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A Wide Berth for FRCP 52: Application of the Clearly Erroneous Standard of Review in the Admiralty Law Context

Emma Nitzberg
Boston College Law School, emma.nitzberg@bc.edu

A WIDE BERTH FOR FRCP 52: APPLICATION OF THE *CLEARLY ERRONEOUS* STANDARD OF REVIEW IN THE ADMIRALTY LAW CONTEXT

EMMA NITZBERG*

Abstract: In the Admiralty proceeding *Frescati Shipping Co. v. Citgo Asphalt Refining Co.*, an oil tanker within its final approach of its destination on the Delaware River struck an abandoned ship anchor. The anchor punctured the hull of the ship, allowing 263,000 gallons of crude oil to spill from it. In reviewing the trial court's decision, the U.S. Court of Appeals for the Third Circuit employed the *clearly erroneous* standard of review. Using this highly deferential standard, the Third Circuit held that the trial court had failed to find facts specially and state its conclusions of law separately, requirements of Federal Rule of Civil Procedure 52(a)(1). In the highly specialized context of Admiralty law, uniformity and consistency are especially necessary. By employing the *clearly erroneous* standard of review in the Admiralty context, the Third Circuit adequately served the aim of maintaining uniformity of results within a niche area of law.

INTRODUCTION

No two oil spills are ever exactly the same.[1] The type of oil, location, and amount of oil spilled are just a few general components that contribute to the success or failure of a clean-up process.[2] Generally, there are four main types of oil spill clean-up techniques: leave the oil alone so that it naturally breaks down; contain the spill with booms and collect it from the water's surface using skimmer equipment; use dispersants to break up the oil and speed up the natural biodegradation process; or introduce biological agents to the spill to hasten biodegradation.[3]

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[1] *See How Do You Clean Up an Oil Spill?,* U. OF DEL. SEA GRANT PROGRAM, http://www.ceoe.udel.edu/oilspill/cleanup.html [http://perma.cc/6S5Y-4NCF].

[2] *Id.*

[3] *Id.* When spilled, different types of oil will have various effects on aquatic ecosystems. *See* Andrea Thompson, *FAQ: The Science and History of Oil Spills*, LIVESCIENCE (Apr. 23, 2010, 6:52 AM), http://www.livescience.com/9885-faq-science-history-oil-spills.html [http://perma.cc/4DHS-HMGB]. Lighter oils, like gasoline and diesel fuel, can be highly toxic to living organisms and fatal when an animal breathes in fumes or absorbs the oil through their skin. *Id.* Heavy crude oil, although less toxic than gasoline, coats the furs and skins of marine wildlife, smothering them to death.

From 1970 until 2009, a reported 1.7 billion gallons of oil have been spilled from tankers into waters around the world, according to the International Tanker Owners Pollution Federation Limited.[4] In the thirty-one years between 1972 and 2004, the Delaware Bay alone has endured more than 13 million gallons of oil spills.[5]

One evening in November 2004, the *Athos I* tanker made its way up the Delaware River, nearing the end of a 1900-mile journey from Venezuela.[6] The *Athos I* had been sub-chartered from a pool of tankers by a set of Citgo Oil affiliates ("CARCO"), and was delivering a shipment of crude oil.[7] As it made its final approach towards Citgo Oil's New Jersey Asphalt Refinery, the vessel had an allision with an abandoned ship anchor just 900 feet from the pier.[8] Upon contact, the *Athos I*'s load of crude oil spilled into the Delaware River through two punctures in the ship's hull.[9]

At the time of the spill, the *Athos I* had been contracted by CARCO to carry oil from Venezuela.[10] Contracts in Admiralty law are called charter parties.[11] Prior to the spill in 2001, the *Athos I* had been enlisted in a tanker pool pursuant to a *time* charter party between Frescati Shipping Co., Ltd. ("Frescati") and Star Tankers, Inc. ("Star Tankers").[12] CARCO then sub-chartered the *Athos I* from Star Tankers to transport a shipment of heavy

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Id. When the feathers of seabirds or fur of marine mammals get covered in heavy crude oil, the animals are unable to maintain their normal body temperatures, causing death by hypothermia. *Id.* Because oil floats, the animals most often harmed in such a disaster are sea otters and sea birds that are found at the sea's surface. *How Oil Harms Animals and Plants in Marine Environments*, OFFICE OF RESPONSE & RESTORATION, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-harms-animals-and-plants.html [http://perma.cc/UDE2-LV9K].

[4] Thompson, *supra* note 3.

[5] *The Athos I Oil Spill on the Delaware River,* U. OF DEL. SEA GRANT PROGRAM, http://www.ceoe.udel.edu/oilspill/index.html [http://perma.cc/BY35-7HMQ] (listing individual spills in the Delaware River and Bay).

[6] Frescati Shipping Co. v. Citgo Asphalt Refining Co., 718 F.3d 184, 189, 192 (3d Cir. 2013).

[7] *Id.* at 190.

[8] *Id.* at 192. An allision is defined as "the running of one ship upon another ship that is stationary—distinguished from collision." John Konrad, *Allision—Nautical Word of the Day*, GCAPTAIN (Nov. 8, 2007), http://gcaptain.com/maritime-word-of-the-day-allision/#.Vhf2UrRViko [http://perma.cc/CZH5-XVNM].

[9] *Frescati Shipping Co.*, 718 F.3d at 189.

[10] *Id.* at 190.

[11] *Id.*

[12] *Id.* at 191. In reviewing the Admiralty contract between the parties, the Court provided:

> "Under a time charter, the owner [Frescati] remains responsible for the navigation and operation of the vessel and the charterer [Star Tankers] assumes responsibility for arranging for the employment of the vessel, providing fuel and paying for certain cargo-related expenses." The time charter party gave Star Tankers, an intermediary or "middleman," the right to sub-charter the *Athos I* although Frescati remained responsible for keeping the vessel staffed and serviceable.

Id. (quoting TERENCE COGHLIN ET AL., TIME CHARTERS ¶ 1.59 (2008)).

crude oil from Venezuela to its asphalt refinery in Paulsboro, New Jersey.[13] The charter party drawn between Star Tankers and CARCO was a *voyage* charter party.[14] This voyage charter party was based on a standard industry form, which contained what is known as a "safe port" and "safe berth" warranty ("safe berth warranty").[15] The safe berth warranty provided that the *Athos I* would "proceed as ordered to Loading Port[s] named . . . or so near thereunto as she may safely get . . . ."[16] Once loaded, she would go as ordered directly to the discharging port, or so near as she may safely get.[17] The safe berth warranty further provided that the *Athos I* would load and discharge at any place or wharf that is designated and procured by CARCO, provided she can do so safely afloat.[18]

In the wake of the Exxon Valdez oil spill, the United States government passed the Oil Pollution Act of 1990 ("OPA") to incentivize "responsible parties" to quickly facilitate the clean-up process from oil spills.[19] OPA enables the Environmental Protection Agency (EPA) to respond to oil spills swiftly by drawing on funds from a trust financed by a tax on oil, exclusively available to clean up oil spills.[20] By setting liability limits on the amount a party can recoup, OPA incentivizes private parties to swiftly conduct clean-up of a spill and thus limit their financial exposure and damage to the environment.[21] Prior to the enactment of OPA, responses to oil spill and liability lacked definitive language explaining who was responsible to report and respond to a spill, which party was in charge of clean-up and containment, and the finite circumstances under which a party could avoid liability or limit it, among other specifications.[22]

To comply with OPA, Frescati quickly initiated a clean-up response, with the intention of limiting their liability and receiving reimbursements from the U.S. government.[23] Looking to reassign liability for the debacle, in

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[13] *Id.* at 190.

[14] *Id.* at 191. "Unlike a time charter party in which a 'vessel's employment is put under the orders of . . . charterers' for a period of time, under a voyage charter party the ship is hired 'to perform one or more designated voyages in return for the payment of freight.'" *Id.* (quoting JULIAN COOKE ET AL., VOYAGE CHARTERS ¶ 1.1 (2007)).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2012); *Frescati Shipping Co.*, 718 F.3d at 193. "OPA was born of two imperfect parents—the Clean Water Act of 1977 (CWA) and the Federal Water Pollution Control Act (FWPCA)." David H. Sump, *The Oil Pollution Act of 1990: A Glance in the Rearview Mirror*, 85 TUL. L. REV. 1101, 1102 (2011).

[20] *Summary of the Oil Pollution Act*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/laws-regulations/summary-oil-pollution-act [http://perma.cc/E78Y-H7WN].

[21] *Frescati Shipping Co.*, 718 F.3d at 193.

[22] *See* Sump, *supra* note 19, at 1102–03.

[23] *See Frescati Shipping Co.*, 718 F.3d at 193.

two consolidated actions, Frescati filed suit against CARCO in the United States District Court for the Eastern District of Pennsylvania alleging a breach of contract for CARCO's breach of a safe berth warranty, negligence, and negligent misrepresentation.[24] To recoup the costs not reimbursed by the U.S. government, Frescati filed contract and tort claims against CARCO.[25] The government also sought reimbursement from CARCO to Frescati's contractual claim pursuant to a limited settlement agreement.[26] After a forty-one day bench trial, the District Court found that CARCO was not liable for the accident under any of the three claims.[27]

Pursuant to Federal Rule of Civil Procedure 52(a)(1), "[I]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately."[28] The United States Court of Appeals for the Third Circuit employed *de novo* review to assess the District Court's conclusions of law regarding the charter party and the legal question of the nature and extent of the duty of due care owed by CARCO.[29] The Third Circuit found that the District Court violated FRCP 52(a) when the District Court judge elected "to set forth in a narrative fashion his finding of facts and conclusions of law."[30] In Federalist Paper No. 80, Alexander Hamilton wrote of Admiralty Laws: "They so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."[31] This Comment argues that the Third Circuit appropriately employed FRCP 52(a) and the *clearly erroneous* standard of review in this case, thus maintaining the federal interests of uniformity and consistency in Admiralty proceedings so as to provide an undeviating standard across all jurisdictions.[32]

I. FACTS AND PROCEDURAL HISTORY

The *Athos I* was a single-hulled oil tanker owned by Frescati.[33] At the time of the accident, the *Athos I* was chartered by Star Tankers (who was

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[24] *See id.* at 190.
[25] *Id.* at 189.
[26] *Id.*
[27] *Id.*
[28] FED. R. CIV. P. 52(a)(1).
[29] *Frescati Shipping Co.*, 718 F.3d at 196.
[30] *Id.* at 197.
[31] THE FEDERALIST NO. 80, at 437 (Alexander Hamilton) (E.H. Scott ed., 1894); *see also* Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Castro*, 30 J. MAR. L. & COM. 361, 373 (1999).
[32] *See infra* notes 100–143 and accompanying text.
[33] *Frescati Shipping Co.*, 718 F.3d at 190.

not a party in this action).[34] To prepare for arrival in New Jersey, the master of the *Athos I* was given a copy of CARCO's port manual, which stated that the allowable maximum draft at the port was thirty-eight feet, but that this number was subject to change and should be verified before a vessel's arrival.[35] Four days prior to *Athos I*'s arrival, the maximum draft was reduced to thirty-six feet, unbeknownst to its master and crew.[36] At the original trial, there were no findings on the record regarding the *Athos I*'s draft at the time of the accident.[37]

On November 26, 2004, the *Athos I* neared its final destination at CARCO's asphalt refinery in Paulsboro, New Jersey.[38] CARCO's asphalt refinery is located on a jetty on the New Jersey side of the Delaware River.[39] Federal Anchorage Number Nine "separates the River channel from CARCO's port waters."[40] Following customary industry procedure for docking, the *Athos I* made a "starboard (right) 180-degree turn into the Anchorage" and then was "pushed sideways by tugs (i.e. parallel parked) into CARCO's pier."[41] At around 9:02 PM, while this process was underway, the *Athos I* "suddenly listed to the port (left) side, and oil became visible in the water."[42] An abandoned anchor had punctured the *Athos I*, creating two holes that spilled 263,000 gallons of crude oil into the Delaware River.[43] When the *Athos I* made contact with the anchor, it was 900 feet from CARCO's berth, "approximately half way through the Anchorage."[44] The tide

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[34] *Id.*

[35] *Id.* at 191–92. A draft is defined as:

> The depth of the vessel below the waterline measured vertically to the lowest part of the hull, propellers, or other reference point. When measured to the lowest projecting portion of the vessel, it is called the "draft, extreme"; when measured at the bow, it is called "draft, forward"; and when measured at the stern, the "draft, aft"; the average of the draft, forward, and the draft, aft is the "draft, mean," and the mean draft when in full load condition is the "draft load."

Nomenclature of Naval Vessels, Glossary of Shipbuilding Terms, NAVAL HISTORY & HERITAGE COMMAND, http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/n/nomenclature-of-naval-vessels/glossary-of-shipbuilding-terms-d-h.html [http://perma.cc/E62N-5WZY].

[36] *Frescati Shipping Co.*, 718 F.3d at 192.

[37] *Id.* at 204.

[38] *Id.* at 192.

[39] *Id.* "Jetty" is defined as "a long structure that is built out into water and used as a place to get on, get off, or tie up a boat." *Jetty*, MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/jetty [http://perma.cc/DK4B-VAEK].

[40] *Frescati Shipping Co.*, 718 F.3d at 192.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

had reached its lowest point fifty minutes prior to the accident, and thus was still relatively low.[45]

The District Court did not make a finding of fact as to the exact position of the anchor at the time of contact, nor did it make a "finding as to the depth of the Anchorage where the anchor lay."[46] Nonetheless, the District Court found expert testimony providing that the anchor was "lying horizontal at the time of the accident with a height of 41 inches above the bottom of the River" to be persuasive.[47] The District Court also did not make any finding as to the draft of the *Athos I*, but "assumed for purposes of analysis" that Frescati's representation—thirty-six feet, seven inches—was correct.[48] Further, the District Court did not resolve the issue of depth or position of the anchor, although again found "persuasive evidence that the anchor was lying down at the time of the accident."[49] On appeal, the Third Circuit found a FRCP 52 violation due to the District Court's failure to find specific facts.[50]

Frescati spent roughly $180 million in clean-up costs for oil deposited in the Delaware River and damages to the *Athos I*.[51] Because of the cap on recoupable funds from OPA, Frescati was only able to obtain $88 million in reimbursement from the U.S. government and was, thus, still responsible for paying $45,474,000 in clean-up costs.[52] As a result, the government stepped into Frescati's position as a statutory subrogee, seeking damages from the terminal owner, CARCO, for the value of reimbursement costs.[53]

In January 2005, Frescati filed a "Complaint for Exoneration From or Limitation of Liability pursuant to the Shipowner's Limitation of Liability Act."[54] In their complaint, Frescati sought a declaration that it was not liable for any losses from the accident, "or in the alternative, a limit on liability to the value of the *Athos I* and its pending freight."[55] CARCO asserted claims in the action against Frescati, seeking recovery for its lost oil in the amount of $259,217.[56] Frescati then filed a counterclaim against CARCO for the costs that Fresceti had incurred beyond those that had been reimbursed by the government under OPA.[57] In 2008, the U.S. government, as statutory subrogee, filed another suit against CARCO seeking $88 million in com-

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 193.
[49] *Id.*
[50] *Id.* at 197.
[51] *Id.* at 189.
[52] *Id.* at 193.
[53] *Id.* at 189.
[54] *Id.* at 195.
[55] *Id.*
[56] *Id.*
[57] *Id.*

pensation.[58] In a partial settlement agreement, the U.S. government waived its negligence claims against CARCO in exchange for CARCO's agreement to refrain from pursuing its negligence claims against the government.[59] The government then moved for partial summary judgment as it believed CARCO was advancing on its negligence claim, which was denied.[60] The two actions were consolidated and were tried during a forty-one day bench trial.[61]

The District Court found that CARCO was not responsible under a contract or tort theory for any of the losses from the accident.[62] The District Court found that Frescati lacked standing because they were not a "third party beneficiary to the voyage charter party between CARCO and Star Tankers," and that CARCO had not breached the safe berth warranties.[63] The District Court further ruled that CARCO "was not negligent in failing to search for or detect the abandoned anchor that lay in the Anchorage" as it was "outside the approach to CARCO's berth" and "thus fell beyond its obligation to provide a safe entry."[64] The District Court finally held that there was no negligent misrepresentation by CARCO in failing to alert the *Athos I* that "the maximum draft had been reduced from 38 feet to 36 feet."[65] Instead, the District Court decided that "the anchor-dropper," rather than CARCO, was at fault and thus rejected all claims.[66]

The Third Circuit ultimately issued four holdings.[67] In its endeavor to provide a more thorough analysis, the Third Circuit found that the District Court had violated FRCP 52 due to a clear lack of factual findings.[68] Moreo-

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[58] *Id.* "Subrogation" means assuming the legal rights of a person for whom expenses or a debt has been paid. Typically, subrogation occurs when an insurance company that pays its insured client for injuries and losses then sues the party that the injured person contends caused the damages to him/her. *Subrogation*, LAW.COM, http://dictionary.law.com/default.aspx?selected=2044 [https://perma.cc/VRC6-7PKP]. A "subrogee" is the person or entity that assumes the legal right to attempt to collect a claim of another (subrogor) in return for paying the other's expenses or debts which the other claims against a third party. *Subrogee*, THE FREE DICTIONARY BY FARLEX, http://legal-dictionary.thefreedictionary.com/subrogee [https://perma.cc/RZF2-94BR].

[59] *Frescati Shipping Co.*, 718 F.3d at 195.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 196.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 214–15. The Court held: (1) as the tanker owner, Frescati was a third party beneficiary of the safe berth warranty; (2) whether the safe berth warranty had been breached was dependent upon whether the port was safe based on agreed upon dimensions of the draft; (3) the *Athos I* had been within its final approach to CARCO's terminal and thus CARCO had a duty to exercise reasonable diligence in providing a safe approach; and (4) Frescati could not recover based on a claim for negligent misrepresentation. *Id.*

[68] *Id.* at 197.

ver, the Third Circuit found that the District Court committed error by drawing conclusions of law given the obvious absence of critical factual findings.[69]

II. LEGAL BACKGROUND

Federal Rule of Civil Procedure (FRCP) 52(a)(1) states: "[I]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately."[70] From FRCP 52 springs the *clearly erroneous* standard of appellate review.[71] In *United States v. U.S. Gypsum Co.*, the United States Supreme Court defined the *clearly erroneous* standard when officials of Gypsum Co. were indicted for violations of the Sherman Act.[72] The Supreme Court found testimony from the trial court was in conflict with "contemporaneous documents" regarding a specific finding, and therefore the trial court's findings were clearly erroneous.[73] A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[74]

In *Mayo v. Lakeland Highlands Canning Co*., FRCP 52(a) was further clarified when Lakeland Highlands Canning Company joined with others to enforce the Grower's Cost Guarantee Act.[75] When corporations of Florida and other states failed to comply with a state statute, the Commissioner of Agriculture, Nathan Mayo, attempted to cancel their licenses as citrus fruit dealers.[76] Defendant Mayo appealed a judgment granting a temporary injunction on the cancellation of the licenses.[77] On appeal, the Supreme Court held that an appellant is entitled "to have explicit findings of fact upon which the conclusion of the court was based."[78] Furthermore, "[s]uch findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."[79]

FRCP 52 resurfaced in *United States v. Aluminum Co. of America,* when the U.S. Circuit Court for the Second Circuit heard a case in which defendants were charged with "monopolizing interstate and foreign commerce."[80] Judge Learned Hand remarked that defining "clearly erroneous"

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[69] *See id.*
[70] FED. R. CIV. P. 52(a)(1).
[71] *See* United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).
[72] *Id.* at 366–67, 371–72.
[73] *Id.* at 396.
[74] *Id. at* 395.
[75] 309 U.S. 310, 311–13 (1940).
[76] *Id.* at 311–12.
[77] *Id.* at 312.
[78] *Id.* at 317.
[79] *Id.*
[80] *See* 148 F.2d 416, 421 (2d Cir. 1945).

was difficult, and all that could be said about the standard is that an appellate court will reverse a judge's findings only very reluctantly, suggesting a high degree of deference to the trial court.[81]

In 1985, the Supreme Court granted a writ of certiorari in *Anderson v. City of Bessemer City,* in which an applicant alleged sex discrimination against the City of Bessemer when a job position was given to a male applicant in her stead.[82] Justice Byron White opined for the court that the Second Circuit had "misapprehended and misapplied the clearly erroneous standard" in overturning three of the District Court's findings.[83] The Supreme Court provided limits to the application of *clearly erroneous*, stating: "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . [A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."[84]

In 1980, the U.S. Circuit Court for the Third Circuit in *H. Prang Trucking Co. v. Local Union 469* relied on Wright and Miller's Federal Practice & Procedure as authority to require trial courts to follow FRCP 52 on a mandatory basis.[85] In *H. Prang Trucking Co.*, an employer appealed from an order and judgment denying motions for preliminary and permanent injunctions.[86] The Third Circuit cited as circuit precedent *O'Neill v. United States*, asserting that FRCP 52(a) "is not satisfied 'by the statement of the ultimate fact without the subordinate factual foundations for it which also must be the subject of specific findings.'"[87] The Third Circuit further dictated that subordinate findings "may not be left unarticulated . . . . [T]herefore, it is necessary that the trial court specify these subordinate facts upon which the ultimate factual conclusion must rest."[88] An appeals court will "vacate the judgment and remand the case for findings if the trial court has failed to make findings when they are required or if the findings it has made are not sufficient for a clear understanding of the basis of the decision."[89]

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[81] *Id.* at 433.
[82] *See* 470 U.S. 564, 567 (1985).
[83] *Id.* at 566.
[84] *Id.* at 573 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, (1969)).
[85] H. Prang Trucking Co. v. Local Union 469, 613 F.2d 1235, 1238 (3d Cir. 1980) (citing 9 CHARLES ALAN WRIGHT & ARTHUR T. MILLER, FEDERAL PRACTICE & PROCEDURE § 2574 (1971)).
[86] *Id.* at 1236.
[87] *Id.* at 1238 (citing O'Neill v. United States, 411 F.2d 139 (3d Cir. 1969)).
[88] *Id.*
[89] *Id.*

In 1990, the Third Circuit expanded their FRCP 52 jurisprudence in *Bradley v. Pittsburgh Board of Education*.[90] In *Bradley*, a high school teacher filed a motion for preliminary injunction to stop a school from eliminating a teaching methodology she favored, and from retaliating against her for using that method.[91] When the U.S. District Court for the Western District of Pennsylvania denied her motion, the teacher appealed.[92] The U.S. Court of Appeals for the Third Circuit held that the District Court failed to make required findings of fact and conclusions of law upon their denial, requiring remand where the Third Circuit was unable to determine why the District Court had rejected the preliminary injunction on the teacher's claim for banning the teaching method.[93] The Third Circuit, applying the *Mayo* standard, held that an FRCP 52 violation is marked by inadequate findings that are "obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."[94]

FRCP 52 does have its limits, as set forth in *Hazeltine Corp. v. Gen. Motors Corp.*, which clarified that the rule does not mandate a literal adherence, but that an appellate court may remand a case for further findings if the trial court failed to make findings that are required.[95] The Third Circuit stated: "The failure of the trial judge to comply literally with the provisions of Rule 52(a) . . . is not always a ground for reversal and remand with instructions to make specific findings as required by the Rule."[96] The rule requires that in an action tried on the facts without a jury, the court must find the facts specially and state its conclusions of law separately, and that an appellate court shall uphold the lower court's findings unless they are clearly erroneous.[97]

A final significant Rule 52(a) decision was *McAllister v. United States*, in which the Supreme Court decided a case brought by an assistant engineer under the Suits in Admiralty Act because he contracted polio in poor condi-

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[90] *See* 910 F.2d 1172, 1174 (3d Cir. 1990).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1178.

[94] *Id.* (quoting Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 317 (1940)).

[95] 131 F.2d 34, 37 (3d Cir. 1942) ("If . . . the opinion of the trial judge afforded a 'clear understanding of the basis of the decision below' and resolved the major factual disputes, the mere formal requirement of separation of findings of fact and conclusions of law has been held not sufficient to necessitate a reversal."); *see U.S Gypsum Co.* 333 U.S. at 542; *see also* Edward H. Cooper, *Civil Rule 50(A): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 645–46 (1988) (arguing that the clearly erroneous standard of review has no intrinsic meaning, and is successful because it is "elastic, capacious, malleable, and above all variable").

[96] *Hazeltine Corp.*, 131 F.2d at 37.

[97] *See* Maureen McGirr, Note, Panduit Corp. v. Dennison Manufacturing Co.: De Novo *Review and the Federal Circuit's Application of the Clearly Erroneous Standard*, 36 AM. U. L. REV. 963, 963 (1987).

tions while on board a vessel.[98] *McAllister* established that FRCP 52(a)'s application of a *clearly erroneous* standard was the proper standard of review for findings of fact in an Admiralty proceeding.[99]

III. ANALYSIS

In *Frescati Shipping Co. v. Citgo Asphalt Refining Co.*, the U.S. Court of Appeals for the Third Circuit ultimately issued four holdings.[100] First, the United States District Court for the Eastern District of Pennsylvania's decision that Frescati Shipping Co., Ltd. ("Frescati") was not a third party beneficiary of the "safe port" and "safe berth" warranty ("safe berth warranty") within the charter party was overturned.[101] Although not a named beneficiary within the charter party between Star Tankers Inc. ("Star Tankers") and a set of Citgo Oil affiliates ("CARCO"), the Court reasoned that the *Athos I* benefited from the warranty.[102] Second, the Court held that the *Athos I* was within its "final approach" when it struck the submerged anchor.[103] This determination was integral in assessing CARCO's geographic sphere of responsibility necessary in calculating its assumption of duty.[104] Third, the Court held that although assessing the standard of care required for a reasonable wharfinger is a matter of law, "factual findings predominate" in a negligence analysis.[105] In its attempt to review the factual findings for clear error, the Court again bluntly noted that "there were no findings" to be assessed.[106] The Court's final holding stated that Frescati's attempt to recover by negligent misrepresentation "fails . . . as a matter of law."[107]

Within the third holding, the Third Circuit employed FRCP 52(a)'s *clearly erroneous* standard to the District Court's findings on the issue of breach of the safe berth warranty.[108] The Court in *Frescati Shipping Co.*

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[98] *See* 348 U.S. 19, 19–20 (1954).

[99] *Id.* at 20.

[100] 718 F.3d 184, 215 (3d Cir. 2013).

[101] *Id.* at 200.

[102] *Id.* at 197–98 (holding that Frescati, as the owner of the *Athos I*, was thus a third-party beneficiary).

[103] *Id.* at 211.

[104] *See id.* (establishing that the *Athos I* was within its final approach when the allision occurred, and also establishing that CARCO had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach).

[105] *Id.* "Wharfinger" is defined as "The owner or occupier of a wharf . . . ." *Wharfinger*, BLACK'S LAW DICTIONARY (10th ed. 2010).

[106] *Frescati Shipping Co.*, 718 F.3d at 211.

[107] *Id.* at 214.

[108] *See id.* at 197. The District Court failed to make findings of fact on crucial details, such as the draft of the *Athos I*. *Id.* The U.S. Court of Appeals for the Third Circuit commented:

> Instead, it concluded "that the port and berth were generally safe" due to "the volume of commercial traffic that passed without incident," not withstanding that it was

applied FRCP 52(a) as it had in *H. Prang Trucking Co. v. Local Union 469*, asserting that it is not satisfied "by the statement of the ultimate fact without the subordinate factual foundations for it which also must be the subject of specific findings."[109] In its analysis, the Court in *Frescati Shipping Co.* noted that the District Court did not make any finding "as to the draft of the *Athos I*," but instead assumed that it was drawing 36 feet, 7 inches, as indicated by Frescati at the time of the accident.[110] Furthermore, the Court highlighted that the District Court did not definitively resolve the question of the anchor's depth or its position, despite "'persuasive evidence' that the anchor was lying down at the time of the accident."[111] It was further stipulated that in order to resolve the issue of the violation of the safe berth warranty, it was crucial to determine whether the anchor "rendered CARCO's port unsafe for the *Athos I*'s agreed-upon dimensions and draft."[112] The allision with the anchor was not an automatic indication of a breached safe berth warranty; therefore, specific factual findings were necessary to resolve the issue.[113] The Court found that an FRCP 52(a) violation had indeed occurred, in that the District Court's inadequate findings rendered a clear understanding of the basis of the decision impossible.[114] Ultimately, the Court found that to reach the heart of the issue at trial—whether the safe berth warranty had been breached—more detailed factual findings were necessary.[115] The District Court's opinion that the port and berth were "generally safe" due to the volume of commercial traffic that had passed without incident, or that similar ships had successfully berthed at the port, fell far below the standard set forth in FRCP 52, and thus needed to be corrected on remand.[116]

In an absence of clear distinction between what is *clearly erroneous* and what is not, legal scholars have rightly approached FRCP 52(a) with caution.[117] The actual definition of the phrase "clearly erroneous" and the precise

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> impossible to know how many ships had passed over the anchor. That similar ships had successfully berthed at the port is irrelevant to whether the warranty was actually breached in this case . . . . Instead, the Court should have evaluated whether the port was safe based on the facts particular to the *Athos I* and its arrival.

Id. at 203–04 (citations omitted).

[109] *Id.* at 196; *see* H. Prang Trucking Co. v. Local Union 469, 613 F.2d 1235, 1238 (3d Cir. 1980).

[110] *Frescati Shipping Co.*, 718 F.3d at 193.

[111] *Id.*

[112] *Id.* at 203.

[113] *See id.*

[114] *Id.* at 197.

[115] *Id.* at 203–04.

[116] *See id.*

[117] *See id.* at 196.

standard of review are not universally clear.[118] Judge Learned Hand aptly stated in *United States v. Aluminum Co. of America*: "It is idle to try to define the meaning of the phrase, 'clearly erroneous' . . . ."[119] The Supreme Court even acknowledged its ambiguity in *Anderson v. City of Bessemer City,* when Justice Byron White opined that "the meaning of the phrase 'clearly erroneous' is not immediately apparent . . . ."[120] To add murkiness to the review standard, *clearly erroneous* review is meant to apply only to a trial court's findings of fact, but not to its conclusions of law.[121] Therefore a distinction between fact and law must be drawn despite the two so often being so intertwined, allowing an appellate court even broader discretion in its review of a lower court.[122] With its present ambiguities, an appellate court could likely evade the constraints of the standard, particularly when a trial court lacks a specialized understanding to distinguish between facts and law.[123]

In review of a lower court's decision in the absence of a jury, the *clearly erroneous* standard has been employed "in justification of widely divergent appellate decisions, ranging from complete adherence to the trial court's findings of fact to complete disregard of these findings, depending upon the qualitative difference between witness testimony and documentary evidence."[124] As one scholar writes, "Although rule 52(a) seems clear on its face and its drafters intended it to apply in all cases, its application in cases where the evidence is documentary or undisputed has been anything but uniform."[125] This scholar even goes as far as to assert that evasion of the rule by circuit courts can be attributable to mere "judicial dissatisfaction"

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[118] *See* United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).

[119] *Id.*; *see* Cooper, *supra* note 95, at 645 (arguing that the *clearly erroneous* standard of review has no intrinsic meaning, and is successful because it is "elastic, capacious, malleable, and above all variable").

[120] 470 U.S. 564, 573 (1985); *see* Cooper, *supra* note 95, at 645.

[121] *See* McGirr, *supra* note 97, at 964.

[122] *See id.; see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed findings of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."); Fowler v. LAC Minerals (USA), LLC, 694 F.3d 930, 933 (8th Cir. 2012) (reviewing the interpretation of a contract *de novo* as a mixed case of law and fact); Joseph v. Daily News Pub. Co., 57 V.I. 566, 582–83 (2012) (citing *Bose* in its statement that in certain instances, appellate courts are forced into the position of balancing 'clearly erroneous' with the constitutional requirement that the reviewing court must make an independent examination of the whole record in a defamation suit).

[123] *See* McGirr, *supra* note 97, at 964.

[124] Susan R. Petito, Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 68–69 (1977).

[125] *See id.* at 90.

with restriction of appellate court power to review "all the factors leading to a lower court decision."[126]

Despite an evidently malleable application of *clearly erroneous* standard of review, the Third Circuit appropriately applied FRCP 52(a) in reviewing the District Court's lack of factual findings in *Frescati Shipping Co.*[127] FRCP 52 was not applicable in Admiralty law until *McCallister* was decided in 1954.[128] Courts, however, including the Supreme Court, have held than an appeal in Admiralty from a District Court, a Circuit Court, or a Circuit Court of Appeals operates to set up a trial *de novo* at the appeal level (notably contrasted to the Supreme Court's opinion in *Bessemer*, stating that an appellate court is over-stepping its duties if it decides factual issues *de novo*).[129] By the early 1800's, however, appeals in Admiralty were already distinguished from those of other civil trials.[130] "An appeal . . . in [A]dmiralty, is rather in nature of a new trial, in which the court does not enter into the mere consideration of the propriety of the decision of the judge below . . . but affords an opportunity to the appellant to present his case with the best possible aspect that new allegations, or new evidence can afford it."[131] As far back as 1809, Chief Justice John Marshall asserted that appealed decisions in Admiralty suspend a sentence altogether and "is not res adjudicata until the final sentence of the appellate court is pronounced . . . . The cause in the appellate court is to be heard *de novo* as if no decree had been passed."[132]

As a distinctive area of law, Admiralty jurisprudence has been shaped by the uniformity that flows from original federal jurisdiction, established during the drafting of Article III of the U.S. Constitution and the Judiciary Act of 1789 that marked a legislative lineage of Admiralty jurisdiction grants throughout congressional history.[133] The very foundation of original federal Admiralty jurisdiction was to promote a fundamental interest in consistency across jurisdictions to ensure "uniform rules of conduct."[134] More-

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[126] *See id.*

[127] *See id.*

[128] *See* McAllister v. United States, 348 U.S. 19, 19–20 (1954).

[129] *See* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (opining that the appellate court oversteps its bounds if it undertakes to duplicate the role of the lower court); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) (echoing the *Bessemer* holding that an appellate court's role is not to decide factual issues *de novo*); Rodney M. Nash, *Nature and Extent of Review Upon Appeal of Causes in Admiralty*, 103 AM. L. REP. 775, 778 (1936) (explaining that many courts have viewed appeals in Admiralty from district courts as vacating the lower court's decree, to ensure that a trial is thoroughly *de novo*).

[130] *See* Nash, *supra* note 129, at 778.

[131] *Id.* (quoting Rose v. Himely, 20 F. Cas. 1178 (C.C.D. S.C. 1805).

[132] *Id.* (citing Saratoga v. 438 Bales of Cotton, 21 F. Cas. 482 (C.C.D. La. 1870) (italics added).

[133] *See* Frank R. Kennedy, *Jurisdictional Problems Between Admiralty and Bankruptcy Courts*, 59 TUL. L. REV. 1182, 1182 (1985).

[134] *See* Christine M.G. Davis et al., 11 N.Y. JUR.2D BOATS *Ships and Shipping* § 9 (2015).

over, the restricted instances in which creating federal common law is permitted includes proceedings in Admiralty because there exists a unique federal interest in providing "rules of law for the business of shipping, to facilitate maritime commerce"—and, most importantly in *Frescati Shipping Co.*— "to apply uniform remedies for persons traveling or working on navigable waters in connection with these activities."[135] The *Supplemental Rules For Admiralty Or Maritime Claims and Asset Forfeiture Actions* provides that the FRCP applies in maritime and Admiralty proceedings "except to the extent that they are inconsistent with these *Supplemental Rules*."[136]

In a general civil context, the potential for abuse of a *clearly erroneous* review has rightly been raised as a concern.[137] This concern, however, does not plague Admiralty jurisprudence to the same extent.[138] Due to its recognition as a specialized area of the law deserving of strong protections and promotions of uniformity, using a *clearly erroneous* review standard pursuant to FRCP 52 in Admiralty law poses less of a risk of variation than in broader legal contexts, and instead promotes consistency in case outcomes.[139] Whether an appellate court decides to find the facts after the lower court fails to (in a sense a *de novo* trial), or remands a case for clearer findings, the result is a more thorough exposure of facts in an Admiralty proceeding.[140] FRCP 52's requirement that facts should be found specially and law found separately, coupled with the highly deferential standard of review on appeal, ensured that more explicit factual findings would emerge in *Frescati Shipping Co*.[141]

In *Frescati Shipping Co.*, the Third Circuit solidified federal Admiralty law uniformity and united both civil and maritime aims in its application of Rule 52.[142] Despite the potential for an over-broad appellate review in typical civil matters, FRCP 52 was correctly applied in an instance that was in essence clearly an error and, therefore, harmoniously exists to serve the Admiralty interest of uniformity.[143]

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[135] *See* Lee A. Handford, *Do Not Fear to Tread on Solid Ground: The Role of the Supreme Court in Furthering Uniformity in Admiralty Law*, 10 U.S.F. MAR. L.J. 235, 236 (1998).

[136] FED. R. CIV. P. SUPP. A(2).

[137] *See* Petito, *supra* note 124, at 90.

[138] *See supra* notes 133–137, i*nfra* notes 139–143 and accompanying text (explaining that because of its need for explicit fact finding and preexisting safeguards, Admiralty is less vulnerable to misuse of *clearly erroneous* review under Rule 52).

[139] *See supra* notes 127–132 and accompanying text.

[140] *See* Frescati Shipping Co. v. Citgo Asphalt Refining Co., 718 F.3d 184, 189, 214 (3d Cir. 2013).

[141] *See id.*

[142] *See* 28 U.S.C. § 1333 (2012); *Frescati Shipping Co.*, 718 F.3d at 196.

[143] *See Frescati Shipping Co.*, 718 F.3d at 197.

CONCLUSION

The United States Court of Appeals for the Third Circuit used the standard of findings set forth in Federal Rule of Civil Procedure 52(a) to serve a unifying purpose in an Admiralty context. Rule 52 has surfaced in Admiralty proceedings in other jurisdictions; however, *Frescati Shipping Co. v. Citgo Asphalt Refining Co.* exemplifies the Third Circuit's correct application of the Rule in this context. The Rule 52 violation resulting in *clearly erroneous* appellate review in *Frescati Shipping Co.* served to create further consensus and clarity in Admiralty law and was, thus, correctly applied.