Recreational Boating Committee of The Maritime Law Association of the United States

BOATING BRIEFS

Frank P. DeGiulio, Chairman

Volume 15 Number 2 *Fall/Winter 2006*

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

Claim for Defective Jet Ski Design Not Barred by California's Assumption of Risk Doctrine

During a family gathering at Lake Berryessa, near Napa, California, Susan Ford took a ride on a 2001 2-seater Polaris personal watercraft being operated by her sister-in-law, Laura Nakamura. Susan initially held onto Laura's waist, but then Laura told her she was holding on too tightly and should use the grips behind her instead. Susan reached back and grasped a handle designed for boarding the craft from the water. As the craft bumped up and down, Susan lost her grip and fell backwards into the wake. The high-pressure stream from the jet nozzle caused very severe rectal injuries and damage to her internal organs, leading to permanent loss of bowel control, inability to urinate without a catheter, and other complications.

Susan and her husband brought a products liability claim against Polaris and a negligence claim against Laura. Polaris cross-claimed against Laura for indemnification. The plaintiffs' theory against Polaris was that the watercraft was defective because it did not provide a means for passengers to hang on securely during those times when it was not feasible to hold onto the operator.

The watercraft had two labels, one in front and one in back, warning passengers to wear a wetsuit or other protective clothing to avoid orifice injuries. The owner's manual contained similar warnings, and stated that passengers should hold onto the operator or a seat strap. Susan had been wearing only a one-piece bathing suit and life jacket. She did not notice the warning

labels and had never seen the manual. This particular watercraft had bolt holes for a seat strap but no strap was installed. A strap would have cost "fifty cents at most" and, according to Susan's expert, would have probably prevented the accident.

Relying on the doctrine of primary assumption of risk, the trial court dismissed all claims against the operator Laura prior to trial. (We previously reported in 12 BOATING BRIEFS Vol. 2 at 12 on the case of *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883 (Cal. App. 2003), which applied the doctrine of assumption of the risk to a collision between two jet skiers.) The trial court found that Laura's failing to tell Susan about the need for protective clothing and her directing Susan to hold onto the rear grips amounted to only ordinary negligence, which was not actionable in light of assumption of the risk doctrine as applied to jet skis under California law.

The court declined to dismiss Polaris, however, concluding that the doctrine of primary assumption of risk was no defense to a claim against a manufacturer for defective design. The court also refused Polaris' request to instruct the jury that plaintiffs had to prove not only a design defect but also that the defect increased the risk of harm beyond that normally associated with jet skiing. Likewise, the court declined to instruct the jury that it could allocate some fault to Laura, and ruled that Laura and her husband, the owners of the watercraft, had no duty to call Susan's attention to the warnings that were affixed to the craft and printed in the owner's manual.

At trial the jury awarded Susan $382,024 for economic losses and $3,262,500 for non-economic losses, and awarded her husband $115,000 for loss of consortium. Judgment was entered against Polaris. Polaris appealed and the Court of Appeal affirmed the judgment in *Ford v. Polaris Industries, Inc.*, 43 Cal. Rptr. 3d 215, 2006 AMC 1476 (Cal. Ct. App. 2006).

The Court of Appeal first held that while the doctrine of primary assumption of risk meant that co-participants generally did not have a duty to protect each other against risks inherent in the sport such as falling into the water, Polaris, as a manufacturer, had a duty not to *increase* the inherent risks of jet skiing. The court found that Polaris could have better protected against the risk of passengers falling off the back of the watercraft and suffering grave injuries without fundamentally altering the nature of the sport. Additionally, the fact that half of all jet skis had no seat straps did not preclude a claim for defective design.

Second, once they established a defect in design, the plaintiffs did not have to separately prove that the defect increased the risk of harm. According to the appeals court, "[t]he very nature of the defect necessarily increased the likelihood that a passenger would fall rearward and suffer the extreme harm of orifice injuries. Thus as a matter of law the defect escalated the risk of harm beyond the inherent risk of falling into the water." Furthermore, once the watercraft's design was proven defective, Polaris had the burden of showing that the benefits of that design outweighed the danger.

Third, the appellate court held that the trial judge properly declined to instruct the jury that it could allocate some fault to the operator Laura, because Laura was immunized from liability under the primary assumption of risk doctrine, and it would have been anomalous to assign fault to her in connection with the claim against Polaris when she had no direct liability to Susan.

Finally, the appeals court held that Laura and her husband, as owners of the watercraft, had no duty to call Susan's attention to the manufacturer's warnings about the danger of orifice injuries and the need to wear protective clothing. Imposing such a duty, the court wrote, would "foist on to the suppliers/co-participants the extra job of being the company's representative with the responsibility of nudging every passenger to read the label and owner's manual."

Failure-to-Warn Claim Dismissed Where Warning Label Complied with Federal Regulations

In the spring of 1998, Russell Wood purchased a Jabsco 250 CFM bilge blower and installed it in his 28-foot yacht. The blower system was equipped with a warning label that read:

> WARNING gasoline vapors can explode. Before starting engine, operate blower for 4 minutes and check engine compartment bilge for gasoline vapors. Run blower below cruising speed. Failure to do so may result in injury or death.

Later in the season, after refueling in preparation for a lobstering trip, Mr. Wood experienced difficulty starting the port engine. When he opened the port engine throttle, the vessel exploded. An investigation revealed the cause to be an ignition of gasoline vapors in the engine compartment.

Mr. Wood and his wife and stepdaughter (who were on the vessel with him) brought suit in Massachusetts state court against ITT Industries, which manufactured the blower, and Northside Marina, which sold it to him. Their claims included negligent failure to warn and breach of implied warranty of fitness for a particular purpose under Massachusetts' law. Both defendants sought summary judgment, arguing, among other things, that the failure-to-warn claim under Massachusetts' law was preempted by the Federal Boat Safety Act (FBSA).

The parties agreed that the blower system's warning label complied with 33 C.F.R. § 183.610(f), a regulation issued pursuant to the FBSA that sets forth the warning to be given on powered ventilation systems:

> Each boat that is required to have an exhaust blower must have a label that:
> (1) Is located as close as practicable to each ignition switch;
> (2) Is in plain view of the operator; and
> (3) Has at least the following information:
> WARNING—GASOLINE VAPORS CAN EXPLODE. BEFORE STARTING ENGINE OPERATE BLOWER FOR 4 MINUTES AND CHECK ENGINE COMPARTMENT BILGE FOR GASOLINE VAPORS.

The court addressed the motions for summary judgment in *Wood v. Northside Marina*, 20 Mass L. Rep. 618 (Mass. Super. Ct. 2006). While noting that preemption was not favored, the court concluded that plaintiffs' failure-to-warn claim could not stand where the contents of the warning label met, and even

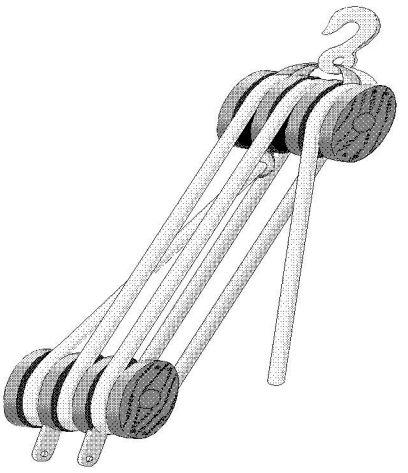
exceeded, the federal standard. The court relied on the Supreme Court's statement in *Sprietsma v. Mercury Marine*, 537 U.S. 51, (2002), that preemption would occur "if a state common law claim directly conflicted with a federal regulation promulgated under the [FBSA], or if it were impossible to comply with any such regulation without incurring liability under state common law." The Massachusetts court also recognized decisions from other jurisdictions that had dismissed failure-to-warn claims in cases where a label complied with specific federal requirements.

The court declined, however, to dismiss the plaintiffs' breach of warranty claim, stating simply that there were issues of fact that precluded summary judgment.

Pure Salvage Award Proper Notwithstanding Evidence of Pre-negotiated Towing Contract

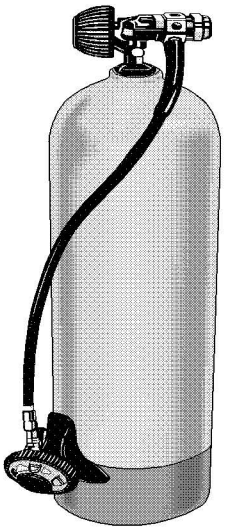
In *Joseph v. J.P. Yachts, LLC*, 436 F. Supp. 2d 254 (D. MA. 2006), the district court found that New Bedford Marine, a marine towing and salvage company, was entitled to recover a pure salvage award notwithstanding evidence of an oral fixed-fee agreement entered with the boat owner prior to the services being rendered. At around 0300 on September 2, 2003, the M/Y LADY MAZIE, a three million dollar motor yacht owned by Jerry Prescott, grounded in the outer harbor at Cuttyhunk Island, Massachusetts. Prescott was a member of Boat U.S. and was familiar with the organization's on-water towing services agreement. After the grounding Prescott called Boat U.S. and was provided with contract details for New Bedford Marine, an approved Boat U.S. towing services provider. According to the trial court, Prescott intentionally waited until after 0500 to contact New Bedford Marine in order to obtain the lower $125 per-hour daytime towing rate. Prescott spoke with Ralph Joseph, the owner of New Bedford Marine.

Prescott informed Joseph that he had dragged anchor, but did not disclose that he was aground, precipitously close to a rocky beach, with strengthening winds and waves pushing the vessel ashore. The trial court found that during the conversation with Joseph, Prescott (an experienced boater who once held a 100 ton master's license) intentionally minimized the nature of the problem and was emphatic that he only needed one assist boat to keep the yacht's stern from going on the beach. Asked for a price, Joseph quoted the discounted rate of $125 per-hour for one boat captained by Clinton Allen to tow the yacht and reset the anchor. Prescott agreed and Joseph dispatched Allen with a 23 foot tow boat equipped with a hawser. When Allen arrived, the vessel was aground with 18 inches of bottom paint visible, listing, and lurching towards shore. Allen immediately informed a member of the vessel's crew that they were in a salvage situation. With the crew's assistance Allen attached the towing hawser to the yacht's starboard quarter and kept a strain on it to minimize the yacht's contact with the rocks. He then called Joseph and requested a second boat. A shallow-water Kencraft was dispatched, captained by Joseph Moniz. The two rescue boats were able to keep tension on the yacht's stern until the rising tide lifted her off the ground at approximately 1020. The yacht sustained no damage.



Allen released his hawser, leaving the Kencraft's towing line in place. To confirm that the yacht's engines were operating properly, Allen then carefully instructed Prescott to momentarily "bump it in gear" while the Kencraft's line was still attached. Instead, Prescott put the yacht in first gear for a full minute, causing the Kencraft assist boat to capsize. Allen rescued Moniz, retrieved the Kencraft, and gave Prescott a salvage invoice. Prescott refused to sign.

New Bedford Marine filed suit against Prescott seeking a pure salvage award of $350,000.00, or approximately 12% of the post-salvage value of the undamaged LADY MAZIE. The district court noted that in order to recover a salvage award a claimant must establish the existence of the following elements: (1) a marine peril; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or that the service rendered contributed to such success. The district court found that the yacht was clearly subject to a marine peril and that the services rendered were successful.



Prescott argued that New Bedford was precluded from obtaining a pure salvage award because the initial conversation between Prescott and Joseph created an oral fixed-fee contract based on a quoted rate of $125 per-hour. Rejecting this argument, the court noted that in order to establish the existence of a fixed salvage contract, there must not only be evidence of an agreement regarding the amount of compensation but, in addition, the evidence must establish that there was a mutual understanding and agreement that the requested services are in the nature of salvage. The court found that the initial agreement between Prescott and New Bedford was a contract for simple towage based on Prescott's description of the yacht's situation, which was not accurate or complete. The scope of this towage contract did not extend to the services required by the actual marine peril, nor was there an agreement to modify the contract to encompass the circumstances encountered by Allen when he arrived on scene.

Relying on *Flagship Marine Services, Inc. v. Belcher Towing Company*, 966 F.2d 602 (11th Cir. 1992), Prescott also argued that the absence of a specific "no cure, no pay" agreement precluded the claim for pure salvage. The court agreed with Prescott's argument that the initial towage contract contemplated payment regardless of success, and found that the existence of a contract for salvage which guarantees payment regardless of the outcome will bar a claim for pure salvage. However, the court reiterated its finding that the initial contract was for towage, and not salvage. The court distinguished *Flagship* as involving a prior business relationship between the parties which involved salvage services.

The court considered several factors in assessing the amount of the salvage award to Joseph, including the labor, promptitude, skill, and energy of the rescuers, the value of the property employed by the rescuers, the risks they faced, the value of the property saved, and the degree of danger from which the property was rescued. Notable among these factors was the value of the capsized Kencraft, and the risk and degree of danger faced by the vessel as a result of the hawser remaining attached to the moving yacht. The court awarded an $80,000.00 salvage fee to Joseph, representing 2% of the post-salvage value of the yacht.

Coverage for Sinking During Solo Trip Not Invalidated by "Single-Handed Navigation" Clause in Insurance Application

Donald Chiarello, a retired attorney and experienced sailor, bought a wooden sailing vessel in 2001 and contacted his broker to obtain insurance. The broker procured a policy from the Lloyd's market, but the coverage was subject to a requirement that Mr. Chiarello submit satisfactory crew resumes. The resumes were not submitted. Apparently the same thing happened again in 2002, i.e., a policy was applied for and issued but crew resumes were never submitted as required by the policy.

In late 2002 Mr. Chiarello completed a renewal application and notified his broker that he required a change in the navigational limits. The application form had been prepared by his broker and included the following statement: "Single-handed navigation is not allowed unless your policy has been specifically endorsed for such activity."

The broker was able to place coverage through underwriting agent T.L. Dallas (Special Risk) Ltd., again subject to the submission of crew resumes. This time Mr. Chiarello sent his broker an email advising that his crew member would be Sandra Huberfield and describing her qualifications. At the time Mr. Chiarello expected Ms. Huberfield to remain a crewmember for the duration of the policy period. T.L. Dallas accepted this information and issued a policy, which by its terms "incorporated in full" all information contained in the application previously signed by Mr. Chiarello. The policy also warned that "non-disclosure or misrepresentation of a fact or circumstance material to our acceptance or continuance of this insurance" would void coverage, but the policy itself did not refer to single-handed navigation, nor was the application attached to the policy.

Several months later Ms. Huberfield left the vessel but Mr. Chiarello did not notify his broker or the insurers. He continued to sail the vessel, sometimes by himself and sometimes with other companions. In October 2003, he sailed alone from Palau Tioman, Malaysia, to Singapore. During the voyage the vessel sank suddenly, with Mr. Chiarello escaping on an inflatable lifeboat.

An adjuster appointed by T.L. Dallas investigated the incident and concluded that the loss was not caused by Mr. Chiarello's sailing the vessel solo and that there had been no breach of the implied warranty of seaworthiness. The adjuster recommended payment on Mr. Chiarello's claim.
Notwithstanding the adjuster's findings, the insurer took the position that Mr. Chiarello's single-handed navigation violated the terms of the policy, breached the duty of *uberrimae fidei,* and was a material non-disclosure.

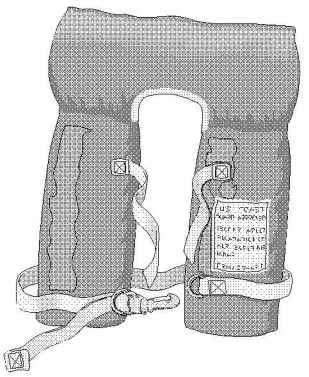
Mr. Chiariello brought suit against the underwriters in federal court in California to enforce the terms of the policy. *Chiariello v. ING Groep NV*, 2006 U.S. Dist. LEXIS 18516 (N.D. Cal. March 2, 2006). On cross motions for summary judgment, the district court focused on the fact that the policy itself did not make specific reference to the single-handed navigation clause in the insurance application. In the court's view, the general incorporation of the policy application into the policy itself "was clearly intended to include those affirmative representations made by Plaintiff, e.g., regarding his intended route or the state of the vessel, not the terms of [his broker's] own application form." According to the court, this was reflected by the fact that the preprinted language on the application form also contained a Florida choice-

of-law clause while the policy itself designated applicable law as either federal admiralty law or New York law in the absence of admiralty precedent. The court also stated that the single-handed navigation clause "was a gratuitous warning offered to Plaintiff by his broker," and that applying the provision as a policy term would result in a windfall to the insurer.

With regard to the doctrine of *uberrimae fidei*, the court found that there is no well-established admiralty rule which requires an insured to keep the insurers informed about material changes in the risk that occur after the policy is issued. Because Mr. Chiarello's statements about the make-up of his crew were accurate at the time when the information was submitted to the underwriters, and there appeared to be no legal obligation requiring him to update the information after the policy was in place, there was no breach of *uberrimae fidei*. Nor did Mr. Chiarello have an obligation under New York law to report the departure of Ms. Huberfield. It appeared that New York law would have required such a report only if the insurer had specifically put Mr. Chiarello on notice that subsequent changes in the crew would void coverage. The court found that because there was no such specific notice in the policy itself or in the insurer's communications with the broker, and because the crewing information that Mr. Chiarello provided to underwriters did not amount to a warranty, Mr. Chiarello was not required to report her departure.

Accordingly, the court entered a $163,000 judgment in favor of Mr. Chiarello, with costs and prejudgment interest. In a subsequent order, the court denied Mr. Chiarello's request for attorneys' fees, finding that the insurer's denial of coverage was not in bad faith. (2006 U.S. Dist. LEXIS 48831 (July 10, 2006).

Florida Marina Subject to Contractual Liability for Ordering Yacht Away Before Hurricane; Negligence Per Se Claim Dismissed



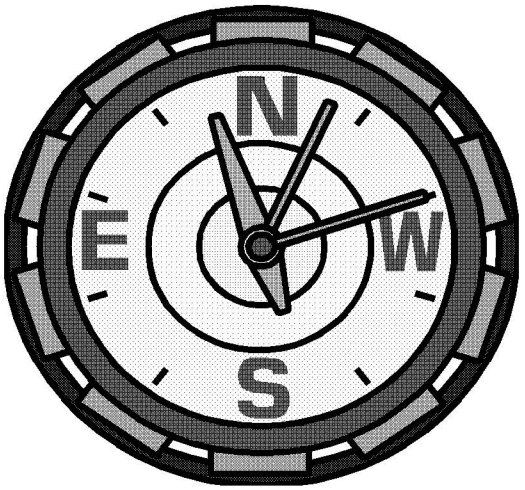
A 70-foot Inace motor yacht was docked at the Harbor Island Marina in Destin, Florida, as Hurricane Ivan approached the Gulf Coast in September 2004. The marina slip agreement called for all vessels to be removed from the marina upon the issuance of a hurricane warning. In this regard, the agreement contravened Fla. Stat. § 327.59, which states that "marinas may not adopt, maintain, or enforce policies pertaining to evacuation of vessels which require vessels to be removed from marinas following the issuance of a hurricane watch or warning." The express purpose of the statute is to ensure that "protecting the lives and safety of vessel owners" will be given priority over protecting property.

After a hurricane watch was issued, Harbor Island Marina contacted the owner of the yacht and advised him to remove the vessel. The parties would later disagree as to whether the marina demanded or merely requested removal of the vessel. In any event, the next day the owner removed the yacht and anchored it in Destin Harbor. The following morning Hurricane Ivan came ashore, and the yacht went aground and became a constructive total loss.

The yacht's insurer paid the owner $650,000 and as subrogee brought an action in federal court against the marina, alleging breach of the slip agreement and negligence per se. The marina moved for summary judgment, arguing that the breach of contract claim failed because the loss of the yacht was caused by the owner's own acts or by a force majeure, and that the negligence per se claim failed because the Florida statute afforded no private right of action and, furthermore, the yacht owner had not suffered the type of injury the statute was intended to prevent.

The marina's motion was the subject of the district court's opinion in *Northern Insurance Co. v. Pelican Point Harbor, Inc.*, U.S. Dist. LEXIS 30380 (N.D. Fla. May 5, 2006). As an initial matter, the district court found that the claims were within the court's admiralty tort jurisdiction because the slip agreement was a maritime contract and the marina's actions in allegedly directing the removal of the yacht had their effect on navigable waters. The court also deemed it appropriate to apply Florida contract and tort law to the extent it was not inconsistent with federal maritime law.

With regard to the breach of contract claim, the court found that the existence of numerous questions of fact precluded summary judgment in favor of the marina. First, there was a factual dispute as to whether the marina had breached the slip agreement by demanding that the vessel be removed or whether the yacht owner had removed his vessel voluntarily. Second, the plaintiff offered evidence that anchoring in Destin Harbor was a reasonable method of riding out the hurricane, contradicting the marina's assertion that the loss resulted from the owner's decision to anchor the yacht rather than move it out of harm's way. Third, while the marina claimed the owner had not anchored the yacht properly and that the anchor gear was inadequate, plaintiff submitted evidence suggesting that the owner and his assistants had the necessary skills to secure the vessel properly and that the yacht's ground tackle was adequate.



As to the marina's contention that the loss of the vessel was attributable to a force majeure or Act of God and not to any breach of the slip agreement, the plaintiff's expert had opined that the yacht likely would have sustained only minor damage had it remained at its slip. Although the marina presented evidence that hurricane force winds and a 9-foot storm surge passed through the area, the court found that the marina was not entitled to summary judgment because a factfinder could reasonably conclude that the alleged breach of the slip agreement was a substantial factor in bringing about the loss of the yacht.

The court agreed, however, that the marina was entitled to judgment as a matter of law on the plaintiff's negligence per se claim based on the Florida statute. The court agreed with the marina's argument that the statute created no private right of action against a marina for violation of it provisions; rather, the offending marina is subject only to criminal penalties brought by the State. In addition, the court found that under Florida law a claim of negligence per se is actionable only if (1) the plaintiff is a member of the class of persons that the statute was meant to protect, (2) the plaintiff suffered an injury of the type the statute was designed to prevent, and (3) the defendant's violation of the statute was the proximate cause of the plaintiff's injuries. The court found that the Florida statute was solely intended to protect vessel owners' lives and safety, not their property. Because the yacht owner

had not suffered any personal injuries, the owner had not suffered an injury that the statute was designed to prevent and, therefore, no actionable negligence per se claim was possible.

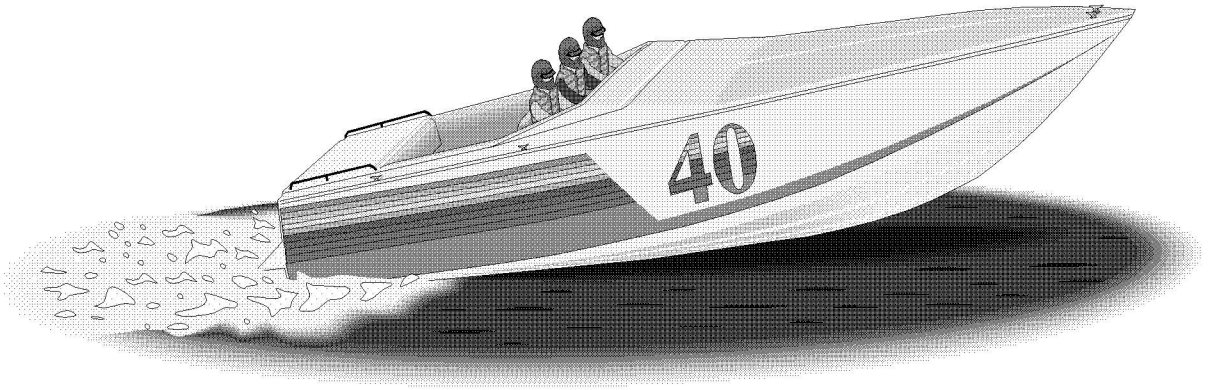
Navigable waters

Parm v. Shumate
2006 U.S. Dist LEXIS 61227 (W.D. La. Aug 29, 2006)

Plaintiffs sued the Sheriff of East Carroll Parish, Louisiana, claiming they were wrongfully arrested for criminal trespass while fishing from a boat on the waters of Mississippi River. Plaintiffs had been fishing over land that was privately owned but covered at the time by the seasonal rise of the river.

The federal district court ruled that the public's general right to use navigable waters for commerce and recreation did not include the right to fish or hunt over private land covered by seasonal flooding, notwithstanding the fact that the area in question was below the river's ordinary high water mark. The district court also ruled that while the Louisiana Civil Code gives the public the right to use the banks of a navigable river between ordinary high and low water, only uses "incidental to the navigable character of the stream and its enjoyment as an avenue of commerce" are protected. As a result, the court concluded, the sheriff had probable cause to arrest Plaintiffs for trespassing on private property.

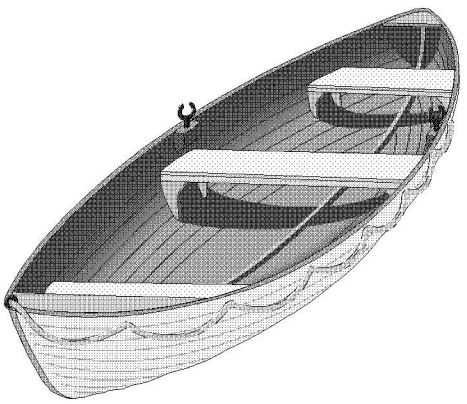
Plaintiffs have moved for reconsideration of the district court's decision, but no decision has been rendered as of the time of printing.



Service Contracts

Great American Insurance Co. Of New York v. Miller Marine Yacht Service, Inc.,
2006 U.S. Dist. LEXIS 49948 (N.D. Fla. July 20, 2006).

Galati Yacht Sales had a program known as "Single Point Make Ready" ("SPMR"), the purpose of which was to have its new vessels rigged and launched by a third party. Galati contracted with Miller Marine Yacht Service to provide the SPMR services. One of Galati's yachts, a 59 foot Carver, sank while in Miller's custody, allegedly as a result of the improper installation of a rudder by Miller's employees. Galati's insurer Great American paid the loss and sued Miller in federal court invoking admiralty jurisdiction. Great American asserted claims based on the underlying SPMR contract and tort claims for negligence by Miller. Miller filed a motion to dismiss the negligence claims based on the Economic Loss Rule, which bars recovery in tort when a party suffers only an economic loss unaccompanied by personal injury or property damage. The district court found that the insurer's contract-based claims could not alone support admiralty jurisdiction because although the yacht had been launched at the time of the loss, it was not fully assembled or "sufficiently advanced to discharge the functions for which it is designed" and was therefore not considered a completed vessel for the purposes of admiralty contract jurisdiction. Turning to the tort claims, the court reviewed admiralty precedent applying the Supreme Court's holding in *East River Steamship Corp. v. Transamerica DeLaval, Inc.* 476 U.S. 858 (1986), wherein the court held that an admiralty plaintiff could not recover from a product manufacturer in tort where a defective product causes only damage to the product itself. Relying on the Fifth Circuit Court of Appeals decision in *Employers Insurance v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752 (5th Cir. 1989), the court held that the *East River* doctrine extended and applied to professional marine service contracts such as the SPMR agreement at issue. The court also concluded that the "product" for purposes of applying the economic loss rule of *East River* was the entire Carver yacht, not simply the improperly installed rudder. The court therefore held that Great American could not assert a tort-based claim against Miller in connection with the loss. As a result, admiralty jurisdiction was no longer present.



Maine-ly Marine Sales & Service v. Worrey
2006 Me. Super. LEXIS 79 (Me. Super. Ct. April 10, 2006)

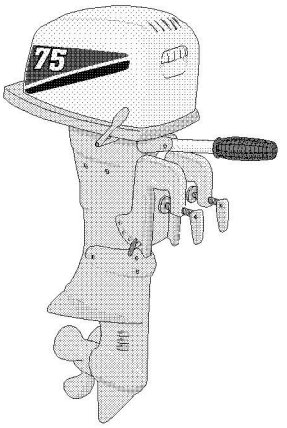
John Worry brought his boat to Maine-ly Marine for winterization during the fall of 2001. Worrey claimed that his engine block froze before Maine-ly performed the winterization, or alternatively that Maine-ly improperly winterized the boat. Worry refused to pay Maine-ly for the services and Maine-ly filed suit against Worry in Maine state court. Worry asserted a counterclaim against Maine-ly for damage to the engine based on breach of contract, breach of warranty, unfair trade practice violations, fraud, and negligent misrepresentation. Maine-ly filed a motion to dismiss the counterclaim. Maine-ly argued that Worry's tort-based fraud and negligent misrepresentation claims were barred by the economic loss doctrine

under Maine law. The court held that the tort-based claims should be dismissed because the economic loss doctrine applies to professional service contracts and precludes recovery in tort where defective service results only in damage to the product itself.

Government Liability

***McMellon v. United States*,**
2006 U.S. Dist. LEXIS 51625 (S.D.W.V. July 26, 2006)

Readers may recognize the McMellon case from previous issues (Vol. 13, No. 2 and Vol. 15, No. 1). This case was appealed to the Fourth Circuit Court of Appeals and subsequently remanded for further proceedings. In August 1999, Plaintiffs, jet ski operators and passengers, were injured when their PWCs plunged over the gates of the Robert C. Byrd Lock and Dam on the Ohio River in West Virginia. Mistaking the dam for a bridge, plaintiffs did not realize they were confronted with a dam until it was too late to avoid the hazard. Federal regulations place a duty upon the Army Corp of Engineers to mark the area above and below each dam as "restricted." Signs and/or flashing red lights are to be installed in "conspicuous and appropriate places." The warning signs that were posted above the dam were obscured by brush and not visible to boaters. At trial, the court found that the inadequacy of the dam's warning system directly and proximately caused Plaintiffs to topple over the Dam at high speeds. The court held that the existing signage was not positioned to catch a boater's attention and that it did not adequately warn boaters of the danger. Because of the breach of its duty to mark the "restricted area" at the dam, the United States of America was ordered to pay $810,959.60 plus interest.



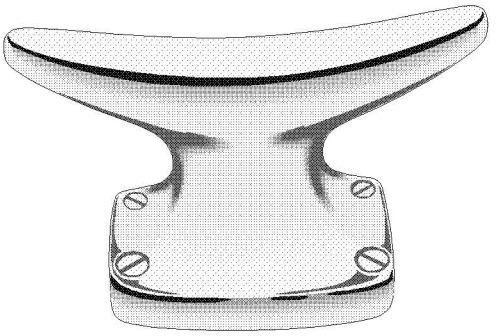
***Heck v. City of Lake Havasu*,**
2006 U.S. Dist. LEXIS 64007 (D. Ariz. August 24, 2006)

Timothy Heck became unconscious and drowned while swimming, allegedly due to high levels of carbon monoxide emitted from boats in the Bridgewater Channel in Arizona. His estate brought suit against the City of Lake Havasu and the County of Mohave, claiming that the governments knew about this hazard but failed to remedy it. Plaintiffs presented evidence of seven specific instances of carbon monoxide poisoning in Lake Havasu. The court held that, while the City, as "possessor" of the land, may have owed a duty to Timothy Heck as an invitee, the County did not.

Jurisdiction and Procedure

Joyce v. Younts,
2006 U.S. Dist. LEXIS 59732 (D.S.C. August 23, 2006)

Joyce's property was damaged when Hurricane Gaston's winds caused Younts' boat lift to collapse. Younts' boat fell into Lake Moultrie and then crashed into Joyce's neighboring property, causing damage to a pier head, dock, sea wall, and other structures. Joyce brought suit against Yount in federal court based on admiralty subject matter jurisdiction. Younts moved to dismiss the action on the grounds that the court lacked admiralty subject matter jurisdiction. Specifically, Younts contended that any negligence occurred while the boat was out of the water and therefore outside the scope of admiralty jurisdiction. In denying Defendant's motion, the court held that the Admiralty Extension Act applied. The Admiralty Extension Act states that "the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 App. U.S.C.A. § 740.



Finance

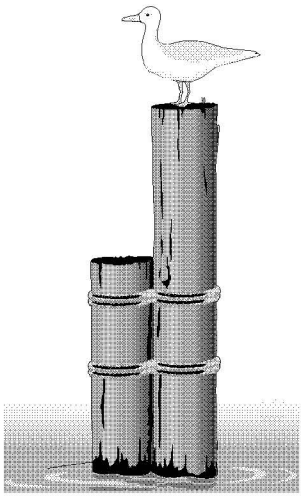
National City Bank v. Verdun,
2006 Mich. App. LEXIS 2521 (Mich. Ct. App. August 15, 2006)

In 1997 Joseph Verdun and Harriet Green purchased a yacht for $216,314 and executed a retail installment loan contract assigning the yacht as collateral. The terms of the loan contract prohibited the defendants from allowing any lien to be placed on the vessel. In 2003 a dispute arose between the boat owners and the facility where the boat was stored regarding the amount of storage charges and service fees. The storage facility asserted a lien against the boat for unpaid charges in the amount of $7,205.43.

The lender, National City Bank, discovered the lien, paid the storage facility's charges and repossessed the boat. The boat owner had paid all monthly installment payments on time since the inception of the loan and was not otherwise in default. After allegedly providing written notice to the boat owner, the lender sold the boat for $86,000, leaving a deficiency of $109,168 on the loan. The lender sued the boat owners in Michigan state court to recover the deficiency. The boat owners counter-claimed, alleging wrongful repossession and violation of Michigan consumer laws. The trial court granted summary judgment in favor of the lender and entered a judgment of $124,708 against the boat owners. The boat owners appealed. Applying Michigan law, the court of appeals affirmed the judgment in favor of the lender. The appellate court held that the existence of the storage facility's lien constituted a default under the loan contract, notwithstanding the fact that the boat owner disputed the basis of the facility's lien and that all loan payments had been timely made. The court held that the mere existence of the lien permitted the lender to accelerate the debt and to repossess and sell the boat following proper notice to the boat owners.

Marina Liens

Heintz v. THI,
2006 Mich. App. LEXIS 2375 (Mich. Ct. App. July 25, 2006)

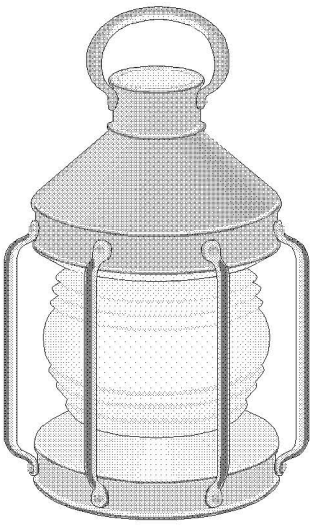


The Michigan Marina and Boatyard Storage Lien Act ("MBSLA") provides that, following notice and a demand for payment, "if a property owner is in default for a period of more than 180 days, the facility owner may enforce the lien by selling the repaired or stored property at a commercially reasonable public sale." The boat owner Heintz argued that the sale was not "commercially reasonable" because the facility owner failed to provide proper notice and then sold the boat to an employee for the amount of plaintiff's indebtedness. The appellate court disagreed. The court held that defendant actually went beyond the requirements of the statute in trying to contact the plaintiff and extending a grace period of two years. Additionally, the court indicated that the definition of "commercially reasonable" is supplied by the Uniform Commercial Code (UCC). Section 9627 of the which provides: "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner." Therefore, the fact that the facility owner's employee offered only the amount of the indebtedness did not render the sale commercially unreasonable.

Insurance Coverage

Cunningham v. Insurance Company of North America
2006 U.S. Dist. LEXIS 62229 (E.D.N.Y. August 31, 2006)

Dr. Joseph N. Cunningham owned a 50 foot fishing vessel, the Swamp Fox, which was destroyed by a fire on March 11, 2004, while docked at a yacht club in Brooklyn, New York. The Insurance Company of North America ("INA") denied Cunningham's claim based on the breach of a lay-up warranty in the policy requiring that the vessel be "laid-up"from December 1st to April 1st. Cunningham filed suit against INA for failure to compensate him for the loss of the vessel, and against Christi Insurance Group, the insurance broker through which Cunningham obtained coverage, for malpractice, negligence, and breach of contract. The court granted INA's motion for summary judgment against Cunningham, finding that while a breach would not necessarily result in a permanent loss of coverage, there was "at a minimum" no coverage for the vessel *during* a breach of the warranty, and by being in the water and not ashore when the fire occurred, the vessel was in breach of the lay-up warranty. The court also granted Christi's motion for summary judgment on Cunningham's malpractice and breach of contract claims, holding that the statute of limitations began to run when Christi first procured the policy for Cunningham, and was not reset with each subsequent annual renewal, and thus his claims were barred. The court denied Christi's motion for summary judgment on Cunningham's negligence claim. The court stated that New York imposes a common law duty upon insurance agents to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so, and that the claim was not barred by the statute of limitations since the claim accrued at the time of the damage to the vessel, not the time that the insurance was procured.



Gfroerer v. ACE American Insurance Co.,
2006 U.S. App. LEXIS 12975 (2d Cir. May 19, 2006)

Mark Gfroerer owned a 1999, 38-foot Donzi powerboat which he insured through ACE American Insurance Company ("Ace"). The policy contained a High Performance Vessel Endorsement that included a Named Operator Warranty stating that the coverage applied "only if the insured vessel is operated by" the named insured. While aboard the Donzi with potential purchasers of the vessel and a marine racing expect, Gfroerer permitted the expert to take the helm. When the expert attempted a high speed turn, the Donzi overturned and ejected its occupants. As a result of the accident, the Donzi was rendered a constructive total loss. Ace denied Gfroerer's claim for the loss, citing the Endorsement and the Warranty. Gfroerer filed suit against Ace, arguing that the term "operated by" was ambiguous, leaving open the possibility that the vessel could be considered "operated by" an owner who was still in the cockpit though not at the helm. In affirming the trial court's grant of summary judgment in favor of Ace, the Second Circuit rejected Gfroerer's argument, finding that the term "operated by" was not ambiguous, and the

average insured would have understood it to mean clearly and unambiguously "directly and physically controlled by." The court found that "operated by" unquestionably referred to the operation of Gfroerer's particular vessel, and that in light of its performance capabilities, the only one capable of truly operating such a vessel is the actual driver.

Grande v. St. Paul Fire and Marine Insurance Company
436 F. 3d 277, 2006 AMC 519 (1st Cir. 2006)

Frank P. Grande owned a vessel in Maine covered under an insurance policy issued by St. Paul Fire & Marine Insurance Company (St. Paul) through Charter Lakes Marine Insurance (Charter Lakes), an insurance agent. The policy's coverage was limited to waters "not more than 100 miles from shore." Grande later obtained another vessel, located in Florida, to use in his chartering business, for which his cousin paid the purchase price on the understanding that Grande would own and operate the vessel and eventually pay the cousin back. Grande contacted Charter Lakes to obtain insurance coverage for chartering the new vessel in Maine and for one-time trip coverage from Florida to Maine. On the insurance application, Grande listed himself as owner and sole operator. The trip to Maine was not successful, and the new vessel was effectively a total loss. St. Paul rejected Grande's claim for the loss of the new vessel on the ground that it had been outside of the 100-mile limit when the loss occurred, and that Grande had failed to disclose his cousin's interest in the sailboat. Grande filed suit against St. Paul for breach of contract, and against Charter Lakes for failing to procure the insurance that Grande requested and failure to notify him of the supposed 100-mile limit prior to his departure. The First Circuit overturned the judgment as a matter of law for St. Paul, finding that a jury might reasonably infer that the insurance contract should be construed to cover the trip from Florida to Maine without the 100 mile limit. The court further found that while an insurance contract is ordinarily voidable if a false statement in the application is material to the contract, and ownership of the insured property is normally a material fact in an insurance contract, it was not clear as a matter of law whether the application required disclosure the cousin's ownership interest in the vessel. Even under the maritime rule of *uberrimae fidei*, the court found that judgment as a matter of law was inappropriate as it was not clear that the arrangement between Grande and his cousin would affect St. Paul's risk assessment, though reasons might be adduced during trial.

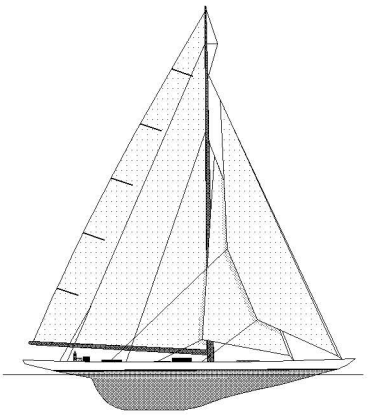
Burwell v. Mid-Century Insurance Company,
2006 Ok. Civ. App. 97 (Ok. Civ. App. August 24, 2006)

David Burwell purchased an insurance policy from Mid-Century Insurance Company to cover his boat and motor. The policy required commencement of any suit on the policy within one year after an accident. On April 23, 2000, the boat and motor suffered accidental damage. Burwell submitted a claim to Mid-Century, which denied the claim on or about May 23, 2000. On August 1, 2001, Burwell brought an action against Mid-Century for breach of contract and bad faith. The trial court granted Mid-Century's motion for summary judgment, and denied Burwell's subsequent motion for reconsideration. On appeal, Burwell argued that the policy was not a marine insurance policy, but rather a casualty insurance policy subject to a two year statute of limitations. The appellate court rejected this argument, stating that where a policy covers losses from multiple perils, and the multiple perils are subject to different commencement

of action periods, an action against the insurer must be commenced within the period prescribed for the particular peril causing the claimed loss. The court found that the one-year commencement-of-action provision in the policy was valid under Oklahoma state law, and further found that the policy could not be considered anything other than a "marine insurance policy." Damage to Burwell's boat and motor, then, were losses covered by a "marine insurance policy," and any action against Mid-Century had to be commenced within one year of the loss.

***Continental Casualty Company v. Reese*,**
No. 8:05-cv-50-T-24 TBM, 2006 U.S. Dist. LEXIS 48035 (M.D. Fla. July 14, 2006).

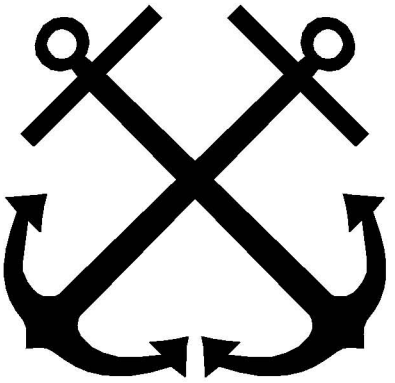
Bonnie Reese resided in Indiana but owned a yacht which she kept in Florida. Reese obtained insurance coverage for the yacht from Continental Casualty Company through Boat Owners Association of America. Reese's initial policy period was 2002-2003, and she renewed coverage for 2003-2004, with the policy ending on July 3, 2004. Reese never paid the premium to renew the policy for 2004-2005, however, and on August 13, 2004, her yacht sustained damage as a result of Hurricane Charley. Despite Reese's apparent failure to renew her policy, Continental paid over $200,000 to cover the damages to the yacht. Upon realizing its mistake, Continental filed suit seeking restitution of the money paid to Reese, arguing that Reese had no coverage for the 2004-2005 period, and that the payment of the claim resulted from a unilateral mistake and resulted in unjust enrichment. The court denied Continental's motion for summary judgment, finding that material issues of fact existed as to both claims. The court stated that it was unclear from the evidence presented whether Reese had coverage for the 2004-2005 period, and that while Continental would be able to recover the money that it paid to Reese as long as its mistake did not result from an inexcusable lack of due care, Continental had not fully explained how the mistake occurred. Without knowing the nature and cause of the mistake, the court could not determine as a matter of law whether the mistake resulted from an inexcusable lack of due care.



***Atwood v. St. Paul Fire and Marine Insurance Company*,**
363 Ill. App. 3d 861, 845 N.E.2d 68 (Ill. App. 2006).

Marjorie Atwood owned a 28-foot pleasure boat which she had insured under an inland marine policy issued by St. Paul Fire & Marine Insurance Company ("St. Paul"). The boat sank, and St. Paul denied coverage under an exclusion for losses caused by deterioration. Atwood waited almost two full years before filing a breach of contract action against St. Paul. The trial court granted summary judgment in favor of St. Paul based on Atwood's failure to file suit within one year of the loss, as required by the policy. On appeal, Atwood argued that language in the policy which stated the insurer would complywith

state law that provided a longer time for filing suit required St. Paul to adhere to the Illinois statute of limitations of two years for general contract claims. The court rejected Atwood's argument, finding that her interpretation of the policy limitation period would have rendered it meaningless as each state had general contract statutes of limitations that would supersede the period stated in the insurance policy. A reasonable interpretation of the policy limitation period, then, was that St. Paul would abide by state laws directed specifically to insurance contracts. Even though Illinois had such a law, the law only tolled the policy period between the time a proof of loss was filed and the time a claim was denied, and even with that tolling period, the Atwood's action was untimely.



Marina Liability

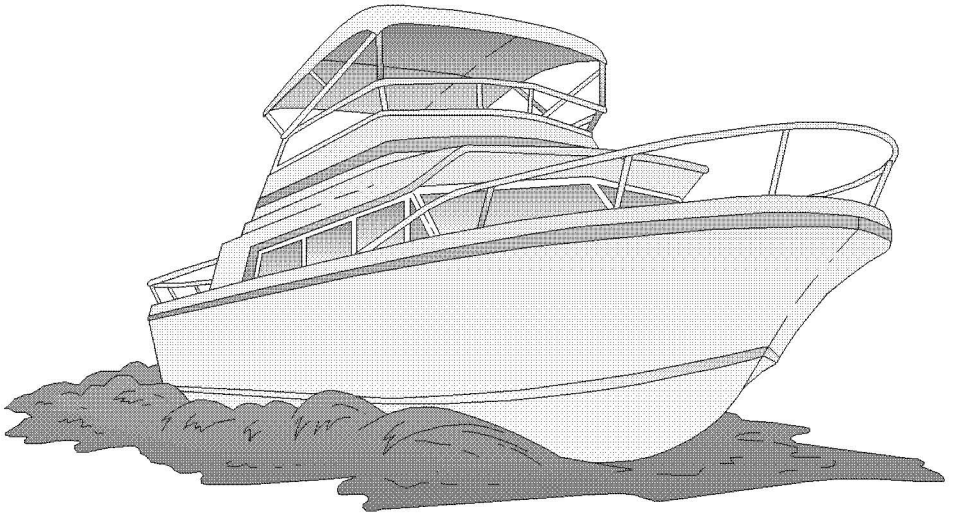
***New Hampshire Insurance Co. v. Dagnone*,**
CA 04-122 ML, 2006 U.S. Dist. LEXIS 49700 (D. R.I. July 10, 2006).

On December 3, 2006, Dagnone faxed a copy of a contract to Hinckley to haul his boat for winter storage. Pending the haul, Hinckley moved the boat to a sheltered slip in preparation for a predicted Nor'easter, which hit Narragansett Bay on December 6. The boat broke free and drifted, resulting in $38,327.00 damages. Dagnone's theory was bailment for hire, which, when the boat was returned in a damaged condition, raised a presumption of negligence against the bailee, Hinckley. Hinckley argued that the storm constituted an Act of God. In addition to proving that the storm was an Act of God, Hinckley would have to prove that it was not guilty of any negligence which contributed to the damage caused by the storm. The court accepted expert testimony that the gale was perfectly aligned to allow a sea wave to develop in the fetch between the opposing shore and the basin entrance, and that the gale passed directly over the boatyard. It concluded that the storm was of such unanticipated force and severity as would clearly preclude charging Defendants with responsibility, i.e. it was an Act of God. Next, the court found that Hinckley acted reasonably and responsibly in moving the boat to a more protected location within the marina, and found that Hinckley was not guilty of any negligence which might have contributed to damage caused by the storm. At the same time, these reasonable precautions rebutted the presumption of negligence raised by Dagnone's bailment claim. Judgment was entered in favor of Hinckley.

Negligent Infliction of Emotional Distress

***Colbert v. Moomba Sports, Inc.*,**
135 P.3d 485 (Wash. Ct. App. 2006).

Colbert's daughter drowned in Lake Tapps, Washington after inhaling carbon monoxide while hanging on the swim platform of a motor boat while underway. Lake Tapps is not susceptible to interstate navigation. The daughter's friends called 911 and Colbert. Rescuers and paramedics arrived first, followed by Colbert, who watched the search and rescue efforts for several hours. Colbert was notified when the body was found, saw rescuers pull it from the water about 100 yards away, and saw them wrap it with a blanket and place it in an ambulance. Colbert sued under theories of product liability and negligent infliction of emotional distress (NIED). The first claim was voluntarily dismissed, and the NIED claim was dismissed on summary judgment. Considering Colbert's appeal from the dismissal of the NIED claim, the appellate court noted that such a claim is available to family members who were physically present at the scene of the accident or arrive "shortly thereafter." The court held that "shortly thereafter" means that a plaintiff must arrive (a) soon enough to observe the accident's immediate aftermath and the accident's effect on the victim, *and* (b) before third-parties, such as rescuers and paramedics, have substantially altered the accident scene or the victim's location or condition. Applying this rule, the court affirmed the dismissal of Colbert's NIED claim. Although Colbert arrived on the scene within 10 minutes of the accident, he did not see his daughter drown; and when he did see the her body, it was from a distance, after rescuers had substantially altered its location, and covered it with a blanket.

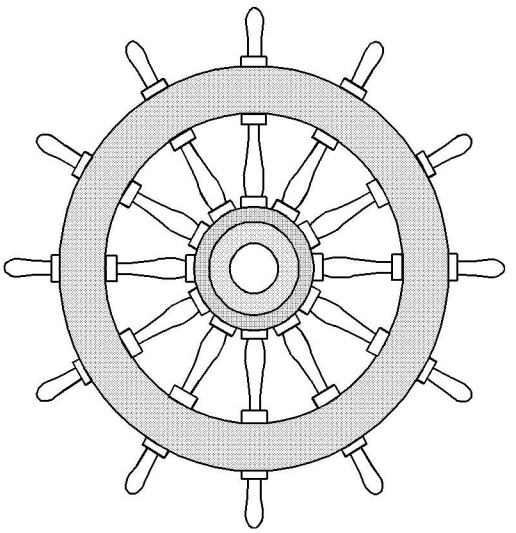


Collision

***Moore v. Matthews*,**
2006 U.S. Dist. LEXIS 62866 (D. Md. Aug. 24, 2006).

On June 6, 2002, Kent County High School held its senior class picnic at Drayton Retreat Center, along Still Pond Creek just off the Chester River. Two jet skis were in use, and students were taking turns operating them: Moore and her friend took one, and Matthews took the other. After some time, both jet skis turned for home, running at top speed. Moore was leading and to Matthews' right. Matthews was maintaining approximately 40 yards separation, and to get a better line into shore, he changed course so that Moore was on his port side. When Moore turned to check Matthews' position, her jet ski began swerving, and suddenly turned a sharp 180 degrees to face Matthews, throwing her passenger into the water. Moore and her jet ski were slightly to Matthews' right, and the passenger in the water was slightly to Matthews' left. Matthews turned right and collided head-on with the other jet ski. Moore suffered multiple damages.

Moore sued for negligence, alleging that Matthews violated Rules 5, 6, 7, 8, 13, and 16 of the Inland Navigation Rules. Matthews moved for summary judgment with respect to all claims on grounds the evidence failed to show he was negligent or otherwise not in compliance with the Rules.



The court granted summary judgment as to Rules 5, 7, 13, and 16. As to Rule 5 (Lookout), the court found that Matthews was aware of all information that could have been discovered by a lookout, namely the positions of Moore and the passenger. According to the court, no reasonable factfinder could find to the contrary. Whether Matthews appropriately responded to the information gained from his lookout was irrelevant. As to Rule 7 (Risk of Collision) the court held that no reasonable factfinder could conclude that Matthews failed to use all available means to ascertain whether a collision would occur. Had Moore maintained her course, Matthews could have passed without altering his.

The court began its analysis of Rules 13 (Overtaking) and 16 (Actions by Give-Way Vessel), by stating that the rules did not impose strict liability on the give-way vessel for all collisions. The overtaking vessel is not required to keep out of the way so as to avoid collision no matter what unexpected or improper maneuver the stand-on vessel makes. The court held that the record did not even establish that Matthews was on notice that he *was* the over-taking vessel; even if Matthews' was the overtaking vessel, he was not obligated to keep out of Moore's way after she spun out. Accordingly, no reasonable fact finder could find that Matthews violated Rules 13 and 16.

The Court denied the motion for summary judgement to as to Rules 6 and 8. The motion was denied as to Rule 6 (Safe Speed) because there was a testimony from which a reasonable fact finder could conclude that Matthews was traveling at an unsafe speed. At only two-thirds of the jet ski's top speed Matthews would have had only 1.8 seconds to impact at 120 feet distance. Matthews argued that a violation of this Rule could not be a cause of the accident, because even at a safe speed he would not have had time to react to the situation. The court rejected this argument, noting that Matthews had submitted no evidence regarding his perception-reaction time. With regards to Rule 8 (Action to Avoid Collision), it was undisputed that Matthews did not attempt to slow his jet ski. The court acknowledged that it was unclear whether he could have slowed without shutting off the engine and losing his steering. Again, noting that Matthews had not introduced any admissible evidence of his perception-reaction time, as regarding the lack of time to take action, the court stated it was not prepared to find Matthews' actions did not violate Rule 8.

BOATING BRIEFS

is a journal published by the Recreational Boating Committee of The Maritime Law Association of the United States.

Committee Chairman

Frank P. DeGiulio
Palmer Biezup & Henderson
620 Chestnut Street
956 Public Ledger Building
Philadelphia, PA 19106-3409
Tel: (215) 625-9900
Email: fpd@pbh.com

Editor

Todd D. Lochner, Esq.
Lochner and Schwenk
Annapolis
tlochner@lochnerandschwenk.com

Associate Editor

Daniel H. Wooster, Esq.
Palmer, Biezup & Henderson
Philadelphia
dwooster@pbh.com

Graphic Design and Layout

Rebecca Rinehart
Stephanie F. Lewis

Contributors to This Issue

Jonathan Pomerance, Esq..

Cite as 15 Boating Briefs No. 1 (Mar. L. Ass'n) Ed. 2006).

If you wish to receive copies by mail, please contact the Committee Chairman.