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CASE NOTE ON *CITGO ASPHALT REFINING CO. v. FRESCATI SHIPPING CO.*, 140 S. CT. 1081 (2020)

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I. Introduction

Recently, in *CITGO Asphalt Refining Co. v. Frescati Shipping. Co.*, the Supreme Court resolved a long-term divergence among circuit courts, with respect to whether the safe-berth clause in maritime contracts is a warranty of safety; namely, should the party be held liable for breach of contract regardless of fault.[1] Circuit court cases focused on the customary operation in the maritime industry.[2] The majority in *CITGO*, however, focused on the contract interpretation and held that the plain language of the subject contract shows that the safe-berth clause constitutes a warranty of safety.[3] As the majority clarified, contract liability is a strict liability.[4] Unexpectedly, the dissent in *CITGO* also focused on the contract interpretation, but interpreted the original language of the subject contract in a different manner.[5]

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1. 140 S. Ct. 1081 (2020).
2. *See, eg.* Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1156-57 (5th Cir. 1990).
3. *CITGO*, 140 S. Ct. 1081.
4. *Id.*
5. *Id*. at 1093–99.

II. Applicable Law

A. Statute

The Oil Pollution Act of 1990 (hereinafter "OPA") creates the cause of subject action.[6] In order to speed up the cleanup process of oil spills, OPA imposes a strict liability on the "responsible party" to pay cleanup costs, without regard to fault.[7] If the responsible party paid the cleanup costs timely, it will receive a reimbursement of the amount exceeding a statutory limit from the Oil Spill Liability Trust Fund, which is operated by the Federal Government.[8] However, OPA allows the responsible party, as well as the Federal Government, after paying the cleanup costs and the reimbursement, to claim indemnification against any third parties who were at fault for the oil spill incident.[9]

B. Common Law

First of all, applicable law for maritime contracts is the same contract law just like any other contract.[10] The contract in dispute is the charter of a ship: Petitioner CITGO Asphalt Refining Company ("CARCO") chartered the M/T Athos I ("*Athos I*"), an oil tanker, by entering into contract with the *Athos I*'s owner, Frescati Shipping Company ("Frescati"). As the subject contract is not a contract for the exchange of goods, it applies to the common law instead of the Uniform Commercial Code ("UCC").

The common law *CITGO* applies to, majorly concerning contract interpretation, includes the law of introducing extrinsic evidence to show what parties originally intended at the time of contract formation. Extrinsic evidence is a broad description, and "parol evidence" is part of it, such as "proof as to the subject matter of a contract, the relations existing between the parties, the facts surrounding them at the time they entered into the agreement, and the negotiations of the parties coincident with or just prior to the execution of the contract."[11] Besides parol evidence, extrinsic evidence also encompasses such as usage of trade, course of dealing, a course of

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6. Public L. No. 101–380, 104 Stat. 484, 33 U.S.C.A. 2701–20, 2731–38, 2751–53, 2761–62 (West 2018).

7. *CITGO*, 140 S. Ct. at 1086–87 (citing 33 U.S.C. § 2702(a)).

8. *CITGO*, 140 S. Ct. at 1087 (citing 33 U.S.C. § 2708, 2704).

9. *CITGO*, 140 S. Ct. at 1087 (citing 33 U.S.C. §§ 2710, 2751(e)).

10. *CITGO*, 140 S. Ct. at 1087–88. (citing Norfolk S. R. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 31(2004) .

11. Rick J. Norman, 36 AM. JUR. PROOF OF FACTS 3D 331, § 2 (Westlaw, December 2020 Update).

performance, similar contract, internal document, statements made by parties, and the circumstances or situation surrounding the making of a contract.[12] In applying this rule, courts generally determine whether there is an ambiguity in the subject contract first, without aid of extrinsic evidence, and then allow extrinsic evidence if the court finds an ambiguity exists.[13]

Second, the issue in *CITGO* regards to the law of warranty. Specifically to the charter party agreement, warranty is a statement of fact in the contract relating to some material matter.[14] "An express warranty is contractual in nature," and "its terms are therefore construed in accordance with their plain meaning."[15]

III. Case Facts

The oil tanker, *Athos I*, spilled heavy crude oil into the river because an anchor had been abandoned on the bed of the Delaware River.[16] As required by OPA, owner Frescati paid the costs of oil-spill cleanups regardless of fault, and the Federal Government reimbursed Frescati. The amount reimbursed exceeded a statutory limit by the Oil Spill Liability Trust Fund: the statutory limit here is $45 million, and Federal Government has reimbursed Frescati $88 million.[17] Then Frescati and the Federal Government brought a suit against CARCO and others which had chartered the *Athos I* for the voyage that occasioned the oil spill, alleging CARCO had breached a contractual "safe-berth clause," and as a result of the alleged breach of contract. Frescati also sought recovery of the cleanup costs not reimbursed by the Fund, while the Federal Government (the United States) claimed recovery of reimbursement it had paid to Frescati.[18]

As the Supreme Court recognized, there was a provision in the charter contract among Frescati, Star Tankers,[19] and CARCO, which is "customarily known as a safe-berth clause," and is a "standard feature of many charter parties."[20] The provision language in this case stated as following: "[t]he

12. *See* Restatement (Second) of Contracts §202 (Am. Law Inst., 1981); UCC §§1-205, 2-208 (Am. Law Inst. & Unif. Law Comm'n 1951, § 1 revised in 2001).

13. *See* 11 WILLISTON ON CONTRACTS § 30:6 (4th ed.).

14. 22 WILLISTON ON CONTRACTS § 58:11.

15. Allen v. Roberts Const. Co., 532 S.E.2d 534, 570–71 (N.C. Ct. App. 2000).

16. *CITGO*, 140 S. Ct. at 1085.

17. *Id*. at 1087.

18. *Id.*

19. Star Tankers is an operator of tanker vessels. It had contracted with Frescati to charter the *Athos I* before and then *Athos I* was sub-chartered to CARCO.

20. *CITGO*, 140 S. Ct. at 1086.

vessel shall load and discharge at any safe place or wharf . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer."[21]

The issue here is whether the safe-berth clause constitutes a warranty of safety, which would impose the liability on the charterer, CARCO, for an unsafe berth regardless of CARCO's diligence in selecting the berth.[22] The Supreme Court held yes.[23]

IV. Court Decision

The Supreme Court recognized that there were two conflicting lower court decisions: *Orduna*, 913 F.2d 1149 and *Paragon Oil Co. v. Republic Tankers, S. A.*, 310 F.2d 169 (2d Cir. 1962).[24] Actually, there were a lot more conflicting circuit court opinions discussing this specific issue, and the circuit courts largely diverged.[25]

The majority admitted that the subject contract did not use the word "warranty" explicitly.[26] However, the majority emphasized the importance of the plain language of a contract. The majority analysis started from dictionary meaning of "safe" and "always," holding the language of the safe-berth clause was "unqualified," and the charterer's duty under the safe-berth clause was "absolute."[27] Therefore, the safe-berth clause was a warranty of safety, and CARCO had breached the contract.[28]

The majority also analyzed the materiality of the safe-berth clause to support its reasoning: the majority pointed out that in *Davison v. Von Lingen (The Whickham)*, 113 U.S. 40 (1885), the Supreme Court held that it is irrelevant what label the parties put in the contract, and the "[s]tatements of fact contained in a charter party agreement relating to some material matter are called warranties."[29] As "the safety of the selected berth is the entire root of the safe-berth clause," the Supreme Court reasoned, "the safe-berth clause

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1087.
25. *See Orduna*, 913 F.2d at 1156-57 (summarizing the opposite reasoning and holdings among circuit courts and district courts, and even by the same court in different cases).
26. *CITGO*, 140 S. Ct. at 1088.
27. *Id.*
28. *Id.*
29. *Id.* at 1089 (quoting 22 WILLISTON ON CONTRACTS § 58.11, at 40–41 (2017) (bracketing in opinion).

contains a statement of material fact regarding the condition of the berth selected by the charterer."[30]

The majority in *CITGO* went even further, clarifying that contract law is strict liability. The majority adopted the Second Restatement's theory and made a straightforward comment distinguishing liability in contract law and liability in torts.[31] Therefore, whether the breaching party was at-fault or careless is irrelevant: a breaching party's due diligence will not help them off the hook. It is rare for the Supreme Court to be so blunt in its adoption of strict liability to contracts. The Supreme Court tried to temper this with potential flexibility: the strict liability is just the default rule, and the parties can deviate from the default rule to at-fault rules into the contracts based on negotiations.[32]

CARCO referred to another term, "general exceptions clause" in the subject contract, which exempts it from liability due to "perils of the seas."[33] CARCO also hoped to use that general exceptions clause to show the intent of the parties to not impose liability when damages occurred because of perils of the seas.[34] The majority made a convincing disagreement, that the general exceptions clause, as itself specified, does not apply when there is a term in the subject contract that provided otherwise.[35] Further, the majority clarified that the language in one clause is not a persuasive way to show the parties' intent on another clause.[36]

V. Analysis

A. Contract Law Perspective

1. The majority's arbitrariness and the dissent's mistake

Given that both the majority and the dissent focused on contract interpretation, let's discuss this case from the contract law perspective first.

Contract interpretation generally requires a prerequisite that there is an ambiguity in the language of the disputed term. If the language is ambiguous, the meaning of the contract is a question of fact, and the court will allow parties to introduce extrinsic evidence to show the parties' actual intents and

30. *CITGO*, 140 S. Ct. at 1089.
31. *Id* (citing Restatement (Second) of Contracts §202).
32. *CITGO*, 140 S. Ct. at 1089.
33. *Id.* at 1090.
34. *Id.*
35. *Id.*
36. *Id.*

the meaning they used at the time of contract formation. If the language is not ambiguous, then the court must follow the contract language itself to interpret the term, where extrinsic evidence will not be allowed.[37] Both the majority and the dissent concluded that the clause was unambiguous.[38] However, the majority held that the safe-berth clause was a warranty of safety "at face value," while the dissent held that "the plain language of the safe-berth clause contained no warranty of safety."[39]

The majority seems too confident in interpreting the term language, and interestingly, the majority seems careless when applying the "plain language" strategy. The majority explicitly admitted that there was no use of the word "warranty" in the safe-berth clause, but it could be deemed as a warranty "regardless of the label ascribed in the charter party."[40] However, the majority could not discern any language "hinting at" due diligence or related at-fault theory, but it held that the omission of that language should be deemed no due diligence required.[41] Given the flexibility in determining whether missing words were implied, the "plain language" strategy used by the majority seems not persuasive.

Moreover, in order to interpret the plain language of the safe-berth clause favoring the majority's own reasoning, and keep the contract interpretation limited in the "unambiguous" circle, the majority chose to look at the contract as a whole at will. While discussing the missing phrase "due diligence" the majority tried to perceive the contract as a whole. The majority held that the due diligence requirement was not implied, as other terms in this contract explicitly used "exercise of due diligence," and if the parties intended to do so they would easily put due diligence limitation into the safe-berth clause.[42] On the contrary, as the dissent pointed out, the majority did not recognize that other terms in this contract also explicitly used "warranty," but concluded directly that a missing word "warranty" was implied.[43] In fact, the two important missing words—"warranty" and "due diligence"—are strong indications that the language of safe-berth term is actually ambiguous. Random usage of the two important missing words in other terms could be another strong indication that ambiguity exists in the safe-berth clause. The divergence between the majority and the dissent on the

37. *Id.* at 1088.
38. *Id.* at 1089, 1094.
39. *Id.* at 1092, 1094.
40. *Id.* at 1088–89.
41. *Id.* at 1090.
42. *Id.*
43. *Id.* at 1095.

plain meaning of the safe-berth clause yet again reinforces that the language was indeed open to different interpretations.

Meanwhile, the dissent made a mistake in terms of the law of contract interpretation. The dissent suggested to "remand for factfinding on whether industry custom and usage establish such a warranty in this case," and criticized the majority's opinion was a "judicial pronouncement on a question of fact."[44] If the language is not ambiguous, then the meaning is not a question of fact, warranty is not established, and the dissent would remand for factfinding on whether CARCO was careful, acted reasonably, and successfully exercised due diligence to designate a safe berth before or at the time of the oil-spill incident. The dissent's remand for factfinding on whether industry custom and usage establish a warranty should follow a holding that the plain language in the safe-berth clause is ambiguous, because according to the law of contract interpretation. Only ambiguity makes it necessary to introduce extrinsic evidence, including the industry custom and usage, to show the parties' intent.[45]

2. Law of contract interpretation

a) Four-corners test and Corbin test

To examine the existence of ambiguity, there are two well-known theories: the four-corners test, by Professor Samuel Williston,[46] and the Corbin test, by Professor Arthur Corbin.[47] The four-corners test, adopted in some states, is relatively stringent, requiring only facial integration of the contract, and "[t]he only criterion of the completeness of the written contract as a full expression of the agreement is the writing itself."[48] The Corbin test, adopted by other states, is more flexible. It determines the integration of a contract based on circumstances such as the situation of the parties, the subject matter, and purposes of the transaction.[49] The two tests were

44. *Id.* at 1094, 1098.

45. It is possible that the dissent tended to apply the Corbin test here. The Corbin test generally allows extrinsic evidence in earlier to show the parties' intent, at the phase of determining if the contract language is ambiguous. But the dissent did not make it clear whether they applied the test in the dissenting opinion. (Further, please see *subsection 2. Law of determining ambiguity*.).

46. 11 WILLISTON ON CONTRACTS § 30:6.

47. 3 CORBIN OF CONTRACTS § 574 (1960).

48. Thompson v. Libbey, 26 N.W. 1, 2 (Minn. 1885).

49. Bussard v. Coll. of St. Thomas, Inc., 200 N.W.2d 155, 162 (Minn. 1972); *See also*, Restatement (Second) of Contracts §214.

originally developed for the parol evidence rule, but can also be used in contract interpretation.

In *Angus Chemical Co. v. Glendora Plantation, Inc.*, the Fifth Circuit applied the four-corners test in contract interpretation, holding "[t]he words of a contract must be given their generally prevailing meaning" and that "[w]ords susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract."[50] In *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, the Supreme Court of California adopted the Corbin test instead, holding "the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."[51] Therefore, the Supreme Court of California allowed the introduction of extrinsic evidence, not only to determine the parties' intent to explain the meaning of the ambiguous term, but also to determine whether the subject term is ambiguous. Under this test parties are allowed to introduce relevant extrinsic evidence to show the parties' intent at the time of contract formation; if parties fail to prove that the subject term is ambiguous by extrinsic evidence, then the court will rule that no ambiguity exists.

It is obvious that the Supreme Court still adopted the four-corners test as it explicitly cited Williston frequently. Based on the four-corners test, the majority in *CITGO* gave no concern to extrinsic evidence, which is consistent with its prior opinion *Oelricks v. Ford* that when there is no ambiguity or uncertainty, introduction of extrinsic evidence, including usage of trade or custom, is not allowed.[52]

When looking at the four-corners test closely, the majority's reasoning is not plausible: the subject charter contract is obviously complete, intended to be final, and much more sophisticated than most contracts as it is a standard contract. The generally prevailing meaning of "safe" and "always," which the majority relied on will not help resolve the dispute on whether charterer's fault is required; missing both "warranty" and "due diligence" makes the explanation of "safe" and "always" more susceptible to different meanings, and the majority never examined which meaning best conforms to the object of the contract.[53]

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50. 782 F.3d 175, 180 (5th Cir. 2015) (citing LA. CIV. CODE ANN. art. 2047, 2048 (1984).).

51. 442 P.2d 641, 644 (Cal. 1968).

52. 64 U.S. 49, 63 (1859).

53. *CITGO*, 140 S. Ct. at 1088.

If we follow the Corbin test, the majority should refer to extrinsic evidence concerning ambiguity as well as the parties' intent. The majority merely scratched the surface of the parties' intent when discussing whether the safe-berth clause contains a statement of material fact, which will be discussed in below.

b) Plain language rule

To determine whether ambiguity exists, the Supreme Court heavily relied on the ordinary meaning of the contract language at face, which is the "plain language" rule. Neither the majority nor the dissent denied the application of the plain language rule. To the contrary, they both emphasized the importance of applying the plain language rule, but they were disputed on what the ordinary meaning of the contract language at face. However, the plain language rule is not supposed to be such a hard or arguable rule for the Supreme Court to apply. The controversy of how to apply the non-controversial plain language rule, put the courts in an awkward situation: they might have disagreement, either between the majority and the dissenting Justices or between the lower courts and the higher courts, on an English language issue. Furthermore, the plain language rule requires an objective standard, which is a matter of law, not a matter of fact, and the disagreement makes it even more subjective.[54] There should be some more specific rules, or at least some tendencies, affirmed by the Supreme Court, to limit the English language disagreement on the application of the plain language rule.

Actually, the definition of unambiguity, as well as ambiguity, is narrow. "A contract is ambiguous if indefiniteness of expression or double meaning obscure the parties' intent."[55] In state courts it has been well established that contract language is unambiguous if there is only one reasonable meaning, and "[w]hen any aspect of a contract is capable of more than one meaning, it is ambiguous."[56] Courts will not consider extrinsic evidence if "ordinary meaning of the language leaves no room for ambiguity."[57]

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54. *See* Dennis v. Fire & Police Emps. Ret. Sys., 890 A.2d 737, 747 (Md. 2006) (explaining that "the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.").

55. Four B Properties, LLC v. Nat. Conservancy, 2020 WY 24, ¶ 33, 458 P.3d 832, 842 (quoting Principal Life Ins. Co. v. Summit Well Serv., Inc., 2002 WY 172, ¶ 19, 57 P.3d 1257, 1262.).

56. *See, e.g.,* Voyager Life Ins. Co., Inc. v. Whitson, 703 So. 2d 944 (Ala. 1997); 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co., 60 A.3d 1 (Md. 2013); Caldas v. Affordable

In *CITGO*, based on the case facts, the contract language itself, and the different explanations from the majority and the dissent, it is hard to say there is only one reasonable meaning, hard to say that the ordinary meanings of the contract language have no room for ambiguity. The contract language allows room for a different meaning that the safe-berth provision has imposed and only imposed a standard of conduct on the charterer, to select berth where the *Athos I* can come and go "always safely afloat," but does not express any substantial liability or restrictions explicitly. Simply stating the standard of conduct does not impose a strict liability on CARCO, and cannot show that CARCO intended to undertake such warranty for safety of the berth when the contract was formed.

"The test for determining whether a term is ambiguous is that common words in a written contract will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clearly evidenced from the face or overall content of the contract."[58] In *McConnell*, the Court of Appeals of Ohio held that Appellant's interpretation goes beyond the plain language of the agreement because it "adds words or meanings not stated in the provision."[59]

In *CITGO*, both the majority and the dissent added words or meanings to the provision. The dissent added the "due diligence" requirement to the provision, when the provision mentions nothing about fault, reasonable efforts, or "due diligence." The majority also added the meaning of "warranty" to the provision when neither party explicitly stated anything close to assuring the safety of the berth. The majority tried to justify its reasoning by broadly extending the meaning of "always safely." This is unpersuasive because the contract at issue is a sophisticated maritime contract, and normally the parties tend to use words more sophisticated and professional to describe warranty.[60] Contrary to the Supreme Court's reasoning, warranty is accompanied with a much more stringent obligation, which cannot be reasonably inferred from those two simple words of "always safe." When people use "always" and "safe" in ordinary life, they don't normally intend to assure anything or assume any obligation. It is

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Granite & Stone, Inc., 820 N.W.2d 826 (Minn. 2012). *See also* 17A AM. JUR. 2D CONTRACTS § 338.

57. *Four B*, 458 P.3d at 842.

58. McConnell v. Hunt Sports Enter., 725 N.E.2d 1193, 1206 (Ohio Ct. App. 1999).

59. *Id.*

60. *CITGO*, 140 S. Ct. at 1095. (As the dissent mentioned, the parties used "warranty" for other provisions.)

unreasonable to create such a heavy obligation[61] to one party by simply stating "always safe," without further details. For example, in *Wayne J. Griffin Electric, Inc. v. Dunn Construction Co.* the Supreme Court of Alabama held there is no ambiguity when the words of a release (the contract at issue in *Wayne*) relieve the other party from "any and all claims."[62] This case is different from *CITGO*, because "any and all claims" is a much clearer legal term to describe its scope, while "safe" and "always" cannot reach such a level of certainty. Therefore, the provision itself should be considered as broad, too simple, and too vague, it allows two or more different meanings, and lacks explicit requirements or details, therefore it is ambiguous.

The majority recognized that the charter contract the parties used is a standard industry form contract called the ASBATANKVOY form, published by the Association of Ship Brokers & Agents (USA) Inc. trade association.[63] As the dissent pointed out, it is also worth noting that trade association "specifically acknowledged" that the ASBATANKVOY form, "the clause does not specify whether the charterer absolutely warrants the safety of the berth."[64] The majority's holding is directly contrary to the creator's intent of the subject contract form.

3. Law of Warranty

The majority focused on the materiality of the safe-berth clause, and cited *The Whickham* case and WILLISTON ON CONTRACTS to support its holding.[65] However, the majority overestimated the importance of materiality. The rule the majority cited simply states that whether a provision is a warranty should not be decided by what label the parties put on it, but it is not sufficient to recognize the safe-berth clause is a warranty. WILLISTON simply states that the definition of warranty is "[s]tatements of fact contained in a charter party agreement relating to some material matter."[66] It aims to draw a line between warranty and representation, in case the party who makes the statement would carry unreasonably broad duty. It is also arguable that the safe-berth clause is a statement of fact or not, as it simply states what CARCO should do, nothing related to factual statements such as vessel's condition or berth's

61. The warranty itself is a strict liability, and the content of a warranty is the safety, which generally requires more efforts to comply with.

62. 622 So. 2d 314, 317 (Ala. 1993).

63. *CITGO*, 140 S. Ct. at 1086.

64. *Id.* at 1095–96 (citing Brief for Maritime Law Association of the United States and the Association of Ship Brokers & Agents (USA) Inc. as Amici Curiae on Pet. for Cert. 19).

65. *CITGO*, 140 S. Ct. at 1088–89, 1091.

66. 22 WILLISTON ON CONTRACTS § 58.11.

condition. As for *The Whickham* case, it is not relevant enough, as the Supreme Court in *The Whickham* focused on construing the contract with extrinsic evidence, under the situation where the contract is ambiguous, which is a different step of contract interpretation.[67]

The majority briefly mentioned the parties' intent when it discussed whether the safe-berth clause contains a statement of material fact. The majority simply stated "[u]nder any conception of materiality and any view of the parties' intent, the charterer's assurance surely counts as material," with no further explanation and supporting records.[68] Even assuming the majority's conclusion on materiality is reasonable, to the extent that the safety of the selected berth is the "entire root" and the "very reason" for the parties to include the safe-berth clause, the conclusion of "charterer's assurance" is still premature, as the majority made such a conclusion only based on that safe-berth clause was "not subject to qualifications or conditions," which is exactly the disputed issue here.[69] Therefore, more discussion is definitely necessary, and the majority should not have made such an absolute conclusion that "no doubt" a warranty of safety was established by "express warranty language."[70]

The dissent recognized the weakness of the majority's "independent legal theory" of materiality when determining the existence of warranty.[71] Further, the dissent pointed out that even assuming the safe-berth clause contained a statement of fact, it is a matter of fact to determine whether it is material.[72] It is a general rule adopted by the Supreme Court as well as state courts that it is a question of fact for the jury to determine whether a representation constitutes a warranty.[73]

B. Admiralty Law Perspective

1. Master's right of refusal

The dissent provided a different rationale: the master's the right to refuse. The dissent concluded that "the vessel master has a duty of discharge and right of refusal, while the charterer has a right of selection and duty to pay for lighterage," but the majority disagreed on those rights and duties.[74] The

67. 113 U.S. 40.
68. *CITGO*, 140 S. Ct. at 1088–89.
69. *Id.*
70. *Id.*
71. *Id.* at 1097.
72. *Id.* at 1097–98.
73. United States v. Gaudin, 515 U.S. 506, 512 (1995).
74. *CITGO*, 140 S. Ct. at 1095.

dissent did not explain further, but the Fifth Circuit in *Orduna* has explained the relationship between the master's right and the charterer's obligation clearly, that the vessel master is in a "better position to judge the safety of a particular berth." [75] The Fifth Circuit completely adopted Professor Gilmore's opinion in THE LAW OF ADMIRALTY.[76]

In THE LAW OF ADMIRALTY Professor Gilmore criticized that courts made an unfair decision and "go too far" to hold that a charterer is liable for damages to the ship regardless of fault.[77] The vessel master has adequate expertise and knowledge regarding navigation and the vessel, and usually on the spot furnished with aids. Meanwhile the charterer has limited expertise or knowledge about the vessel except its capacity, and the charterer usually is not on the spot when the decision as to safety was made. Instead, the charterer usually designates berth on commercial consideration.[78] Further, the vessel master usually enjoys the clause, which frees him the obligation to take his vessel to any unsafe berth: the master has the right to refuse to enter into an unsafe berth, which totally exceeds the charterer's power.[79]

Even in the circumstances that the charterer is aware of the factors making a port unsafe, such as the conditions at the berth that the vessel master has not known or has no reason to know, the charterer can be held liable under "an actionable wrong . . . to invite the ship without warning into a peril known to him," which is close to a tort claim, therefore it is not necessary to impose liability to the charterer under the safe-berth clause.[80] However, the majority was not persuaded by Professor Gilmore's theory: the majority found a probable better position to bear liability is not sufficient, and Professor Gilmore also admitted that his theory was not adopted by many courts.[81] The majority did not discuss further, and used the plain language rule as a shield instead.[82]

Furthermore, the majority found the conflict between the vessel master and the charterer's rights and duties did not exist, holding that "[o]n its face, the vessel master's duty creates no tension with the charterer's duty."[83] The

75. 913 F.2d at 1156-57 (citing Grant Gilmore & Charles Black, THE LAW OF ADMIRALTY § 4-4, at 204–06 (2d ed. 1975)).

76. *Orduna,* 913 F.2d at 1156-57.

77. THE LAW OF ADMIRALTY, at 204.

78. *Id.*

79. *Id.* at 204–05.

80. *Id.* at 205.

81. *CITGO*, 140 S. Ct. at 1092.

82. *Id.*

83. *Id.* at 1091.

majority criticized the dissent's reasoning that this double liability will create contradictory warranties of safety, because the charterer carries the duty to select the safe berth, and the vessel master, following the charterer's choice, "load and discharge" at the safe berth.[84] The dissent, on the other hand, cited *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995), and *United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998), to discover an important contract principle that "no term of a contract should be construed to be in conflict with another unless no other reasonable construction is possible."[85] The dissent further criticized that the majority "makes no attempt to limit its expansive interpretive approach."[86] Again, the majority used the plain language rule as a shield and made no further discussion.

The majority did admit two important assertions: first, they "recognized that similarly worded safe-berth clauses may implicitly denote a vessel master's right to refuse entry and the charterer's resultant obligation to bear the costs of that refusal."[87] Second, they admitted that it is a "common sense" that "the vessel master implicitly has a separate, dueling obligation regarding the safety of the berth, when the clause explicitly assigns that responsibility to the charterer."[88] Based on those two admissions, it is hard to insist that there is no conflict of rights and duties between the vessel master and the charterer, which at least creates confusion in the contract. Without statute and even without an undisputed contract provision, is it fair or necessary to let two different parties both have the warranty of safety on one incident? Before confusion is clarified properly, I doubt that imposing warranty duty on the charterer is a plausible interpretation from the original plain contract language.

2. Industry custom

It has been well established by the Supreme Court that the usage of trade, as well as industry custom, can be used as extrinsic evidence to show the parties' intent.[89] To answer whether industry custom can be introduced to show ambiguity, the four-corners test and the Corbin test are discrepant. Interestingly, the dissent has shown the inclination to adopt the Corbin test and proposed to introduce custom or usage evidence to determine the parties' intent, even though the dissent found the contract languages' plain meaning

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1091.
89. Robinson v. United States, 80 U.S. 363 (1871).

was not ambiguous and did not contain a warranty of safety.[90] Therefore, the dissent suggested a remand for factual findings on the question "whether the parties entered into the charter party with knowledge of an established custom or usage," instead of a remand for factual findings on whether CARCO has successfully exercised due diligence to designate a safe berth before or at the time of the oil-spill incident.[91]

C. Public Policy Perspective

The majority resolved a long-term controversy, overruled *Orduna*, and established a rule of safe-berth clause: it is a warranty of safety regardless of fault, it is strict liability, but it could be overcome by mutual assent. The majority tried to keep a balance, but its impact is unknown: at least it is unfair to CARCO in this case, and in the future, what the business in the oil and maritime field would react is unknown.

I would like to point out that justice and fairness in every single case is as important as the future impact the decision may create. The Supreme Court should be more careful in determining whether the language is ambiguous or not, because it is the very first step for contract interpretation. It is absolutely simple for courts to hold that there is no ambiguity in a contract, so they don't need to look at extrinsic evidence. It is harder and may create more uncertainty to introduce extrinsic evidence, but it at least gives the parties the opportunity to provide evidence before the court or jury, to show their intents and mutual assent at the time of contract formation.

In this case, the contract language is at least not obviously unambiguous, and we could see the ambiguity from the dissenting opinion, and the treaty interpretation, as well as the customary understanding. The Supreme Court seemed really reluctant to determine the contract language was ambiguous, as both the majority and the dissent wanted to fix the dispute on the plain language step. Ironically, the majority and the dissent interpreted the "unambiguous language" in an opposite way, which exactly indicates that an actual ambiguity existed. Because the Supreme Court was reluctant to hold that actual ambiguity exists, the case holding in *CITGO* is unfair to CARCO as a charterer, who is not an expert in choosing a safe berth, may not be at the spot when the oil spill incident occurred, and possibly has no knowledge that the vessel master has made the decision to enter an unsafe berth. Furthermore, there might be extrinsic evidence showing mutual assent that both parties expressly or implicitly agreed that the safe-berth clause assurance is

90. *CITGO*, 140 S. Ct. at 1094, 1098–99.
91. *Id.* at 1099.

fault-basis, or there might be customary evidence showing that most negotiation on safe-berth clause in this maritime industry is based on the presumption of due diligence. Unfortunately, CARCO had no opportunity to provide such evidence.

As mentioned above, the double warranty duties of the charterer and the vessel master set forth in *CITGO*, although they are not conflicting, they may at least lead to confusion, in determining who will ultimately owe the warranty duty. If the vessel master refused to operate on the berth the charterer has selected, the charterer may be held liable for a third-party's fault, and the charterer has no remedial measures to control such liability. Without statute, or substantial policy consideration, it is unfair to the charterer for having a warranty of safety when the conduct of a third party who the charterer cannot control, is crucial to the warranty.

As the Fifth Circuit held in *Orduna*, "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects."[92] Not imposing the charterer strict liability would not increase the risks of safety because the vessel master has the freedom to refuse an unsafe berth.[93] On the contrary, "[s]uch a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth."[94] When all the public considerations for interpreting the safe-berth clause to a warranty fail, what left is the confusion of liability leading to unfairness to a non-fault party.

VI. Conclusion

According to the law of contract interpretation, the contract plain language is ambiguous. Either by applying the four-corners test or the Corbin test, the safe-berth clause is capable of having more than one reasonable meaning. There are several indications that ambiguity exists: the missing words "warranty" and "due diligence" in the safe-berth clause, the random use of the missing words in other terms, and the divergence between the majority and the dissent of the plain meaning. The materiality of the safe-berth clause will not help it become a warranty. When recognizing the safe-berth clause as a warranty, double warranty duties of the charterer and the vessel master are in conflict. The failure to introduce extrinsic evidence showing the parties' intent is unfair to CARCO in *CITGO*, and due to the charterer's lack of expertise, recognizing the safe-berth clause as a warranty

92. 913 F.2d 1149, 1157 (5th Cir. 1990).
93. *Id.*
94. *Id.*

makes the charterer suffer liability of injury when the charterer acted prudently without fault or when a third party such as the vessel master acted carelessly. When public considerations are not substantial enough to prevail over the misapplication of law, only confusion and unfairness is left.