BOATING BRIEFS

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Frank P. DeGiulio, Chairman

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This journal will summarize the latest cases and other developments which impact the recreational boating industry. We welcome any articles of interest or suggestions for upcoming issues.

- The Editorial Staff

In this Issue

Jet Ski Rental Company Liable Based on Violation of Florida Statute

Ronald Tassinari, Sheila Silva, and her daughter Ashley Silva rented jet skis from Key West Water Tours, L.C. as part of a guided tour of the waters near Key West. Ashley rode along on Ronald's jet ski while Shield operated her own. During the tour Ronald and Ashley's ski was hit by a jet ski driven by Jeffrey Wilkerson, another participant in the tour. Wilkerson had panicked and kept his jet ski at full throttle until the moment of impact. Sheila Silva was nearby and witnessed the collision but was not injured. Ronald, Sheila and Ashley brought suit against the rental company.

The district court granted plaintiffs' motion for summary judgment as to liability, holding that the rental company's violation of Florida's vessel safety statutes triggered the Pennsylvania Rule and created a presumption of causation that the company failed to rebut. *Tassinari v. Key West Water Tours, L.C.*, 2007 U.S. Dist. LEXIS 46490 (S.D. Fla. June 27, 2007).

The statutes in question (Fla. Stat. §§ 327.39, 327.54) make it a second degree misdemeanor for the owner of a personal watercraft to permit anyone to use it unless the user has first received certain safety instruction from someone who has taken an approved boater safety course. The rental company employee who instructed plaintiffs and Wilkerson in the use of the jet skis had not taken an approved course, and the court suggested that had Wilkerson received instruction from someone who had taken such a course he might not have panicked. The court concluded that in the circumstances the rental company's "fault is presumed." The company was also barred from relying on the release and waiver provisions in the rental agreement signed by Tassinari, with the court finding that such reliance would be against public policy where the company had violated the safety statutes.

In a separate opinion, the court declined to strike the company's affirmative defense that Tassinari was comparatively negligent by not taking action to avoid the collision. The court viewed this as a question of fact to be resolved at trial, as there

was some indication that Tassinari may have had the opportunity to take evasive maneuvers before impact. But because Ashley was simply Tassinari's passenger and was not controlling the jet ski, no comparative fault could be assigned to her. 2007 U.S. LEXIS 43858 (S.D. Fla. June 18, 2007).

Finally, in a third opinion, the court dismissed Sheila Silva's claim for negligent infliction of emotional distress because she failed to allege any "physical manifestation," i.e., physical effects directly resulting from her emotional distress. While noting that the U.S. Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), had not addressed whether a physical manifestation is required to state such a claim, the district court held that in the absence of a physical injury from the collision, recovery is permitted under maritime law only where there is a physical manifestation of the emotional distress. 480 F. Supp. 2d 1318 (S.D. Fla 2007). ■

Limitation of Liability

Boat Rental Company Denied Limitation Due to "Gross Negligence"

Petition of KDME, Inc. d/b/a Seaforth Boat Rental, 2007 U.S. Dist. LEXIS 59810 (S.D. Cal. Aug. 14, 2007)

Janine and Samantha Bucci visited Seaforth Boat Rental in Mission Bay, California to rent a boat with two friends. Despite some initial reluctance Janine decided to rent a 16-foot Bayliner Capri with a 50-horsepower outboard motor, based on assurances by Seaforth's employees that "if you can drive a car, you can drive a boat." Janine signed a rental agreement that exculpated Seaforth for "injury to persons or property or resulting in death . . . whether caused by the negligence of [Seaforth] or otherwise."

Seaforth's dock manager gave Janine and her friends instructions on operating the boat. Topics included the steering wheel, throttle, life jackets, proper speed, and areas to avoid on the bay. The dock manager also offered to rent the group an inner-tube, which they accepted. The manager secured the inner-tube's towing bridle to a metal ring on each side of the motor, and pulled the towline and inner-tube into the boat. Janine asked the manager about the proper method for deploying the inner-tube and was told to "just throw it in when you're ready."

The boat was also equipped with a lanyard kill switch that, when pulled, would have shut off the engine, but apparently the group was not given any instruction about this.

Once the group was out on the bay Janine and Samantha decided to ride on the inner-tube. Someone in the group improperly attached both ends of the bridle to the same side of the motor. (It is not clear from the court's opinion how the bridle became disconnected after the dock manager secured it.) The towline became wedged between the motor and the motor mounting bracket, which caused the steering to lock up. As a result the boat made a sharp u-turn, striking the inner-tube and injuring Janine and Samantha who were on the tube. Janine and Samantha brought suit against Seaforth, and Seaforth filed a petition for exoneration or limitation of liability.

Because Janine had signed Seaforth's hold harmless agreement which specifically disclaimed liability for negligence, the district court concluded that claimants would have to show gross negligence, which California law defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct."

Citing testimony by claimants' experts, the court found that Seaforth's dock manager had committed "gross negligence" by not explaining how to configure the bridle in response to Janine's question about deploying the inner-tube. The failure to instruct the group about the lanyard kill switch likewise amounted to gross negligence, the court stated.

Finally, the court deemed the dock manager to be the equivalent of a managing officer of the company and therefore his "gross negligence" was within the company's privity and knowledge. Thus, limitation was denied. ■

Limitation Petition Dismissed Due to Owner's Faulty Lookout

Matter of Via Sales & Leasing, Inc., 499 F. Supp. 2d 887 (E.D. Mich. 2007)

A 43-foot Wellcraft Cruiser, owned and operated by J. Murray Troup, ran into the stern of a Sea Ray Runabout, injuring the Sea Ray's owner, her daughter and her two guests onboard. Troup and the Wellcraft's co-owner filed petitions for exoneration from or limitation of liability, and the Sea Ray claimants moved for summary judgment dismissing Troup's petition.

To assess whether an owner of a vessel is entitled to limitation of liability, the court makes a two-step inquiry: the court must determine (1) whether the loss was caused by negligence or unseaworthiness, and (2) whether the owner had privity or knowledge of the negligence or unseaworthiness.

As to the first prong, the court first found that the Wellcraft had violated the Rules of the Road by failing to maintain a proper lookout, as evidenced by Troup's failure to notice the Sea Ray in front of him. The court determined that this violation triggered the Pennsylvania Rule, requiring the Wellcraft to show that the violation could not have been a cause of the collision, a burden the Wellcraft was unable to carry.

As to the second prong, the court noted that negligence in the navigation of a vessel will ordinarily be attributed to an owner who is onboard and piloting the vessel at the time of the casualty. Because Troup himself was piloting the Wellcraft, maintaining a proper lookout was necessarily his responsibility. Under the circumstances, Troup was not entitled to exoneration or limitation of liability and his limitation petition was dismissed with prejudice. ■

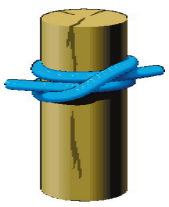
Limitation Act Inapplicable to Negligent Entrustment/Supervision Claims

Petition of Manuel Ruiz, 494 F. Supp. 2d 1339 (S.D. Fla. 2007)

Thirteen-year-old Christopher Ruiz was driving a 90-horsepower motorboat belonging to Manuel Ruiz when he drove over six-year-old Charlie Smith, who was snorkeling with family members. Smith received catastrophic and fatal injuries. Christopher Ruiz then struck the Smiths' boat, which sank as a result. The Smith family filed suit in Florida state court, asserting claims against Manuel Ruiz for negligent entrustment and negligent supervision. Manuel Ruiz then filed an action in federal court, seeking limitation of liability.

In moving to dismiss the limitation action, the Smith family relied on the Seventh Circuit's holding in *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992). In that case, the court dismissed a limitation action initiated by the owner in response to a state court negligent entrustment action. The Seventh Circuit reasoned that when a vessel owner attempts to limit liability for a negligent entrustment claim, one of two scenarios unfolds: (1) the court determines that the owner negligently entrusted the vessel, in which case the entrustment was necessarily within the owner's privity and knowledge and thus there can be no limitation, or (2) the court determines that the owner did not negligently entrust the vessel, in which case there is no liability and thus no need for limitation. Either way, the federal court would be "powerless to do anything to affect either party."

The district court agreed with the Smith family, adopted the reasoning of *Joyce*, and dismissed Ruiz's limitation petition as moot. ■



Seaman Status

Part-Time, Unpaid Recreational Sailor Not A Seaman

Knight v. Longaker, 2007 U.S. Dist. LEXIS 47080 (N.D. Cal. June 28, 2007)

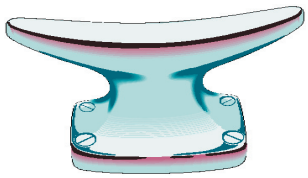
Heather Knight, described by the court as a "weekend sailing enthusiast," was injured while participating in an amateur sailboat race on the San Francisco Bay on a boat owned by Christopher Longaker. Knight frequently served as "crew" aboard Longaker's vessel but often missed races when she had conflicts with work or social engagements. She paid all of her own expenses and was never compensated for participating in races aboard Longaker's boat.

Knight sued Longaker for (1) negligence under the Jones Act, (2) unseaworthiness, (3) maintenance and cure, and (4) negligence under general maritime law.

As to the first three claims, the court required Knight to show that she qualified as a seaman under the Supreme Court's two-prong test in *Chandris v. Latsis*, 515 U.S. 347 (1995), i.e., that her duties contributed to the function of the vessel or to the accomplishment of its mission, and that her connection to the vessel was substantial in both duration and nature.

The court then discussed at length a line of cases holding that unpaid, recreational sailors do not qualify for seaman status. As a result of Knight's "full time employment on land and purely recreational participation on the boat," the court found Knight's connection to the boat to be substantial in neither nature nor duration, and thus she was not a Jones Act seaman.

Having failed the *Chandris* test, she was also unable to make claims for unseaworthiness and maintenance and cure. As such, Knight was left with only her claim for negligence under general maritime law. ■



Salvage

Securing a Vessel Adrift

Miami Yacht Divers, Inc. v. M/V ALL ACCESS, 2007 U.S. Dist LEXIS 63703 (S.D. Fla. Aug. 29, 2007)

On October 24, 2005, Ft. Lauderdale was being buffeted by Hurricane Wilma. Pablo Munoz, owner of the S/V SOUTHERN CROSS (moored in a residential community on the Del Mar Canal) contacted Miami Yacht Divers, Inc. to assist in untangling the dock lines of his boat from those of a sport-fishing vessel that had broken loose from its moorings, floated down the canal, and became entangled with the SOUTHERN CROSS. Daniel Delmonico, of Miami Yacht Divers, arrived at the SOUTHERN CROSS, donned free-diving gear, entered the water and began cutting loose the entangled lines.

Approximately one hour after Delmonico's arrival, he and Munoz heard a voice from across the canal alerting them to the approach of another vessel. They looked up and saw the ALL ACCESS, a 48-foot Sunseeker motor yacht, floating down the canal with engines off and no crew. The ALL ACCESS had broken free of her mooring approximately 8-10 houses west of the SOUTHERN CROSS.

Delmonico, still in his free-diving gear, swam to the stern of the ALL ACCESS, grabbed a trailing line, and handed it to Munoz who tied the line to a piling which stopped the progress of the ALL ACCESS within seconds. Once secured, the men checked the interior and exterior of the vessel to ensure it was watertight. They then moved the ALL ACCESS closer to where they were working on the SOUTHERN CROSS and inspected it every half hour to ensure it remained watertight. Approximately three hours later, Jeffrey Cohen, owner of the ALL ACCESS, arrived on the scene, and he and Delmonico jointly transported the vessel back to its berth up the Del Mar Canal.

In a salvage action, a salvor must prove that (a) there was a marine peril placing the property at risk of loss, (b) the salvage was voluntarily rendered, and (c) the salvage was successful. In this case the court determined that a successful salvage occurred and an award was due.

In determining the amount of the award, courts consider (1) the labor expended by the salvor, (2) the promptitude and skill displayed, (3) the value of the property employed by the salvor in rendering assistance, (4) the risk incurred, (5) the value of the saved property, and (6) the degree of danger from which the property was rescued.

After considering all the evidence, the court determined that this was low level salvage. The salvage operation took about 30 minutes, no skills other than swimming were required, no special equipment was utilized, there was a low to moderate risk involved, the stipulated post-casualty value of the ALL ACCESS was $300,000, and (given the vessel's slow progress down the canal) the degree of danger was not substantial. The court awarded 7.5% of the post-casualty value of the vessel--$22,500. ■

Claiming Salvage from Adjacent Vessel

Atlantis Marine Towing, Inc. v. M/V PRISCILLA, 491 F. Supp. 2d 1096 (S.D. Fla. 2007)

On May 14, 2004, the PRISCILLA (a 63-foot Hatteras sport-fishing yacht) was moored behind the CURE ALL (a 57-foot Ferretti motor yacht) at Monty's Marina in Miami, Florida. The CURE ALL's tender was tied up at its stern, just forward of the PRISCILLA's bow pulpit. At some point that evening, the tender caught fire. Employees of Atlantis Marine Towing extinguished the fire using a water pump and hose.

Atlantis Marine filed a complaint seeking a salvage award against both the PRISCILLA and the CURE ALL, claiming its salvage services had saved both vessels from fire damage. The PRISCILLA asserted a cross-claim for indemnification against the CURE ALL, claiming that, in the event the PRISCILLA was held liable for salvage, the CURE ALL must indemnify it because the fire aboard the tender resulted from the CURE ALL's negligence.

The PRISCILLA moved for summary judgment on the basis that (1) a salvor has no right to a salvage award from a vessel that benefited only incidentally from services rendered to another vessel, and (2) there was no risk of the fire spreading to the PRISCILLA and thus no marine peril as to the PRISCILLA.

The CURE ALL likewise sought summary judgment on the PRISCILLA's indemnity claim, arguing there was insufficient evidence to support the PRISILLA's theory that the CURE ALL had negligently left the keys in the tender's ignition and that a would-be thief, when turning the ignition key, had caused a backfire that resulted in the fire.

With regard to the PRISCILLA's motion, the court reviewed the existing caselaw and concluded that "a claim for salvage will not lie when asserted against a vessel that gained an incidental benefit from a salvor's services to another vessel." However, the court indicated that the question of whether the benefit was merely "incidental" was one of fact to be answered at trial. The court also found that in view of the conflicting affidavits by each side's experts, the question of whether the PRISCILLA was actually in danger from the fire was likewise a matter that had to be determined at trial. Therefore, the court denied the PRISCILLA's motion for summary judgment.

In addressing the CURE ALL's motion for summary judgment (dealing with the PRISCILLA's claim that the CURE ALL was responsible for the fire), the court found that the evidence produced by the PRISCILLA was insufficient to show that the CURE ALL's alleged fault in leaving the keys in the tender's ignition had led to the fire. In this regard, the only evidence in support of the PRISCILLA's theory was the testimony of a witness on the dock who said he saw someone walking away quickly from the vicinity of the tender about an hour before the fire broke out. Since this testimony was not sufficient to conclude that the person was a thief attempting to start the tender, the court granted the CURE ALL's motion against the PRISCILLA. ■

Marinas

Generic Exculpatory Language No Bar to Negligence Claims

Markel American Insuance Co. v. Dagmar's Marina, LLC, 161 P.3d 1029 (Wash. App. 2007)

Markel sued Dagmar asserting negligence and breach of implied warranty of workmanlike performance, when their insured's vessel was damaged during a windstorm at Dagmar's facility. The trial court granted summary judgment for Dagmar, relying on a limitation of liability provision in the marina contract between Dagmar and Markel's insured.

The issue on appeal was whether the limitation of liability provision in the lease relieved the marina of liability due to its own negligence, as under Ninth Circuit precedent, exculpatory clauses in maritime contracts are enforceable even if they absolve a party of all liability for negligence. The court, in reversing the trial court's dismissal, found that the limitation of liability provision did not clearly and unequivocally exculpate the marina, as it did not expressly state that the marina was relieved of its own negligence and did not contain language that conveyed a similar meaning. ■

Martinez v. Matt-A-Mar Marina LLC, 2007 NY Slip Op 51637U (N.Y. Supr. Suffolk 2007)

Martinez brought a negligence suit against the marina where he leased a slip, claiming he had fallen on the premises. The lease agreement between Martinez and the marina contained an exculpatory clause releasing the marina from any and all responsibility or liability for injury occurring at its facilities but the marina did not specifically disclaim liability for its own negligence. In denying the marina's motion for summary judgment, the court concluded that the use of broad, sweeping language providing release from any and all responsibility or liability of any nature whatsoever for any loss of property or personal injury will not bar claims based upon negligence. ■

Insurance

Mortgagee Covered by Breach of Warranty Endorsement

Federal Insurance Co. v. PGG Realty, LLC, 2007 U.S. Dist. LEXIS 29483 (S.D.N.Y. April 17, 2007)

A 124-foot Trident motor yacht capsized at sea and sustained irreparable damage. The insurer denied coverage and brought a declaratory judgment action against the insured and the vessel's mortgagee, alleging, among other things, that the mortgagee had violated the duty of disclosure pursuant to *uberrimae fidei* by failing to provide the insurer with a copy of a report prepared by the insured's marine surveyor.

The court granted the mortgagee's motion for summary judgment for the unpaid balance of the mortgage, holding that the mortgagee was covered under the policy's breach of warranty endorsement. The court reasoned that the doctrine of utmost good faith had rarely, if ever, been imposed on a mortgagee and, in any event, the mortgagee was entitled to assume that all of the information it had received from the insured, including the survey report, had also been disclosed to the insurer. The court additionally noted that, while the report cited various problems with the condition of the yacht, it also indicated that none of the problems were of such magnitude as to impair "safe operation and/or insurability." ■

Court Declines to Dismiss First-Filed Declaratory Action

Great Lakes Reinsurance (UK) PLC v. Zielinski, 2007 U.S. Dist. LEXIS 52231 (M.D. Fla. July 19, 2007)

Plaintiff marine insurer filed a complaint for declaratory judgment in federal district court in Tampa, claiming there was no coverage for damages sustained in an allision because the insureds had misrepresented their nautical experience in their insurance application. Fifteen days later, the insureds brought suit in state court in Tampa against the insurer for breach of contract and against their insurance brokers for profes-

sional negligence. The insureds moved to dismiss or stay the federal action in favor of the state action.

The federal court denied the insured's motion, noting that the central issue in the case would be the admiralty doctrine of *uberrimae fidei* and not an issue of state law, the insureds were free to add their brokers as third-party defendants in the federal litigation, and the federal action was the first to be filed. ■

Products Liability

Claims for Off-Throttle Steering Loss

Folsom v. Kawasaki Motors Corp., 2007 U.S. Dist. LEXIS 37936 (M.D. Ga. May 24, 2007)

A minor was operating a 1998 Kawasaki 900STX Jet Ski on Lake Hartwell. He temporarily lost control of the steering and struck Seth Ellis Folsom, who was floating on a raft. Folsom was struck in the head, lost consciousness, and drowned.

Plaintiffs, Folsom's parents, alleged that Kawasaki was liable for (1) defective product design for failing to provide off-throttle steering capabilities; (2) failure to provide adequate warnings of the complications associated with off-throttle steering loss; (3) negligence per se based on the FBSA (Federal Boat Safety Act of 1971); and (4) punitive damages.

Kawasaki contended that any claim based on defective design was expressly preempted by the FBSA and impliedly preempted by the Coast Guard's affirmative decision not to regulate personal watercraft (PWC) design. Kawasaki also argued that the plaintiffs' experts were not qualified to testify that the Jet Ski was defectively designed, and sought dismissal of the claim for punitive damages.

The Kawasaki Jet Ski required thrust from a jet pump to steer, and turning the handlebars changed the direction of the jet pump. Off-throttle steering loss is the condition that occurs when the operator releases the throttle and then attempts to execute a turn. In the absence of an off-throttle steering system like those installed on some newer PWCs, the operator has little or no directional control once the throttle is released.

There are no FBSA regulations governing the design of PWC steering systems, and the district court relied on the Supreme Court's decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), in concluding that the plaintiffs' claims for defective design were not expressly preempted by the FBSA.

With respect to implied preemption, the court reviewed the various PWC studies that had been commissioned by the Coast Guard (as the FBSA's regulatory entity), and determined that the Coast Guard had elected not to regulate PWC steering systems because of a lack of available data relating to off-throttle steering solutions and *not* because the Coast Guard adopted an agency policy against regulation. Therefore, the claims based on defective design were not impliedly preempted.

Nevertheless, the court granted summary judgment for Kawasaki on both the design and negligence per se claims, deciding that the plaintiffs' expert witnesses were not qualified to testify that the Jet Ski was defectively designed. According to the court, Georgia law requires that an expert testifying as to defective product design be qualified to conduct a "risk-utility" analysis and provide an opinion that the risks associated with the design in question outweighed the utility or benefit derived from the product. Although both of the proposed experts were very experienced with PWC operation and maneuverability, one having developed safety courses and lectured on PWC safety and the other having designed rudder systems to address off-throttle steering loss, the court concluded that neither had the background or knowledge necessary to perform the risk-utility analysis, including an assessment of the state of the art at the time the product was manufactured and the defendant's ability to eliminate the danger without impairing the product's usefulness or making it too expensive.

In the absence of plaintiffs' expert testimony, there was no evidence that the Jet Ski was defective and Kawasaki was therefore entitled to summary judgment on the plaintiffs' defective design and negligence per se claims.

With regard to the failure-to-warn claim, the plaintiffs argued that the Jet Ski's warning label about off-throttle steering loss was not sufficient to warn an operator that the Jet Ski could not be steered if the throttle was released. The Jet Ski had eleven different warning labels affixed to it, and the sticker that men-

tioned off-throttle steering loss was located on the side of the Jet Ski, in front of the handlebars, and could not be seen by the operator when seated at the controls. Moreover, the warning about off-throttle steering loss was printed in the middle of the sticker, amidst nine other warnings, and the operator had testified that he did not notice any of the stickers on the Jet Ski. The court concluded that in view of this evidence "a jury could reasonably determine that Kawasaki was negligent in failing to place the off-throttle steering warning in such position, color, and size print or to use symbols which would call the user's attention to the warning or cause the user to be more likely to read the label and warning than not." Thus, the adequacy of the warning label would be decided at trial.

Finally, as to the punitive damages claim, the court noted that punitive damages were not available in a wrongful death action under Georgia law and could only be recovered as part of a survival action, which required proof that the deceased had experienced pain and suffering prior to death. As it appeared the plaintiffs' son never regained consciousness after the initial impact, there was no evidence that he had suffered conscious pain prior to death and therefore the plaintiffs' claim for punitive damages was dismissed. ■

Hidden Defect May Overcome Oregon Presumption

Vinson v. Cobb, 501 F. Supp. 2d 1125 (E.D. Tenn. 2007)

Marcia Vinson was a passenger aboard a houseboat owned by her friend Greg Mercer. Grant Cobb had his houseboat tied to Mercer's boat, in "something akin to a floating backyard barbeque." Cobb decided to untie his boat from the Mercer boat, but after drifting away, Cobb's boat suddenly engaged in reverse gear and backed into the Mercer boat, injuring Vinson, who moved for summary judgment on the issue of liability.

The court found that the Cobb boat's collision with the stationary Mercer boat triggered the Oregon Rule, which assigns presumptive fault to a moving vessel that allides with a stationary object. The burdens of production and persuasion are placed on the moving vessel, which is presumed to be at fault unless it can show by a preponderance of evidence that it acted with reasonable care, that the allision was the stationary vessel's fault, or that the allision resulted from an inevitable accident.

The court found that the Oregon Rule was properly invoked, which established Vinson's prima facie case for negligence. However, the court determined that Cobb had introduced evidence sufficient to rebut the presumption created by the rule. Specifically, Cobb claimed that the allision occurred when his boat's transmission fell out of neutral and into reverse, which it had never before done. Cobb's expert witness testified that a mechanical defect had caused the transmission to slip unexpectedly into reverse, and further that the defect was undiscoverable by Cobb.

Thus, Cobb had introduced sufficient evidence to create a material issue of fact regarding liability despite the effect of the Oregon Rule, and Vinson's motion for summary judgment was denied. ■

Warranty and Repair

Seller Disclaims All Warranties

Drew v. Boaters Landing Inc. of Ft. Myers, 2007 U.S. Dist. LEXIS 67676 (M.D. Fla. Sept. 13, 2007)

Plaintiffs purchased a 2003 Four Winns vessel from Boaters Landing Inc. Over a period of 3 ½ years, Plaintiffs notified Boaters Landing of defects in the vessel nine different times, and finally filed suit asserting (I) breach of contract, (II) breach of express warranty, and (III) revocation of acceptance. The court, in dismissing counts I and II, looked to the "Exclusion of Warranties" section of the sales contract, finding the section to be conspicuous and unambiguous, and that Boaters Landing therefore effectively disclaimed any express or implied warranties in the sales contract. The court also dismissed Count III, as revocation of acceptance is not an available remedy under Florida law where a seller has properly disclaimed all warranties. ■

Notice to Seller Sufficient for Warranty Claim

ACE American Insurance Co. v. Fountain Powerboats, Inc., 2007 DNH 102 (D.N.H. Aug. 24, 2007)

ACE's insured, while boating on Lake Winnipesaukee, asserted that his vessel suddenly and unexpectedly dropped to starboard, the bow dove down, and the stern rose out of the water, ejecting the insured and his four passengers and causing severe damage to the vessel. ACE brought a subrogation claim against Defendant manufacturer, asserting (I) strict product liability, (II) failure to warn, (III) violation of the New Hampshire Consumer Protection Act, and (IV) breach of the implied warranty of fitness for a particular purpose. Counts I and II were dismissed on the basis of the economic loss rule and Defendant manufacturer then moved for summary judgment on Count IV, asserting that ACE and its insured failed to provide Defendant manufacturer with timely notice of the warranty claims, as is required by the New Hampshire Uniform Commercial Code. In denying Defendant manufacturer's motion, the court determined that the buyer in a consumer transaction needs to notify only his or her immediate seller of potential U.C.C. warranty claims. When ACE's insured notified the boat's seller, and not Defendant manufacturer, the burden of giving notice was met under the U.C.C. ■

Criminal Law

Conviction for Prompting False Distress Call

United States v. Haun, 494 F.3d 1006 (11th Cir. 2007)

During a late night outing on the bay near Panama City, Florida, Defendant left an acquaintance in command of his boat and boarded a raft. After the boat pulled away to begin towing the raft, Defendant left the raft, swam to an island where he had previously placed a jet ski, rode to shore and then left the state with the intent to disappear to avoid an impending court date. The individuals aboard his boat, fearing he had fallen overboard from the raft, called the Coast Guard and a day-long search ensued. When Defendant was later found, he was charged and convicted under 14 U.S.C. § 88(c), which makes it a felony to "knowingly and willfully communicate a false distress message to the Coast Guard or cause the Coast Guard to attempt to save lives and property when no help is needed."

The issue on appeal was whether the government had to prove specific intent, i.e., that Defendant actually intended for the Coast Guard to mount a rescue effort. Based on the legislative history, the court determined that 14 U.S.C. § 88(c) defined a general intent crime. Defendant had purposely faked his disappearance and had to have known that the Coast Guard would likely be called, and therefore the conviction was affirmed. ■

Intoxicated Boater Convicted of Homicide

Fonte v. Jenkins, 2007 U.S. Dist. LEXIS 34517 (E.D. Wis. May 10, 2007)

Fonte was convicted of homicide by intoxicated use of a motor vehicle under Wis. Stat. § 940.09 as a result of a boating accident on Geneva Lake, and was sentenced to 25 years. He filed a petition for a writ of habeas corpus in federal court, asserting that Wis. Stat. § 940.09 was unconstitutional because it did not require the State to prove a causal connection between a boat operator's intoxication and the homicide.

In denying the writ, the federal court concluded that in light of the inherent danger of boating while intoxicated, and in the absence of clearly established federal law to the contrary, states may hold individuals who operate a boat under the influence of an intoxicant strictly liable for any death that results from the operation of the boat, whether caused by the operator's intoxication or not. ■

Community Caretaking Doctrine as Basis for Warrantless Search

Castella v. State, 959 So. 2d 1285 (Fla. 4th DCA 2007)

Defendant was convicted of felony boating under the influence following a stop by law enforcement. Police officers approached Defendant's boat after they were informed by other boaters that Defendant's boat had been involved in an accident. Upon approaching the boat the officers smelled alcohol and administered a sobriety test, which Defendant failed. Defendant filed a motion to suppress, which was denied, upon which he filed a motion for rehearing.

In affirming the denial of the motion to suppress, the court determined that the legality of the stop hinged on the status of the informants and their interaction with the deputies who investigated Defendant. The court concluded that the individuals who provided information to the officers face-to-face were more akin to citizen-informants than anonymous tipsters, and that under the community caretaking doctrine the deputies were entitled to rely on them without further corroboration before stopping Defendant to investigate the reported accident. Under the community caretaking doctrine, law enforcement may make warrantless searches and seizures in circumstances where they reasonably believe that their action is required to deal with a life-threatening emergency. ■

Not at Helm but Still in Control

Div. of Waterworks v. Ardale, 2007 Ohio 3022 (Ohio App. 2007)

Defendant was convicted of operating a watercraft while under the influence of alcohol. Officers had conducted a safety inspection after they noticed his vessel stopped in the Grand River without lights. When the officers boarded, Defendant was in the engine compartment trying to fix the boat's lights and another man was at the vessel's helm. Officers, smelling alcohol on Defendant, conducted a field sobriety test, which Defendant failed.

Defendant appealed, claiming the prosecution had failed to prove he was operating the vessel given that, at the time of his arrest, he was not at the helm. In affirming the conviction, the court decided that the officers need not have seen Defendant at the helm in order for the prosecution to establish that he was operating the vessel; rather the testimony by one officer that Mr. Ardale had admitted to driving the boat within twenty minutes before the boarding, coupled with the evidence of his intoxication at the time of boarding, was sufficient to sustain the conviction. ■

Government Liability

Coast Guard Prevails Over Negligent Rescue Claim

Powell v. United States, 2007 U.S. Dist. LEXIS 60347 (D. Ore. Aug. 6, 2007)

A sailboat's engine broke down in rough weather off the Oregon coast and the Coast Guard dispatched a 47-foot Motor Life Boat (MLB) to assist. Once on the scene, the coxswain in charge of the MLB asked Mitchell Powell, the sailboat's owner (and the only person onboard), whether he had any medical conditions. According to the trial testimony, Mr. Powell answered that he was "fine."

The coxswain decided that the best course was to rig a drogue off the stern of the sailboat and tow the vessel back to port. In the coxswain's assessment, transferring personnel between the sailboat and the MLB would have been too risky given the rough seas, and a helicopter rescue was not an option due to dense fog.

The MLB crew passed a drogue to Mr. Powell, who with some difficulty was able to haul it onto the stern of his boat. He was instructed not to deploy the drogue until told to do so. He then went to the bow but he appeared unsteady and disoriented as he retrieved and connected the towing bridle.

As the MLB moved slowly away to begin the tow, Mr. Powell started to deploy the drogue before being told to do so. His left leg became caught in a bight of the drogue line, pinning him against the stern rail. About 30 minutes elapsed before the MLB crew realized what had happened and could maneuver back to relieve the strain on the drogue line. At this point

Mr. Powell advised the Coast Guard that he was weak and entering diabetic shock. This was the first time he had informed the Coast Guard about his diabetes. As weather conditions were still too rough to transfer personnel, the MLB resumed the tow toward port and summoned additional assistance on an urgent basis. Two medics from a smaller Coast Guard utility boat were able to board the sailboat after it was towed closer to port.

As a result of the incident Mr. Powell suffered a strangulation injury to his left leg and compartment syndrome, and he brought a negligence suit against the United States under the Public Vessels Act.

After a two-day bench trial, the court found that the Coast Guard, and in particular the MLB's coxswain, had acted reasonably under all the circumstances and had given proper consideration to the safety of both Mr. Powell and the MLB crew. The court concluded that Mr. Powell's injuries were caused solely by his own actions in deploying the drogue prematurely, and the court further noted that in venturing out to sea, Mr. Powell, a novice sailor, had disregarded the predictable weather in the area, the danger of sailing alone, and his own medical condition. Accordingly, judgment was entered for the government. ■

Sailboater Charged With Knowledge of Overhead Power Lines Marked on Chart

Alprin v. City of Tacoma, 159 P.3d 448 (Wash. App. 2007).

While anchoring his 29-foot Ericson sailboat in Henderson Bay, Puget Sound, Scott Alprin was severely injured and thrown into the water when the mast on his boat struck live overhead power lines. The jolt of electricity also caused extensive damage to his boat. The power lines had been in place since 1925 and the applicable NOAA navigational chart clearly showed their location and their 30-foot clearance above mean high water.

Mr. Alprin sued the City of Tacoma and Tacoma Public Utilities, claiming they had failed to give adequate warning of the power lines. The trial court granted summary judgment for the defendants.

On appeal, the court noted that although there is an initial presumption of fault against a party who places an obstruction in a navigable waterway, the presumption can be rebutted by showing that the party gave sufficient warning of the obstruction. In this case, the fact that the power lines' position and height above water were clearly marked on the chart was held to be sufficient warning as a matter of law. Having allided with a fixed object shown on the chart, Mr. Alprin himself was deemed to be presumptively at fault and he could not overcome this presumption in light of his failure to even consult the chart before sailing into the area. Therefore, summary judgment for the defendants was affirmed. ■

Recreational Use Statute: No Defense to Negligent Navigation

Matheny v. Tennessee Valley Authority, 2007 U.S. Dist. LEXIS 59992 (M.D. Tenn. Aug. 15, 2007)

Two fishermen were thrown into the Cumberland River and one of them drowned after their small boat was swamped in the wake of a passing tugboat. The decedent's wife brought a negligence suit against the Tennessee Valley Authority, the owner of the tugboat. The TVA moved for summary judgment on the basis of Tennessee's Recreational Use Statute, Tenn. Code Ann. § 70-7-102, which generally provides that property owners owe no duty of care to keep their premises safe for recreational users (including boaters and fishermen) or to warn of hazards on the property.

The court denied the TVA's motion, finding the recreational use statute inapplicable for three reasons. First, the statute was preempted to the extent it would have deprived the plaintiff of the federal maritime claim she had under *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001), for wrongful death in state territorial waters caused by negligence. Second, the statute provided a defense only to premises liability and failure-to-warn claims and in this case the plaintiff was not taking issue with the condition of the river but rather was alleging that the tugboat had been negligently operated. Finally, the statute protected only persons who owned, leased, occupied or otherwise controlled the premises in question, and the TVA

had not shown that it owned or controlled the particular area of the river where the accident occurred. ■

McMellon Postscript: Court Denies Joint Request to Vacate Rulings

McMellon v. United States, 2007 U.S. Dist. LEXIS 24477 (S.D.W.Va. April 2, 2007)

Readers may recall our previous reports on this case (Volumes 12:2, 13:2, and 15:2), which involved two personal watercraft that plunged over the Robert C. Byrd Dam on the Ohio River. Plaintiffs claimed that the signage above the dam provided insufficient warning of the danger, and after six years of litigation and a bench trial, they were awarded a judgment against the United States in excess of $800,000.

The United States appealed, but while the appeal was pending the parties reached a settlement that called for the district court to vacate the findings of fact and conclusions of law issued after the bench trial (2006 U.S. Dist. LEXIS 51625) as well as its earlier holding that the Corps of Engineers' duty to mark the dam properly was not a discretionary function (395 F. Supp. 2d 422). In their joint motion to the district court, the parties stated that vacating these decisions "would bring finality to the plaintiffs and assist the United States as a frequent litigator in Federal court."

In denying their request, the district court noted that while settlement was certainly desirable, significant judicial resources had already been expended in the litigation and the government's goal of minimizing the negative precedent generated in the case was not a sufficient basis for vacatur. The court wrote that the public at large has an interest in a court's decision-making and "must not feel that the government can shape the law to its favor by buying settlements that erase unfavorable precedents."

As the government's appeal has since been voluntarily dismissed, it appears the parties were able to resolve the case notwithstanding the district court's ruling. ■

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