UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In Re: The Complaint and Petition of Jersey Shore Boat Towing & Salvage, Inc., Absolute Boat Towing & Salvage, Inc., and their respective stockholders, as owners and/or owners pro hac vice of the vessel, a 2009 28' ZODIAC, Registration Number NJ4875HL, HIN XDCR347MG809, including her engines, gear, tackle, appurtenances, equipment, furniture, etc., for Exoneration from and/or Limitation of Liability,

Petitioners,

v. Case No.: 6:21-cv-1779-WWB-RMN

ABDEL-ILLAH ZIDAL,

Respondent/Claimant

v.

BOAT AMERICA CORPORATION,

Third Party Defendant

_____/

ORDER

THIS CAUSE is before the Court on Petitioners' and Third Party Defendant's Motion for Summary Judgment (Doc. 53) and Claimant's Motion for Summary Judgment (Doc. 54) and the Responses (Doc. Nos. 55, 56) and Replies (Doc. Nos. 58, 59) thereto.[1]

[1] Claimant's filings fail to comply with Local Rule 3.01 and the Court's January 13, 2021 Standing Order. In the interest of justice, the Court will consider the filings. The parties are cautioned, however, that future failures to comply with all applicable rules and orders of the Court may result in the striking or denial of filings without notice or leave to refile.

For the reasons set forth below, Petitioners' Motion will be denied and Claimant's Motion will be granted in part.

I. BACKGROUND

In the summer of 2020, Claimant purchased the 1985 30' S2 9.2 C Sailboat, named "Action" (the "**sailboat**"). (Doc. 53-4 at 32:7–11). The sailboat required extensive repair—it was incapable of moving on its own power and was not equipped with working electronics or a VHF radio. (*Id.* at 183:20–184:10; Doc. 53-8 at 43:1–7). Claimant had little to no experience with sailboats and had "no clue" how they worked. (Doc. 53-4 at 54:23–55:1, 185:7–9). Some months later, with Claimant at the helm, the unpowered sailboat was accidentally towed against the underside of a bridge by Petitioners. (*Id.* at 249:20–23). This case arises from that allision.[2]

Before the allision, Claimant was keeping the sailboat anchored along the Banana River, but it was set adrift after inclement weather snapped the anchor's chain. (*Id.* at 176:6–11). The sailboat drifted to Mark Oakes' dock in Merritt Island, Florida, where it became grounded. (*Id.* at 56:25–57:3). The sailboat remained unlawfully grounded at Oakes' dock for weeks until Claimant received a citation from the Florida Fish and Wildlife Conservation Commission for keeping his sailboat in a derelict condition. (Doc. 53-5 at 1). Claimant and Oakes then sought towing services to move the sailboat. (Doc. 53-4 at 96:13–17).

[2] "An allision is the sudden impact of a vessel with a stationary object such as an anchored vessel or a pier. A collision, on the other hand, is the crashing together of two vessels." *Superior Constr. Co. v. Brock*, 445 F.3d 1334, 1336 n.1 (11th Cir. 2006) (internal quotation marks, citations, and alterations omitted) (quoting Black's Law Dictionary (7th ed.1999)). The Court adopts the parties' practice of calling the accident at issue an "allision."

Oakes contacted Charles Tharp, the owner and general manager of Absolute Boat, to tow the sailboat. (Doc. 54-6 at 39:10–13, 140:20–23). Absolute Boat specializes in towage and salvage, operating under the trade name "Towboat U.S." from a licensing agreement with Boat America Corporation. (*Id.* at 36:1–25). One of the vessels Absolute Boat uses in its towing operations is the 2009 28' ZODIAC, Registration Number NJ4875HL, HIN XDCR347MG809 (the "**Tug**"). (*Id.* at 31:5–14). At the time of the incident, Absolute Boat was leasing the tug from Jersey Shore Boat Towing & Salvage, Inc. ("**Jersey Shore**") under a bareboat charter. (*Id.* at 32:5–8). Tharp owns both companies. (*Id.* at 26:22–25).

Tharp sent Captain Charles Nunn to tow the sailboat. (*Id.* at 23:21–25). Based on a recommendation from Florida Fish and Wildlife, Claimant decided to have the sailboat towed to a marina just north of the Pineda Causeway, an expressway spanning the Indian River Lagoon and the Banana River. (Doc. 53-4 at 53:22–55:9; Doc. 53-8 at 60:8–14). To complete the voyage as planned, the sailboat would be towed underneath the Pineda Causeway.

Before setting sail, Captain Nunn visually inspected the sailboat and approximated that it was about 48 feet, 6 inches tall. (Doc. 53-8 at 141:6–9). Captain Nunn knew from experience that the Pineda Causeway had a maximum vertical clearance height of 43 feet. (Doc. 54-6 at 89:23–90:1; Doc. 53-8 at 32:19–24). Despite the fuzzy math, Captain Nunn never asked Claimant about the height of his sailboat or took any measures to verify it, and Claimant never raised any concerns either. (Doc. 53-8 at 142:22–24). Absolute Boat had no policy requiring that the height of the mast be verified, even though everyone

involved knew it was going to be towed beneath a bridge with limited vertical clearance. (*Id.* at 92:14–22).

The tow commenced on November 18, 2020, with Captain Nunn as the sole crewmember aboard the tug and Claimant as the sole crewmember aboard the sailboat. (Doc. 53-8 at 43:23–44:20). Claimant never advised Captain Nunn of his inexperience or otherwise asked him anything about his role during the voyage. (Doc. 54-4 at 180:16–181:25). As the parties sailed beneath the Pineda Causeway, the mast of the sailboat allided against the northern span of the bridge. (Doc. 53-8 at 151:8–14). The allision caused the boom of the sailboat to swing and strike Claimant on the head. (Doc. 53-4 at 5–16). Claimant's personal injuries are the basis for this litigation.

Petitioners initiated this action by invoking their rights under the Limitation Act on October 22, 2021. (*See generally* Doc. 1). Petitioners seek summary judgment on the issue of liability for this incident and Claimant moves for summary judgment arguing that Petitioners cannot succeed under the Limitation Act as a matter of law.

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306,

1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor." *Allen*, 495 F.3d at 1314 (citing *Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003)).

Substantive admiralty law applies because the allision and consequent injuries occurred in the navigable waters of the United States. *See Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 924 (11th Cir. 2001) ("[E]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." (quoting *The Plymouth*, 70 U.S. 20, 36 (1865))); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990) ("[I]f the injury occurred on navigable waters, federal maritime law governs the substantive issues in the case."); *see also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law.").

III. DISCUSSION

A. An Overview of the Limitation Act

The issue before the Court is whether Petitioners are entitled to exoneration or limitation of liability under the Limitation Act. Section 183(a) of Title 46 provides:

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

The Limitation Act creates "a form of action peculiar to the admiralty and maritime context." *Germain v. Ficarra* (*In re Petition of Germain*), 824 F.3d 258, 263–64 (2d Cir. 2016) (quotation omitted). "[I]nstead of being vicariously liable for the full extent of any [damages] caused by the negligence of the captain or crew employed to operate the ship, the owner's liability is limited to the value of the ship unless the owner himself had 'privity or knowledge' of the negligent acts." *Otal Invs. Ltd. v. M/V CLARY*, 673 F.3d 108, 115 (2d Cir. 2012) (quotation omitted). To invoke their rights under the Limitation Act, a vessel owner must file a petition within six months of receiving written notice of a claim which could reasonably exceed the value of the vessel. 46 U.S.C. § 30511(a).

The Eleventh Circuit has outlined a two-step process to determine whether a shipowner is entitled to receive exoneration or limitation of liability. *Hercules Carriers, Inc. v. Claimant State of Fla., Dep't. of Transp.*, 768 F.2d 1558, 1563–64 (11th Cir. 1985). "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." *Id.* (quotation omitted). To successfully contest a petition under the Limitation Act, a

claimant must make an initial showing that the negligence or unseaworthiness of the vessel was a proximate cause of their injury. *See Coryell v. Phipps*, 317 U.S. 406, 409 (1943); *Coleman v. Jahncke Serv., Inc.*, 341 F.2d 956, 958 (5th Cir. 1965).[3] If the claimant is unable to make this threshold showing, the petitioner is entitled to a decree of exoneration. *See, e.g.*, *In re Complaint of Sheen*, 709 F. Supp. 1123, 1128 (S.D. Fla. 1989).

But if a claimant can satisfy the initial burden of proving negligence or unseaworthiness, the burden of proof then shifts to the shipowner to show they lacked privity or knowledge of the negligence or unseaworthiness of their vessel. If the shipowner successfully demonstrates their lack of privity or knowledge, the shipowner is entitled to limitation of liability. If the shipowner cannot show it lacked privity or knowledge, then limitation is unavailable and the petition must be dismissed. *Fecht v. Makowski*, 406 F.2d 721, 722 (5th Cir. 1969). Claimant would then be entitled to have the injunction against other actions dissolved, "so that they may, if they wish, proceed in a common law forum as they are entitled to do under the saving to suitors clause." *Id.* at 722–23 (citing 28 U.S.C. § 1333).

Petitioners and Claimant cross-move for summary judgment based on the other's inability to meet their burden of proof. Petitioners argue that Claimant cannot meet his burden of proving negligence. Claimant argues that the Petition is time-barred, that there is no genuine dispute that the Tug was negligent, and that the Tug's negligence occurred within the privity or knowledge of the shipowner.

[3] Decisions of the Fifth Circuit entered before October 1, 1981, are binding on the courts of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

B. Timeliness of the Petition

Claimant argues that the Petition should be dismissed because it is time-barred. A shipowner must file a petition invoking the protections of the Limitation Act "within six months of receiving 'written notice of claim.'" *Paradise Divers, Inc. v. Upmal*, 402 F.3d 1087, 1090 (11th Cir. 2005) (quoting 46 U.S.C. § 30529(a)). Because Claimant initially gave Petitioners notice on December 17, 2020, and the Petition was not filed until October 22, 2021, Claimant urges the Court to find that Petitioners sat on their rights and are procedurally barred from petitioning for limitation. Petitioners do not dispute the timeline; they argue instead that Claimant's December 17, 2020 letter was insufficient to put them on notice of a reasonable possibility of a claim that could exceed the value of the vessel.

As clarified by the Eleventh Circuit, a claimant must provide the shipowner or its agent with "written notice" that reveals a "reasonable possibility" of a claim that will exceed the value of the vessel at issue to trigger the six-month filing period. *Orion Marine Constr., Inc. v. Carroll*, 918 F.3d 1323, 1338 (11th Cir. 2019). The question is whether Petitioners, by virtue of having received the December 17, 2020 letter from Claimant's lawyer, had "written notice" sufficient to bar Petitioners' limitation of liability action after six months. As explained in *Orion*, the notice does not need to include a specific demand for damages, and although "the vessel owner bears the burden of 'uncertainty' and 'doubt' as to the amount of alleged damages"—the claimant's notice still must reveal a "reasonable possibility" that the claim may exceed the vessel's value and is subject to limitation. *Id.* at 1330–31, 1337–38. Only when the notice reveals such a reasonable possibility does a vessel owner's duty to investigate arise.

Courts have illustrated when written notice is sufficient to trigger the six-month deadline. In *In re Bertsch*, the written notice "identified the vessel in question as 'responsible for the accident.'" 540 F. Supp. 3d 1188, 1192 (S.D. Fla. 2021). The vessel owner was aware of the injuries since they personally assisted the claimant and "applied a tourniquet to [the claimant]'s left arm." *Id.* Additionally, the letter requested preservation of evidence and warned that counsel would do "whatever is necessary to protect our client's interest." *Id.* The *Bertsch* court concluded that the letter "provided a reasonable possibility that a forthcoming lawsuit was imminent, and that damages likely would exceed the value of the vessel." *Id.*; *see also In re Intrepid Marine Towing & Salvage, Inc.*, 644 F. Supp. 3d 1013, 1020 (M.D. Fla. 2022) (written notice raised reasonable possibility of a claim exceeding the value of the vessel because the letter explicitly blamed the shipowner for a "violent collision" which caused "significant injury"); *but see In re Complaint of Harad*, No. 13-62353-CIV, 2014 WL 12600719, at *3 (S.D. Fla. Mar. 28, 2014) (finding written notice insufficient because, "[a]lthough [c]laimant references pain and an appointment with a surgeon, she gives no indication that her injuries might exceed $150,000"), *report and recommendation adopted*, 2014 WL 12600720 (S.D. Fla. May 16, 2014).

Here, the December 17, 2020 letter does not indicate that Petitioners are liable or at fault for Claimant's injury or that Claimant seeks to bring a cause of action subject to limitation. The letter states only that Claimant sustained "personal injuries" in an "incident that occurred on November 18, 2020, while on his sailboat and the company affiliated with Absolute Boat . . . was towing." (Doc. 54–8 at 6). The letter references 'an incident' and 'personal injuries' in "cryptic terms, with no further information, and without reference to a collision or other serious injury on the vessel." *Ferreira Constr. Co. v. Atkins*, No. 22-

14330-Civ, 2023 WL 2388698, at *4 (S.D. Fla. Feb. 6, 2023). The letter does not "provide information on the severity of [Claimant's] injuries or allege unseaworthiness as to the vessel." *Id.* Accordingly, the letter was not sufficient to procedurally bar Petitioners from invoking their rights under the Limitation Act.

C. Exoneration

A shipowner is entitled to exoneration from liability for damages incurred by maritime collision only when the vessel was free of any contributory fault for the accident. *Am. Dredging Co. v. Lambert*, 81 F.3d 127, 129 (11th Cir. 1996). In an action by a shipowner or charterer for exoneration, "(t)he burden of proof of exoneration is on the claimants; they must prove some fault on the part of petitioner as in the case of a complaint charging liability." *Petition of M/V Sunshine II*, 808 F.2d 762, 764 (11th Cir. 1987). Analysis of the cross motions for summary judgment on the exoneration issue requires an exploration of each claim. *In re Garda Marine*, *Inc.*, No. 88-2282-Civ, 1991 WL 701611, at *1 (S.D. Fla. Oct. 10, 1991).

1. Duties of Tug and Tow

During towage, a tug owner has a duty to provide a qualified master and crew for the intended voyage. *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1155 (2d Cir. 1978). Although the tug has no duty to make a detailed inspection of the tow either before or during the voyage, the tug has a duty to take reasonable steps to determine the exact condition of the tow if the unseaworthiness of the tow is apparent or disclosed. *A. E. Staley Mfg. Co. v. Porto Rico Lighterage Co.*, 323 F. Supp. 27, 40 (E.D. La. 1970). In the event of injury to the tow, the negligence of the tug "must be affirmatively shown and

the burden of proving negligence rests upon those seeking to establish liability therefor." *Stall & McDermott v. The S. Cross*, 196 F.2d 309, 311 (5th Cir. 1952).

The tow likewise owes duties to the tug during towage. Principally, "the owner of the [tow] is responsible for the seaworthiness of his vessel." *Consol. Grain & Barge Co. v. Marcona Conv. Corp.*, 716 F.2d 1077, 1081 (5th Cir. 1983). It is well-established that the owner of the tow warrants that the tow is sufficiently seaworthy "to withstand the ordinary perils to be encountered on the voyage." *S., Inc. v. Moran Towing and Transp. Co.*, 360 F.2d 1002, 1005 (2d Cir.1966). In determining whether the tow is sufficiently seaworthy to withstand the ordinary perils to be encountered on its voyage, courts must consider whether the tow was "reasonably fit for its intended purpose." *S.C. Loveland v. E. W. Towing, Inc.*, 415 F.Supp. 596, 605 (S.D. Fla. 1976).

Petitioners argue that to be reasonably fit for its intended purpose, the sailboat must have had the capacity to safely travel to its intended destination. Given this, Petitioners argue the sailboat was not seaworthy and fit for its purpose for the voyage because its mast exceeded the vertical clearance of the Pineda Causeway. Petitioners are correct. Claimant was aware that the sailboat was being towed north of the Pineda Causeway, he was aboard the sailboat throughout the voyage and could see that it was being towed beneath the Pineda Causeway, and he had the opportunity to advise Captain Nunn that his sailboat was unseaworthy, but he failed to do so. In failing to furnish a seaworthy tow, Claimant directly contributed to his own injury.

Claimant was also negligent for agreeing to take the helm in light of his inexperience. Just as it is "unreasonable for a person with almost no driving experience to drive a car on a highway at night, so too is it unreasonable for a person to operate a

vessel with the full knowledge of being inexperienced or simply uneasy about operating the vessel." *Truehart v. Blandon*, 696 F. Supp. 210, 214 (E.D. La. 1988). In his inexperience, Claimant failed to consider the height of his sailboat relative to the vertical clearance of the Pineda Causeway and this failure contributed to his injury.

But Claimant's negligence and the unseaworthiness of his sailboat were not the sole proximate cause of his injury. The record shows that the unseaworthiness of the sailboat was so apparent that it was negligent for the Tug to attempt to proceed beneath the Pineda Causeway. *Dameron-White Co. v. Angola Transfer Co.*, 19 F.2d 12, 14 (5th Cir. 1927); *Otto Candies, Inc. v. Great Am. Ins. Co.*, 221 F.Supp. 1014, 1018 (E.D. La. 1963). Captain Nunn negligently failed to verify the height of the mast of the sailboat before undertaking the voyage despite knowing at the time the voyage commenced that the sailboat was likely unseaworthy. *See Ryan Walsh Stevedoring Co. v. James Marine Serv., Inc.*, 557 F. Supp. 457, 460–61 (E.D. La. 1983). By failing to at least inquire about the height of the mast relative to the bridge clearance, Captain Nunn did not "exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Houma Well Serv., Inc. v. Tug Capt. O'Brien*, 312 F.Supp. 257, 260 (E.D. La. 1970). Had Captain Nunn acted with reasonable care and taken steps to verify his suspicion that the height of the mast potentially exceeded the vertical clearance of the Pineda Causeway, he would not have attempted to tow the sailboat underneath it and Claimant would not have been injured. Thus, Petitioners are not free from contributory fault for the accident and exoneration will be denied as a matter of law.

2. The "Dominant Mind" Doctrine

The parties accuse one another of having been the dominant mind of the flotilla during the allision. The "dominant mind" doctrine holds that the vessel acting as the dominant mind of a flotilla is presumptively at fault, even if another part of the flotilla causes the damage. *Chevron U.S.A., Inc. v. Progress Marine Inc.*, No. 77-463 Section "I", 1979 WL 6504708, at *2 (E.D. La. Aug. 24, 1979). During towage, the tug is generally considered the dominant mind because it provides the "motive power" for the flotilla. *Marathon Pipeline Co. v. Drilling Rig ROWAN/ODESSA*, 527 F.Supp. 824, 834 (E.D. La. 1981). But this presumption may be overcome by evidence that the tow was actually in control of the operation. *Id.*; *Plains Pipeline, L.P. v. Great Lakes Dredge & Dock Co.*, 54 F. Supp. 3d 586, 591 (E.D. La. 2014). Even where the tug is the dominant mind, the tow can still be partially liable if it breached a duty which contributed to the casualty. *In re TT Boat Corp.*, No. CIV. A. 98-0494, 1999 WL 123810, at *3 (E.D. La. Mar. 3, 1999); *Dow Chem. Co. v. Tug THOMAS ALLEN*, 349 F.Supp. 1354, 1364 (E.D. La. 1972).

Petitioners' argument is that the tug moved at Claimant's behest. But "tugs generally move their tow at the behest of their tow; this fact does not make the tow liable if the tug crew makes foolish choices." *TT Boat Corp.*, 1999 WL 123810, at *4. Claimant "was entitled to assume that the [tug] would navigate them safely." *Id.* at *3; *Ryan Walsh Stevedoring Co.*, 557 F.Supp. at 461 (finding that a tug which tows her tow into an allision with a stationary object is presumptively at fault). Petitioners have provided no evidence to rebut the presumption that the tug was the dominant mind of the flotilla and therefore will be held liable as such.

3. The Oregon Rule

The *Oregon* rule states that a vessel moving under its own power is presumptively at fault if it allides with a stationary object. *See The Oregon*, 158 U.S. 186 (1895). By invoking the *Oregon* rule, the owner of a stationary object hit by a moving vessel can satisfy its initial burden of demonstrating breach of a duty on the part of the moving vessel. *N.D. Shipping, S.A. v. ZAGORA M/V*, No. CIV.A.06-10734, 2009 WL 1606877, at *5 (E.D. La. June 5, 2009). The moving vessel can rebut the presumption by proving, by a preponderance of the evidence, that it acted with reasonable care, that the stationary object was at fault for the allision, or that the allision was an unavoidable accident. *Id.* The rule applies "where the dispute is over the allocation of fault between the vessel and the stationary object." *Hartford Ins. Co. v. Fishing Holdings, LLC* (*In re Operation Bass, Inc.*), No. 1:14-cv-2976, 2017 WL 6029645, at *10 (W.D. Tenn. Dec. 5, 2017).

The *Oregon* rule is inapplicable to this case. The only fault to allocate is between the owners of two different moving vessels. Neither party seeks to allocate fault to the owner of the Pineda Causeway, nor does the owner of the Pineda Causeway seek to recover from any of the parties. And Claimant's sailboat is the vessel which allided with the bridge, not Petitioners' Tug. Thus, Claimant cannot hold Petitioners liable under the *Oregon* rule as a matter of law.

4. The Pennsylvania Rule

The *Pennsylvania* rule holds that "when . . . a ship at the time of a[n allision] is in actual violation of a statutory rule intended to prevent [allisions], it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster." *The Pennsylvania*, 86 U.S. 125, 136 (1873). "In such a case the

burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.*; *see also Superior Constr. Co. v. Brock*, 445 F.3d 1334, 1340 (11th Cir. 2006).

To support a finding that Petitioners should be held liable under the *Pennsylvania* Rule, Claimant points to Rules 5 and 7 of the International Regulations for Preventing Collisions at Sea ("**COLREGS**").[4] The failure to comply with these rules constitutes a statutory violation which can trigger the *Pennsylvania* rule's presumption of negligence. *See In re Gore Marine Corp.*, 767 F. Supp. 2d 1316, 1328 (M.D. Fla. 2011). As a matter of federal law, the COLREGS shall be applicable to, and shall be complied with by:

> (1) all vessels, public and private, subject to the jurisdiction of the United States, while upon the high seas or in waters connected therewith navigable by seagoing vessels, and
>
> (2) all other vessels when on waters subject to the jurisdiction of the United States.

33 U.S.C. § 1603.

Rule 5 is within Part B of the COLREGS, which addresses "Steering and Sailing Rules." Rule 5 provides: "Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision." 33 C.F.R. § 83.05. The question of a proper lookout is "one of fact to

[4] Claimant also states that Petitioners' failure to undertake a navigational assessment violated 46 CFR Subchapter M, and that this failure contributed to the allision. But Title 46 of the CFR explicitly excludes assistance towing vessels from its requirements. 46 C.F.R. § 136.105. Because Petitioners are indisputably assistance towing companies as defined by § 136.110, Subchapter M does not apply as a matter of law.

be determined from all of the circumstances on the basis of common prudence." *China Union Lines, Ltd. v. A.O. Andersen & Co.*, 364 F.2d 769, 783 (5th Cir.1966).

A captain of the vessel always serves as a lookout, but "there are circumstances and conditions when that is insufficient and where additional means of lookout are needed." *In re Yazoo River Towing, Inc*, No. CV 20-214-JWD-SDJ, 2023 WL 6319895, at *8 (M.D. La. Sept. 28, 2023). The need for an additional lookout is generally based on the following factors: (1) visibility, (2) traffic density, (3) the attention necessary when navigating in areas of increased vessel traffic, and (4) proximity of dangers to navigation. *Id.*

Here, Claimant has not set forth any evidence that visibility, weather, and traffic were such that Rule 5 or reasonable care required the use of a supplemental lookout at that time of the incident. Given the good visibility and otherwise unremarkable conditions, the pilot in the wheelhouse may have been an appropriate lookout within the meaning of the Rule. (Doc. 54-4 at 182:4–11). Claimant has not conclusively demonstrated that a supplemental lookout was required or that one could have prevented the allision. Therefore, summary judgment will be denied on this issue.

Claimant also alleges that Captain Nunn failed to use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision existed, in violation of COLREGS Rule 7. Rule 7 is another Steering and Sailing Rule and provides in pertinent part that "[e]very vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist." 33 C.F.R. § 83.07. The

Rule also forbids making assumptions "on the basis of scanty information." *Id.*; *In re Gore Marine Corp.*, 767 F. Supp. 2d at 1329.

Captain Nunn violated Rule 7 during the tow. Captain Nunn did not independently verify the height of the sailboat even though he knew or reasonably should have known that it posed a risk of allision. Captain Nunn also made assumptions based on scanty information. Even though his personal calculations indicated that the sailboat was too tall, Captain Nunn believed it was safe to tow the sailboat under the Pineda Causeway because Claimant told him the sailboat "came from the north." (Doc. 54-5 at 142:24–143:15). Captain Nunn accepted this as true without further inquiry and interpreted it to mean that the sailboat had successfully navigated beneath the Pineda Causeway previously. (*Id.* at 143:16–23). Captain Nunn was never informed that the sailboat could travel beneath the Pineda Causeway; he assumed it based on his interpretation of Claimant's comment. (*Id.*). This constitutes an assumption based on scanty information in violation of Rule 7, and this undue assumption directly contributed to the allision.

The aforementioned Rule 7 violations implicate the *Pennsylvania* rule. Thus, Petitioners must prove that Captain Nunn's erroneous assumptions and failure to properly ascertain the risk of allision did not, and could not, have contributed to causing the allision. Petitioners cannot do so. Thus, the Tug is at fault for failing to appreciate that a risk of allision existed and making impermissible assumptions, and this violation was a proximate, contributing cause of the allision.

D. Privity or Knowledge

Claimant argues that no genuine issue of material fact exists as to whether the shipowner had "privity or knowledge" of those acts of negligence by Captain Nunn

recounted above. *Petition of M/V Sunshine, II*, 808 F.2d at 763–64. "Privity or knowledge" generally refers to the vessel owner's personal participation in, or actual knowledge of, the specific acts of negligence or conditions of unseaworthiness which caused or contributed to the accident. *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1064 (11th Cir. 1996). "[P]rivity and knowledge is established where the means of obtaining knowledge exist, or where reasonable inspection would have led to the requisite knowledge." *Hercules*, 768 F.2d at 1564, 1576. The shipowner's privity or knowledge is not measured against every fact or act regarding the accident; rather, privity or knowledge is measured against the specific negligent acts or unseaworthy conditions that actually caused or contributed to the accident. *Farrell Lines, Inc. v. Jones,* 530 F.2d 7, 10 (5th Cir. 1976).

In the context of a corporate shipowner, the privity and knowledge of "corporate managers vested with discretionary authority" is attributed to the corporation. *Great Lakes Dredge & Dock Co. v. City of Chi.*, 3 F.3d 225, 231 (7th Cir. 1993); *Coryell v. Phipps*, 317 U.S. 406, 410–11 (1943) (explaining that a corporate shipowner may not limit its liability where "the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred"); *Hercules*, 768 F.2d at 1574 (11th Cir. 1985). Here, Tharp held a fifty percent interest in both Jersey Shore and Absolute Boat at the time of the incident. (Doc. 54-6 at 17:3–10). Tharp was the general manager of both companies and Captain Nunn's direct supervisor. (*Id.* at 17:17–18, 23:19–25). Thus, whether Claimant has conclusively established that Captain Nunn's negligence was within Tharp's privity or knowledge is the proper inquiry.

There is no genuine dispute that Tharp could have discovered that Claimant's sailboat was unseaworthy with a reasonable inspection or inquiry. Tharp was contacted directly to complete the tow. (*Id.* at 39:10–13). Tharp personally approved the towing agreement, which included a description of the make and model of the sailboat. (*Id.* at 68:14–23). Tharp knew the sailboat was going to be towed northbound on the Banana River and sail beneath the Pineda Causeway. (*Id.* at 69:13–18). Tharp was familiar with the vertical clearance height of the Pineda Causeway at the time of the incident. (*Id.* at 89:23–90:1). Despite knowing the make and model of the sailboat, the route it was to be towed, and the vertical clearance height of the Pineda Causeway, Tharp did not require Captain Nunn to ascertain the height of the mast before commencing the tow. (*Id.* at 92:18–22). Based solely on the information personally available to Tharp before the tow commenced, Tharp could have ascertained that the sailboat was likely to allide against the Pineda Causeway.

Petitioners cannot demonstrate that Captain Nunn's negligence occurred outside of Tharp's privity or knowledge or that he could not have obtained this information by reasonable inquiry or inspection. *See Hercules*, 768 F.2d at 1577. Therefore, Petitioners are not entitled to limit their liability as a matter of law.

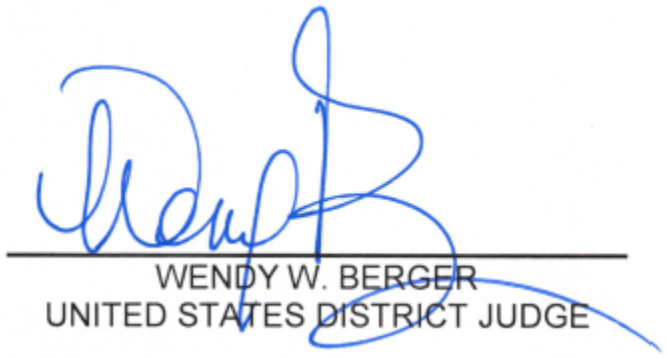
IV. CONCLUSION

For the reasons set forth above, it is **ORDERED** and **ADJUDGED** as follows:

1. Petitioners' Motion for Summary Judgment (Doc. 53) is **DENIED**.
2. Claimant's Motion for Summary Judgment (Doc. 54) is **GRANTED in part**. The Petition is dismissed to the extent it seeks to limit liability to the value

of the 2009 28' ZODIAC, Registration Number NJ4875HL, HIN XDCR347MG809. In all other respects, the Motion is **DENIED**.

DONE AND ORDERED in Orlando, Florida on November 13, 2023.



Copies furnished to:

Counsel of Record