CASE NO. 14-30423

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES JOHNSON,
Plaintiff - Appellant

VERSUS

PPI TECHNOLOGY SERVICES, L.P.,
Defendant -Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA,
NO. 2:11-CV-2773

ORIGINAL BRIEF ON BEHALF OF APPELLANT, JAMES JOHNSON

TIMOTHY J. YOUNG (22677)
tjy@theyoungfirm.com
TAMMY D. HARRIS (29896)
tdh@theyoungfirm.com
THE YOUNG FIRM
400 Poydras St., Ste. 2090
New Orleans, LA 70130
Telephone: (504) 680-4100
Facsimile: (504) 680-4101
Attorneys for Plaintiff/Appellant,
James Johnson

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.

I. **Parties:**

Plaintiff/Appellant: James Johnson

Defendant/Appellee: PPI Technology Services, L.P.

II. **Attorneys**:

For Plaintiff, James Johnson

Timothy J. Young
Tammy D. Harris
The Young Firm
400 Poydras Street, Suite 2090
New Orleans, Louisiana 70130
Telephone: 504-680-4100
Facsimile: 504-680-4101

For Defendant, PPI Technology Services, L.P.

Kevin Andrew Marks
Galloway, Johnson, Tompkins, Burr & Smith
40th Floor
701 Poydras Street
1 Shell Square
New Orleans, LA 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456

Scott Robbert Huete
Galloway, Johnson, Tompkins, Burr & Smith
40th Floor
701 Poydras Street
1 Shell Square
New Orleans, LA 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456

/s/Timothy J. Young
TIMOTHY J. YOUNG
Attorney for Appellant, James Johnson

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the claims of Plaintiff/Appellant James Johnson against Defendant/Appellee PPI Technology Services L.P. for the injuries suffered by Johnson on November 8, 2010 when he was shot in his knee by Nigerian kidnappers who had boarded a Transocean oil rig which was working off the coast of Nigeria. This appeal involves: (1) factual issues surrounding the borrowing employer status of PPI Technology and the granting of summary judgment by the lower court on such issue, when the court had previously ruled that factual issues existed regarding same, and (2) the refusal of the lower court to grant leave to amend under Rule 15. Appellant, therefore, requests this Honorable Court to grant oral argument in this appeal so all such issues may be fully addressed.

JURISDICTIONAL STATEMENT

The District Court for the Eastern District of Louisiana had jurisdiction over this maritime personal injury action pursuant to 28 U.S.C. Section 1333, 46 U.S.C. Section 30104 and diversity. This is a timely appeal from the Court's judgment dated May 28, 2014 [1]which dismissed James Johnson'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 reversing a prior ruling of the court which had found 'myriad factual issues concerning Johnson's [employment] relationship with PPI [Technology Services] that make summary judgment on this record unwarranted'.

Whether the District Court erred in granting summary judgment to PPI Technology Services holding that as a matter of law it was not the borrowing employer of Johnson.

Whether the District Court further erred by denying leave of court to James Johnson to amend the claim and name as a defendant the Nigerian affiliate of PPI Technology Services.

[1] ROA. 7792.

STATEMENT OF THE CASE

On November 8, 2010, James Johnson ("Johnson") was working as a drilling superintendent aboard the 'Transocean' owned HIGH ISLAND VII as the rig operated off the coast of Nigeria. Security threats from Nigerian gunmen were a known risk in the area given the unrest of the country. 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. Johnson, a resident of Mississippi, alleges that he had been hired by PPI Technology Services L.P. ("PPI Tech") out of Houston, Texas 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 time he suffered from osteomyelitis of his leg. He has since undergone more than a dozen knee surgeries including a knee replacement that became infected and needed to be removed and re-performed, and he now has permanent limited mobility.

On November 8, 2011 Johnson filed a Seaman's Complaint for Damages against various parties including PPI Tech for the injuries he suffered during the boarding of the rig.[2] He alleged PPI Tech to be his employer under the Jones Act, 46 U.S.C. Sec. 30104 et seq, and that PPI Tech was negligent in failing to provide him with a safe place to work. He further alleged PPI Tech was negligent in failing to take steps to stop the boarding which they knew or should have known would occur, and negligent in failing to ensure the rig and platform were securely protected from the Nigerian gunmen. He further sought maintenance and cure benefits from PPI Tech under maritime law.

On January 19, 2012 PPI Tech filed a Motion to Dismiss the claims of Johnson arguing that it was not the employer of Johnson.[3] PPI Tech argued that it was PPIN who controlled the activities of Johnson. Because the lower court considered evidence outside of the pleadings, the motion was treated as a motion for summary judgment. By decision dated May 22, 2012, Judge Sarah Vance of the district court denied the motion holding that here were issues of fact concerning the employment relationship between Johnson and PPI Tech.[4] After considering the evidence surrounding the employment relationship between Johnson and PPI Tech, Judge Vance stated:

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[2] ROA.70-78.
[3] ROA.108-134.
[4] ROA. 599-615.

> There is thus evidence that PPI personnel directed and supervised Johnson, hired and fired him, and led him to believe that he was indeed a PPI employee (notwithstanding his contract with PSL). Looking at the 'venture as a whole,' Cosmopolitan Shipping, 337 US at 795, the Court finds myriad factual issues concerning Johnson's relationship with PPI that make summary judgment on this record unwarranted.[5]

On November 8, 2012 this matter was transferred in the district court from Judge Vance to Judge Carl Barbier.[6] On February 25, 2014 PPI Tech reurged its motion for summary judgment.[7] On March 19, 2014 Johnson opposed same urging that issues of fact remained as to whether PPI Tech was Johnson's borrowing employer. Alternatively, Johnson sought leave to name PPIN as a defendant.[8] On April 3, 2014 the district court issued Order and Reasons granting PPI Tech's motion for summary judgment.[9] This Order and Reasons was completely silent as to whether leave was being granted to Johnson. On April 8, 2014 Johnson filed a Motion to Clarify and/or Amend Judgment arguing that the court's Order and Reasons were silent as to whether the alternative relief of leave to amend would be granted, and that the court should clarify such.[10] On April 24,

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[5] ROA.614-615.
[6] ROA. 1839
[7] ROA.5779-6024
[8] ROA.6655-6751.
[9] ROA.7513-7537.
[10] ROA.7539-7548.

2014 the district court denied Johnson's Motion to Clarify and/or Amend Judgment in a one sentence denial. [11]

On May 23, 2014 Johnson filed a Motion for Rule 54 Judgment[12] and on May 28, 2014 the district court entered a Final Judgment.[13] Johnson then filed this timely appeal on June 6, 2014.[14]

The district court was tasked with sorting out the complex and confusing relationship of three interrelated entities: 1) PPI Technology Services L.P. which operates out of Houston, Texas, (2) PSL, Ltd. which Johnson alleges to be a shell company operating out of a shared corporate office in Belize City, Belize, and (3) PPI Nigeria (PPIN) which operated out of an apartment 'flat' in Lagos, Nigeria. In regards to these entities, and as an overview for the court from Johnson's perspective, Johnson alleges PPI Tech was his true employer, as he was hired by PPI Tech employees, and his direct supervisors who controlled his daily activities were PPI Tech employees; PSL was a Belize shell entity set up by PPI Tech merely to handle payroll for Johnson and others; and PPIN was a land based office in Nigeria, run exclusively by Kent Schwarz, which did not deal with the Houston PPI Tech principals or employees such as Johnson and admittedly it never gave any direction or instructions to Johnson. A Consulting Services Agreement was

[11] ROA.7663-7664.
[12] ROA.7789-7790.
[13] ROA.7792-7794.
[14] ROA.7868-7869.

signed by the three entities which shows that PPI Tech was contractually obligated to provide the services of Johnson and others to PPIN, an obligation PPI Tech could not have met if it did not control Johnson.

A. THE HIRING OF JOHNSON AND TRAIL OF EMAILS

The sworn affidavit of Johnson sets forth the background of his hiring by PPI Tech.[15] Johnson's first contact with PPI Tech occurred while he was working in the Middle East in early 2010. At that time a contact gave him the name of a Mr. John Arriaga, and his contact told him that Arriaga was hiring drilling supervisors for a company called PPI Tech Services located in Houston, Texas. The phone number that was supplied to Mr. Johnson was from the Houston, Texas area code of (713).[16] Mr. Johnson then phoned Arriaga and discussed the drilling supervisor position which was available. During the conversation Arriaga informed Johnson that Johnson would need to speak to a Mr. Galan Williams, who also worked for PPI Tech. Arriaga said that Williams would be the individual responsible for supervision of the work done by the new drilling supervisor.[17] Johnson subsequently learned that Williams held the position of Vice-President for

[15] ROA.317-321.
[16] ROA.317.
[17] ROA.317.

Contracts Administration for PPI Tech and he worked out of the Houston, Texas office.[18]

Johnson's affidavit is supported by numerous emails.[19] Arriaga sent an initial email to Johnson on March 6, 2010 at 11:49 a.m. in which Arriaga states, "As I mentioned, we are looking for rig supervisors and directional drilling managers." This email is signed "John Arriaga – Project Coordinator, PPI Technology Services" and lists two 713 area code phone numbers. The email address comes from "jarriaga@ppitech.net."[20] On March 8, 2010, at 1:10 p.m. Arriaga sent another email to Johnson stating "I am going to have you call Galan Williams our Super on the project tomorrow … he is not available today. His cell is 713-705-0765." [21]

Johnson subsequently spoke with Williams and Williams informed Johnson that he had been hired by PPI Tech in the position of drilling supervisor. Williams then instructed Mr. Johnson to deal with an individual named Sandra Birkline who worked for PPI Tech in Houston, Texas in regards to the details of his transportation to Nigeria, which PPI Tech would arrange and pay for such.

Johnson spoke to Ms. Birkline on multiple occasions. Each of these phone conversations took place while Birkline worked out of the PPI Tech office in

[18] ROA.322-325.
[19] ROA.326-364.
[20] ROA.326.
[21] ROA.326.

Houston, Texas. During one of the conversations between Birkline and Johnson, Birkline informed Johnson that he would need to sign a "consulting agreement" as part of the regular employment process. She forwarded this contract to Johnson for his signature. By email dated March 9, 2010 she sent the "PSL contract" to Mr. Johnson. Significantly, she wrote in her email "as I explained on the phone PSL is our international entity that we run all ***our*** international guys through"[22] Before sending the email with the "PSL contract" to Johnson, Birkline had informed Johnson on the phone that the "PSL contract" was required strictly for tax purposes because, as she stated, "we just run all our people through Belize."

Over the next few days Johnson's air travel to Nigeria was arranged for by Birkline and PPI Tech. Numerous emails were sent back and forth documenting that PPI Tech purchased the airline ticket for Johnson.[23] Additionally, PPI Tech, through Birkline, assisted Johnson in obtaining his Nigerian STR visa. By email dated March 10, 2010, Birkline requested numerous items from Johnson so that PPI Tech could arrange for his travel/work visa.[24]

Once Johnson arrived in Nigeria, his overnight transportation in Lagos was arranged for and paid for by PPI Tech. He did not pay any out-of-pocket expenses for the hotel nor did he arrange for or pay for his travel from the hotel to the

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[22] ROA.328-329.

[23] ROA.330.

[24] ROA.331-333.

heliport which transferred him to the rig on each hitch.[25] In order for Johnson to communicate while he was employed by PPI Tech, the company issued him an intra-company email address with his own PPI Tech email address. By email dated March 19, 2010, Birkline emailed Johnson informing him that a "PPI email address had been set up for him at 'jjohnson@ppitech.net'."[26]

Once Johnson arrived on the rig, he was under the constant supervision and control of PPI Tech employees. His direct supervisors were Williams and William's relief, Jack Rankin. Johnson has explained in his affidavit that at least twice a day (and often more) he was required to send written reports regarding the drilling data from the well to either Williams or Rankin. This data detailed the drilling activities during the past 24-hour period. He would then have daily, multiple phone conversations with these individuals regarding the data in the reports. Significantly, Johnson was always instructed by them on what action needed to be taken in regard to the drilling of the well. These instructions included all details regarding the well including weight of the drilling mud, condition of the drilling bit and/or need to change out the drilling bit, the running of the casing, all aspects of cementing the casing and all other general aspects of drilling the well.[27]

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[25] ROA.318.
[26] ROA.340.
[27] ROA.318-319.

Johnson estimates that he spoke to Mr. Ron Thomas ("Thomas") at least 15 to 20 times before his injury and while Johnson was working aboard the rig in Nigeria. Thomas is an engineer, a co-founder of PPI and its President.[28] During this time Thomas was working out of the PPI Tech office in Houston, Texas. All of these conversations dealt with the drilling operations aboard the rig. Thomas was particularly interested in ensuring that the casing procedures were performed exactly as he had prescribed in written drilling plans which he had created. Thomas made it clear to Johnson and other PPI Tech employees that they must follow his drilling plans.[29]

Finally, in regard to his day-to-day activities, Johnson did not make any independent decisions in regard to the drilling aspects of the well without being instructed to do so by Williams, Rankin or Thomas. Johnson states that it would have been grounds for immediate termination if he were to have been making decisions in regard to the drilling of the well without being told to do such by one of these PPI Tech employees.[30]

As one example of the day-to-day control that PPI Tech employees exercised over Johnson on a daily basis, Johnson submits an email from Rankin from May 10, 2010 at 3:33 a.m. Rankin sent this email to Johnson and two other

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[28] ROA.365.
[29] ROA.319.
[30] ROA.319.

individuals. The email dealt with obtaining fuel from the Odinakachi fuel barge which was available to provide fuel at that time. Rankin gave specific instructions to Johnson and the other individuals that "I want you guys to take every liter of fuel anyone will give you and as fast as you can at all times."[31] Rankin signed off on this email as "Afren Energy Ebok Development Project PPI Technology Services".

In regard to payment of wages while working for PPI Tech, Mr. Johnson was required to fill out basic time sheets each month. However, PPI Tech controlled the manner in which these time sheets were to be completed by Johnson and other PPI drilling supervisors. By email dated December 16, 2010, Rankin provided a lengthy email to numerous individuals, including Johnson, providing details on the method by which the time sheets were to be completed. Rankin stated in the email, "Most of you guys are near ***another PPI guy***, sometimes in the same room with them, ask them for help or assistance. If you have any issues, contact Galan or myself and we can help."[32] Rankin again signed off on this email with his title as "Afren Energy Ebok Development Project, PPI Technology Services" as he did all his emails he sent to Johnson.[33]

[31] ROA.348.

[32] ROA.358-361.

[33] ROA.349,352,357 and 361.

Even after Johnson's injury occurred, PPI Tech individuals continued to communicate with him on a regular basis regarding all aspects of his employment. Thomas visited Mr. Johnson while he was in the hospital in London.[34] Additionally, following his injury Mr. Johnson began to communicate on a fairly regular basis with general counsel for PPI Tech, Mr. Scott Kirklin.[35] Johnson estimates that he communicated approximately 10 to 15 times with Kirklin following his injury. Kirklin told Johnson that PPI Tech "would sue" if it needed to in order to make sure that Johnson's medicals were covered by its insurance.[36] Indeed, it was Kirklin who informed Johnson that his full salary was being terminated in September 2011.

B. THE WITNESSES' DEPOSITION TESTIMONY

Thomas and Williams both admitted during deposition testimony that they could fire Johnson.[37] Williams also admitted that he gave Johnson his day to day instructions and spoke to Johnson on a daily basis:

> Q. Did you continue to have communications with Mr. Johnson once he started working over in Nigeria?
>
> A. Every day.
>
> Q. Okay. Tell me about those please.

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[34] ROA.320.
[35] ROA.366.
[36] ROA.320.
[37] ROA.6693 and 6747.

A. He was…Mr. Johnson was hired as a Rig Supervisor and he reported to me as the Afren Project Manager. So we had conversations daily on drilling the wells. He submitted the Daily Drilling Report to me every day that he was working or to my back-to-back.

Q. Which was Jack Rankin?

A. Yes.[38]

Mr. Kent Schwarz worked in Nigeria in a land based office for PPIN, but it was unclear at best by whom he was actually employed, and what his actual title was during the boarding of the rig. He received his paychecks from PSL.[39] He initially stated that he was employed as "managing director, Nigeria, for PSL" and that he had held this position for the last nine years.[40] He stated that there would be no one above him at that company in his opinion and he stated "I'm kind of autonomous." However, he also stated that his position was "managing director of PPI Technology Nigeria", a statement somewhat contrary to his earlier statement of being the managing director for PSL in Nigeria.[41] When asked who he believed his supervisor to be, he named Joy Godfried who is a Belize resident whom he had never meet nor ever spoken to.[42] He was clear, however, that he ran the PPIN office in Lagos:

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[38]

[39] ROA.6739.

[40] ROA.6743.

[41] ROA.6742.

[42] ROA.6741.

Q. "The company" being which company?

A. Nigeria Limited.

Q. Okay. Do you believe…other than yourself, who do you think runs PPI Technology Nigeria?

A. Me

Q. …if anyone? There would be no one above you at the company?

A. Not in my opinion. As I say, I believe I'm kind of autonomous.[43]

Johnson does not dispute that there was an actual operating PPIN entity in Lagos, Nigeria. This was run entirely by Kent Schwarz and it actually did pay Nigerian nationals through its own bank account. Johnson's dispute concerns the degree of control, if any, that any PPIN individual ever had over him during the project. Schwartz never spoke to Johnson before the shooting incident.[44] When asked if anyone out of PPIN's office would have directed Johnson on a daily basis, Schwartz said 'absolutely not':

Q: No one out of Apartment 2 or Flat 2 would ever give day to day instructions to Mr. Johnson…?

A: Absolutely not. Absolutely not.[45]

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[43] ROA.6742.

[44] ROA.6743.

[45] ROA.6743, deposition page 78, lines 17-20.

The man who ran PPIN testified that neither he himself or anyone working out of the PPIN office ever gave Johnson any day-to-day instructions in regard to his job duties at all relevant times.

C. THE CONSULTING SERVICES AGREEMENT

PPI Tech, PPIN and PSL had entered into a Consulting Services Agreement ("CSA") concerning the work being done in Nigeria. This CSA establishes clearly that PPI Tech exercised control over Johnson. The CSA was discussed during the deposition of Schwarz. Schwarz was the signatory to the Consulting Services Agreement on behalf of PPIN.

The CSA specifically discusses Mr. Johnson's daily activities in Section 1(e) of the contract. Pertinent portions of the CSA include:

> WHEREAS, PSL and PPI desire to enter into this Agreement, for the Benefit of PSL, to retain PPI supply technical, accounting, legal, Marketing, administrative and logistical support to its wholly Owned subsidiary, PPI Technology Services Nigeria Limited ("PPIN")
>
> ***
>
> Services Provided by PPI.
>
> 1. PPI shall provide to and for the benefit of PSL, the following services.
>
>   (a) Make PPI's staff and employees available to consult with and advise PPI Nigeria at PPIN's reasonable request, concerning policies and Procedures affecting the conduct of the business of PPIN and to Consider suggestions with respect thereto made by PPIN and

(b) Advise PPIN with respect to and assist PPI Nigeria in obtaining insurance coverage and insurance policies pertaining to the conduct of the business.

(c) Provide legal, accounting and administrative support for PPIN upon Request.

(d) B. Randy Sullivan and Ronald D. Thomas will remain as directors of PPIN.

(e) Provide engineering and technical support to PPIN's operations such as:

i. Engineering support

ii. Project management support

iii. Quality assurance

iv. Materials and logistical support

v. Training

2. <u>Remuneration.</u>

(a) In connection with providing the Services in 1(b), 1(c) and 1(d) above: PPIN shall pay to PPI a fee of $15,000 per month.

(b) In connection with providing the Services under 1(e) above: PPIN Shall pay to PPI a fee equal the actual employee cost (including applicable burden) plus 15%. Additionally, PPIN will reimburse PPI For any out of pocket third party expenses such as travel, hotel, visas, etc.

(c) The payment of the fee will be due and payable upon PPIN's receipt of PPI's invoice therefore. PPIN shall make payment in full by wire transfer to a bank account designated by PPI in immediately available funds.

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7. PPI Performance. PPI will perform its functions and discharge its duties under this Agreement in accordance with the standard of care, diligence and judgment normally and reasonably applicable under International commercial standards for the performance of the Centralized Services. PPI shall not be liable for any losses or damages arising directly or indirectly as a result of any bona fide error of judgment by PPI or its personnel. PPI's liability shall be limited to losses or damages directly resulting from exercise of willful or gross negligence by PPI or its personnel, provided, however, in no event shall PPI be liable indirect or consequential loss or damages, including but not limited to, losses of earnings or potential profits and such damages are hereby waived by PSL. It is agreed however, that PPI shall be solely liable for damages to its property or injury to its personnel.[46]

When Schwarz was questioned regarding this language, he admitted that the individuals referenced in 1.(e) were the specialized drilling consultants such as Johnson.[47] The CSA thus required PPI Tech to provide engineering and technical support employees (in this case, Johnson, Rankin and others) for various jobs aboard various rigs. PPI Tech fulfilled its obligation under the CSA by providing the work of Johnson, Rankin, Williams and Thomas for the Ebok Project.

When questioned as to why Johnson's payroll was run through PSL, Schwarz answered that PPIN could have never recruited Johnson to work for a Nigerian based company, and that PPIN does not pay any Americans directly:

Q. Why was Butch's relationship run through PSL and not PPI Nigeria?

[46] ROA.7396-7399.

[47] ROA.6744-6745.

A. Because it's typical. If a Nigerian company called Butch up, he probably wouldn't go to work for them.

Q. Okay. PPI Nigeria's employees that they pay directly are typically Nigerian?

A. Could be. Most are, I guess.

Q. Do you know of any Americans that are paid through PPI Nigeria?

A. Not directly, no.[48]

SUMMARY OF ARGUMENT

At the outset of this case, the district court believed there was a myriad of facts surrounding the role that PPI Tech played in regards to the employment of Johnson, and the court denied summary judgment to PPI Tech. Discovery never controverted any of those "facts." Indeed, much of the discovery proved the facts to be true. The district court erred in reversing its prior ruling since none of the critical underlying facts upon which it based its original ruling were disproven.

Moreover, even if additional review was proper, the district court should not have granted summary judgment to PPI Tech. Under *Ruiz* there were factual disputes concerning at least 4 factors, including whether PPI Tech controlled Johnson, which prevented the granting of summary judgment. And the district court had acknowledged that 2 of the *Ruiz* factors weighed in favor of Johnson being a borrowed employee of PPI Tech. Given that a jury could have reasonably

[48] ROA.7408.

concluded that 6 of the 9 *Ruiz* factors weighed in favor of Johnson being a borrowed employee of PPI Tech, the district court should not have dismissed the claim.

Finally, Johnson's requested alternative relief for leave of court to name PPIN as a defendant was never addressed by the court. Nowhere in the 25 page original Order and Reasons did the district court mention the requested relief nor did the court address whether it was granting or denying was denying leave. Nor was the request addressed in regards to Johnson's Motion to Clarify and/or Amend the Judgment, which the court simply denied this in a single sentence without explanation or mention of the request for leave. Such a denial was in error. There was no trial date set in the case at the time leave was requested and Johnson had never before been granted leave to amend his pleadings. The district court abused its discretion in denying leave to Johnson given the standard of Rule 15.

ARGUMENT

A. STANDARD OF REVIEW

This Court reviews the granting of summary judgment *de novo*.[49] 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."[50] Summary

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[49] *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).

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

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.[51]

Generally, a denial of leave to amend a complaint is reviewed for abuse of discretion. *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927, 934 (5th Cir. 1996, *cert. denied,* 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2 713 (1997); *Halbert v. City of Sherman*, 33 F.3d 526, 529 (5th Cir. 1994). The discretion of the district court is limited, however, by Fed. R. Civ. P. 15(a), which provides that "leave shall be freely given when justice so requires." Rule 15(a) expresses a strong presumption in favor of liberal pleading:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230,

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

9 L.Ed. 29 222 (1962). *See Lowrey v. Texas A & M University System*, 117 F.3d 242, 245 (5th Cir. 1997), quoting same.

B. APPLICABLE LAW

1. Borrowing employer law under *Ruiz*

The factors set forth in *Ruiz v. Shell Oil Company*, 413 F2d 310, 312 (5th Cir. 1969) should be considered by the court to determine the existence of a borrowed-servant relationship. Specifically, *Ruiz* notes the following factors to be considered:

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
>
> (2) Whose work is being performed?
>
> (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> (4) Did the employee acquiesce in the new work situation?
>
> (5) Did the original employer terminate his relationship with the employee?
>
> (6) Who furnished tools and place for performance?
>
> (7) Was the new employment over a considerable length of time?
>
> (8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?[52]

Concerning the *Ruiz* factors, "no one factor is determinative, and courts are instructed to look to the "venture as a whole." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 795 (1949). Whether Johnson is the borrowed servant of PPI is a question of law; however, "[i]f some of the factors involve a factual dispute those factors must be submitted to the jury, unless a sufficient number of the other factors clearly favor summary judgment." *Capps v. N.L. Baroid–NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir.1986) (citing *Gaudet v. Exxon Corp.*, 562 F.2d 351, 357–58 (5th Cir.1977)), *cert. denied* 479 U.S. 838 (1986).

2. Multiple Employers Under the Jones Act

Under the Jones Act an employee may have multiple employers. The immediate employer's status as an employer does not end merely because the seaman may be subject to control by a borrowing employer. *See Spinks v. Chevron*, 507 F.2d 216 (5th Cir. 1975), and *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 446 (5th Cir. 1980). "[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." *Guidry*, 614 F.2d at 452.

[52] *Ruiz*, 413 F.2d at 312-313.

3. Amendments under FRCP Rule 15

Absent a scheduling order in place, as was the record when the court considered PPI Tech's motion, amendments to a pleading are governed by the principles of Federal Rule of Civil Procedure 15(a)(2), which states that leave to amend pleadings "shall be freely given when justice so requires." The Federal Rules allow for liberality in the amendment of pleadings because it is important to assure parties have a fair opportunity to present their claims and defenses. *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967) *rehearing denied* 384 F.2d 365. Rule 15(a) (2) states in part "…The court shall freely give leave when justice so requires."

Concerning Rule 15, in *Marucci Sports, L.L.C. v. National Collegiate Athletic Ass'n*, 751 F.3rd 368, 378 (5th Cir. 2014) this court recently explained:

> Rule 15(a) requires a trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend." *Jones v. Robinson Prop. Grp., LP,* 427 F.3d 987, 994 (5th Cir. 2005) (citation and internal quotation marks omitted). Leave to amend is in no way automatic, but the district court must possess a "substantial reason" to deny a party's request for leave to amend. *Id.* (citation and internal quotation marks omitted). The district court is entrusted with the discretion to grant or deny a motion to amend and may consider a variety of factors including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ..., and futility of the amendment." *Id.* (citation omitted). "In light of the presumption in favor of allowing pleading amendments, courts of appeals routinely hold that a district court's failure to provide an adequate explanation to support its denial of leave to amend justifies reversal." *Mayeaux v. La. Health Serv. and*

> *Indent. Co.*, 376 F.3d 420, 426 (5th Cir. 2004) (citation omitted). However, when the justification for the denial is "readily apparent," a failure to explain "is unfortunate but not fatal to affirmance if the record reflects ample and obvious grounds for denying leave to amend." *Id.* (citation and internal quotation marks omitted).
>
> Denying a motion to amend is not an abuse of discretion if allowing an amendment would be futile. *Briggs v. Miss.,* 331 F.3d 499, 508 (5th Cir. 2003). But an amendment is futile if it would fail to survive a Rule 12(b)(6) motion. *Id.*

Rule 15 (c) governs when the amendment of pleadings relates back to the date of the original pleading. Under Rule 15 (c) (1) (B) an amendment relates back if "…the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out- or attempted to be set out- in the original pleading." The United States Supreme Court discussed Rule 15(c) in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945). In *Tiller* plaintiff, who had originally plead claims only under FELA, sought leave to amend and allege a claim under the Boiler Inspection Act (BIA). The BIA provided for a 3 years statute from the date of the accident, a period which had run at the time leave to amend was sought. The Supreme Court affirmed the lower court's granting of leave, and recognized that while the amendment sought to allege a new applicable law, the underlying cause of action still arose out of the exact same set of facts:

> The original complaint in this case alleged a failure to provide a proper lookout for deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, to warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. The amended complaint charged the failure to

> have the locomotive properly lighted. Both of them related to the same general conduct, transaction and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. 'The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant.' *Maty v. Grasselli Co.*, 303 U.S. 197, 201, 58 S.Ct. 507, 509, 82 L.Ed. 745. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.[53]

ARGUMENT

A. THE DISTRICT COURT ERRED IN REVERSING THE PRIOR RULING OF THE CASE

The district court acknowledged that Judge Vance had previously addressed the same issue that the court was then re-visiting. In justifying the reason for the court to re-visit the issue, the district court stated that there were 'new facts' that had emerged since the court's prior ruling:

> In the instant motion, Johnson asserts nearly the same set of facts as he presented in response to PPI's first motion for summary judgment; however, the record is much more fully developed at this late stage in litigation and PPI has submitted evidence to rebut Johnson's assertions, so the Court must re-evaluate PPI's contentions in light of these new facts.[54]

[53] 323 U.S. 574, 581.

[54] ROA.7519.

The court then proceeded to re-visit and reverse the court's prior findings. This was in error. Indeed the district court stated that PPI had 'submitted evidence to rebut' Johnson assertions, suggesting that a weighing of the evidence was needed.

Even if 'new facts' had been gleaned during discovery, such facts would not have negated the 'myriad' of facts that Judge Vance had previously found to have existed. She had been presented with emails and an affidavit from Johnson. These same emails and affidavit of Johnson still existed in the record at the time the district court re-visited the issue. And the underlying assertions in Johnson's affidavit were not entirely disputed by PPI Tech. For example, PPI Tech admits that Ron Thomas, Galan Williams and Jack Rankin did exert control over Johnson's daily activities, and that Thomas and Williams had the right to terminate Johnson. What Judge Vance found persuasive had not been entirely rebutted by PPI Tech, yet the district court improperly weighed such evidence, and then dismissed the claim.

B. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PPI TECH

The complex, confusing factual nature of PPI Tech's relationship with Johnson provided more than sufficient evidence upon which a jury could have reasonably found Johnson to have been a borrowed servant of PPI Tech. As the district court itself acknowledged after considering the evidence:

> After considering the nine *Ruiz* factors and considering the venture as a whole, it is clear that: (1) PPI, PPIN, and PSL created a complex corporate structure which is not easily understood, and (2) that Johnson did not appreciate the complexity of this structure when employed as a drilling rig supervisor.

Despite acknowledging this 'complex corporate structure which is not easily understood' the district court then made inappropriate factual determinations regarding several of the *Ruiz* factors including control, meeting of the minds, whose work was being performed and the ability to terminate. These factual issues should have been submitted to the jury for determination. Moreover, the 'venture as a whole' strongly suggested that Johnson was employed by PPI Tech and the jury should have been tasked with making this determination.

D. <u>ISSUES OF FACT CONCERNING CONTROL OVER JOHNSON</u>

It was undisputed at the lower court level that Williams, Rankin and Thomas supervised and controlled Johnson. PPI Tech claimed only that these men did not work for PPI Tech. But this was a hotly disputed factual issue which should have been left to the jury. The issue before the lower court was not which individuals controlled Johnson's day to day activates, as that was undisputedly Williams, Rankin and/or Thomas. Rather the *Ruiz* issue before the lower court should have been by whom were Williams, Rankin and Thomas employed when they were instructing Johnson. On this issue, there was a significant factual dispute that the lower court failed to recognize. The district court found:

> Despite the Plaintiff's confusion regarding who Rankin, Thomas, and Williams worked for, it may be reasonably concluded that they each worked for either PPIN, Afren, or PSL, but not for PPI. Further, Plaintiff cites no case in support of his contention that, in analyzing this factor, the Court should consider Johnson's subjective beliefs or analyze who each person held themselves out to work for.

The district court made two errors in respect to the above finding. First, in order to determine by whom Williams, Rankin and Thomas were employed, the court had to make a factual finding which should have been reserved for the jury. While it may have been 'reasonable' to conclude that the individuals worked for PPIN, it would have been just as 'reasonable' to conclude they worked for PPI Tech given (1) they signed their emails with such designation, (2) Thomas and Williams admittedly held positions at PPI Tech at the relevant time (President and Vice President)[55], (3) they never mentioned PPIN to Johnson or being employed by such entity to Johnson, and (4) Schwarz who ran PPIN said his office had nothing to do with controlling the workers on the rigs, including Johnson. It is only after Johnson was seriously injured that Thomas and Williams now claim that any instructions they gave to Johnson were done while they were wearing their PPIN and/or Afren 'hats'.

The second error made by the district court was in dismissing Johnson's 'subjective' beliefs or who each person held themselves out to work for. With due respect to the lower, how could the individuals' representations in emails and in

[55] ROA.324 and 6735.

person to Johnson not be relevant evidence as to who they worked for? If Johnson relied upon such to his detriment, the jury should have been able to consider such. In every respect before this litigation began these men held themselves out to be employed by PPI Tech, and solely PPI Tech. Emails bore such representations, and the company website showed Thomas and Williams to be President and Vice-President of PPI Tech which they continue to admit. The district court erred in finding that the only 'reasonable' conclusion was that the men were employed by PPIN.

The CSA also provided overwhelming evidence that PPI Tech retained control over Johnson (and Rankin, Williams and Thomas). Examination of the CSA shows such.

The CSA starts by establishing that PSL (the shell Belize company) and PPI Tech wanted to enter into an agreement for PPI Tech to provide services [these were the services of Johnson, Rankin, Williams and Thomas] to PPIN. PSL was basically brokering a deal whereby PPI Tech would be a 'vendor' for PPIN of certain administrative services <u>as well as</u> specialized drilling labor such as Johnson, Rankin, Williams and Thomas. Schwartz directly stated such in his deposition:

> Q. Okay. In reviewing this consulting services agreement, Sir, is it fair to say that PPI Tech here in Houston is a Vendor and PPIN, PPI Nigeria, is a customer in this Situation?

A. Yes, I would liken it very much to the fact that they provide the rental car and we sent the car.[56]

How could PPI Tech have possibly fulfilled its contractual obligation to provide Johnson and others to PPIN if it did not control them to some extent? Under *Spinks* and *Guidry* PPI Tech does not cease to be the primary employer even if a borrowing employer relationship is later established with another company.

The CSA then establishes that PPI Tech financially benefited from any "labor" under section 1(e) that it provided to PPIN. Section 2 regarding 'Remuneration' states that for any services provided under Section 1(e) [which are the PSL 'consultants' such as Johnson, Williams and Rankin] PPIN would pay the actual cost as well as an additional 15%: "*PPIN shall pay to PPI a fee equal the actual employee cost (including applicable burden) plus 15%.*" This allowed PPI Tech to take the money paid by PPIN to PPI Tech for the consultants such as Johnson, Rankin, Williams and others, and sweep their actual salaries into the PSL Belize account (out of which PSL paid Johnson and others), and then PPI Tech still hade 15% left over as profit that PPI Tech had earned on the services of Johnson, Rankin, Williams and other "PSL consultants."

Section 7 of the CSA entitled "PPI's Performance" spells out in plain English that PPI Tech was responsible for the performance of its "personnel", thus explicitly reserving to PPI Tech control over its 'personnel' including Johnson.

[56] ROA.7391

Section 7 also states that PPI would remain liable for the claims of injuries to its personnel: "It is agreed however, that PPI shall be solely liable for damages to its property or injury to its personnel" (emphasis added). Clearly the CSA contemplated Johnson and the other PPI Tech rig workers when it referred to potential injuries to its personnel. And if so, then PPI Tech was in fact referring to such individuals as 'its personnel' in the CSA. And by contract it remained responsible for their performance [read control].

Finally, under the CSA, PPI Tech was paid when it submitted its invoices to PPIN and PPI Tech directed which account would receive the funds [Section 2 (c)], thus retaining control over the method of PPIN making payment and to which account PPIN was to make payment.

Another consideration is the "dual capacity" that Thomas and Williams appear to be taking in their employment rolls. Without question Thomas held the position of President of PPI Tech and Williams held the positon of Vice-President of PPI Tech at all relevant times. The twist in this case is that they characterize their work on the Afren project as being done in different capacities—Thomas as the "Drilling Advisor" for Afren and Williams as a PSL consultant who was supplied by PPIN to Afren through the CSA. Again, the court should not have unilaterally determined that such men were acting only in this purported

capacities—it was just as likely that they were acting in their PPI Tech executive roles when they were controlling Johnson's activities, or in a dual capacity.

There was often evidence at the lower court level that Williams was acting in a PPI Tech capacity when working the Afren job and directing Johnson on a daily basis. This evidence relates to PPI Tech's argument that Williams was a PSL consultant working for Afren, as the court noted: "Defendants claim that Williams and Rankin were both PSL consultants that PPIN supplied as Afren Nigeria Project Managers."[57] This claim by PPI Tech is significant for two reasons. First, recall that the CSA is the document by which PSL paid individuals were provided to PPIN for work on the Afren project. <u>But under the CSA it was PPI Tech that was obligated to provide such individuals under Section 1.(e)</u>. If Williams was a PSL consultant 'that PPIN supplied as Afren Nigeria Project Managers' (as the court found), then this also means that PPI Tech had 'provided' Williams to PPIN. The point is that again we have PPI Tech having enough control over Williams (as it did with Johnson) to 'supply' Williams to PPIN for the Afren project. This level of control should not have been disregarded by the district court as it could have been factually significant to the jury.

Moreover, Williams' testimony raised significant issues of fact as to how he could even be considered a consultant for PSL. He testified:

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[57] ROA.7528.

A. Well, Mr. Johnson himself would have had to initiate the process by completing the contract that was sent to him from PSL.

Q. Do you…

A. And I cannot tell you anyone at PSL. I do not know anyone at PSL.

Q. Have you ever met anyone at PSL?

A. No.

Q. Have you ever been in Belize?

A. I have not.

Q. Are you a board of director of PSL at all?

A. No.

Q. Do you hold any capacity at all at PSL?

A. No.[58]

This testimony by Williams shows just how convoluted the entire relationship was between PSL, PPI Tech and PPIN. Williams has no relationship whatsoever with PSL: he is not paid by PSL, he had never met anyone at PSL, he did not hold any capacity at all at PSL, yet somehow he is purported to be a ‘consultant’ for PSL? This is the man who gave Johnson his day to day instructions and under *Ruiz* who he was employed by is critical. Yet he knows so little of PSL, the company for whom he is supposed to be a consultant at the time of the event? If he was not employed by PSL as a consultant, then he must have been employed by PPI Tech

[58] ROA.6692.

where he held the title of Vice President. This key issue should have been deferred to a jury's determination.

E. <u>ISSUES OF FACT CONCERNING RIGHT TO DISCHARGE</u>

Similar to who retained the right to control Johnson, it was undisputed at the district court level that Thomas and Williams both retained the right to also terminate Johnson. The real issue, again, was who employed Thomas and/or Williams. For all the reason stated above, there were strong facts set forth to suggest that these men were employed by PPI Tech. Just as the district court should not have weighed such evidence in regard to the *Ruiz* control factor, by concluding that "…it may be reasonably concluded that they each worked for either PPIN, Afren, or PSL, but not for PPI", the district court should not have concluded such in regard to the *Ruiz* right to discharge factor. It would have been equally reasonable to conclude that Williams and Thomas were employees of PPI Tech and/or acting as such when they retained the right to terminate Johnson. And recall that Johnson was in fact terminated by PPI Tech's general counsel Scott Kirklin, not anyone associated with PPIN or PSL. PPI Tech has never alleged that Kirklin worked for anyone other than PPI Tech. The fact that Kirklin did in fact terminate Johnson is proof that PPI Tech retained such right to terminate Johnson under *Ruiz*.

F. <u>ISSUES OF FACT CONCERNING AN AGREEMENT OR MEETING OF THE MINDS BETWEEN THE ORIGINAL AND BORROWING EMPLOYER</u>

The district court also erred in making factual determinations concerning any meeting of the minds between PPI Tech, which operated solely out of Houston, Texas, and PPIN, which operated out of Lagos, Nigeria. The court ignored the important testimony from Schwarz on this issue. As the man in charge of PPIN, Schwarz was clear that in his mind that neither he nor anyone working out of Flat 2 gave Johnson instructions on how to perform his work. Certainly PPIN, through Schwarz, did not have a complete understanding of any relationship between itself and PPI Tech. This *Ruiz* factor should have been deferred to a jury rather than decided against Johnson.

G. <u>ISSUES OF FACT CONCERNING WHOSE WORK WAS BEING PERFORMED</u>

The CSA contractually required PPI Tech to provide *engineering* support and other *technical* support to PPIN. See CSA, Section I.(e). Schwarz testified that Johnson was one of the men workers who satisfied this contractual obligation for PPI Tech. The court addressed this contractual obligation by creating a non-existent distinction between the 'support' services the court found Johnson was providing and the 'drilling' services PPIN was obligated to provide: "PPI was

contracted to provide support services to PPIN, not actual drilling services."[59] In fact Johnson was providing drilling services—he was the drilling superintendent on the rig. Johnson was performing the work that PPI Tech was obligated to provide to PPIN. A reasonable jury could have viewed the CSA as such, and thus the 'work being performed' by Johnson was that which PPI Tech was contractually bound to provide. In other words, by virtue of the CSA, Johnson was performing the work of PPI Tech, i.e.) the work under Section I(e). At best this *Ruiz* factor was unclear and the court should not have held that Johnson was performing the work of PPIN to the exclusion of the work of PPI Tech. It was equally plausible that the work of both entities was being performed under the CSA, or that Johnson was performing only the work of PPI Tech.

The district court misconstrued the significance of the CSA. The CSA obligated PPI Tech to provide engineering labor (i.e. Johnson) to PSL which in turn provided such labor to PPIN. The district court's only focus on the CSA was from the standpoint of PPIN. But the CSA also established that PPI Tech had some degree of control over Johnson. How could PPI Tech arrange for Johnson to be provided to PPIN if it did not in fact directly control him? The language obligating PPI Tech to provide Johnson as engineering labor simply cannot be

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[59] ROA.7524.

ignored. If PPI Tech had no relationship with or control over Johnson, how could it have possibly fulfilled its obligations under the CSA?

H. THE "VENTURE AS A WHOLE"

While the *Ruiz* factors are typically cited to determine if an employee is a borrowed employee of defendant company, the Supreme Court has stated that 'the venture as a whole' should be considered. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 795 (1949). In this matter, the venture as a whole gives great support that Johnson was employed by PPI Tech.

First consider the circumstances surrounding Johnson's hiring. The recruiter (John Arriaga) with whom Johnson had initial contact concerning PPI Tech was himself employed by PPI Tech.[60] Arriaga emailed Johnson at the beginning of this whole relationship and signed off on his emails as "John Arriaga- Project Coordinator PPI Technology Services". In that email Arriaga also referred to Galan Williams as 'our super on the project': "I am going to have you call Galan Williams our super on the project tomorrow….he is not available today."[61] After speaking with Williams and being 'hired', Johnson was then passed off to Sandra Birkline for details concerning his hiring. Birkline sent numerous emails to Johnson facilitating his hiring process and every single time she signed the emails as "Sandra Birkline PPI Technology Services LP." Johnson was assigned an

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[60] ROA.6679.
[61] ROA.327.

email address bearing the PPI Tech domain name and once he got into the field, Jack Rankin, who gave daily instructions to Johnson, signed off on his emails as an employee of 'PPI Technology Services'. After the shooting incident, Scott Kirklin, in addition to others, communicated with Johnson, and Kirklin signed his emails as General Counsel for PPI Tech.[62] And when Johnson's relationship with PPI Tech was terminated, it was PPI Tech's general counsel, Kirklin, who terminated Johnson.

This 'venture as a whole' operated as PPI Tech throughout the entire hiring process of Johnson and never indicated anything to the contrary to him. Once Johnson was on the rig, and following the event, he continued to get emails from individuals representing themselves to be employed by PPI Tech, including Rankin, Birkline (who emailed him before and after the event), and Kirklin. If he was indeed 'supplied' to PPIN as PPI Tech argues, the evidence is still confusing at best if PPI Tech ceased to also control and direct Johnson, and the role PPI Tech had at that point.

I. IT IS NOT AN EITHER OR SITUATION

Under the Jones Act, an employee who is 'loaned' to another does not cease to be the employee of his first employer. Johnson could have had two employers and the CSA provides language and obligations of the parties upon which a jury

[62] ROA.362.

could have relied in finding Johnson to have been an employee of PPI Tech. *See Spinks* and *Guidry*, *supra*, holding that a seaman may have two employers and that his immediate employer does not cease to be his employer even if he is a borrowing employee of another company. The district court erred when it failed to apply *Spinks* and *Guidry* and hold that PPI Tech, by virtue of the CSA contract (as well as all the above factors) must have had some relationship of employment and control over Johnson otherwise it could not have fulfilled its contractual obligations. Under *Spinks* the immediate employer does not cease to be the employer of the seaman even if he is being borrowed by another entity. Even if evidence suggested that PPIN satisfied some of the *Ruiz* factors, this did not mean that PPI Tech could not have also have satisfied some of the same factors. *Ruiz* does not hold that there can be only one borrowing employer at a time; it is not a mutually exclusive standard. Given the complex, intertwined nature of the relationship which PPI Tech set up in this case between itself and Johnson, PSL, and PPIN, Johnson submits *Ruiz* is not a singular test in this matter.

J. BAKER IS FACTUALLY DIFFERENT THAN THIS MATTER

The district court cited to and relied upon *Baker v. Raymond Intern., Inc.*, 656 F.2d 173 (5th Cir. 1981), but with due respect to the district court, *Baker* said little that directly applied in this matter. Plaintiff Baker sought to prove that Raymond International, the American parent of his payroll foreign subsidiary

Raymond Saudi Arabia (RSA), was his employer under the Jones Act. The battle in court was over whether Raymond International could be cast as a borrowing employer. This court held merely that Baker had failed to produce any evidence at trial addressing the *Ruiz* factors concerning the borrowing employer status of Raymond International ("Raymond"):

> At the trial, Baker introduced virtually no evidence establishing any of these factors. Raymond's evidence, contradicted by Baker, was that the master of the vessel, and its crew, were employed by RSA, the vessel was operated by RSA, and RSA paid Baker's wages.[63]

Johnson submits that *Baker* decision simply establishes that when an employee of one payroll company (RSA) seeks to hold another entity (Raymond) liable as a borrowing employer under the Jones Act, the seaman must set forth evidence which satisfies the *Ruiz* factors. In this matter Johnson has done so by submitting evidence that: (1) he was hired by PPI Tech, (2) he dealt with PPI Tech on a sole basis in regard to the details of his employment, (3) he was controlled day to day by Rankin, Williams, and Thomas, (4) evidence existed to show that Rankin, Williams and Thomas all were acting as PPI Tech employees when directing Johnson, (5) Johnson was sent emails from multiple individuals in which they represented that they were employed by PPI Tech, (6) PPI Tech was contractual obligated under the CSA to deliver Johnson's services to PPIN, (7) Johnson always believed himself to be employed by PPI Tech and never

[63] Baker, 656 F.2d at 179.

acquiesced in any borrowing relationship with PPIN, and (8) when Johnson was terminated, he was terminated by an employee of PPI Tech. This is materially different than the facts of *Baker* where apparently none of these issues were addressed at trial.

K. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW LEAVE FOR JOHNSON NAME PPIN

Johnson requested leave of court to amend and name PPIN as a defendant in the event the district court granted PPI Tech's motion for summary judgment.[64] The district court never addressed this request at all. It neither denied it or granted it; indeed its Order and Reasons were silent on the request. Johnson then filed a Motion to Clarify and/or Amend the Order and Reasons seeking to determine the decision of the court. The district court simply denied such motion without providing any written explanation. As the record stands, technically the district court has never addressed the request for leave but presumably denied such by implication. Johnson should have been granted leave of court under Rule 15.

The district court had continued the trial of this matter on March 27, 2014.[65] At the time the court issued its Order and Reasons, there was no trial date in place. Rule 15 providing for the liberal amendment of pleadings should have been

[64] ROA.7421-7433.
[65] ROA.7271.

followed by the court. When considering various factors surrounding the request for leave, the district court should have weighed each in favor of Johnson.

Concerning timeliness or unnecessary delay in seeking leave, Johnson had actually prevailed on the exact same issue that PPI Tech was re-arguing to the court, i.e. that there was no material issue of fact concerning PPI Tech's employment relationship with Johnson. This was the motion Judge Vance had originally denied. Why would Johnson have possibly sought leave any time prior to the re-urging of the motion? Johnson could not have predicted that PPI Tech would challenge the prior ruling, and even if so, Johnson would not have predicted the court would reverse a prior ruling on the same issue. Moreover, the depositions of Thomas, Williams and Schwarz had taken place during the summer of 2013.[66] On July 24, 2013, Johnson had in fact sought leave of court to name an additional party [Afren] as a defendant based on evidence obtained during those depositions, and the district court had denied such leave.[67] How would Johnson have possibly thought to then again seek leave (after having been just denied leave) to name PPIN, all as a prophylactic measure in the event PPI Tech tried to re-urge a motion that the court had denied? Given the unique facts and procedural history of this case, there was no delay in Johnson seeking leave once the issue was squarely put before the court.

[66] ROA.6746-6749, 6689-6694 and 6738-6745.
[67] ROA.3409-3410.

Concerning possible delay of trial date, there was none, as no trial date was set when Johnson sought leave. Moreover, no additional depositions or discovery would have been needed as the key individuals had all been deposed. Johnson was not seeking to name an unrelated party—instead he sought only to name an incestuously intermixed entity of PPI Tech, purportedly controlled by the PPI Tech individuals who had already been deposed.

Concerning prejudice to PPI Tech, again there was none. PPI Tech had been represented throughout the case and presumably PPIN would have been represented by the same counsel. Judge Vance addressed the exact issue re-presented to Judge Barbier concerning the purported role played by PPIN in this matter—thus, clearly counsel for PPI Tech knew of all employment issues at the start of the litigation. PPI Tech could not claim that it would somehow need to conduct further discovery concerning such issues.

In a stinging procedural twist to Johnson, who has now endured a gunshot wound to his knee and a plethora of surgeries which have left him crippled, had Judge Vance granted PPI Tech's original motion to dismiss, Johnson would have had sufficient time to re-file a suit against PPIN. Now, given that the district court dismissed the claims in April 2014 more than three years after the November 2010 incident, it is beyond any three year statute. Amending to name PPIN would have allowed for the pleading to relate back to the original date of filing in 2011 [see

discussion of Rule 15 (c) relation back above] and the district court was made aware of this significance when Johnson sought leave. Thus leave of court was very significant to Johnson and the district court improperly failed to realize such when it denied leave. The [delayed] timing of PPI Tech's motion to reurge its summary judgment, which was done more than three years beyond the incident date, played significantly in this matter. Thomas and Williams were deposed in June 2013, so any evidence needed to reurge PPI Tech's motion was available to it four months before the November 2013 three year anniversary date, yet PPI Tech did not re-urge its motion until after the anniversary date.

L. IN CLOSING

In closing, Johnson submits the above evidence showed the following. PPI Tech created a byzantine corporate structure to achieve tax advantages and the ability to provide drilling services off the coast of Nigeria. PSL was nothing more than a shell corporation set up in Belize as a payroll account for the PPI Tech international workers such as Johnson and Rankin. PPIN, in this case, was the local Nigerian entity tasked with entering into the local contracts presumably due to Nigerian regulations or politics which required that Nigerian companies drill off the coastline. But since PPIN didn't directly employee any specialized drilling consultants, it needed to somehow arrange for those individuals to work the Ebok project. And, as Schwarz said, "If a Nigerian company called Butch up, he

probably wouldn't go to work for them." This then required PPIN to find qualified, specialized workers for the Ebok project and it did this by having its parent company, PPI Tech, provide such labor and workers. Johnson speculates that the PSL shell is presumably required so that an American company doesn't receive any funds necessary to pay the overseas drilling specialists. Johnson further speculates that this may relieve PPI Tech from paying any payroll taxes and other US tax obligations on these 'Belize independent contractors' and PPI Tech justifies this by presumably arguing that the money is 'generated' overseas for the drilling support in Nigeria. Regardless of any potential domestic tax benefits in the US or foreign regulatory benefits in Nigeria, it is clear that PPI Tech orchestrated the tri-party structure in this matter. But the reality was that Johnson remained controlled by PPI Tech and its employees. Otherwise, PPI Tech would have not been able to satisfy the CSA and it would have been in violation of Section 7 of the CSA which required it to perform its services in certain manners. PPI Tech could only serve as a 'vendor' to PPIN if PPI Tech retained control over its product (specialized labor).

CONCLUSION

Judge Vance properly denied summary judgment to PPI Tech at the outset of the case as she recognized the evidence supporting PPI Tech as Johnson's employer under *Ruiz*. She was presented with the exact same argument PPI Tech

later made to Judge Barbier. This was not a case were additional discovery then proved all of Johnson's contentions to be false, thus justifying a reversal of opinion. Instead, during discovery Thomas and Williams both confirmed what Johnson had plead to Judge Vance, that they (1) controlled Johnson day to day and (2) had the right to fire him. They both also admitted they held executive positions at the relevant time period as Johnson had represented at the outset of the case. Discovery revealed the Consulting Services Agreement which obligated PPI Tech to provide Johnson's services for the rig. This evidence further supported Johnson's position that PPI Tech necessarily had some degree of control over him.

PPI Tech and PSL were both controlled by the same entity out of Houston, Texas. Thus these entities could, and arguably should, have made it clear who they believed Johnson to have been working for at the time of his incident. This was not a case under *Ruiz* where an independent third party contractor began to control Johnson with his knowledge. Instead this is a case where entities under common control failed to make anything about Johnson's employment clear to anyone, including Johnson. This lack of clarity created issues of fact which should have been resolved by a jury. PPI Tech should not benefit from the murky, opaque facts it created surrounding the employment of Johnson. To Johnson, his employment with PPI Tech seemed clear. It was only after suit was filed that the facade of separate entities was set forth.

Johnson properly believed himself to be employed by and working for the PPI Tech entity out of Houston and a jury could reasonably have found such. The district court erred in taking that issue away from the jury under the facts of this case. Johnson seeks relief from this court of reversing the district court's ruling in favor of PPI Technology Services, LP, and this court holding that there are material issues of fact concerning whether under *Ruiz* PPI Technology Services LP was a borrowing employer of Johnson at the time of the incident.

Moreover, leave of court should have been granted to Johnson. He had never been granted leave to amend his pleadings, and had actually been denied leave the one time he sought such. Rule 15 applied at the time of the district court's ruling and under such a liberal standard, leave should have been granted. Johnson seeks additional relief from this court of reversing the district court's refusal to allow Johnson to amend to name PPIN as a defendant in this matter.

Respectfully Submitted,

/s/Timothy J. Young

TIMOTHY J. YOUNG (22677)
TAMMY D. HARRIS (29896)
THE YOUNG FIRM
400 Poydras Street, Suite 2090
New Orleans, Louisiana 70130
Telephone: (504) 680-4100
Facsimile: (504) 680-4101
Attorneys for Appellant, James Johnson

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 18th day of August 2014:

Kevin Andrew Marks
Galloway, Johnson, Tompkins, Burr & Smith
40th Floor
701 Poydras Street
1 Shell Square
New Orleans, LA 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456

Scott Robbert Huete
Galloway, Johnson, Tompkins, Burr & Smith
40th Floor
701 Poydras Street
1 Shell Square
New Orleans, LA 70139
Telephone: (504) 525-6802
Facsimile: (504) 525-2456

/s/Timothy J. Young
TIMOTHY J. YOUNG
Attorney for Appellant, James Johnson

CERTIFICATE OF COMPLIANCE

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

Dated: August 18, 2014

/s/Timothy J. Young
TIMOTHY J. YOUNG
Attorney for Appellant, James Johnson