds, holding that GSF was subject to the court's jurisdiction under FRCP Rule 4(k) 2 as GSF did sufficient business in the state of Texas, yet refused to designate a proper venue in the United States. [10]

GSF next argued that it was merely a "paymaster" of the individuals to whom it issued payroll and W-2 forms at the time of the event (Ball, Ashley and Robertson—hereinafter "the rig hands"). Therefore, GSF contended, it could not

[9] R.E.3.

[10] R. at 14-30422.2311- 2340.

be a liable party under the doctrine of respondent superior for any of the negligent acts of the rig hands. Rather, GSF argued that an entity known as Transocean Support Services Nigeria Limited (TSSNL) was the employer of the rig hands. GSF based this argument on the fact that the contract under which the rig was operating at the time was signed and entered into by TSSNL.[11]

## A. BACKGROUND OF GSF

The deposition testimony of Bradley McKenzie explains the origin and background of GSF.[12] Mr. McKenzie is the global payroll manager for Transocean Offshore Deepwater Drilling.[13] In connection with his position he provided the following testimony regarding GSF.

GSF issues paychecks and W-2 forms for more than 300 American citizens.[14] If these American citizens work overseas (rather than in the Gulf of Mexico), on what are commonly known as "Transocean" oil rigs, then these American citizens receive their W-2 forms from the entity known as GlobalSantaFe Offshore Services.[15] In Louisiana alone there are approximately 40 individuals who receive W-2 forms from GSF.[16] McKenzie further explained

[11] R. at 14-30422.5349-5495.
[12] R. at 14-30422.6616-6629.
[13] R. at 14-30422.6617 and 6619.
[14] R. at 14-30422.6619.
[15] Id.
[16] R. at 14-30422.6620.

that "processing" and paperwork related to issuing the payroll to GSF employees is done out of the building at 4 Greenway Plaza in Houston, Texas.[17] The controller who has authority to sign checks for GSF works out of 4 Greenway Plaza.[18] If there was any type of error made or questions raised in regard to a GlobalSantaFe issued w-2 forms, the "payroll" department in Houston at 4 Greenway Plaza would handle such issues.[19] When GSF individuals need assistance traveling abroad, such help is provided by the "immigration" department which also works out of 4 Greenway Plaza.[20] Finally, the actual transfer of money into the "GlobalSantaFe" bank account for payroll is done by the "treasury department" which also works out of 4 Greenway Plaza.[21]

## B. ALL OF THE RELEVANT RIG HANDS TOOK THEIR ORDERS FROM A GSF EMPLOYEE AND HAD NO INTERACTIONS WITH TSSNL

The highest ranking rig hand aboard the HIGH ISLAND VII at the time of the boarding was Tim Ashley. He received his W-2 from GSF.[22] Danny Ball, Jeffrey James and James Robertson, who also received their paychecks and W-2s from GSF, all provided testimony indicating that they took their orders from Tim

[17] R. at 14-30422.6621 and 6622.
[18] R. at 14-30422.6623 and 6624.
[19] R. at 14-30422.6625-6626.
[20] R. at 14-30422.6627-6628.
[21] R. at 14-30422.6629.
[22] R. at 14-30422.6561-6562.

Ashley.[23] Moreover each of these individuals provided testimony which would greatly support a finding that GSF was their actual employer. Finally, none of these individuals provided any testimony to support that they received day-to-day orders or that their activities were controlled by any employee of Transocean Support Services Nigeria Limited as alleged by GSF. To the contrary, all of them established that the chain of command aboard the rig in regard to the day-to-day operations of the rig essentially ended at Tim Ashley who was, it is undisputed, a W-2 GSF employee. And none of them could identify the entity (TSSNL) which was the actual party to the drilling contract.

Danny Ball was Barge Master aboard the HIGH ISLAND VII at the time of this event. He testified that he took his day-to-day orders from Tim Ashley.[24] Ball testified that while he had spent a night or two on land in Nigeria in Harcourt, he never went to the "Transocean" office at any time while he was working on the High Island VII.[25] Ball further testified that he believed himself and OIM Tim Ashley were responsible for security aboard the rig.[26]

James Robertson was the day tool pusher aboard the High Island Seven leading up to the boarding event. Robertson testified that OIM Tim Ashley was

[23] R. at 14-30422.6563-6566 and 6630-6631.
[24] R. at 14-30422.6587.
[25] R. at 14-30422.6585-6586.
[26] R. at 14-30422.6584.

ultimately responsible for the safety of the rig.[27] Robertson stated that he did not know what entity was named on the drilling contract itself[28] and that he never saw the drilling contract.[29] Robertson's day-to day orders came directly from Tim Ashley.[30] Robertson was questioned at length regarding his employer at the time of this event. He believed that he was employed out of Houston, Texas.[31] When questioned regarding whether he believed his employer would change as the rig went from drilling contract to drilling contract he testified that this was a "wild" idea:

> Q. I am talking about when you go from contract to contract, like right now, you are with Addax, a new contract, presumably and nobody told you before going over there that you were going to be employed by a different company, correct?
>
> A. No. That's wild.[32]

Finally, Robertson explained that he received multiple training at the Greenway Plaza location including safety training.[33]

Rig Mechanic Jeffrey James also testified that as a worker aboard the HIGH ISLAND VII he took all of his orders directly from Tim Ashley the OIM.[34] James

[27] R. at 14-30422.6580.
[28] R. at 14-30422.6581.
[29] R. at 14-30422.6578.
[30] R. at 14-30422.6569.
[31] R. at 14-30422.6577.
[32] R. at 14-30422.6579.
[33] R. at 14-30422.6568.
[34] R. at 14-30422.6636.

never dealt with or went to the office located on land in Nigeria.[35] James testified that he thought he was employed by "Transocean" out of Houston, Texas.[36] James never saw the drilling contract he was operating under while working off the coast of Nigeria.[37] Finally, James explained that he, like Robertson, had been to several training schools located at 4 Greenway Plaza since the merger of GlobalSantaFe and Transocean.[38]

## C. GSF'S PRIOR REPRESENTATIONS AS AN EMPLOYER

Outside of this matter, GSF has appeared in other cases in which it has alleged itself to be the actual employer of rig hands. In *Sammy Valchar v. Transocean, Inc. and Global Santa Fe Offshore Services, Inc.*, Civil Action 09-0001 United States District Court for the Southern District of Texas, Houston Division, Mr. Valchar filed a Jones Act suit against defendants Transocean, Inc. and GSF.[39] Valchar alleged in his Complaint, and GSF did not contest, that GSF employed Valchar as an "employee".

[Mr. Valchar was actually assigned to and worked aboard the same rig as is involved in this matter, the HIGH ISLAND VII]. Mr. Valchar alleged age discrimination which had occurred on the rig while it was stationed off the coast of

[35] R. at 14-30422.6637.
[36] R. at 14-30422.6635.
[37] R. at 14-30422.6639.
[38] R. at 14-30422.6633-6634.
[39] R. at 14-30422.1156-1161.

West Africa, the same general location where the rig was operating at the time of Mr. Johnson's injuries. Thus while the entity known as GSF admitted to employing a worker aboard the HIGH ISLAND VII in the *Valchar* matter, in this matter GSF represents that it does not employ anyone.

Significant for purposes of this matter, in *Valchar* GSF (1) admitted in its answer that it actually employed Mr. Valchar as an "employee" and (2) did not object to personal jurisdiction in Texas, indeed admitting the Plaintiff's allegation that:

> Defendant, Global Santa Fe Offshore Services, Inc. ("Global Santa Fe") is a Cayman Island corporation whose principle place of business is in Houston, Harris County, Texas.[40]

*Valchar* is not the only matter in which GSF has presented itself in court as the "employer" of individuals to whom it issues W-2 forms. In *Global Santa Fe Offshore Services, Inc. v. Victor Paul Nichols*, Civil Action 08-2283, United States District Court for the Southern District of Texas, Houston Division, GSF filed a Complaint for Declaratory Judgment against its employee/seaman Victor Paul Nichols.[41] In attempting to obtain a declaratory judgment that Mr. Nichols was not a seaman, GSF represented to the court in its complaint for declaratory judgment

[40] R. at 14-30422.1162.

[41] R. at 14-30422.1167-1169.

that, "On February 15, 2008, Mr. Nichols was employed by Global [Santa Fe Offshore Services, Inc.] and working onshore at a shipyard in Singapore."[42]

## SUMMARY OF ARGUMENT

The District Court made two findings which were in error, and its Order and Reasons are contrary to the law enunciated in *Spinks*. First, the court erred in holding that GSF was a "paymaster" of the rig hands. Johnson submits that there were factual issues which precluded such finding, and the jury should have been tasked with determining the employment role played by GSF. This was not an issue to be resolved in a summary proceeding given the factual issues surrounding the relationship between GSF and the rig hands, and the prior judicial assertions of GSF in other courts.

Additionally, the court further erred in then concluding that GSF was not liable under the doctrine of respondeat superior for the actions of the rig hands. The court acknowledged that this issue appeared to be an issue of first impression in this Circuit. As explained below, finding that GSF was not liable for the actions of the rig hands was directly contrary to the holding and logic of *Spinks v. Texaco*, 507 F.2d 216, 223 (5th Cir.1975) and *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 446, 452 (5th Cir.1980).

[42] R. at 14-30422.1168.

## ARGUMENT

### A. STANDARD OF REVIEW

This Court reviews the granting of summary judgment *de novo*.[43] A district court's summary judgment should only be affirmed if "no genuine issues of fact are presented and if judgment was proper as a matter of law."[44] Summary judgment is only proper when the evidence, as viewed in the light most favorable to the non-movant, shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[45] A factual dispute is "genuine" where a reasonable jury could find for the non-moving party.[46]

### B. APPLICABLE LAW

This Court's case of *Spinks v. Texaco*, 507 F.2d 216, 223 (5th Cir.1975), is instructive on the issue of GSF's employment status in this matter. *Spinks* involved a labor service company which issued paychecks and retained Social Security taxes out of the paychecks of an employee/seaman who was ultimately injured. This Court recognized that for purposes of the Jones Act an injured seaman may have two Jones Act employers, his actual payroll employer as well as,

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[43] *Cal-Dive Intern., Inc. v. Seabright Ins. Co.*, 627 F.3 110, 113 (5th Cir. 2010) citing *Stewart v. Mississippi Transportation Co.*, 586 F.3d 321, 327 (5th Cir. 2009).

[44] *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 102 (5th Cir. 1990).

[45] *Amburgey v. Corhart Refractories Corp.*, 937 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. Proc. 56 (c).

[46] *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000).

if applicable, a borrowing employer provided such borrowing employer exercised sufficient control of the employee's day-to-day activities. Critical for the issue now before this court, *Spinks* specifically recognized that the payroll employer does not cease to become the Jones Act employer of the plaintiff even if there is a borrowing employer relationship:

> That a seaman is a borrowed servant of one employer does not mean that he thereby ceases to be his immediate employer's servant. Restatement 2d Agency § 227, Comment b. In any common sense meaning of the term, Labor Services was Spinks' employer. He was hired and paid by Labor Services. That company, not Chevron, withheld taxes and social security payments from his salary, and forwarded them to the government as required of an employer by law. Labor Services employed Spinks' co-worker Walker and his supervisor Hanks. Hanks could fire Spinks; the record strongly suggests that Chevron could not— it could merely have Labor Services recall and replace him. Labor Services made a profit for every day Spinks was aboard the S-66. Now that he is injured, Labor Services cannot forget him. We do not quarrel with the trial court's finding that Chevron had sufficient control over him to be a borrowing employer. We merely hold that under the Jones Act, Labor Services remained his employer.[47]

In this matter, it is undisputed that GSF issued the payroll checks and W-2 forms to the relevant HIGH ISLAND VII rig hands. Even if a borrowing employer relationship existed, with say Transocean Support Services Nigeria Ltd. ("TSSNL") as urged by GSF, *Spinks* makes it clear that GSF would not cease to be the employer in this matter:

[47] 507 F. 2d at 224.

> If this means that an injured seaman must speculate at his peril on whether the trial court ultimately will find him a borrowed employee of the shipowner, or an employee of his immediate employer, we reject the theory. Such a rule can result in defeating Jones Act rights through contractual manipulations. See Mahramas, 471 F.2d at 173 (Oakes, J. dissenting), Hanks, 280 F.Supp. at 738. We see nothing offensive in suing an immediate employer under the Act, or even both employers in the alternative. The defendants can sort out which between them will bear the final cost of recovery, either through common law indemnity or contribution principles, or contractual provisions, as in the instant case. This is especially important in the area of offshore drilling operations, where oil exploration companies customarily contract for all labor.[48]

The logic and holding of *Spinks* has been upheld and applied in facts similar to this matter. In *Smalls v. Global Industries*, 1999 WL 225444, Judge Duval held that a payroll employer (Global Industries) was the Jones Act employer of a plaintiff for purposes of a motion for summary judgment on maintenance and cure. Addressing an issue nearly identical to the one currently before this court, Judge Duval granted summary judgment and in doing so held that the payroll employer was, as a matter of law, the Jones Act employer of the plaintiff. The payroll defendant tried to argue that summary judgment was not appropriate as plaintiff may have been the borrowed employee of another defendant, and therefore (defendant argued) could not have also been the employee of the payroll defendant. Judge Duval directly rejected this argument, citing *Spinks* and *Guidry*:

> This argument focuses on the fact that a) plaintiff alleged that he was the borrowed servant of Global and that as such Global should be

[48] 507 F.2d at 225.

> responsible (if Smalls establishes that he had seaman status). Constructors relies on *Baker v. Raymond Intern., Inc.*, 656 F.2d 173 (5th Cir.1981) and *Hall v. Diamond M. Co.*, 635 F.Supp. 362 (E.D.La.1986). It also reviews the *Ruiz* factors found in *Ruiz v. Shell Oil*, 413 F.2d 310 (5th Cir.1969), and emphasizes how Global had control over Smalls. Constructors' analysis overlooks *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 446, 452 (5th Cir.1980) and *Spinks v. Chevron*, 507 F.2d 216, 223 (5th Cir.1975). It is beyond cavil that a plaintiff can have more than one Jones Act employer. As stated in *Guidry* "[E]ven if a seaman is deemed to be a borrowed servant of one employer, this does not automatically mean that he ceases to be his immediate employer's servant for Jones Act purposes .

## ARGUMENT

### A. THE LOWER COURT ERRED IN FINDING GSF TO BE A "PAYMASTER"

#### 1. The lower court improperly defined a paymaster

GSF set forth a creative, and apparently novel, defense in the lower court which doesn't have any support in the law- the paymaster defense. There are few cases which discuss the definition and role of a "paymaster". However, the ones that do discuss a paymaster, and specifically those cited by the lower court, do not apply to the facts of this matter. GSF is trying to fit a square peg in a round hole but shoehorning itself into the traditional (and likely now antiquated) definition of a paymaster. GSF does not fit the definition of a traditional paymaster.

In addressing GSF's "paymaster" defense, the lower court started its analysis by looking to the Webster definition of a "paymaster." The lower court then cited to only three cases which use the term "paymaster." In each of these cases, the

"paymaster" played a vastly different role than played by GSF in this matter. Indeed, in both *Pikna v. The Telfar Stockton*, 174 F. 2d 472 (4th Cir. 1949) and *Thomas v. SS Santa Mercedes*, 572 F. 2d 1331, 1333-1334 (9th Cir. 1978) the "paymaster" appears to have been an actual position held by an employee of the defendant employer:

> "On June 4, Thomas presented the voucher for payment at Prudential's [defendant employer's] office in San Francisco. The paymaster instructed him to proceed to the United States Shipping Commissioner's office to sign off the vessel's articles and to sign a certificate of mutual release."[49]
>
> ***
>
> "The District Judge found upon substantial evidence that the paymaster of the respondent company, who was on board the ship with the Shipping Commissioner for the purpose of paying off…"[50]

The lower court summarized what it gleaned from the scant case law discussing paymasters: "From cases involving paymasters, it appears that a paymaster is usually presented with a worker's or troop's claim for pay, and the paymaster satisfies the claim on behalf of the employer."[51] The lower court also acknowledged that historically such claims were made in person by the seaman to the paymaster. Had the court used this understanding of the role of a paymaster as guidance in determining if GSF was a paymaster, Johnson submits the court would have held against GSF. However, the court then incorrectly appeared to stretch the

[49] 532 F. 2d at 1331.

[50] 174 F. 2d at 472.

[51] R. at 14-30422.7497-7498.

definition of paymaster: ""There is nothing to say, though, that the manner in which a paymaster effects his role cannot be updated through modern technology."[52] Johnson submits that by making this statement the lower court was acknowledging that GSF would not meet the traditional definition of paymaster, and only by extending and redefining the paymaster role could the court hold GSF to be a paymaster. This was improper. Had the lower court applied the generally accepted meaning of a "paymaster," the court would have concluded that GSF could not meet such definition. At no time did any of the rig hands "present" themselves to GSF for payment of their wages. Instead, GSF wrote regular paychecks to the rig hands on which GSF listed the office location that all the rig hands knew as the Houston office of what they deemed to be their employer. Those who got payroll and W-2s from GSF all meet specific criteria (i.e. American assigned to work on overseas oil rigs). And this payroll and W-2s were issued for years to hundreds of American workers, and it coincided with their assignment to an overseas rig location. Finally, it was never made clear to any of the GSF payees that GSF was purportedly only playing the role of a paymaster. In contrast, the seamen in *Pikna* and *Thomas* were aware of the existence of a "paymaster" as they had presumably been instructed on the method of presenting themselves to this individual for payments of wages.

[52] R. at 14-30422.7498.

**2. Issues of fact existed as to whether GSF meet the court's definition of paymaster**

Even if the lower court was correct in fashioning its definition of a paymaster (which definition is still unclear to Johnson as the court was not clear in defining the test for this newly created "paymaster" defense), the court should have acknowledged the existence of factual issues of whether or not GSF meet the definition of a paymaster. The above cited testimony of McKenzie, Ball, Robertson and James is evidence upon which a jury could have reasonably concluded that GSF played a role beyond mere paymaster. Specifically, the record contains the following evidence: (1) GSF held itself out to its payees as doing business out of 4 Greenway Plaza, the same location where one or more of the rigs hands believed they were employed out of; (2) all of the travel, rig transfer and other "administrative" functions of GSF were performed out of the same address on the paychecks issued to the rig hands (4 Greenway Plaza); (3) GSF admittedly issues paychecks and W-2 forms to more than 300 Americans and did so based on very specific criteria, i.e. any American "Transocean" rig worker who was assigned to work on an overseas oil rig; and (4) training was performed for the rig hands at the 4 Greenway Plaza location which was listed on their paychecks and W-2 forms as the address of GSF. Most notably, there was no evidence that any of the GSF payees were ever told that GSF was acting merely as a "paymaster" and NOT their employer, a fact a jury could have found determinative. As the lower

court decision currently stands, an entity which for all intents and purposes appears to be a traditional employer of more than 300 American payee is now cast as a "paymaster" with no employment relationship with these 300 individuals. If these individuals were polled today, by whom would they say they were employed?

In contrast to the *Spinks*, *Guidry* and *Smalls* decisions discussed above which directly address the legal issue before this Court, GSF notably did not provide any case law citations to the lower court in support of its argument that it was a "paymaster" and nothing more. Instead, GSF provided only counsel's argument in support for its motion for summary judgment, and evidence which, even if true, would establish only at best a borrowing employer relationship between TSSNL and the rig hands—a fact which under Spinks does not preclude GSF from also being deemed an employer of such rig hands. Moreover, material issues of fact existed as to which entity (GSF or TSSNL) controlled the day to day activities of the rig hands, such that summary judgment is inappropriate. The rig hands took their orders from Ashley, a GSF payee. None of them knew the name of TSSNL or knew that they would be claimed to be employees of such entity. Finally, a Houston address appeared on their paycheck, the same address where they received their training and mail from the entity they assumed to be their employer.

## B. GSF'S PURPORTED EMPLOYMENT PRINCIPLE CREATES ABSURD RESULTS

GSF's claim to only serve as paymaster of the more than 300 American workers working overseas, including the rig hands in this matter, creates at least two absurd results. The lower court ruling in favor of GSF only cemented these ill effects for future cases.

First, GSF's claim that the party to the contract under which the HIGH ISLAND VII was operating should be the employer of the rig hands creates a situation in which overseas rig hands will now fluctuate wildly in and out of employment relationships based merely upon where the rig is operating. Each time the rig would move location, and presumably enter into another drilling contact, which contract would contain the name of a different Transocean entity, the employer of the rig hands would change. Pray tell, who would serve as the employer of the rig hands when the rig was under tow or otherwise not under a specific contract? Would these rig hands only momentarily be employed by GSF (as they would not be subject to any drilling contract), only to then revert back to employees of the party to the specific drilling contract once the rig began drilling again? This "gap" between drilling contracts creates an issue that was never addressed by GSF at the lower court or by the trial judge at the lower court. Johnson's position in the case would avoid this situation. Johnson submits that what GSF is more properly arguing is that TSSNL was possibly a borrowing

employer of the rig hands. But such a borrowing employer relationship would not negate the underlying employment relationship between the rig hands and GSF. Instead, GSF asked the lower court to impose upon the rig hands a single employment relationship with TSSNL, to the exclusion of any others, even when the rigs hands were unaware of the existence of TSSNL, and the lower court erred in doing so. Moreover, none of these rig hands ever interacted on a day-to-day basis with any employee of TSSNL and none went to the land office of TSSNL in Nigeria. Rather they all worked on the rig and took their daily orders directly from Tim Ashley, the rig OIM (who was paid by GSF).

The second ill effect of the lower court's current holding is that, from the standpoint of the rig hands, the ruling that GSF was not their employer leaves them to "speculate" as to the identity of their employer, the very result that was prohibited by Spinks:

> If this means that an injured seaman must speculate at his peril on whether the trial court ultimately will find him a borrowed employee of the shipowner, or an employee of his immediate employer, we reject the theory.

The trial judge avoided addressing this prohibition of *Spinks* by essentially creating a separate test for employment status depending upon whether the claim was being filed directly by the purported employee against his employer (the *Spinks* situation) or if the claim was being filed by a third party against the purported employer (the facts of this case). This holding of the lower court has created a wildly varying test

for an employment relationship — if you yourself claim to be my employee, we apply one test, whereby if another person claims you are my employee, we apply a different test. Johnson submits the employment test should not be different. If there is evidence that GSF should be the employer of the rig hands under *Spinks* (by virtue of GSF's issuance of the paychecks to such hands and the other evidence discussed above) then such evidence should also establish an employment relationship for purposes of Johnson's claim against GSF (or at least a factual issue reserved for the jury). To hold otherwise is contrary to *Spinks* and would create inconsistent results. What happens when an oil rig accident is caused by the negligent acts of an employee of a drilling contractor, and the accident injures co-employees of the negligent hand as well as third party workers? Might the drilling contractor employer only be liable to some of the injured workers but not others due to the same negligent act of its employee?

## C. EVEN IF GSF WAS A PAYMASTER, IT IS STILL THE EMPLOYER OF THE RIG HANDS

The lower court stated that the issue of whether a "paymaster" should be considered an employer appeared to be an issue of first impression. Setting aside that it is still unclear as to what defines a paymaster, Johnson now addresses the lower court's finding that GSF, as a "paymaster," was not an employer of the rig hands.

Whether a "paymaster" could be an employer was actually the issue addressed in *Spinks* almost 40 years ago by this Court. Johnson submits that this was not an issue of first impression for the lower court. Only by reclassifying GSF as a "paymaster" did the court then justify shifting GSF outside the holding of *Spinks*. When *Spinks* is examined, it is clear that *Spinks* was addressing the facts applicable in this matter. Plaintiff Spinks was paid by Labor Services and this court acknowledged that Labor Services would remain his employer even if Chevron exercised sufficient control to be deemed Spinks' borrowing employer. Labor Services performed what could be described as a limited payroll function, certainly the minimum role played by GSF in this matter.[53] At best, at the trial court GSF set forth some evidence that perhaps TSSNL could be considered a borrowing employer of the rig hands. But under *Spinks* the possible existence of a borrowing employer relationship does not abolish the underlying payroll employer's relationship with the employee.

Also of note is this Court's comment in *Spinks* in 1975 that:

> We see nothing offensive in suing an immediate employer under the Act, or even both employers in the alternative. The defendants can sort out which between them will bear the final cost of recovery, either through common law indemnity or contribution principles, or contractual provisions, as in the instant case. **This is especially**

[53] Johnson urges that GSF played a greater role than mere payroll provider. Nonetheless, under *Spinks* even a payroll provider can be deemed an employer.

> **important in the area of offshore drilling operations, where oil exploration companies customarily contract for all labor**.[54]

As Johnson urged at the outset of this brief, the issues before this court are of the utmost importance for the now global economy in which American workers find themselves. If "oil exploration companies customarily" contracted for all labor back in 1975 when Spinks was decided, such is even more so the case today when overseas oil exploration laws and regulations routinely require that local foreign business entities be established in order to ensure local participation in the drilling operations. Required layers of contracts now exist, especially in the area of overseas oil exploration. So in this matter while Transocean sets up a Nigerian entity (TSSNL) arguably in order to ensure compliance with the Nigerian governmental requirements to drill off the coast of Nigeria, all unbeknownst to the American rig hands working on the rig, that Nigerian entity is now deemed to be their employer, to the exclusion of the named entity on the very paychecks they receive.

The facts of this case are essentially those of *Spinks*, fast forwarded by 40 years. Instead of recognizing the controlling law of *Spinks* and holding that GSF [read Labor Services] was the employer of the rig hands [read Spinks], and merely updating the *Spinks* test to a modern, more global application, the court looked backwards to the archaic "paymaster" term and mischaracterized GSF as such, and

[54] 507 F.2d at 225 (emphasis added).

then unnecessarily created "an issue of first impression" to decide if a paymaster was an employer. With due respect to the lower court, the court simply should have looked to *Spinks* as controlling law, and equated GSF with Labor Services, while acknowledging that GSF is simply operating on a larger and more international scale which is consistent with the 40 year time span that has elapsed since *Spinks*.

## CONCLUSION

It is not hyperbole to suggest that the decision of this Court will have long range implications. More than 300 GSF American payees will be directly affected and the decision will guide the definition of an employer in an international maritime setting as it relates to claims filed by Americans for injuries occurring overseas. The ability to hold entities accountable for negligent and dangerous acts which cause injuries is a core issue herein. GSF held itself out to be operating out of 4 Greenway Plaza, Houston, Texas, it issued regular paychecks to more than 300 workers, and it never gave any indication to these individuals that it was disclaiming them as employees, and yet now it contends it bears no accountability for the actions of these workers. Surely tax benefits were achieved over the years through the corporate structuring of GSF and running payroll through the Cayman Islands, yet based on the current ruling of the lower court, GSF appears to have received a plum arrangement of all benefit and no responsibility. Johnson seeks

only to have the corresponding obligations of GSF as employer of the rig hands recognized in this matter. It is no less than GSF sought when it filed a declaratory action in which it claimed to be the employer of Victor Paul Nichols, seeking to absolve itself from any maintenance and cure obligations it may have owed to him.

Wherefore, Plaintiff/Appellant James Johnson requests that this Court reverse the lower court ruling and hold that under *Spinks* the Defendant/Appellee GlobalSantaFe Offshore Services is the employer of the rig hands. Alternatively, Johnson requests that this Court reverse the lower court ruling and remand the matter so that the jury may address the issues of fact as to the employment role played by GlobalSantaFe Offshore Services in relation to the rig hands.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant Brief has been served upon the following counsel of record, who are CM/ECF participants electronically by filing in the Court's CM/ECF system on this 11th day of August 2014:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

> This brief contains 6642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(1)(7)(B)(iii).

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> This brief has been prepared in proportionally spaced typeface using Times New Roman in 14 point.

Dated: August 11, 2014

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