BOATING BRIEFS

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Fourth Circuit: Coast Guard breached no duty to missing boaters

Turner v. United States, 736 F.3d 274 (4th Cir. 2013)

The U.S. Court of Appeals for the Fourth Circuit has held that the U.S. Coast Guard was not liable for failing to launch an immediate search for overdue boaters, given that the Coast Guard neither increased the danger facing the boaters nor dissuaded others from coming to their aid.

Mr. and Mrs. Turner were operating their 20-foot motorboat at night, in rough weather, near Elizabeth City, North Carolina. After Mrs. Turner fell overboard, she saw her husband turn the boat around to try to recover her. But she then lost sight of the boat, and sometime thereafter Mr. Turner entered the water as well, unbeknownst to his wife.

Later that night, Mr. Turner's father became concerned when he could not reach the Turners on their cell phones. He dialed 911, which relayed his report to the North Carolina Wildlife Resources Commission and the U.S. Coast Guard. When the Coast Guard returned his call about a half hour later, the father expressed his concern and mentioned three rough locations where he thought the Turners might be. But due to the large size of the area in question, the fact that the Turners were reported to be experienced boaters and swimmers, and the fact that an active search was already underway on a separate and unrelated emergency, the Coast Guard did not begin an active search for the Turners. The Coast Guard did, however, make marine radio broadcasts asking others in the area to keep a lookout for the Turners' boat.

The next morning, a friend of the Turners began his own search and located their boat washed ashore with no sign of the Turners. Upon learning of this, the Coast Guard reclassified the case as an "overdue distress" and launched an air and sea search. Mrs. Turner, who had stayed afloat overnight by clinging to crab-pot buoys, made it to shore shortly thereafter, but Mr. Turner remained missing. For the next two days, the Coast Guard deployed twelve boats and planes and searched 173 square miles without success. After the search ended, Mr. Turner's body was found washed ashore, with the likely cause of death determined to be drowning.

This newsletter summarizes the latest cases and other legal developments affecting the recreational-boating industry. Articles, case summaries, suggestions for topics, and requests to be added to the mailing list are welcome and should be addressed to the editor.

Inside this Issue

Mrs. Turner, in her own right and on behalf of her husband's estate, brought a negligence suit under the Suits in Admiralty Act, claiming in particular that the Coast Guard waited too long to begin searching. The trial court dismissed her claims, holding that the Coast Guard had no duty to commence a search any earlier than it did. (We reported on that decision in Boating Briefs Vol. 21:2.) Mrs. Turner appealed.

As the appellate court observed, the Coast Guard is authorized by statute to undertake search and rescue operations, but it does not have any affirmative duty to do so. Once it does undertake a search, however, the Coast Guard has a common-law duty to act with reasonable care. Its actions are judged according to the Good Samaritan Doctrine, under which a rescuer may be held liable if the rescuer increases the risk of harm to the victim or induces reliance by the victim or other potential rescuers.

Here, according to the appellate court, the Coast Guard's delay in beginning an active search did not affirmatively worsen the Turners' plight. Nor did the Coast Guard induce any reliance on the part of the Turners, who themselves had no communications with the Coast Guard during their ordeal. Nor had the Coast Guard dissuaded any potential third-party rescuers from conducting a search, inasmuch as the Coast Guard did not represent to anyone that it was going to undertake its own search when the Turners were reported as overdue.

Mrs. Turner also alleged that the Coast Guard improperly destroyed evidence by deleting and recording over the audiotapes of the telephone calls made on the night in question. The trial court rejected this argument, and the appeals court did likewise. Because Mrs. Turner had not sent the Coast Guard a preservation letter or other correspondence threatening litigation, and because the deletion of the tapes was standard operating procedure for the Coast Guard, the appeals court held that there was no basis to impose sanctions against the Coast Guard for spoliation. ■

Insurance

Failure to disclose criminal history as required by insurance application voids policy

Great Lakes Reinsurance (UK) PLC v. Kranig, 2013 WL 2631861 (D.V.I. June 12, 2013)

This case stemmed from the grounding and sinking of the catamaran sailboat *Solitude* in St. Thomas.

Two years earlier, in response to questions on his insurance application, the vessel's owner identified himself and another person as the proposed insureds, and he denied that either of them had been convicted of or pleaded no contest to a criminal offense or had any "violations / suspensions (including Auto) in [the] last 5 years." The application stated that it would be incorporated into the policy and that any misrepresentation would render the policy null and void from inception. The policy was issued and then renewed the following year.

While being moved from one mooring to another, the vessel grounded and became a total loss. As part of the insurer's investigation, both the owner and his fellow insured (who was handling the vessel at the time of the loss) were examined under oath. The investigation revealed that the owner, a few years before the loss, had been charged with and pleaded guilty to domestic violence after assaulting his fellow insured on the vessel. Moreover, the fellow insured had previously been in an automobile accident while driving under the influence of alcohol and drugs and had pleaded guilty to DUI. More recently, her driver's license had been suspended. When the owner signed the insurance application, how-

ever, he apparently did not consider domestic violence to be a "criminal offense" and he believed the statements regarding his fellow insured's driving and criminal background (based on her representations to him) were correct.

The insurer brought an action for declaratory judgment, contending that the policy was void due to the misrepresentations in the insurance application. The court agreed.

The policy provided that any disputes "shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York." Here, the court observed that the doctrine of uberrimae fidei ("utmost good faith") is entrenched in the Third Circuit (whose jurisdiction includes the Virgin Islands), and that under that doctrine an applicant for marine insurance must fully disclose to the insurer all facts material to the risk, even if the insurer does not explicitly ask for the information. A fact is "material" if it would have prompted an insurer not to issue the policy or prompted it to charge a higher premium.

Here, the owner failed to disclose on the insurance application both his and his fellow insured's criminal histories (and in the case of the fellow insured, also the suspension of her driver's license). The application specifically asked for this information, and there was testimony from the insurer that the coverage would not have been bound had the insureds' criminal and driving histories been disclosed. The omissions were therefore material as a matter of law, and as a result the policy was void from inception. ■

Allegation of BUI in civil suit, coupled with guilty plea, triggers criminal-acts exclusion and relieves insurer of duty to defend

Markel Am. Ins. Co. v. Norris, 2013 WL 4737246 (M.D. Ala. Sept. 3, 2013)

Markel insured a 22-foot Chaparral owned by a law firm. One night, while being operated by one of the firm's lawyers (who was also an insured under the policy), the Chaparral collided with another boat. The force of the collision threw a boy on the other boat into the water, where he was run over by the Chaparral.

In the ensuing personal-injury suit, the boy's parents alleged that the incident was caused by the lawyer's operating the Chaparral "in an unsafe manner . . . and under the influence of alcohol."

In a separate criminal case, the lawyer was charged with and pleaded guilty to two felonies in connection with the incident: boating under the influence of alcohol and first-degree assault.

The Markel policy excluded coverage for liabilities "caused by, resulting from or arising out of . . . [w]illful or intentional misconduct or criminal act on the part of any insured or during any illegal activity on the part of any insured." The policy went on to specifically exclude coverage for liabilities "occurring while an insured is operating the insured watercraft with a blood or breath alcohol level equal to or in excess of the legal limit applicable for the operation of motor vehicles in the state where you reside."

After the guilty plea, Markel concluded that it had no duty to defend or indemnify its insureds in the personal-injury suit and filed an action for declaratory judgment based on the policy's criminal-acts exclusion.

Since the complaint in the personal-injury suit alleged that the incident was caused by the lawyer's operating the boat under the influence of alcohol, and since the lawyer pleaded guilty to and was convicted of boating under the influence, the

court agreed that Markel had no duty to defend. The court observed that under Alabama law a guilty plea "is a conviction of the highest order and is an admission, of record, of the truth of whatever is sufficiently charged in the indictment."

The insureds countered that, under Alabama law, a criminal conviction "is not to be conclusive of the facts of which [the defendant] was convicted when such fact is an issue in a civil case." But in this instance, the court stated that Markel was not relying on the conviction as conclusive proof that the insured had been boating under the influence. Instead, Markel was relying on the allegations in the underlying action and on the guilty plea and conviction to bring the case within the terms of the criminal-acts exclusion.

Having held that Markel had no duty to defend, the court nevertheless declined to rule that Markel had no duty to indemnify. Determining whether Markel had a duty to indemnify would be premature, the court wrote, since "the duty to indemnify is not ripe for adjudication until the insured is in fact held liable in the underlying suit." If the insureds ultimately prevailed in the underlying suit, then the question of Markel's duty to indemnify would be moot. Thus, the issue of indemnification was not sufficiently ripe to present a "case or controversy" and therefore would not be addressed at this stage. ■

First Circuit reconciles latent-defect coverage with manufacture-defect exclusion

Ardente v. Standard Fire Ins. Co., 2014 WL 944766 (1st Cir. Mar. 12, 2014)

A yacht builder failed to use waterproof laminate in way of the hull fixtures, and over time the absence of laminate in these areas allowed water to seep directly from the fixtures' installation holes into the hull's balsa core. The yacht's owner submitted a claim to his marine insurer for the cost of repairing the wet core.

The policy excluded coverage for "[d]efects in manufacture, including defects in construction, workmanship and design." But as an exception to that exclusion, the policy provided coverage for damage resulting from a "latent defect," which the policy defined as "a hidden flaw inherent in the material existing at the time of the original building of the yacht, which is not discoverable by ordinary observation or methods of testing." The insured argued that the builder's failure to use waterproof laminate around the fixtures was a "flaw in the material" and therefore constituted a latent defect, even though there was nothing wrong with the balsa itself when it was installed.

On appeal, the First Circuit ruled that in light of policy's exclusion for defects in manufacture, the term "latent defect" should not be read to encompass the builder's failure to use waterproof laminate:

> [The insured's] interpretation of the word "material" would allow the latent-defect exception to swallow the manufacture-defect exclusion, rendering the exclusion superfluous and doing violence to the policy. To say that "material" in the definition of "latent defect" refers not to an individual raw ingredient used in constructing the yacht, but rather to a composite of various raw ingredients that appear in close proximity in a particular area of the ship, yields the following result: If a carpenter building the yacht accidentally affixes balsa wood instead of solid laminate around the installation holes, we could refer to the defect as a "latent defect" instead of a "defect in construction or workmanship." Similarly, if an engineer drawing the blueprints of the yacht accidentally calls for balsa wood instead of solid laminate to be placed around the installation holes, we could refer to that defect as a "latent defect" instead of a "defect in design." But it is clear that the policy meant to exclude from coverage precisely those types of defects.

Since applying the "latent defect" exception in the manner suggested by the insured would render the manufacture-defect exclusion meaningless, the insurer prevailed on appeal. ■

Court rejects insurer's reliance on exclusion for wear and tear and finds coverage for sinking caused by hose failure

Markel Am. Ins. Co. v. Olsen, 2013 WL 2372193 (E.D. Mich. May 30, 2013)

The 56-foot yacht *Camelot*, built in 1982, sank alongside a dock in calm weather after a raw-water intake hose failed. The insurer, citing the policy's exclusions for wear and tear and gradual deterioration and contending that the vessel was unseaworthy, denied coverage and brought a declaratory-judgment action. The insured counterclaimed for breach of contract and violations of Michigan's Trade Practices Act. The insured prevailed on the coverage question after a three-day bench trial.

The vessel had been docked in Fort Lauderdale following a rough passage from Virginia. It had been inspected by various individuals both before and during the passage and was found to be well-maintained. After four days alongside the dock in Fort Lauderdale, the vessel sank.

The insurer retained a marine surveyor and a professional engineer to investigate the incident. They concluded that the sinking was the result of a raw-water intake hose that had failed due, in their view, to wear and tear and long-term deterioration. The policy excluded loss or damage "caused by or resulting from . . . wear and tear, gradual deterioration, [or] failure to maintain" the vessel. The insurer therefore argued that the loss was excluded from coverage or, alternatively, that the insured had breached the implied warranty of seaworthiness. The insured conceded that the hose failure caused the sinking but disputed the reasons for the hose failure and argued that the vessel was seaworthy.

On the issue of whether the loss was excluded, the court concluded that the insurer had not proven that the loss was proximately caused by wear and tear or a failure to maintain the hose. Although the hose was 27 years old, there was no literature the insured could have consulted to determine the hose's useful life and therefore the insured was not in a position to know whether it needed maintenance or replacement. Also, if wear and tear had truly been the culprit, then the large leak would have likely been preceded by smaller leaks, which had evidently not occurred. Moreover, although surface cracking was discernible on close inspection of the hose, the hose had appeared to be in serviceable condition, and there was abundant evidence that the insured was a conscientious owner who otherwise maintained the vessel well. The court concluded that the hose failure was likely attributable to the stresses encountered during the sea passage rather than to wear and tear or lack of maintenance.

On the issue of seaworthiness, although an insurer typically bears the burden of proving that a vessel was unseaworthy, in this case—because the vessel sank while moored in calm water—the insured had the burden of proving that the vessel was seaworthy. Here, the court concluded that the same evidence suggesting that the hose failure was not caused by wear and tear or a failure to maintain was likewise sufficient to overcome the presumption of unseaworthiness.

Judgment was therefore entered for the insured. While not explicitly addressing the insured's claim under the Michigan Trade Practices Act, and without making any finding that the insurer had acted in bad faith, the court nevertheless directed that the insured's legal fees be paid as part of the judgment. ■

Jurisdiction

E.D.N.Y.: Floating clubhouse is not a vessel

Armstrong v. Manhattan Yacht Club, Inc., 2013 WL 1819993 (E.D.N.Y. April 30, 2013)

After being injured while performing maintenance duties on the floating "Clubhouse" owned by the Manhattan Yacht Club, the plaintiff sought damages under the Jones Act. He argued that he was a seaman, while the yacht club asserted that he was simply a land-based maintenance worker.

The court determined that the plaintiff's claim could only succeed if the Clubhouse was a vessel. The physical characteristics of the Clubhouse were therefore vital to the analysis. The two-story structure included a viewing platform and a bar serving alcoholic beverages. Visitors to the Clubhouse came and went by boat. Forty-foot steel "spuds" and an anchoring system secured the Clubhouse to the riverbed. The structure moved once a year, when the spuds were raised and it was towed to a marina to avoid inclement winter weather. It had no crew, engine, steering gear, navigation lights, or lifeboats. The Clubhouse was categorized as a "passenger barge" on its U.S. Coast Guard Certificate of Inspection, but the Certificate also stipulated that "passengers shall only be carried when vessel is anchored, moored, or made fast (spud) to bottom."

Applying *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013), in which the Supreme Court held that a floating home was not a vessel even though it could be towed through navigable waters, the district judge found many similarities between the Clubhouse and the floating home at issue in *Lozman*. The fact that a Certificate of Inspection had been issued by the Coast Guard did not necessarily mean that the structure was a vessel for purposes of the Jones Act. Because a reasonable observer would not consider the Clubhouse to be designed, to any practical degree, for carrying people or things on water, the judge concluded that the Clubhouse was not a vessel, and therefore plaintiff was not a "seaman" entitled to assert a Jones Act claim. ■

S.D. Tex. says fall from boat lift along navigable canal sounds in admiralty

Hupp v. Danielson, 2013 WL 3208588 (S.D. Tex. June 24, 2013)

After taking delivery of a high-performance powerboat, the new owner and his friend piloted the vessel to a boat lift behind the owner's house. The lift was constructed along a narrow canal, which provided direct access to a lake which in turn emptied into Galveston Bay.

The boat was floated onto the lift and raised for cleaning, with the hull less than a foot out of the water and a portion of the outdrives remaining in the water. As the owner's friend stepped onto one of the beams of the lift, the lift failed. Cables and other parts of the lift struck the friend, and he fell into the water. He brought an admiralty suit against the owner. The owner moved to dismiss the suit for lack of jurisdiction.

The court observed that maritime tort jurisdiction exists where (1) the tort occurs on navigable waters (or is caused by a vessel on navigable waters) and (2) the tort bears a connection to maritime activity.

The canal in question was used by commercial fishermen and other commercial vessels. It also provided access to a navigable lake, from whence one could reach Galveston Bay and ultimately the Gulf of Mexico. The canal was therefore navigable for purposes of maritime jurisdiction.

The next question was whether the tort occurred on the navigable canal. The owner argued that the boat lift was merely an extension of land, much like a pier, wharf, or dock. The plaintiff, on the other hand, argued that the boat lift was akin

to a liftboat or drydock, which have previously been held to be subjects of maritime jurisdiction. The court found that the boat lift was functionally closer to a drydock or liftboat and thus concluded that the tort had occurred on navigable waters.

The "connection" test encompasses two issues: whether the incident has a potentially disruptive effect on maritime commerce and whether the character of the activity giving rise to the incident is substantially related to traditional maritime activity. To determine whether the incident was potentially disruptive, the court examined whether the general features of the incident, "projected onto the busiest of commercial waterways," would be likely to disrupt commercial activity. Had this type of incident occurred on a busy waterway like the Houston Ship Channel, it would have likely been a disruption to those who witnessed it, as well as to those who attended to the rescue of the injured person. The court also found that the activity underlying the incident—raising a boat in order to clean its hull—should be considered a traditional maritime activity.

Accordingly, the court concluded that the case could proceed in admiralty. ■

Yacht Brokers

Suit for commission barred by Florida's statute of limitations

Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC, 714 F.3d 1234 (11th Cir. 2013)

A yacht broker sued a builder to recover commissions based on the broker's having allegedly facilitated the sale of two multi-million-dollar yachts. The builder denied that any commission was owed and refused to pay anything more than a relatively modest "referral fee."

The district court concluded that the broker's claims for quantum meruit and unjust enrichment were barred by Florida's statute of limitations, Fla. Stat. § 95.11(3)(k), because they accrued more than four years before the broker brought suit. In particular, the district court found that the claims accrued when the broker allegedly conferred a benefit upon the builder and that this occurred, at the earliest, when the builder and the buyer executed a purchase agreement and, at the latest, when the buyer made his first payment to the builder. Because the contracts between the buyer and the builder were signed and the first payment was made more than four years before the broker brought suit, the district court held the claims were time-barred. The Eleventh Circuit affirmed.

The appeals court observed that, under Florida law, the four-year limitations period began when the claims accrued—that is, "when the last element constituting the quantum merit and unjust enrichment claims occurred." It was therefore necessary to determine the point at which the broker allegedly conferred a benefit on the builder. In this regard, the broker consistently alleged in the trial court that the relevant benefit was the broker's having introduced the parties to each other, which occurred more than four years before suit was filed. Since the broker alleged no other benefit, the Eleventh Circuit concluded that the broker by its own admission had "conferred a benefit"—thus triggering the statute of limitations—more than four years before suit was filed.

The broker countered that its claims were timely because the benefit it conferred was "delayed significantly beyond the time of the services being performed." Specifically, it asserted that the claims relating to the first yacht did not accrue until the buyer took delivery. Had the buyer not taken delivery, the builder would have received no "benefit" and the broker would have been entitled to no commission. The Eleventh Circuit rejected this argument and held that under Florida law a benefit is conferred when the plaintiff performs, even if at that point there remains uncertainty as

to whether the defendant will ultimately receive the value of the benefit.

As to the second yacht, the broker contended that its claims did not accrue until the buyer began making installment payments toward the purchase price. Since the broker was to be paid its commission in successive pro rata installments as the builder received payments from the buyer, the broker's theory was that a new limitations period commenced as each incremental payment was made. The court also rejected this theory and held that the broker's claims accrued when the services were provided—regardless of whether the broker was entitled to receive a pro rata commission on payments made at some later time. ■

Product Liability

Wrongful-death claims rejected due to misuse of product

Korban v. Boostpower USA, Inc., 533 Fed. App'x 820 (10th Cir. Aug. 13, 2013) (unpublished)

A man died from serious burns he received while riding as a passenger in a friend's high-performance speedboat. The boat's owner had installed a highly modified engine several years after purchasing the boat. On the day of the incident, the boat owner, the victim, and another friend boarded the boat to take a ride. They had been drinking alcohol. While boarding the vessel, the victim fell against the engine and unknowingly dislodged one of the fuel rails (the gas lines that deliver fuel to the fuel injectors). The fuel rails were manufactured by defendant Boostpower.

During the boat ride, the owner noticed that the fuel rail was leaking gasoline. He stopped the boat and adjusted the fuel rail by hand so that it would stop leaking gasoline. The men proceeded with their ride back to the boat ramp. The owner noticed as he accelerated the boat that the fuel rail was again leaking. This time, he asked the victim to hold the fuel rail with his hands to keep it from leaking. Before they made it back to the boat ramp, the victim exclaimed that gasoline was spraying all over him. The owner then stopped the boat and turned off the ignition, but the fuel that had sprayed on the victim nevertheless ignited and formed a fireball, causing burns that were ultimately fatal.

The plaintiff's experts opined that the accident would not have occurred if the fuel rail had been designed with a "security bar" to hold it in place. This, the plaintiff claimed, would have prevented the fuel rail from coming loose.

But the district court granted summary judgment to Boostpower, ruling that the fuel rail was misused and that its design, therefore, did not cause the accident.

Applying the substantive law of Oklahoma, the Tenth Circuit held that summary judgment for Boostpower was appropriate for two reasons: a lack of causation and misuse of the product.

As to causation, the proximate cause of an injury is a cause which, "in a natural and continuous sequence, unbroken by an independent cause, produces the event and without which the event would not have occurred." Causation here was not established, the court concluded, because the fire did not result from "a natural and continuous sequence, unbroken by an independent cause." Here the boat owner had discovered the leaking fuel rail and had attempted, unsuccessfully, to remedy the situation twice before the fire.

As for misuse of the product, the court recognized that a manufacturer typically would not be liable for injuries resulting from a particular use if that use was not foreseeable by the manufacturer. The court relied on the fact that the boat owner had previously discovered that the fuel rail was loose and spraying fuel out under pressure on two occasions during the boat ride, and yet elected to continue operating the vessel in the face of the obvious hazard. The manufacturer, the court

concluded, could not have intended or reasonably anticipated such a misuse. The Tenth Circuit therefore affirmed the grant of summary judgment to the manufacturer. ■

Court applies Australian law to claims against WaveRunner manufacturer

McCarthy v. Yamaha Motor Mfg. Corp., 2014 WL 904527 (N.D. Ga. Feb. 28, 2014)

The plaintiff was an Australian citizen who suffered spinal-cord injuries while operating a Yamaha WaveRunner in Australia. The WaveRunner had been manufactured in Georgia, and the case was brought in the Northern District of Georgia on the basis of diversity jurisdiction. Yamaha moved for the application of Australian law. The plaintiff opposed it, arguing that Georgia law should apply. The court granted Yamaha's motion in part and denied it in part.

The court was asked to decide whether Australian law governed the following four issues: (1) limits on compensatory damages; (2) limits on punitive damages; (3) the effect of contributory negligence; and (4) the prevailing party's ability to collect fees and costs from the losing party. The court held that Australian law would apply to issues (1), (2), and (3), while Georgia law would apply to issue (4). The decision was based on Georgia's conflicts-of-law rules.

In general, Georgia courts apply the law of the place of injury. But the application of foreign law will be limited to "statutes and decisions construing those statutes" and will not extend to a foreign nation's judge-made laws. Moreover, Georgia courts do not apply foreign law if doing so would conflict with Georgia public policy.

Australia was the place of the accident, so it was up to the plaintiff to explain why Australian law should not apply. There was no evidence that Australia had a "loser pays" statute, and therefore the prevailing party's right to recover fees would have to be determined by Georgia law, under which the parties normally bear their own fees.

Australia does, however, have statutes that impose caps on compensatory damages, that limit the cases in which punitive damages are available, and that provide for certain affirmative defenses, including contributory negligence. The plaintiff argued that Australian law on these subjects conflicted with Georgia public policy. The court disagreed.

Australia's statute on damage caps did not measure "damages from a different perspective" or "wholly limit" one avenue of recovery, so there was no public-policy conflict on the question of damage caps. The court also noted that Australian law on the availability of punitive damages was "not so dissimilar" to the law of Georgia, and thus there was no public-policy conflict on the question of punitive damages. And, as to the effect of contributory negligence, the court found that Australian law was actually more forgiving than Georgia law in that Australian law, unlike Georgia law, did not bar recovery if a plaintiff was more than 50 percent at fault. Thus, no public-policy conflict existed, and Australian law would govern the question of contributory negligence. ■

Torts

Owner of mooring dolphin not liable for allision

Veldink v. Boise Cascade Corp., 2013 WL 1907375 (D. Or. May 7, 2013)

This case arose from an 18-foot boat's allision with an unlit dolphin (of the mooring variety). The dolphin, owned by a paper mill, consisted of five steel pilings driven deep into the riverbed and extending at least four feet above the high-water mark and 26 feet above the low-water mark. The dolphin was constructed in accordance with a U.S.

Army Corps of Engineers permit, and was on the side of the river not typically used by boaters.

In the pre-dawn hours, during poor weather, the plaintiff set out to fish for salmon with his friend on his friend's boat. The two turned off their flashlights because of the glare on the falling rain, and the plaintiff sat down because he was cold, leaving the boat owner to navigate alone in the dark. The owner stopped consulting his GPS while navigating a channel, and the vessel struck the dolphin moments after the owner realized that he was coming too close to the paper mill.

The plaintiff brought suit against the paper mill, alleging that it was negligent by failing to mark, light, or remove the dolphin. Under the Oregon Rule, a boat owner would be presumptively negligent in an allision like this, since a vessel would not usually strike a stationary object absent some mishandling of the vessel. But here the boat owner was not a party to the suit, and the judge noted that the Oregon presumption is not determinative of liability: "there is room in maritime law to find comparative fault in the stationary object."

Observing that a wharfinger has a duty to warn of hidden hazards or deficiencies but no duty to warn of obvious hazards like pilings extending well above the water line in seldom-used areas of the river, the court granted summary judgment to the paper mill. ■

Irreconcilable charter party and vessel-services agreement cancel each other out; arbitrator denies owner's claim against helmsman for grounding

Arbitration Between Lone Fox, LLC and Gordon Ingate, ICDR No. 50 196 T 00644 11 (Aug. 7, 2013) (David J. Farrell, Jr., Arb.)

S/V Lone Fox had completed a day of New York Yacht Club racing. America's Cup veteran Gordon Ingate (Respondent) was at the helm. Also aboard were Ira Epstein, who was the principal of the vessel owner, Lone Fox, LLC (Claimant), and Brian McClellan, who served as first mate and was hired by Epstein for his local knowledge and sailing skill.

On the return to Gilkey Harbor, Ingate steered a course laid out by Epstein. Epstein testified that Ingate should have steered the vessel to port of Nun "2" northwest of Minot Ledge. Nonetheless, and for unclear reasons, *Lone Fox* found itself in the gap between Minot Ledge to the west and Minot Island to the east.

McClellan and Epstein decided that the vessel should come about immediately, and directed Ingate to begin his turn. Unfortunately, Ingate steered toward, not away from, the ledge. The vessel struck the ledge before completing the turn. Epstein then instructed Ingate how to steer off the ledge, but *Lone Fox* grounded again—and harder. Only then did Epstein take the helm. Ironically, had *Lone Fox* not turned at all, it likely would have transited the gap safely due to a high tide.

Epstein's company, as the vessel owner, commenced arbitration proceedings against Ingate, claiming he was liable for the damage caused by the grounding.

Epstein and Ingate had intended for their relationship to be governed by a Recreational Bareboat Charter Agreement ("Charter") and a Vessel Services Agreement ("VSA"). The arbitration hinged on the question of who, as between Epstein and Ingate, was ultimately responsible for the navigation of the vessel.

The Charter purported to be a demise charter but provided that, if Ingate utilized the services of a captain, then the captain was responsible for safe navigation and would not be bound to comply with any unsafe or improper order.

Meanwhile, under the VSA, Lone Fox had agreed to provide Ingate with a competent captain and crew who, as independent contractors,

would be charged with the management, operation, and navigation of the vessel.

Epstein testified that he was the captain and owner of the *Lone Fox* but that he did not serve as captain during the Charter. He relied on the language of the Charter and contended that he had turned the vessel over to "Skipper Ingate." He testified that he referred to himself as "Captain" only to avoid potential problems with his insurance company. Epstein also testified that McClellan was his first mate and that he had authority to take the helm from Ingate.

Ingate testified that he was "purely the helmsman." He stated that he had authority to "direct the crew in various maneuvers of setting the sails, generally the handling of the boat by the crew and myself" but that "[a]fter we crossed the finishing line, from that stage I was not the skipper anymore."

McClellan testified that he was unsure who was in charge, but his testimony suggested that responsibility for navigation fell to him and Epstein.

The arbitrator held that, as the contemporaneously executed Charter and VSA could not be reconciled, they canceled each other out and would therefore be disregarded. Based on the remaining evidence, the arbitrator found that Ingate was not a true demise charterer, inasmuch as there was no clear and complete transfer of control to him. Rather, Lone Fox, LLC had furnished Epstein as captain and McClellan as first mate. And because the grounding was caused by poor navigation, Lone Fox, LLC would bear the loss. Lastly, since the Charter and VSA were hopelessly contradictory, the clauses in the agreements calling for an award of attorney's fees and costs to the prevailing party were likewise without effect, and therefore each party would bear its own fees and costs. ■

Thanks to Sandy Welte of Camden, Maine for bringing this decision to our attention.

Legislative Developments

Selected changes in state boating laws

Idaho has criminalized the grossly negligent operation of vessels. Grossly negligent is defined to mean without due caution and circumspection, and in a manner as to endanger or be likely to endanger any person or property. The new law takes effect June 1, 2014.

Illinois has removed PFD requirements for racing shells, rowing sculls, racing canoes, and racing kayaks participating in events designated as "PFD Optional." The state has also amended the definition of "overloading" such that water skiers, tubers, parasailers, or other persons towed by a motorboat must be considered part of the total number of passengers and cargo allowed by a watercraft's capacity plate. Finally, operators of vessels involved in a personal injury or fatal accident will now be deemed to have consented to either a breath test using a portable device as approved by the Department of State Police or a chemical test (blood, breath, or urine).

In **Indiana**, the fee for a boat-dealer license is now $30 for a whole year and $10 more for each additional place of business. The state also changed the classifications of dealers. A "Class A" dealer has more than one place of business. A "Class B" dealer has one place of business. And the state's motor-vehicle sales advisory board will now include at least one member representing boat dealers.

Kentucky has declared itself the "Houseboat Capital of the World." It will also require "a reasonable and articulable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts" before officers of the department of Fish and Wildlife may stop a boat.

North Carolina has classified operating a vessel under the influence as a Class 2 misdemeanor,

punishable by a fine of not less than $250. The state has also delegated authority to local counties to prohibit the abandonment of vessels in navigable waters subject to State provisions.

In **Ohio**, individuals possessing a valid merchant mariner credential issued by the U.S. Coast Guard in accordance with 46 C.F.R. 10.109 and having at least one endorsement of master or operator as defined in 46 C.F.R. 10.107 will no longer be required to complete a boater-safety course before operating a recreational vessel. But when operating any recreational vessel, such individuals must carry documentation of their merchant mariner credentials and endorsements, and the documentation must be presented to a watercraft officer or law-enforcement officer upon request. Also, state watercraft officers and other law-enforcement officers will no longer be permitted to stop or board any vessel solely for the purpose of conducting a safety inspection unless the owner or operator voluntarily requests the officer to conduct a safety inspection. Officers still can stop or board a vessel if they have reasonable suspicion that the vessel or its equipment is in violation of Ohio law or a local ordinance, resolution, rule, or regulation, or if the stop is conducted at an authorized checkpoint.

In **Washington**'s 200-foot Orca Whale buffer zones, the following are not considered "vessel(s)": inner tubes, air mattresses, sailboards, and small rafts, or flotation devices or toys customarily used by swimmers. Violation of an Orca buffer zone now carries a fine of $500 in addition to any statutory assessments that may apply. And, persons arrested due to accidents resulting in personal injury or fatality, as well as persons under suspicion of operating under the influence of THC, may be subject to a blood test with the consent of the arrested person and a valid waiver of the warrant requirement or without the consent of the person so arrested pursuant to a search warrant or when exigent circumstances exist. ■

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