BOATING BRIEFS

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Todd Lochner, Chair
Jody McCormack, Editor

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Legendary Sailboat Designer Prevails against the Willful Infringement of His Well-Recognized Name

Bruce Kirby, Inc. v. LaserPerformance (Eur.) Ltd., **No. 3:13-cv-00297 (JAM), 2021 WL 328632 (D. Conn. Feb. 1, 2021)**

After seven years, world-renown sailboat design icon, Bruce Kirby, prevailed in an action against Quarter Moon, Inc. ("QMI") and LaserPerformance (Europe) Ltd. ("LPE") for trademark infringement under the Lanham Act and for common law misappropriation of the Bruce Kirby name.

Bruce Kirby ("Kirby"), a legend in the sailing world of Laser Sailboats, instituted an action in the United States District Court for the District of Connecticut in March 2013, culminating in a unanimous jury verdict in his favor on February 1, 2021. Although the verdict was just – it would be hard pressed to say that it was speedy – a main feature of Kirby's sailboat design that lay at the heart of this litigation.

Kirby designed the Laser sailboat in 1969 ("Laser"), never manufacturing his design and strictly licensing the use of his design to various manufacturers. Kirby Lasers are a well-recognized class of sailboat by the International Sailing Federation ("ISAF") and International Laser Class Association ("ILCA"), that required the sailboats be constructed and design according to specific rules in its Construction Manual, more formally known as the "One Design" rule that allowed these vessels to race in specific class races. Unless constructed to the One Design rule these sailboats were prohibited from participating in class races. Kirby licensed his design with QMI and LPE requiring his design to be built according to the Construction Manual. For every Laser sold Kirby received a royalty. The Construction Manual required Lasers to bear an ISAF Plaque and a Builder's Plaque – both of which required the sailboat to be designed by Kirby and the builder to be authorized by Kirby to construct the sailboat. Each plaque was affixed in the same place aboard each sailboat and was required for racing under the

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

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ISAF and ILCA class rules until April 2013. At that point the class rules changed allowing unauthorized builders to build Lasers.

In 2008, Kirby sold the rights to his design to Global Sailing Limited ("GSL"), including all royalties. He also registered the Bruce Kirby name as a trademark that same year. After the sale, QMI and LPE stopped paying royalties, but continued to use Kirby's namesake on its sailboats. Kirby requested QMI and LPE cease manufacturing the sailboats based on his design and for the ILCA to stop issuing plaques to QMI and LPE bearing his mark for failure to pay royalties. As the court pointed out, it was undisputed that QMI and LPE did not have to pay Kirby royalties, instead they were to pay GSL. Neither QMI nor LPE stopped manufacturing Lasers and continued to place plaques bearing Kirby's mark aboard the vessels. As a result, Kirby filed suit.

After seven years, a unanimous jury decision was returned in Kirby's favor. The jury found that QMI willfully committed trademark infringement and willful false designation of origin. The jury also found that QMI and LPE were liable for common law misappropriation of Bruce Kirby's name. The Defendants filed post-trial motions to dismiss for lack of standing and for a new trial. Kirby filed a cross-motion for entry of judgement.

The Court denied Defendants motions on the grounds that (1) Kirby had standing under the Lanham Act because he registered his trademark in 2008 and retained all proprietary rights in the trademark; and (2) under common law a person has a protected interest in the exclusive use of his own identity and it is against the law to use someone's name or likeness to another's benefit without authorization. All in all, the Court determined that the characteristics, placement of the plaques onboard the sailboat, and the consumer expectation in purchasing authentic Lasers outweighed the evidence in favor of granting the Defendants' motions.

Ultimately, Kirby's motion for entry of judgement was granted in major part and subject only to a reduction in damages from $6,857,736.30 to $6,116,022.88 due to Kirby's failure to prove the number of Lasers sold per month over the period that Kirby rescinded his authorization for use of his design. The Court's decisions is a bittersweet victory for a lifelong endeavor.

Insurance

Cross Motions for Summary Decisions denied due to failure of parties to establish clear facts about owner's intent and charter usage of vessel

Scotland Cay, LLC v. American Reliable Insurance Company, Case NO. 20-CV-603450 RUIZ/STRAUSS

Magistrate Judge Strauss recommended that Cross Motions for Summary Decision in a breach of insurance contract matter arising out of a 65' Viking yacht sinking after striking an underwater water object when returning from the Bahamas to Fort Lauderdale, Florida be denied. The Viking's insurer declined coverage on the grounds that the owner misrepresented and / or failed to disclose for insurance its intent to use the vessel for chartering or commercial purposes.

As background, on a 2016 application for coverage, the vessel owner answered that it was not used for chartering or commercial purposes. However, at the time, the owner requested coverage for chartering in case he decided to use it for that purpose in the future. Coverage was accepted, but the charter provision was removed until the owner submitted proof of a credentialed captain. In response the owner submitted documents supporting his captain's credtials. For the next three years, the owner thought he had charter coverage, however the declaration pages for each policy did not contain any charter endorsements.

During that time, the owner spoke with some charter companies about the possibility of listing his boat for charter. Apparently one of the companies he contacted posted an advertisement for the charter of the vessel on a website, although the owner disclaimed knowledge of the advertisement. In 2019 the owner had to obtain insurance from a new insurer and chose Defendant, American Reliable. During the due diligence process, in response to a question about whether there was a full-time captain and crew, the owner responded that he had a part-time captain who oversaw his vessel's maintenance. On his application, he specifically denied wanting charter coverage and verified the vessel was not primarily used for commercial purposes. However, concurrently the owner described the vessel as a charter boat on his taxes with declared commercial income on the advice of his accountant. Defendant's underwriter confirmed that the insurer was not in the business of insuring charters except under limited circumstances. In order to receive coverage with the defendant underwriter the owner would have had to have signed a statement declaring the vessel would not be used for charters. Otherwise, the policy would not have been issued. Moreover, the underwriter further explained that if it had been in possession of the tax returns, the applications for the prior policies, and the policies, there would have been veracity issue which would have led to the policy not being issued.

The owner moved for summary judgment arguing he did not intend to use it for charter when he applied and that even if he had the insurer would have issued a policy regardless of whether it was. The insurer moved for summary judgment based on exclusion of coverage as evidenced by its policy. The insurer also moved to re-open discovery based on its learning of recorded statements and emails from the owner's captains which indicate the boat had been chartered on at least three different occasions. Further the underwriter discovered that the captains had created the advertisement at the direction of the owner who intended the vessel to be used as a commercial charter vessel.

The Court denied the motion to re-open discovery on the grounds that Defendant had failed to be diligent in discovery. The captains had been disclosed for over a year prior to discovery closing, but the defendant had failed during that time to request the relevant information. Nonetheless the Court noted that the Defendant would have the opportunity to present the captains and the advertising person at trial in order to challenge the owner's credibility. The Court also denied the cross-motions for summary decision, because (1) the record was equivocal about whether the owner had the intent to charter (2) the record was equivocal about whether any such use of the vessel in charter constituted use "primarily for commercial purposes" and whether the policy would have been issued under the same terms had the owner's responses on his application been different; and because (3) many of these issues actually depended on whether and the extent to which the vessel was chartered, which remained in dispute.

United States Court of Appeals for the First Circuit held that the doctrine of uberrimae fidei entitled insurer to a declaration that insurance policy of boat owner who failed to disclose a prior grounding and vessel ownership history was void.

QBE Seguros v. Carlos A. Morales-Vázquez, **Case No. 19-1503 (Filed January 19, 2021). [Not for Publication]**

On October 24, 2014 a forty-eight foot Cavileer yacht owned by Carlos A. Morales-Vázquez, the defendant-appellant ("Morales") sustained appreciable damage from a fire. Morales reported the loss to his insurance company, plaintiff-appellee, QBE Seguros ("QBE"), which

retained an independent adjustor. Negotiations broke down in May 2015 when QBE discovered that Morales had grounded a forty-foot Riviera Offshore yacht in Fajardo, Puerto Rico in January 2010 but failed to disclose the grounding when he applied for the policy on the Cavileer (the "Cavileer Policy"), even though the application required that he "disclose any accidents or losses sustained in connection with any vessel [he had] owned, controlled, and/or operated." Morales also only listed two of the seven yachts that he previously had owned and/or operated in his application for the Cavileer Policy, and had omitted the prior grounding when he applied in 2011 for an insurance policy for his forty-foot Riviera yacht from a company later acquired by QBE. This was despite the fact that both the Cavileer and the Riviera policy applications clearly stated that "[i]f incorrect answers are provided (either by error, omission or neglect), I will be in breach of this warranty and the policy, if issued, will be void from inception."

Following Morales' admission under oath that he had failed to disclose the prior grounding and the other vessels he had owned on the Cavileer Policy application, QBE sought a declaratory judgment from the federal district court voiding the Cavileer Policy on the grounds that (1) Morales had failed to honor his duty of utmost good faith (known as "uberrimae fidei" in maritime law) in acquiring the Cavileer Policy, and (2) he had breached the warranty of truthfulness contained in the Cavileer Policy. The doctrine of uberrimae fidei, loosely translated from latin as "utmost good faith," requires parties to a marine insurance contract to disclose all known facts or circumstances material to an insurer's risk. Under the doctrine, an insurer may void a marine insurance policy if its insured fails to disclose "all circumstances known to [the insured] and unknown to the insurer" that materially impact the insurer's risk calculus.

After a six-day bench trial, the district court agreed with QBE on both grounds and rejected Morales' affirmative defenses. It issued a declaratory judgment in favor of QBE.

On appeal, Morales argued, in relevant part, that (i) the doctrine of uberrimae fidei was inapplicable because of recent legal developments in the United Kingdom, (ii) even if the doctrine applied generally, the district court made no finding that QBE actually relied on his omissions and, thus, it had erred in holding that he had breached the duty. Following a discussion of the history of uberrimae fidei, the Court of Appeals found that, while US and U.K. law concerning marine insurance has historically been aligned there is no reason why U.S. federal courts should be required to follow the laws of Parliament or any foreign government. Further to abandon the doctrine of uberrimae fidei in marine insurance cases "would have rebarbative consequences, both upending settled law and disrupting an industry that has long been premised on insureds telling the whole truth to insurers."

The Court also found that, despite some favorable authority from the Eighth Circuit cited by Morales, actual reliance on an insured's misrepresentations has never been found to be a necessary prerequisite for an insurer to void a marine insurance policy under the doctrine of uberrimae fidei: rather, under the majority rule and existing precedent in the First Circuit (as well as binding Supreme Court precedent), the materiality of a false statement or an omission, without more, provides a sufficient ground for voiding such a policy. Because Morales did not challenge the district court's finding that the incomplete accident history (most notably, the earlier grounding) crossed the threshold for materiality, the Court held that the doctrine of uberrimae fidei entitled QBE to a declaration that the Cavileer Policy was void. □

United States Court of Appeals for the Eleventh Circuit upholds doctrine of uberrimae fidei

Quintero v. Geico Marine Insurance Co., No. 19-12734 (11th Cir. 2020)

The Court of Appeals for the Eleventh Circuit affirmed the continuing vitality of the doctrine of uberimmae fidei with regard to the law of marine insurance, holding that an insurance policy was void ab inbitio where the assured misrepresented facts regarding his possession of his vessel at the time he renewed his policy. This holding was forthcoming despite the fact that the misrepresentation took place after the original policy had been underwritten and issued.

On May 25, 2018, Alfredo Quintero woke to find that his boat and trailer had been stolen from in front of his Broward County, Florida residence. Surveillance video from a neighbor's camera caught the perpetrators hauling the boat away just before 5 A.M. Likely recognizing that it had been an inauspicious decision to allow his Geico marine insurance policy to lapse three weeks prior, Quintero called Geico at 7:30 A.M. that morning to "renew" the policy. During the call, the Geico representative asked Quintero several questions precedent to issuing a new policy. One of those questions, was, "...when was the last time you physically saw your boat?", to which Quintero answered, "Every day. It's in my house." Upon Quintero's answering the questions, Geico took down payment information and reinstated the policy, backdating it to May 5, 2018. Later that afternoon, Quintero reported his boat stolen to local police, and then called Geico back and made a claim for the loss.

Rightfully dubious, Geico investigated the claim. As part of its investigation, Geico sought to examine Quintero under oath, but Quintero refused. Instead, Quintero filed suit in Florida state court seeking a declaratory judgment that Geico breached the policy in failing to cover his loss. Geico removed the case to federal court. The district court granted summary judgement in favor of Geico, on the grounds that Quintero's misrepresentations regarding the status of the boat on the day it was stolen voided the renewed policy ab initio under the doctrine of uberrimae fidei. The district court subsequently denied Quinero's motion for relief under rules 59(e) and 60(b) of the Federal Rules of Civil Procedure.

On appeal to the Eleventh Circuit, Quintero argued that it was error for the district court to apply the doctrine of uberrimae fidei because his policy had been "reinstated" and backdated to May 5, 2018, and thus it was not cancelled, non-renewed or expired. Rather, he argued, his coverage continued in full from the earlier policy, there was no new underwriting process having taken place on May 25th, 2018. He asserted that his statements regarding the status of the boat on May 25th were therefore not material to Geico's decision to insure the boat.

Reviewing the grant of summary judgment de novo, the Eleventh Circuit rejected Quintero's arguments. The court found that Quintero's original policy had expired on May 5, 2018, based on the transcript of a phone call Quintero had with a Geico representative on May 4, 2018, wherein he objected that the increased cost to renew the policy, was "ludicrous" and "not acceptable." The court also cited a Notice of Policy Expiration sent to Quintero by Geico on May 10, 2018, after Quintero failed to pay the premium for renewal. This, the court held, resulted in a lapse in coverage beginning May 5, 2018. It found that the original policy, therefore, did not cover the theft which occurred on May 25, 2018.

As to Quintero's argument that the renewal policy was backdated to May 5 when he reinstated it on May 25, and thus there was no lapse in coverage, the court determined that this reinstatement was void *ab initio* under uberrimae fidei.

Though there was no new underwriting procedure performed by Geico, Quintero was asked several qualifying questions prior to the reinstatement, including when he had last seen his boat. The Court held that Quintero's misrepresentation in response was material to Geico's decision to extend coverage.

"[T]he uberrimae fidei doctrine requires an insured to 'fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk,' and 'the duty to disclose extends to those material facts not directly inquired into by the insurer.'" Invoking the district court's "common sense observation that insuring a stolen vessel is akin to insuring a loss," the Court held that Quintero's statement that the boat was in his possession at that time he placed the call to reinstate his policy was material to Geico's decision to reinstate that policy. Under the doctrine, when an assured breaches the duty of disclosure by misrepresenting material facts, even by "mistake, accident, or forgetfulness," the contract of insurance is void ab initio.

As such, the Eleventh Circuit affirmed the district court's grant of summary judgement in favor of Geico. □

Jurisdiction/Procedure

District Court denied all summary judgement claims of Plaintiff after it brought action against Defendant boatyard's, asserting various claims in admiralty and pursuant to state law to recover damages after vessel fell over in boatyard.

Vesper Marine Limited v. Lyman Morse Boatbuilding, **2020 WL 6826209 (D. ME. 2020)**

Between 2016 and 2018, Plaintiff utilized the services of Defendant, a boatyard operator. On November 4, 2018, S/Y Vesper (Yacht; owned by Plaintiff) departed Defendant's boatyard, en route to Antigua, when its captain had difficulties with the vessel's steering. With the concurrence of Defendant, the Yacht returned to the boatyard. After arrival, Defendant hauled the Yacht and stored it on a travel lift.

On November 7, Defendant moved the Yacht to its storage area after it was determined repairs were not nominal. The Yacht was stored and supported with boat stands on its keel fin. It was blocked fore and aft and beneath the bulb of the keel. While in storage, the Yacht remained rigged and provisioned. Defendant had the responsibility to ensure the proper standing and storage of boats in its yard. In so doing, it would not typically add additional stands to support a rigged yacht.

Late on November 9, 2018, Plaintiff and Defendant met to discuss the weather forecast. The parties agreed upon the weather forecast, but later disagreed on who was responsible for properly securing the Yacht. Plaintiff allegedly abrogated the responsibility to Defendant due to Defendant's local knowledge and experience with the area as well as based upon Defendant's recommendations at that meeting. Defendant conversely, believed that the parties had mutually agreed that the weather would not be an issue and that the Yacht was properly secured for the anticipated weather.

Early morning of November 10, Defendant discovered that the Yacht had fallen over onto its side and was concerned there could be a fuel spill or a fire, or that the Yacht might collapse. The parties collectively worked throughout the day to cordon off the area and to remove debris. During this remediation process, the parties spoke with their respective insurance companies to determine rights and responsibilities.

A dispute arose over liability and Plaintiff eventually brought 12 causes of action against Defendant and moved for summary judgment on five. Those five causes of action, all in admiralty, were: (1) Breach of the Warranty of Workmanlike Performance, (2) Breach of Maritime Contract, (3) Maritime Negligence, (4) Maritime Bailment, and (5) Res Ipsa Loquitur under Maritime Law. Addi-

tionally, Plaintiff sought summary judgment on the issue of spoliation with an adverse inference or the exclusion of evidence.

The seminal issue between the parties is who had ultimate responsibility for ensuring that Yacht was properly standed. Plaintiff believed it exerted some control over the Yacht when it was hauled out; however, it was not responsible for those matters under the Defendant's control. Conversely, Defendant acknowledged that it was responsible for a boat's safety when an owner drops a vessel off and relinquishes control, but when a vessel has a full-time professional captain at the yard, it is that captain who remains in charge.

The court held that whether or not Plaintiff held exclusive control as to the decision to stand the Yacht is a genuine issue of material fact. With the rules of summary judgment mandating all inferences be viewed most favorable to the non-moving party, summary judgement must was therefore denied as to the causes of action for negligence, bailment, and res ipsa loquitur.

The court further held that the causes of action for breach of warranty of workmanlike manner and maritime contract do not require proof of negligence nor do they impose a standard of strict liability. A plaintiff must prove by a preponderance of the evidence that the alleged breach of the warranty caused the injury. To do so, it may use circumstantial evidence to prove causation and exclusivity of control as an important factor in supporting an inference based on circumstantial evidence. The court noted that the implied warranty of workmanlike performance is a legal standard, but the question of what is required in a workmanlike performance is necessarily a factual question that naturally varies from case to case, precluding summary judgment.

Finally, as to the spoliation and adverse inference issues, the Court held that a proponent must establish, inter alia, that evidence has, in fact, been spoiled. Further Circuit Courts consider, inter alia, whether evidence was destroyed in bad faith when assessing a sanction for spoliation. Here, the Court held that a genuine issue of material fact remained as to whether any evidence was actually spoiled as well as whether or not Defendant acted in bad faith during the early remediation efforts. On that basis the motions for summary judgment were denied.

United States Magistrate Judge in Fort Lauderdale, Florida: Denies Defendant's motion to quash plaintiff's Subpoena of nonparty Accountant and Insurance Brokerage on grounds of privilege and grants in part and denies in part the Defendant's motion to quash plaintiffs' Subpoena of the nonparty Accountant and Insurance Brokerage on grounds of relevancy of the evidence

Yacht Management South Florida Inc. v. M/V PRIVEE, **Case No: 20-60849-CV-RUIZ/STRAUSS**

This case arose from a dispute pertaining to the payment for repairs to the defendant's Vessel. Defendants objected to the subpoenas on grounds that they are irrelevant, overly broad in scope and redundant, and argued that the subpoena served upon the Accountant attempts to subpoena privileged information. The applicable law in this case was found to be Florida law which does not protect tax returns when they are relevant to the case. Plaintiff sought discovery of the Accountant and Insurance Broker's communication as they may contain material misrepresentations to the insurer and would therefore be permitted within the broad scope of permitted discovery under Federal Rule of Civil Procedure 26.

The court addressed the arguments pertaining to each subpoena in turn.

<u>Accountant Subpoena</u>

i. <u>Privilege</u>

Florida law applies due to the contract between the parties, and Florida's accountant-client privilege protects "communications" but not the tax returns. The subject tax returns are not subject to Florida's accountant-client privilege because De-

fendants did not demonstrate that the Accountant falls within the definition of a Certified Public Accountant under Florida's accountant-client privilege law. Defendants failed to carry their burden to show that the privilege applies. Therefore, the court denied to quash the subpoena on grounds of privilege.

ii. Relevance

The Court found that the information about tax records was relevant to determine the Vessel's income,and granted Defendant's motion to quash broader request for "communications" that were relevant to determining the Vessel's income.

Insurance Broker Subpoena

The Subpoena to the Insurance Broker sought the following:

1. All communications between Atlass Insurance Group and Phil Cyburt relating to insurance for the M/ V PRIVEE, a 95-foot Sunseeker.
2. All communications between Atlass Insurance Group and Anna Cyburt relating to insurance for the Vessel.
3. All documents reflecting any insurance claims submitted by or on behalf of [PMO] or Privee Management LLC for property damage or injury related to the Vessel.
4. All applications for insurance submitted by or on behalf of [PMO] or Privee Management LLC for the Vessel.
5. All policies of insurance procured by Atlass Insurance Group for [PMO] or Privee Management LLC for the Vessel.

Defendants claimed that the insurance contracts sought by Plaintiff were irrelevant because they existed for Defendants' benefit, and the Insurance Broker's policy took effect after Plaintiff arrested the Vessel and therefore was not tethered in any way to the repair process at Plaintiff's facility.

Plaintiff avers that discovery revealed that Defendants may have made material misrepresentations to the insurer about the scale, scope and quality of repairs. Plaintiff also argues relevance because: (1) a prior inconsistent statement on an application signed by Defendants is admissible for impeachment purposes; (2) evidence of prior claims on the Vessel represent potential pre-existing defects for which Plaintiff should not be held responsible; and (3) evidence of subsequent claims demonstrate that Defendants filed their counterclaim in bad faith.

The court found that Plaintiff's explanation indicated that the information bears on claims and defenses, and such information is within the scope of discovery allowed by the Federal Rule of Evidence. Furthermore, the documentation in the possession of the Insurance Broker was not completely untethered from the timeframe or events that occurred in this case. Additionally, even though Defendants allege that they did not collect for fire damage before the policy went into effect, claims made by Defendants under the policy could still be relevant to pre-existing defects. or to Defendants' counterclaims.
Therefore, the Court held the Defendant's Motion to Quash, as it pertains to the Insurance Broker subpoena, was granted with respect to request 1 and 2 above and denied with respect to requests 3 through 5. Defendants' objections to request numbers 3 through 5 were overruled.

11th Circ. Orders Arbitration In $1.4M Yacht Contract Dispute

Northrop and Johnson Yacht-Ships, Inc., v. Royal Van Lent Shipyard, B.V., Feadship America, Inc. D.C. Docket No. 0:19-cv-62878-KMW [NOT FOR PUBLICATION]

Northrop and Johnson ("Northrop") filed suit against Feadship America Inc. ("Feadship America") and Royal Van Lent Shipyard B.V. ("Royal Van Lent") for an allegedly unpaid commission on the construction of a luxury yacht. The district court ordered Northrop and Johnson's complaint dismissed and compelled arbitration under the New York Convention. On appeal, the Eleventh Circuit considered the sole question of

whether Northrop agreed in writing to arbitrate its claims. Because the court concluded that it did agree in writing to arbitrate its claims it affirmed the decision of the lower court and ordered Northrop to arbitrate its claim that the two boat builders breached a contract by cutting it out of a high-end deal with two billionaire clients, depriving it of an agreed to $1.4 million commission.

Court Orders Sale of Vessel for Satisfaction of Claim for Necessaries under the Commercial Instruments and Maritime Lien Act ("CIMLA")

Chesapeake Harbour Marina, Inc. v. M/V Southern Charm, Civil Action No. ELH-20-2770 (Dist. Court Md.) Filed 4/7/2021.

Chesapeake Harbour Marina, Inc. ("Chesapeake") filed an *in rem* claim against the *M/V Southern Charm* (the "Vessel") seeking to foreclose on an alleged maritime lien under the Commercial Instruments and Maritime Liens Act ("CIMLA") 46 U.S.C. Sec. 31301, *et. seq.* In addition, Chesapeake filed three claims against Pelican Investment, LLC ("Pelican") the alleged owner of the Yacht, for breach of maritime contract, quantum meruit and unjust enrichment. Following the arrest of the vessel, and the failure of Pelican to respond to the verified complaint Chesapeake filed a request for entry of default *in rem* against the Vessel. Thereafter, the Clerk entered default against the Vessel. Plaintiff then filed motions for default judgment and interlocutory judicial sale of the Vessel. Following an analysis of the validity of the underlying claims and a review of damages the court granted both those motions in part ordering a judicial sale of the vessel.

Negligent Entrustment

Court Finds No Negligent Entrustment and Denies Injured Passenger's Claim Against Boat Owner

Stolinas v. Palmer, Case No.: 2:18-cv-702-FtM-38MRM (M.D. Fla. Jan. 11, 2021)

After a passenger suffered grievous injuries onboard a recreational vessel, the passenger brought a negligent entrustment action against the boat owner. On January 11, 2021, the US District Court granted the owner's motion for summary judgement. The Court found the evidence did not support that the owner deliberately delivered the boat to the operator's care and custody.

Plaintiff Nicholas Stolinas was seriously injured while onboard Defendant Walter Palmer's boat. The Defendant's neighbor, Andrew Derwin, made a sudden and unexpected turn, causing the Plaintiff to fall in the water and suffer serious injuries which included having his right leg seriously injured and his right hand nearly completely severed. After the accident, Derwin was charged with grand theft of the vessel, he pled not guilty at his arraignment, but committed suicide before trial.

The Plaintiff claimed the Defendant negligently and deliberately gave permission to Derwin to use the vessel. This claim was based on statements provided by the Plaintiff, another passenger on the vessel, Ms. Derwin, and a private investigator. The Plaintiff's witnesses claimed Derwin had apparent permission to use the boat as the passengers had parked on the Defendant's property when they then took out the boat. The Court found that parking on the Defendant's driveway did not prove entrustment or create a genuine question of material fact.

The Plaintiff claimed the Defendant negligently entrusted Derwin with the boat as Derwin had responsibilities on the boat, including occasionally covering the boat with a tarp. The Court found that having responsibilities to help with the boat does not necessarily mean Derwin was entrusted with operating the boat.

To refute the Plaintiff's claim, the Defendant submitted an affidavit claiming Derwin did not have his permission to use the boat and, in fact, the Defendant never let anyone beside himself operate the boat. To demonstrate a lack of permission, the Defendant claimed he argued for criminal charges, including grand theft, against Derwin. The Defendant also provided a witness statement from an individual who heard the De-

fendant tell Derwin "No, absolutely not! You cannot use the boat!"

The Plaintiff's witnesses claimed Derwin said he had permission to use the boat; however, no witness could corroborate the Defendant saying Derwin had permission to use the boat. The Court found Derwin's statements were not admissible under any hearsay exception. The Court also held the statements were not reliable and trustworthy to permit the statements being admitted under the residual hearsay exception.

The Court found that, with Derwin being unavailable, the Plaintiff's did not present sufficient, admissible evidence to contradict the Defendant's claims denying Derwin permission to use the boat. The Court held there was no entrustment and granted the Defendant's Motion for Summary Judgement.

NTSB Update

The National Transportation Safety Board published its final report into the 34-fatal fire and subsequent sinking of the commercial dive vessel *Conception*

The final report published on November 19, 2020 can be found at: https://www.ntsb.gov/investigations/AccidentReports/Reports/MAR2003.pdf

Coast Guard Update

U.S. Coast Guard announces new law requiring use of engine cut-off switches

Operators of recreational vessels less than 26 feet in length will be required to use an engine cut-off switch (ECOS) and associated ECOS link (ECOSL) as of April 1, 2021, as the U.S. Coast Guard implements a law passed by Congress. The ECOS and ECOSL prevent runaway vessels and the threats they pose. The ECOSL attaches the vessel operator to a switch that shuts off the engine if the operator is displaced from the helm. The ECOSL is usually a lanyard-style cord that attaches to an ECOS either in close proximity to the helm or on the outboard motor itself if the vessel is operated by a tiller. When enough tension is applied, the ECOSL disengages from the ECOS and the motor is automatically shut down. Wireless ECOS have recently been developed and are also approved for use. These devices use an electronic "fob" that is carried by the operator and senses when it is submerged in water, activating the ECOS and turning the engine off. Wireless devices are available on the aftermarket and are beginning to become available as manufacturer-installed options.

Each year, the Coast Guard receives reports of recreational vessel operators who fall off or are suddenly and unexpectedly thrown out of their boat. These events have led to injuries and deaths. During these incidents the boat continues to operate with no one in control of the vessel, leaving the operator stranded in the water as the boat continues on course, or the boat begins to circle the person in the water eventually striking them, often with the propeller. These dangerous runaway vessel situations put the ejected operator, other users of the waterway, marine law enforcement officers, and other first responders in serious danger.

Section 503 of the Coast Guard Authorization Act of 2018 required manufacturers of covered recreational vessels (less than 26 feet in length, with an engine capable of 115 lbs. or more of static thrust) to equip the vessel with an ECOS installed as of December 2019. Owners of recreational vessels produced after December 2019 are required to maintain the ECOS on their vessel in a serviceable condition. It is recommended that recreational vessel owners regularly check their existing ECOS system to ensure it

works properly, following manufacturer's instructions.

Section 8316 of the Elijah E. Cummings Coast Guard Authorization Act of 2020 requires individuals operating covered recreational vessels (less than 26 feet in length, with an engine capable of 115 lbs. or more of static thrust, which equates to about 3 horsepower or more) to use ECOS "links" while operating on plane or above displacement speed. Using the ECOSL is not required when the main helm is installed within an enclosed cabin. Common situations where ECOSL use would not be required include docking/trailering, trolling, and operating in no-wake zones.

Seven states currently have ECOS use laws for recreational vessels, and 44 states have ECOS use laws for personal watercraft (PWC).

U.S. Coast Guard encourages paddle craft labeling this spring across the PNW

The Coast Guard and its agency partners urge the labeling of paddle craft and owner responsibility as spring arrives across the Pacific Northwest.

Reports of unmanned and adrift paddle craft continue to divert federal, state, and local response boat and air crews on hundreds of dangerous and costly searches that turn out to be false alarms. Since 2016, 13th Coast Guard District aircraft and vessels have launched on 746 individual cases of vessels reported adrift or capsized.

All were unmanned and adrift, not resulting in an actual distress. Each case represents a minimum cost of approximately $40,000 to the government to respond and conduct searches for possible persons in the water. For the 13th District, this accounts for an operation cost of approximately $29,840,000.

The Coast Guard urges three specific actions:

1) Mark It – Use an 'If Found' Sticker
2) File It – File a Float Plan and check the weather
3) Wear It – Wear a life jacket and use a buddy system.

State-Law Update

- **California -** California Boater Cards are now required (with some limited exceptions) for all California operators who were 40 years of age or younger on January 1, 2021.

- **Washington –** State bill that would require paddlesport participants to take a safety course in WA has stalled in committee this year, but nonetheless those using kayaks, canoes, row boats and stand-up paddleboards are encouraged to take an online course to learn the laws, emergency procedures, rules and paddling techniques.

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Committee Chair
Todd Lochner
Lochner Law Firm, P.C.
tlochner@lochnerlawfirm.com

Editor
Jody McCormack
Bohonnon Law Firm, LLC
jmccormck@bohonnon.com

Past Editors
Thomas A. Russell
Frank P. DeGiulio
Todd D. Lochner
Daniel Wooster

Contributors to this Issue

Kevin M. Baldwin, Esq

Adam M. Wernicke, Esq.
Hill, Betts & Nash LLP.

Mark Buhler
Buhler Law Firm, P.A.

Nicholas Dugdale
Sheppard Mullin

Edwin Barnes
Thomas Quinn, LLP

Masoud Jahani
Jahani Law, P.C.

Adam Jaffe
United States Coast Guard

Salomee Briggs
United States Coast Guard

Shawn Bevans
MGC Law