Otis Felder
May 2, 2023

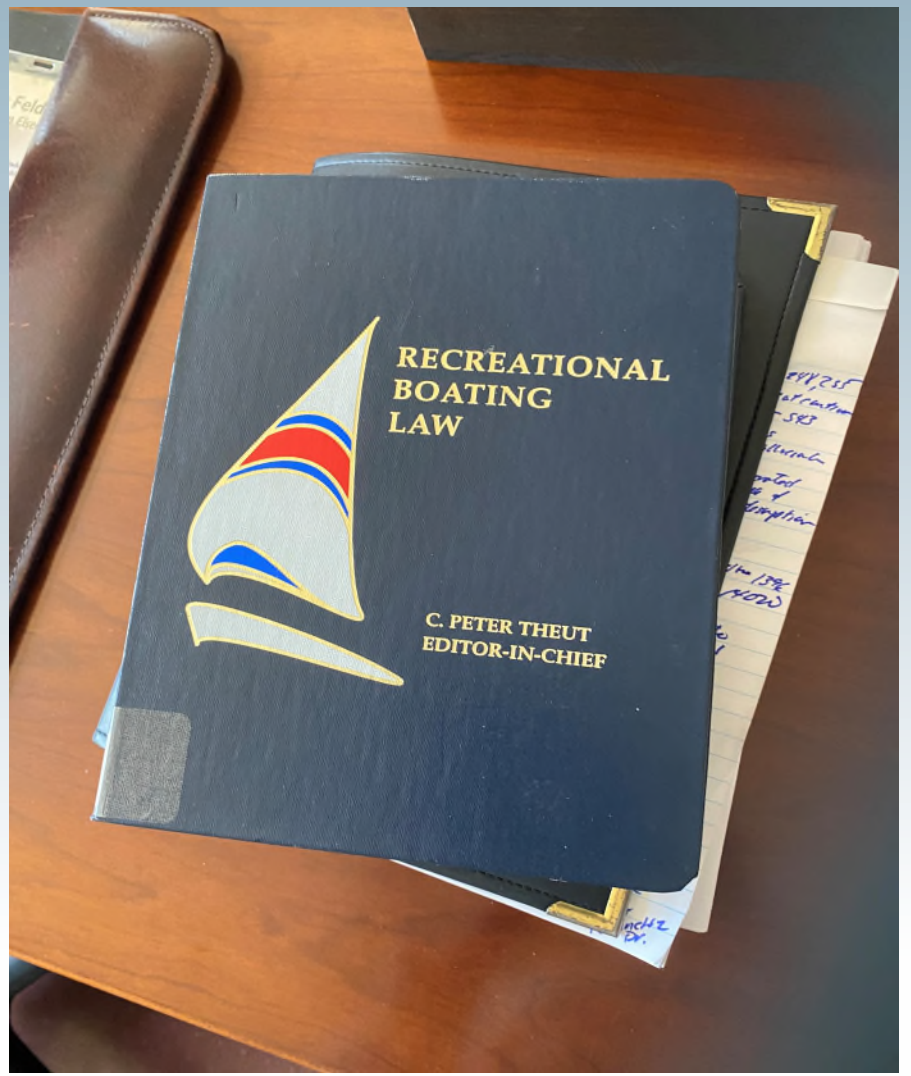
The Maritime Law Association of the United States
Committee on Recreational Boating
Spring 2024 Meeting
Thursday, May 2, 2024, 2:30 – 4:00 p.m.
New York Yacht Club
37 West 44th Street, New York, New York

New developments on exculpatory clauses and limitation practice

WILSON ELSER

Limitation of Liability

- Historical Development
- Enacted March 3, 1951
- No express intent by Congress to apply act to recreational vessels
- 1881 *The MAMIE*
  - 5 F. 813 (E.D. Mich. 1881), *aff'd* 8 F. 367 (6th Cir. 1881)
  - *51' steam-powered yacht use for fishing between Detroit and Lake St. Claire not a vessel*
  - *Not engaged in interstate commerce*



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Section 7

- Amended in 1851
- From:
  - Section 7: This Act shall not apply to the owner or owners of any vessel of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers and inland navigation

  - To:
    - The provisions of the six proceeding sections and of section 175 and 189, shall apply to all seagoing vessels, and also to vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

PS General Slocum

The 1935 and 1936 Amendments

- Following the 1934 *MORRO CASTLE*

- *Loss of Life Amendments providing a minimum limitation fund of $60 per ton to satisfy claims for loss of life or bodily injury involving "any seagoing vessel.*


Morro Castle

- 1936 amendment – defined the term "seagoing vessel" so as "shall not include pleasure yachts…"

- Courts read this to mean that since seagoing vessel is excluded from loss of life amendments, it means they are included in the basic grant of the LOLA

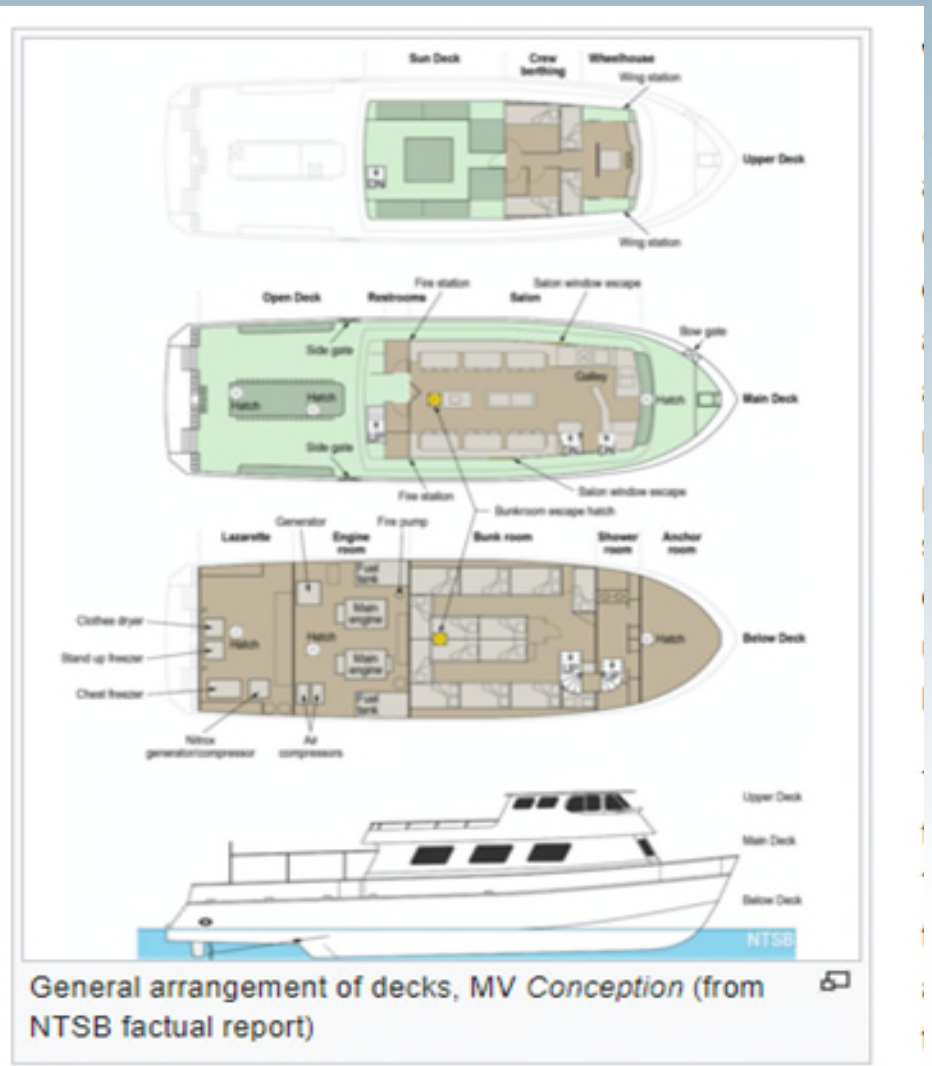
1936 Amendments

STIPULATIONS LIMITING LIABILITY FOR NEGLIGENCE INVALID . — It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.

2022 Amendments

2022 Amendments

LOLA Filed



General arrangement of decks, MV *Conception* (from NTSB factual report)

2. Plaintiff Truth Aquatics, Inc. is, and at all times relevant to this action was, a business entity doing business within Santa Barbara County, in the State of California, and was the alleged owner or owner *pro hac vice* of the CONCEPTION.

3. Plaintiffs Glen Richard Fritzler and Dana Jeanne Fritzler, individually and as Trustees of the Fritzler Family Trust DTD 7/27/92 ("Fritzler") were, at all times relevant to this action, individuals residing within Santa Barbara County, in the State of California, and are or are alleged to be the legal and equitable owner of the CONCEPTION, Official Number 638133, a 75 foot, wooden hulled, 97 Gross Registered Tons, dive vessel ("CONCEPTION"), which was at all times relevant to this action located within the jurisdictional waters of Santa Barbara or Ventura County in the State of California. As alleged below the wreck and/or wreckage of the CONCEPTION is located in either Ventura and/or Santa Barbara County.

4. Plaintiffs are informed and believe and thereon allege that thirty-three passengers ("Passengers") and six crewmembers ("Crewmembers") were on board the CONCEPTION at the time of the Fire on September 2, 2019, and at all times relevant to this action, and were injured or died as a result of the below-described Fire on the CONCEPTION and are potential claimants in this action.

5. Plaintiffs are informed and believe and thereon allege that no Passengers or Crewmembers have filed suit in for alleged personal injuries, property loss, death, damages and/or losses arising out of the below-described Fire on the CONCEPTION on September 2, 2019.

6. Plaintiffs are unaware of the true names and identities of fictitiously-named DOES 1 through 20, inclusive, and therefore sue them under such fictitious names.

7. There are no known liens or mortgages on the CONCEPTION, nor is there any pending freight or hire.

8. Following the Fire on the CONCEPTION, only the wreck and

2022 Amendments

- On December 23, 2022, President Biden signed the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 into law. PL 117-263, December 23, 2022, 136 Stat 2395.
- While the overwhelming majority of the lengthy 2400 page legislation addresses financial appropriations related to defense spending, the final "Division K" of the bill's eleven divisions, entitled the "Don Young Coast Guard Authorization Act of 2022," contains several significant amendments impacting the maritime industry.
- This includes Section 11503, which amends the Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.* ("LOLA"), to specifically exclude its application to "covered small passenger vessels" while maintaining its application for owners and operators of "seagoing vessels and vessels used on lakes and rivers or in inland navigation." 46 U.S.C. § 30502.

Sections 20501 & 30502

- The “Application” section, Section 30502, includes a new subsection ((b)), which reads “Exception- This chapter (except for section 30526) shall not apply to **covered small passenger vessels**.” In other words, if the vessel qualifies as a “covered small passenger vessel”, by the terms of Section 30502, it should be excluded from the Limitation Act.
- Section 30501(1)(A) now defines a “covered small passenger vessel” as a **“small passenger vessel**, as defined in [46 U.S.C. § 2101] that is (i) not a wing-in-ground craft; and (ii) carrying – (I) not more than 49 passengers on an overnight domestic voyage; and (II) not more than 150 passengers on any voyage that is not an overnight domestic voyage…”

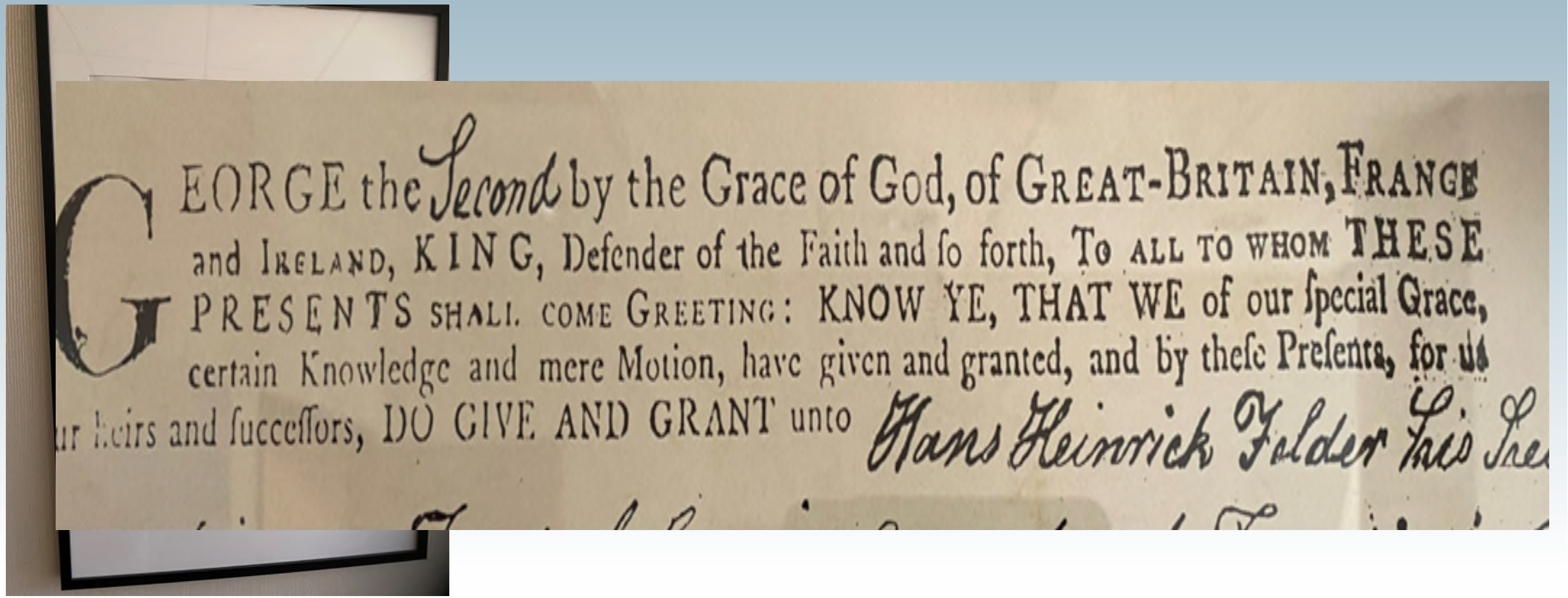
Section 2101

- 46 U.S.C. § 2101(47) defines a "**small passenger vessel**" as either a "wing-in-ground" craft carrying at least one passenger for hire; and a vessel of less than 100 gross tons : (A) carrying more **than 6 passengers**, including at least **one passenger for hire**; (B) that is **chartered with the crew** provided or specified by the owner or the owner's representative and carrying more than **6 passengers;** (C) that is **chartered with no crew** provided or specified by the owner or the owner's representative and carrying more than **12 passengers**; (D) that is a submersible vessel carrying at least one passenger for hire; or (E) that is a ferry carrying more than 6 passengers.

Section 30526

- In addition to carving out small passenger vessels, another significant substantive change to the Limitation Act is to former Section 30508 (now 30526) which previously addressed contractual time limits for bringing notice of a claim and an action against a seagoing vessel. Section 30526 now adds “covered small passenger vessels” to these provisions setting out the permissible minimum claim time limits and provides that passengers aboard covered small passenger vessels must have no less than two years to provide notice or bring an action after injury or death.

Form Contracts


GEORGE the Second by the Grace of God, of GREAT-BRITAIN, FRANCE and IRELAND, KING, Defender of the Faith and ſo forth, To ALL TO WHOM THESE PRESENTS SHALL COME GREETING: KNOW YE, THAT WE of our ſpecial Grace, certain Knowledge and mere Motion, have given and granted, and by theſe Preſents, for us ur heirs and ſucceſſors, DO GIVE AND GRANT unto Hans Heinrick Folder

Recent Developments

- ***In re Complaint & Petition of Blue Water Boating, Inc.,*** 786 Fed. App. 703 (2019)
  - No LOLA in federal court Without admiralty jurisdiction
  - Liability waiver issues

Recent Developments

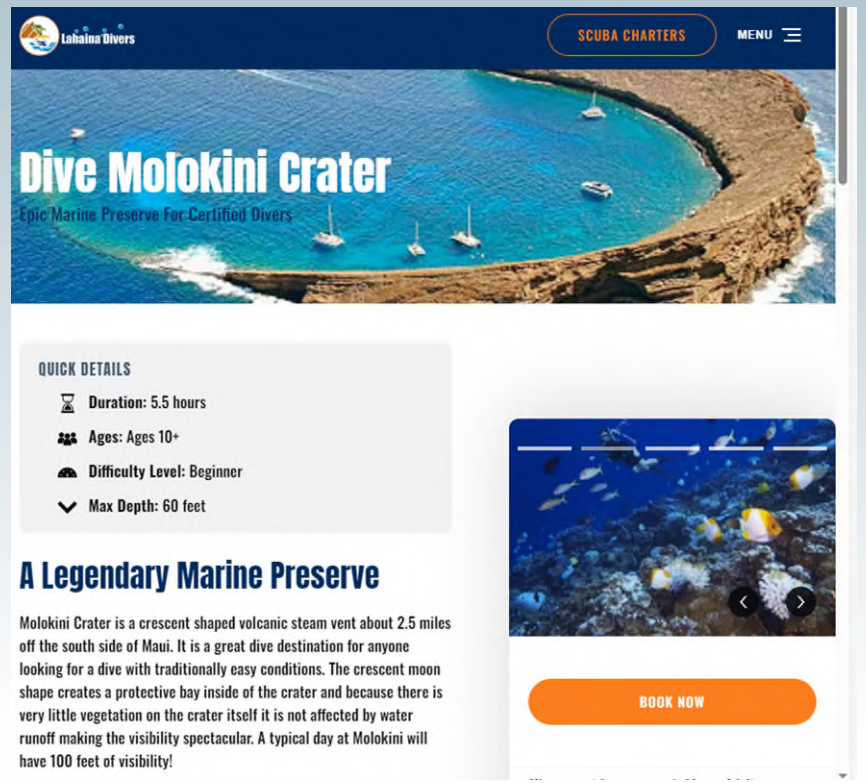
- ***Williams Sports Rentals, Inc. v. Willis et al.,***
  90 F.4th 1032 (Jan. 16, 2024)

- Reinstatement of Rule F injunction when multiple claims
- Indemnity & Contribution Claims
- Scope of Injunction as to non-vessel renters

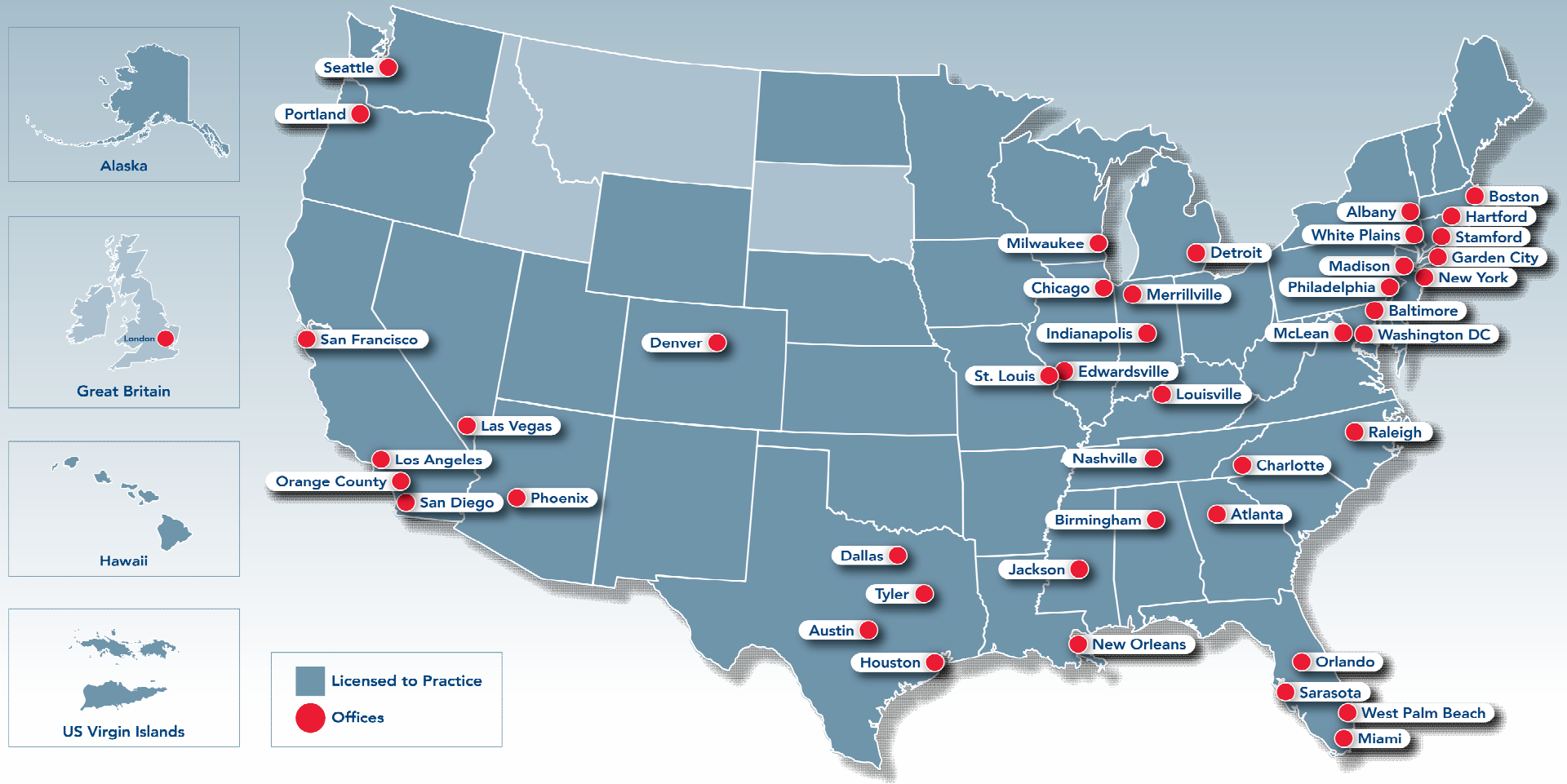
Recent Developments

- ***Ehart v. Lahaina Divers, Inc.,*** 92 F.4th 844 (9th Cir. Feb, 8. 2024)
- "***between ports in the United States***"

- Section 30527(a) prohibiting certain liability waivers regarding "vessel[s] transporting passengers between ports in the United States…"



44 Offices located throughout the United States

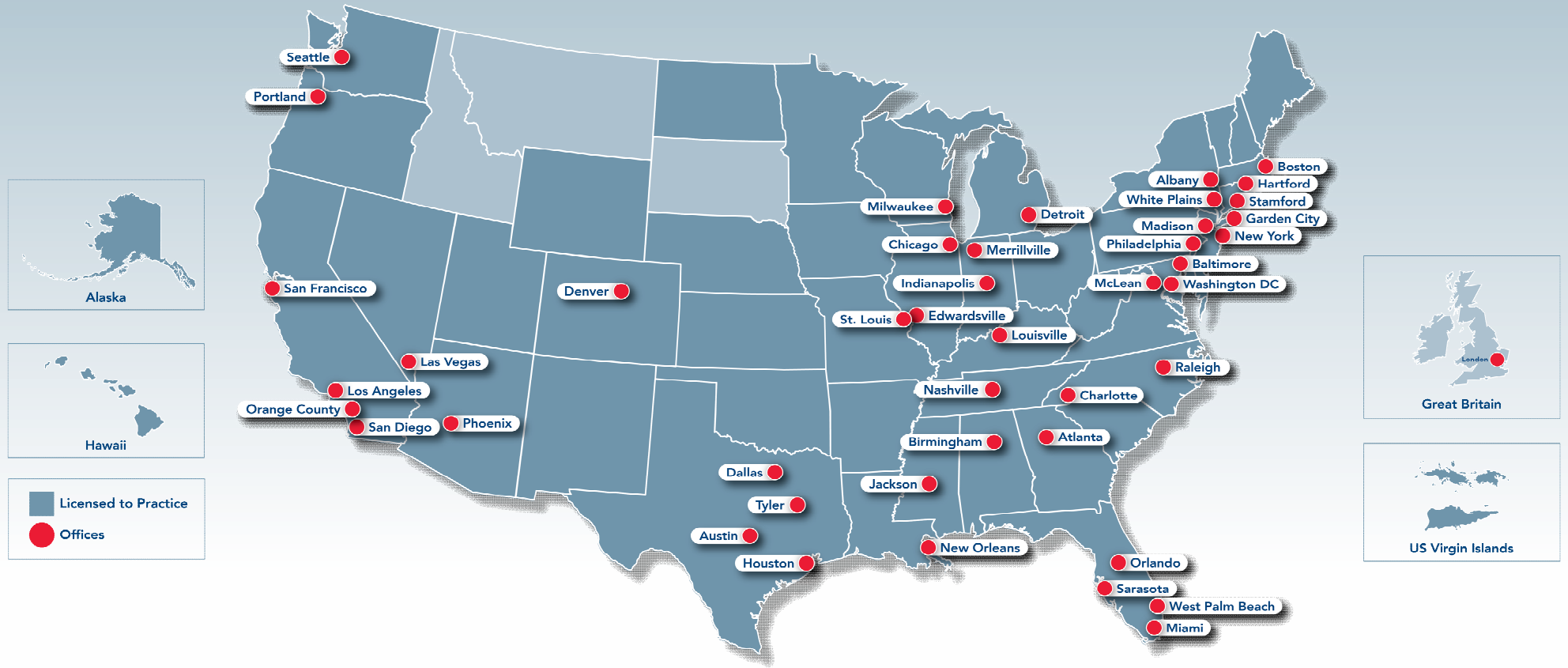


WILSON ELSER

44 Offices located throughout the United States

Attorneys Licensed **(States in bold)**

Alabama | **Alaska** | **Arizona** | **Arkansas** | **California** | **Colorado** | **Connecticut** | Delaware | **Florida** | **Georgia** | **Hawaii** | **Illinois** | **Indiana** | **Iowa** | Idaho | **Kansas** **Kentucky** | **Louisiana** | **Maine** | **Maryland** | **Massachusetts** | **Michigan** | **Minnesota** | **Mississippi** | **Missouri** | Montana | **Nebraska** | **Nevada** | **New Hampshire** **New Jersey** | **New Mexico** | **New York** | **North Carolina** | **North Dakota** | **Ohio** | **Oklahoma** | **Oregon** | **Pennsylvania** | **Rhode Island** | **South Carolina** | South Dakota **Tennessee** | **Texas** | **Utah** | **Vermont** | **Virginia** | **Washington, DC** | **Washington** | **West Virginia** | **Wisconsin** | **Wyoming**



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Biography | B. Otis Felder (wilsonelser.com)

In re Complaint & Petition of Blue Water Boating, Inc.

United States Court of Appeals for the Ninth Circuit

November 6, 2019, Argued and Submitted, Pasadena, California; December 4, 2019, Filed

No. 18-55575

Reporter

786 Fed. Appx. 703 *; 2019 U.S. App. LEXIS 35994 **; 2019 WL 6525202

In re: COMPLAINT AND PETITION OF BLUE WATER BOATING, INC. AND SKIP ABED AS OWNERS OF A SUP FOR EXONERATION FROM OR LIMITATION OF LIABILITY, BLUE WATER BOATING, INC.; SKIP ABED, Petitioners-Appellants, v. AGNES NABISERE MUBANDA; SOLOMON SSEMWANGA; CITY OF SANTA BARBARA, Claimants-Appellees.

Subsequent History: Rehearing denied by, Rehearing denied by, En banc *Blue Water Boating v. Mubanda, 2020 U.S. App. LEXIS 1951 (9th Cir., Jan. 22, 2020)*

Prior History: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. 2:18-cv-01231-JFW-AS. John F. Walter, District Judge, Presiding.

In re Complaint & in re Blue Water Boating, 2018 U.S. Dist. LEXIS 229219 (C.D. Cal., Mar. 27, 2018)

Counsel: For BLUE WATER BOATING, INC., SKIP ABED, Petitioners - Appellants: Brian Otis Felder, Esquire, Attorney, Ian Stewart, Esquire, Attorney, Wilson Elser Moskowitz Edelman & Dicker LLP, Los Angeles, CA.

For AGNES NABISERE MUBANDA, SOLOMON SSEMWANGA, Claimants - Appellees: A. Barry Cappello, Esquire, Attorney, Leila J. Noel, Esquire, CAPPELLO & NOEL LLP, Santa Barbara, CA.

For CITY OF SANTA BARBARA, Claimant - Appellee: Terence S. Cox, Attorney, Cox Wootton Lerner Griffin & Hansen LLP, San Francisco, CA.

Judges: Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA, ** District Judge.

Opinion

[*703] MEMORANDUM*

Skip Abed and Blue Water Boating, Inc. (collectively, "Blue Water") rent watersports [*704] equipment to the public. Davies Kabogoza's survivors filed a wrongful death and survival action against Blue Water in California state court after Kabogoza drowned in the Santa Barbara Harbor while using a stand-up paddleboard ("SUP") rented from Blue Water. Blue Water then filed an action in federal court seeking to limit its liability to the value of the SUP.[1] The district [**2] court dismissed that action for lack of subject matter jurisdiction. We have jurisdiction under *28 U.S.C. § 1291* and affirm.

Tort claims invoking a federal court's admiralty jurisdiction under *28 U.S.C. § 1333* must satisfy the location and maritime nexus tests,

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* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

[1] Blue Water sought to avail itself of the protections of the Limitation of Liability Act, 46 U.S.C. § 30505 *et seq.*, which allows vessel owners to limit their liability under certain circumstances.

which require that: (1) the alleged tort occur on navigable waters; (2) the alleged tort have the potential to disrupt maritime commerce; and (3) the general character of the activity giving rise to the tort have a substantial relationship to traditional maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 538-40, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)*. Even assuming arguendo that the first and second of these requirements are met, we affirm the district court's order of dismissal because the complaint does not allege a sufficient relationship to traditional maritime activity.[2]

Before invoking admiralty jurisdiction, a federal court must "ask whether a tortfeasor's activity . . . on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply." *Grubart, 513 U.S. at 539-40*. Although the case law often associates "traditional maritime activity" with activity involving vessels,[3] neither *28 U.S.C. § 1333* nor the maritime nexus test expressly require the involvement of a vessel. Rather, we focus [**3] on the underlying activity at issue. *See Ali v. Rogers, 780 F.3d 1229, 1235 (9th Cir. 2015)*.

Here, "the general character of the activity giving rise to the incident" does not have "a substantial relationship to traditional maritime activity." *See In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1127 (9th Cir. 2009) (quoting *Grubart, 513 U.S. at 539*). Blue Water's alleged negligence involved the rental of a SUP. Traditional maritime activity, however, generally relates to specialized rules and technical concepts of maritime commerce such as "maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage," [*705] *see Exec. Jet, 409 U.S. at 270*, as well as the navigation, storage, and maintenance of traditional vessels, *see Grubart, 513 U.S. at 539-40*. Those are not at issue here. Blue Water's alleged negligence lacks both "maritime flavor," *Ali, 780 F.3d at 1235*, and a "close[] relat[ion] to activity traditionally subject to admiralty law," *Gruver, 489 F.3d at 983* (quoting *Grubart, 513 U.S. at 538*). And there is no reason why special admiralty rules should apply. *See Grubart, 513 U.S. at 539-40*.[4]

AFFIRMED.[5]

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[2] The parties do not dispute that the Santa Barbara Harbor is a body of navigable water. We assume arguendo that the district court properly found the second requirement satisfied.

[3] *See Sisson v. Ruby, 497 U.S. 358, 365, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990)* (finding admiralty jurisdiction over an incident involving a vessel's storage and maintenance at a marina); *Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982)* (finding admiralty jurisdiction over a collision between two vessels); *Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 274, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972)* (declining to extend admiralty jurisdiction over a plane crash in navigable waters); *Mission Bay Jet Sports, 570 F.3d at 1129* (extending admiralty jurisdiction to an incident involving a jet ski); *Gruver v. Lesman Fisheries Inc., 489 F.3d 978, 986 (9th Cir. 2007)* (finding admiralty jurisdiction over a wage dispute for maritime services performed aboard a commercial vessel); *Taghadomi v. United States, 401 F.3d 1080, 1082, 1087, 1090 (9th Cir. 2005)* (finding the location and nexus tests satisfied in incident involving Coast Guard search-and-rescue operations, but affirming summary judgment on other grounds).

[4] For similar reasons, Blue Water's alternative argument that admiralty contract jurisdiction applies, based on the release of liability form Kabogoza signed, is unavailing. *See* ***Ali, 780 F.3d at 1235*** ("Federal courts have admiralty jurisdiction over a contract 'if its subject matter is maritime.'"). None of the claims before the federal district court [**4] or state court were contract claims. And the Limitation Act does not, as Blue Water contends, independently support admiralty jurisdiction. *See Seven Resorts, Inc. v. Cantlen, 57 F.3d 771, 772-73 (9th Cir. 1995)*.

[5] Appellees' request for judicial notice, Dkt. 19, is denied.

Williams Sports Rentals, Inc. v. Willis

United States Court of Appeals for the Ninth Circuit

June 8, 2023, Argued and Submitted, San Francisco, California; January 16, 2024, Filed

No. 22-16928

Reporter

90 F.4th 1032 *; 2024 U.S. App. LEXIS 969 **; 2024 AMC 7; 2024 WL 159005

In re: COMPLAINT AND PETITION OF WILLIAMS SPORTS RENTALS, INC. AS OWNER OF A CERTAIN 2004 YAMAHA WAVE RUNNER FX 140 (CF 5408 LE) FOR EXONERATION FROM OR LIMITATION OF LIABILITY,WILLIAMS SPORTS RENTALS INC., as Owner of a Certain 2004 Yamaha Waverunner FX 140, Petitioner-counter-respondent-Appellee, v. MARIAN LATASHA WILLIS, on behalf of the Estate of Raeshon Williams, Respondent-counter- claimant-Appellant, v. THOMAS SMITH; KAI PETRICH; BERKELEY EXECUTIVES, INC.; ZIP, INC., Third-party-defendants.

Prior History: [**1] Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:17-cv-00653-KJM-JDP. Kimberly J. Mueller, Chief District Judge, Presiding.

Willis v. Williams Sports Rentals, Inc. (In re Williams Sports Rentals, Inc.), 2022 U.S. Dist. LEXIS 222208, 2022 WL 17555565 (E.D. Cal., Dec. 8, 2022)

Disposition: VACATED and REMANDED.

Summary:

SUMMARY[**]

Shipowner's Limitation of Liability Act

In an action under the Shipowner's Limitation of Liability Act, the panel vacated the district court's order granting a jet ski owner an injunction against a state-court lawsuit concerning a fatal accident and remanded with instructions to narrow the injunction so that it barred only claims against the owner, not claims against other parties.

The Limitation Act limits the liability of vessel owners for accidents that occurred without their privity or knowledge to "the value of the vessel and pending freight." When a vessel owner files suit under the Limitation Act, injured parties must file their claims against the owner in the federal limitation proceeding.

Here, after the jet ski owner initiated the federal limitation proceeding, the district court enjoined all other lawsuits arising from the jet ski accident. Only the decedent's mother filed a claim against the owner in the limitation proceeding. She also filed a wrongful-death lawsuit against other [**2] defendants in California state court, and she asked the district court to dissolve its injunction so that she could add the jet ski owner to her state-court lawsuit. The district court denied the motion. In prior appeals, this court vacated and then reversed with instructions to dissolve the injunction. State-court defendants subsequently filed cross-complaints against the jet ski owner for indemnity and contribution, as well as attorney's fees, and the district court again enjoined the "continued prosecution of any legal proceedings of any

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

nature, except in the present proceeding, in respect to any claim arising from" the accident.

The panel held that, in general, a district court has broad discretion in deciding whether to dissolve or reinstate an injunction issued under the Limitation Act, but the district court must allow a state-court lawsuit to proceed when there is only a single claimant, and that claimant enters a stipulation protecting the vessel owner's limitation right. The panel declined to take a position on a circuit conflict regarding whether parties seeking indemnity or contribution count as separate claimants because, apart from such claims, the state-court defendants [**3] also brought claims for attorney's fees, and, absent a stipulation, a party seeking attorney's fees is a separate claimant. The panel held that the district court did not abuse its discretion in granting an injunction because, with a limitation fund of only $5,000 to cover pending claims for wrongful death, survival, indemnity, contribution, and attorney's fees, the district court could fairly conclude that an injunction was necessary to protect the jet ski owner's limitation right.

The panel further held, however, that the injunction was overbroad because, on its face, it prohibited the decedent's mother from proceeding in state court on her claims against any party. The panel concluded that, under the Anti-Injunction Act, which prohibits a federal court from granting an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments, the district court could not enjoin the decedent's mother from proceeding against anyone other than the vessel owner.

Counsel: John R. Hillsman (argued), McGuinn Hillsman & Palefsky, San Francisco, California; Anthony L. Label and Steven A. [**4] Kronenberg, The Veen Firm, San Francisco, California; for Respondent-counter-claimant-Appellant.

Brian O. Felder (argued) and Ian Stewart, Wilson Elser Moskowitz Edelman & Dicker LLP, Los Angeles, California, for Petitioner-counter-respondent-Appellee.

Judges: Before: Eric D. Miller and Lucy H. Koh, Circuit Judges, and Barbara M. G. Lynn,* District Judge.

Opinion by: Eric D. Miller

Opinion

[*1034] MILLER, Circuit Judge:

The *Shipowner's Limitation of Liability Act (the Limitation Act), 46 U.S.C. § 30501 et seq.*, allows the owner of a vessel to limit [*1035] its liability for accidents and to enjoin lawsuits that threaten its right to do so. After a fatal accident involving a jet ski, the district court granted the jet ski's owner an injunction against a state-court lawsuit. We previously ordered the district court to dissolve the injunction, but the addition of new claims arising from the accident prompted the district court to reinstate it. We hold that the district court had the authority to grant an injunction but that the injunction it imposed is overly broad. We vacate and remand with instructions to narrow the injunction so that it bars only claims against the owner, not claims against other parties.

I

On August 13, 2016, during a corporate retreat in South Lake Tahoe, California, Raeshon Williams went for a ride [**5] on a jet ski with a co-worker, Thomas Smith. Smith allegedly

* The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

turned into another vessel's wake at high speed, throwing Williams off the jet ski and into Lake Tahoe, where he drowned.

The jet ski had been rented from Williams Sports Rentals (WSR), which is not related to Raeshon Williams. Anticipating a lawsuit, WSR filed a complaint in federal district court under the Limitation Act. That statute limits the liability of vessel owners for accidents that occurred without their privity or knowledge to "the value of the vessel and pending freight." *46 U.S.C. § 30523(a)*. Congress enacted the statute in 1851 "primarily to encourage the development of American merchant shipping." *Lake Tankers Corp. v. Henn, 354 U.S. 147, 150, 77 S. Ct. 1269, 1 L. Ed. 2d 1246 (1957)*; *see Martz v. Horazdovsky, 33 F.4th 1157, 1166 (9th Cir. 2022)*. But courts have long recognized that it covers a wide range of vessels, including pleasure craft such as jet skis. *See, e.g., In re Hechinger, 890 F.2d 202, 206 (9th Cir. 1989)*; *Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1228-29 (11th Cir. 1990)*. The parties agree that the jet ski is a "vessel" to which the Limitation Act applies.

When a vessel owner files a lawsuit under the Limitation Act and posts security for the limitation amount, "all claims and proceedings against the owner related to the matter in question shall cease." *46 U.S.C. § 30529(c)*; *see also Fed. R. Civ. P. Supp. R. F(3)*. Injured parties must file their claims against the owner in the federal limitation proceeding. *Fed. R. Civ. P. Supp. R. F(4)*. After [**6] the claims are filed, the district court, sitting without a jury, decides whether the owner is liable and, if so, whether the owner can limit its liability. *Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 448, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001)*. If liability is limited and the limitation amount is insufficient to cover all claims, the district court distributes the limitation amount to the valid claimants in proportion to their losses. *46 U.S.C. § 30525*; *see Fed. R. Civ. Supp. R. F(8)*. This procedure, sometimes referred to as a "concursus," "provides for all claims against an owner to be aggregated and decided at one time under a single set of substantive and procedural rules, thereby avoiding inconsistent results and repetitive litigation." *In re Paradise Holdings, Inc., 795 F.2d 756, 761 (9th Cir. 1986)*.

In this case, WSR stipulated that the jet ski was worth $5,000 and posted security in that amount. The district court then enjoined all other lawsuits arising from the accident and issued a notice directing anyone who had a claim against WSR to file it with the court. Only Williams's mother, Marian Latasha Willis, filed a claim. She asserted causes of action for wrongful death and survival, alleging that WSR was negligent in renting the jet ski to Smith and to Kai Petrich, the CEO of Williams's employer, Zip, Inc.

[*1036] Although the Limitation Act gives vessel owners the right [**7] to limit their liability in an exclusive proceeding in federal court, claimants have a competing right to bring certain maritime claims in a forum of their choice. Under *28 U.S.C. § 1333(1)*, federal courts have exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The saving-to-suitors clause "preserves remedies and the concurrent jurisdiction of state courts over . . . admiralty and maritime claims" that are brought in personam, that is, against a person rather than a vessel. *Lewis, 531 U.S. at 445*; *see County of San Mateo v. Chevron Corp., 32 F.4th 733, 763-64 (9th Cir. 2022)*. Trial by jury is the classic example of a remedy that limitation actions lack and that the saving-to-suitors clause protects. *Lewis, 531 U.S. at 454-55*; *Newton v. Shipman, 718 F.2d 959, 962 (9th Cir. 1983)* (per curiam).

As permitted by the saving-to-suitors clause,

Willis also filed a lawsuit in California state court. As with the claim she filed in the limitation proceeding, her state-court lawsuit asserted wrongful-death and survival claims, both of which are maritime claims over which California state courts have concurrent jurisdiction. The Supreme Court has recognized a maritime cause of action for wrongful death—that is, a cause of action asserted by the decedent's family [**8] members to compensate them for the injuries they suffered because of the death. *Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)*; *see also Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820, 121 S. Ct. 1927, 150 L. Ed. 2d 34 (2001)*. The Supreme Court has not decided whether there is a maritime survival cause of action—that is, a claim for injuries to decedents that survives their death and that may be asserted by their representatives on behalf of their estate. *Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 210 n.7, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996)* ("[W]e assume without deciding that *Moragne* also provides a survival action."). We have recognized one, however, as have several other courts of appeals. *See Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985)*; *Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974)*; *Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1093-94 (2d Cir. 1993)*; *Casaceli v. Martech Int'l, Inc., 774 F.2d 1322, 1328 (5th Cir. 1985)*; *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc., 466 F.2d 903, 909-10 (8th Cir. 1972)*.

We look to state law to determine who is entitled to assert wrongful-death and survival claims. *See Evich, 759 F.2d at 1433*; *see also Ortega Garcia v. United States, 986 F.3d 513, 523 (5th Cir. 2021)*. The parties do not dispute that under California's wrongful-death and survival statutes, Willis is a proper plaintiff to assert such claims because she is Williams's mother and the representative of his estate. *See Cal. Civ. Proc. Code § 377.60(a)* (wrongful death); *id. § 377.34(a)* (survival).

Willis's state-court complaint named Smith, Petrich, and Zip as defendants, but it did not name WSR. Willis asked the district court to dissolve its injunction so she could add WSR to her state-court lawsuit. The district court denied the motion, and Willis appealed.

In that appeal, we held that "[t]he district court abused its discretion by failing [**9] to consider whether Williams Sports Rentals's limitation right would be prejudiced if the injunction were lifted." *In re Williams Sports Rentals, Inc., 770 F. App'x 391, 392 (9th Cir. 2019)* (per curiam). When the proceedings outside a limitation action involve "a single claim," we explained, a court's discretion to enjoin them is "narrowly [*1037] circumscribed and the injunction must be dissolved unless the owner can demonstrate that his right to limit liability will be prejudiced." *Id.* (quoting *Newton, 718 F.2d at 961*). We vacated the judgment and remanded "for the district court to conduct the proper prejudice inquiry . . . in the first instance." *Id.*

On remand, the district court did not conduct a prejudice inquiry, so Willis appealed again. In the second appeal, we reversed and remanded with instructions to dissolve the injunction. *William Sports Rentals Inc. v. Willis, 786 Fed. Appx. 105, 106 (9th Cir. 2019)* (per curiam). We held that the district court must allow the state-court lawsuit to proceed because "[t]he record reflects that this is a single claim case; Willis has entered formal stipulations protecting WSR's right to limit liability; and WSR has not demonstrated prejudice to its right to limit liability." *Id.* On remand, the district court dissolved its injunction and Willis then amended her state-court complaint to add WSR as a defendant.

Since then, [**10] the state-court lawsuit has expanded. Petrich filed a cross-complaint

against WSR seeking indemnity and contribution, as well as attorney's fees. Zip's insurers intervened and filed a cross-complaint against WSR seeking indemnity and contribution, as well as attorney's fees. Neither Petrich nor the insurers entered stipulations protecting WSR's right to limit its liability to the value of the vessel.

Based on those developments, the district court concluded that "the state court action has morphed into a multiple claimant action" because Willis, Petrich, and the insurers had each brought "separate claims for damages." The district court entered an injunction barring "[t]he continued prosecution of any legal proceedings of any nature, except in the present proceeding, in respect to any claim arising from" the accident.

Willis now appeals the grant of that injunction, which she may do "as a matter of right under *28 U.S.C. § 1292(a)(1)*." *In re Bowoon Sangsa Co., 720 F.2d 595, 597 (9th Cir. 1983)*.

II

Willis argues that the district court erred in reinstating the injunction against her state-court lawsuit. In general, a district court has "broad discretion" in deciding whether to dissolve or reinstate an injunction previously issued under the Limitation Act. *Newton, 718 F.2d at 961*; *cf. Lewis, 531 U.S. at 449* ("[W]here, [**11] as here, the District Court satisfies itself that a vessel owner's right to seek limitation will be protected, the decision to dissolve the injunction is well within the court's discretion."). But we have recognized two contexts in which a state-court lawsuit poses no threat to the owner's limitation right, and in which the district court must allow the state court to proceed.

First, a district court may not enjoin a state-court lawsuit when "the limitation fund exceeds the value of all the claims" against the vessel owner. *Newton, 718 F.2d at 962*; *see Lewis, 531 U.S. at 451-52*. An injunction in that instance "would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it." *Lake Tankers Corp., 354 U.S. at 152*. Willis does not argue that this is such a case. The limitation fund is only $5,000, and as Willis told the district court, that sum "is a pittance which will not cover the court costs in this case."

[*1038] Second, a district court may not enjoin a state-court lawsuit when there is only a "single claimant"; that claimant enters a stipulation protecting the vessel owner's limitation right; [**12] and "nothing appears to suggest the possibility of another claim." *Newton, 718 F.2d at 962* (citation omitted); *see Lewis, 531 U.S. at 451*. The required stipulation concedes that the value of the limitation fund equals the value of the vessel and its freight, accepts the district court's exclusive jurisdiction to decide the limitation of the owner's liability, and waives the right to claim res judicata based on any judgment rendered outside the limitation action. *See Newton, 718 F.2d at 962*. Because such a stipulation fully protects the limitation right, several courts of appeals have held that a state-court action should proceed, even if there are multiple claimants, so long as they all enter equivalent stipulations. *See In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 756 (2d Cir. 1988)*; *Gorman v. Cerasia, 2 F.3d 519, 526 (3d Cir. 1993)*; *Odeco Oil & Gas Co., Drilling Div. v. Bonnette, 74 F.3d 671, 674-75 (5th Cir. 1996)*; *In re Illinois Marine Towing, Inc., 498 F.3d 645, 652 (7th Cir. 2007)*; *Jefferson Barracks Marine Serv., Inc. v. Casey, 763 F.2d 1007, 1009-11 (8th Cir. 1985)*; *Beiswenger Enters. Corp. v. Carletta, 86 F.3d 1032, 1039 (11th Cir. 1996)*.

We previously held that this case involved a single claimant. *William Sports Rentals, 786 Fed. Appx. at 106*. Willis alone had brought a claim, and she had entered the necessary stipulation. *Id.* Since then, however, the state-court lawsuit has expanded. Petrich and Zip's insurers have asserted cross-claims against WSR seeking indemnity, contribution, and attorney's fees. And while Willis stipulated that she would not seek damages from WSR beyond any limitation imposed by the federal court, the other parties have made no such promises. According to WSR, both the indemnity [**13] and contribution claims, as well as the claims for attorney's fees, independently, mean that this is no longer a single-claimant case.

Courts of appeals have disagreed over whether parties seeking indemnity or contribution count as separate claimants. The minority view, held by the Sixth and Eighth Circuits, is that they do not because those claims are "merely derivative" of the claim for injury. *Universal Towing Co. v. Barrale, 595 F.2d 414, 419 (8th Cir. 1979)*; *see S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co., 678 F.2d 636, 645 (6th Cir. 1982)*. The party seeking reimbursement can recover only as much as the injured claimant was entitled to recover, those courts reason, and that amount "cannot exceed the owner's statutory limit." *Universal Towing, 595 F.2d at 419*; *see S & E Shipping, 678 F.2d at 645*.

The majority view is that unless a party seeking indemnity or contribution enters a stipulation of its own, it is a separate claimant whose threat to the owner's limitation right may justify an injunction. *See Dammers, 836 F.2d at 757 (2d Cir.)*; Gorman, 2 F.3d at 526 (3d Cir.); *Odeco, 74 F.3d at 675 (5th Cir.)*; In re Holly Marine Towing, Inc., 270 F.3d 1086, 1090 (7th Cir. 2001); *Beiswenger, 86 F.3d at 1042 (11th Cir.)*; *see also S & E Shipping, 678 F.2d at 648* (Kennedy, J., concurring in the result). The courts taking that view reason that although indemnity and contribution claims cannot exceed the injury claims, they may well exceed the limitation amount. Suppose the state court awarded Willis a $1 million judgment against Petrich, who in turn recovered $1 million in contribution from WSR. Having never agreed to respect [**14] WSR's limitation right or its $5,000 fund amount, Petrich could then try to assert the state court's judgment as res judicata in the limitation proceeding. [*1039] *See* Holly Marine Towing, 270 F.3d at 1088-89. At a minimum, WSR would have to "await the outcome of state-court litigation to obtain [its] protection." Id. at 1090. But "the Limitation Act entitles the shipowner to obtain limitation upon the filing of his petition for limitation in federal district court and his satisfying the requirements of the Act, not, possibly much later, upon the completion of state-court proceedings." Id. at 1089-90. The limitation right requires assurances at the outset from everyone whose claims could obstruct it, those courts reason, and that includes other tortfeasors no less than the tort victims.

We need not take a position in that circuit conflict because even apart from the indemnity and contribution claims, Petrich and the insurers are also additional claimants because of their claims for attorney's fees. The courts of appeals are in agreement that, absent a stipulation, a party seeking attorney's fees is a separate claimant. *See Dammers, 836 F.2d at 756* ("It is . . . well settled that the potential for claims for attorneys' fees or costs against a shipowner by a claimant or a third party [**15] creates a multiple claimant situation . . . ."); *accord* Gorman, 2 F.3d at 525; *In re Port Arthur Towing Co., 42 F.3d 312, 316 (5th Cir. 1995)* (per curiam); *S & E Shipping, 678 F.2d at 646*; *Universal Towing, 595 F.2d at 419*; *Beiswenger, 86 F.3d at 1040*. Attorney's fees are "separate from any claims for liability," so they are not derivative of the injured party's

claim. *S & E Shipping, 678 F.2d at 646*. They simply add to the sum that the claimants seek.

Despite the presence of new claimants, Willis contends that she is still the only claimant because we previously decided that she was, and that decision is law of the case. The law-of-the-case doctrine "precludes a court 'from reconsidering an issue previously decided by the same court, or a higher court in the identical case.'" *Manufactured Home Cmtys., Inc. v. County of San Diego, 655 F.3d 1171, 1181 (9th Cir. 2011)* (quoting *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000)*). But the doctrine does not apply where, as here, "the evidence on remand is substantially different." *Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1034 (9th Cir. 2015)* (quoting *United States v. Renteria, 557 F.3d 1003, 1006 (9th Cir. 2009)*); *see also Manufactured Home Cmtys., 655 F.3d at 1181*. When we held that this case involved a single claimant, that was because only Willis had asserted a claim, so "the record reflect[ed] that this is a single claim case." *William Sports Rentals, 786 Fed. Appx. at 106*. The record no longer reflects that, and we are not required to pretend that it still does.

Willis also argues that we should disregard the new claimants because she considers their claims to be "shams." But the merits of the state-court claims are not before us. The limitation right attaches "upon the filing [**16] of [the] petition for limitation in federal district court," not "upon the completion of state-court proceedings." *Holly Marine Towing, 270 F.3d at 1089-90*. Whether or not the state-court litigation produces an outcome in WSR's favor, the proceedings would obstruct its limitation right along the way.

Because the state-court lawsuit leaves the prospects of limitation uncertain, the district court did not abuse its discretion in granting an injunction. With a limitation fund of $5,000 to cover pending claims for wrongful death, survival, indemnity, contribution, and attorney's fees, the district court could fairly conclude that an injunction was necessary to protect WSR's limitation right.

[*1040] III

The remaining question is the scope of the injunction. The district court enjoined "[t]he continued prosecution of any legal proceedings of any nature, except in the present proceeding, in respect to any claim arising from the 2016 incident described in the complaint" until the conclusion of the limitation action. On its face, the injunction prohibits Willis from proceeding in state court on her claims against any party. She contends that this restriction is overbroad. Under the Anti-Injunction Act, she argues, the district court could [**17] not enjoin her from proceeding against anyone other than the vessel's owner, WSR. We agree.

The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *28 U.S.C. § 2283*. The statute is "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within" one of the statutory exceptions. *Negrete v. Allianz Life Ins. Co. of N. Am., 523 F.3d 1091, 1100 (9th Cir. 2008)* (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970)*).

WSR relies on the exception for injunctions "expressly authorized by Act of Congress," *28 U.S.C. § 2283*, arguing that the Limitation Act provides such authorization. But although Limitation Act injunctions fall within the

exception, *see* Mitchum v. Foster, 407 U.S. 225, 234, 92 S. Ct. 2151, 32 L. Ed. 2d 705 & n.13 (1972), the Limitation Act does not authorize the breadth of the injunction here. Instead, it provides for an injunction whereby "all claims and proceedings *against the owner* related to the matter in question shall cease." 46 U.S.C. § 30529(c) (emphasis added); *see also Fed. R. Civ. P. Supp. R. F(3)* ("On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding *against the plaintiff or the plaintiff's property* with respect to any claim subject to limitation [**18] in the action." (emphasis added)). Thus, the Limitation Act authorizes an injunction only of proceedings "against the owner," and the only owner here is WSR.

WSR argues that Smith and Petrich also qualify as owners because the statute defines "owner" to "include[] a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement." 46 U.S.C. § 30501(2). But although Smith and Petrich rented the jet ski, they were not charterers under the terms of the statute. Petrich in no way "navigate[d]" the jet ski involved in the accident; the rental covered two jet skis, and he rode the other one. *Id.* And neither Smith nor Petrich "supplie[d]" the jet ski with gas, life jackets, or any other equipment. *Id.; see also Calkins v. Graham, 667 F.2d 1292, 1296 (9th Cir. 1982)* (holding that an agent of a vessel's owner was not a statutory charterer when there was "no evidence" that the agent "manned, victualled or navigated" the vessel); In re American Milling Co., 409 F.3d 1005, 1007, 1017 (8th Cir. 2005) (holding that a contractor was not a statutory charterer when it "did not provide ship-related supplies, parts for repairs, or fuel"); *cf. In re United States, 259 F.2d 608, 609 (3d Cir. 1958)* (holding that a contractor was a statutory charterer when he agreed to "equip, fuel, supply, maintain, man, victual and navigate the tankers"). [**19]

Nor does the rental agreement present the "clear picture of exclusive possession and management" characteristic of a Limitation Act charterer. *In re United States, 259 F.2d at 609*; *see also* 2 Thomas J. [*1041] Schoenbaum, *Admiralty & Maritime Law* § 11:3, at 10 (6th ed. 2018) (explaining that an "essential characteristic" of a covered charter "is that the entire command and possession of the vessel be turned over to the charterer"); *id.* § 15:2, at 190-91. The agreement bound Smith and Petrich to comply with "all of Williams Sports Rentals, Inc. requirements, rules and instructions governing the use of [the company's] vessels." According to WSR, those requirements dictated who could ride the jet ski and how and where they could do so. Essentially, Smith and Petrich paid to participate in a tourist activity that WSR designed. WSR did not surrender "complete control and dominion" of the jet ski to the renters by empowering them to decide where within a restricted area to ride. *Admiral Towing Co. v. Woolen, 290 F.2d 641, 645 (9th Cir. 1961)*; *see also* American Milling, 409 F.3d at 1014 ("[W]e should not ascribe owner status to a party merely based on the fact that it performed functions of master or crew.").

WSR also argues that, even if the state-court litigants are not owners, the district court may still enjoin proceedings against [**20] them under our decision in *Paradise Holdings*. In that case, we affirmed the grant of an injunction that stayed state-court proceedings against both the owner of a vessel and its captain, who had a common insurance policy. *795 F.2d at 762-63*. We acknowledged that the text of the Limitation Act did not clearly support that result. *Id. at 761-62*. But we explained that a "major purpose" of the statute "is to permit the shipowner to retain the benefit of his insurance." *Id. at 762*; *see also* Maryland Cas. Co. v. Cushing, 347 U.S. 409, 422-23, 74 S. Ct. 608, 98 L. Ed. 806 (1954) (plurality opinion) (enjoining a separate lawsuit by claimants

against the insurer of a vessel owner to preserve the owner's "right to indemnification" in the limitation proceeding). We therefore upheld the injunction to prevent a state-court judgment against the captain from depleting the coverage available to the owner in the limitation proceeding. *795 F.2d at 762-63*.

Paradise Holdings has no application here. WSR does not claim to have an insurance policy with Smith, Petrich, Zip, or any other party to the state-court action. A judgment against those parties would not deplete WSR's insurance or impair WSR's right to limit its liability. The only way that the state-court parties could deplete any of the funds available to WSR is through their claims against WSR. An injunction that prohibits [**21] the adjudication of those claims outside the limitation action gives WSR all the protection that the statute provides.

The broader injunction that the district court imposed prevents Willis from pursuing her claims against parties that have not established or even attempted to assert any right to limitation in federal court. That restriction would "transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights." *Lake Tankers Corp., 354 U.S. at 152*. It would also contravene the traditional limits on the remedial authority of federal courts. We have long understood that our role is to "render a judgment or decree upon the rights of the litigant[s]." *Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718, 9 L. Ed. 1233 (1838)*. We "may not attempt to determine the rights of persons not before the court," nor may we redress their potential injuries. *Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983)*; *see also Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *DHS v. New York, 140 S. Ct. 599, 600, 206 L. Ed. 2d 115 (2020)* (mem.) (Gorsuch, J., [*1042] concurring in the grant of stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit."). The only plaintiff in the federal [**22] lawsuit is WSR, so the district court could redress the injury only to WSR's limitation right, not the limitation rights that WSR professes others to have. WSR could not "rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)*. Nor could the district order relief on behalf of parties who never asked for it.

The non-party-specific injunction that the district court awarded exceeds its authority, so we vacate and remand with instructions to narrow the injunction to proceedings against WSR, the only plaintiff in the limitation action. Willis is allowed to "pursue [her] common law remedy, hampered to the extent only of the limitation on the liability of the opposing party." *The Helen L., 109 F.2d 884, 886 (9th Cir. 1940)*.

VACATED and REMANDED.

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Ehart v. Lahaina Divers, Inc.

United States Court of Appeals for the Ninth Circuit

February 17, 2023, Argued and Submitted, Honolulu, Hawaii; February 8, 2024, Filed

No. 22-16149

Reporter
92 F.4th 844 *; 2024 U.S. App. LEXIS 2974 **

WILLIAM MCMEIN EHART, Jr., Individually and as Personal Representative of the Estate of Maureen Anne Ehart, Deceased, Plaintiff-Appellee, v. LAHAINA DIVERS, INC.; CORY DAM, Defendants-Appellants, and KAITLIN MILLER; JULIANNE CRICCHIO; LAHAINA DIVE & SURF LLC, Defendants.

Subsequent History: Rehearing denied by, En banc *Ehart v. Lahaina Divers, Inc., 2024 U.S. App. LEXIS 6161 (9th Cir. Haw., Mar. 14, 2024)*

Prior History: [**1] Appeal from the United States District Court for the District of Hawaii. D.C. No. 1:21-cv-00475-SOM-KJM. Susan O. Mollway, District Judge, Presiding.

Ehart v. Lahaina Divers Inc., 2022 U.S. Dist. LEXIS 84040, 2022 WL 1472048 (D. Haw., May 10, 2022)

Disposition: REVERSED AND REMANDED.

Summary:

SUMMARY*

Admiralty Law

The panel reversed the district court's order granting plaintiff's motion to strike an affirmative defense of waiver or release and remanded for further proceedings in a wrongful death admiralty action.

Plaintiff's claims arose from his wife's death during a scuba and snorkeling tour from Lahaina Harbor to Molokini Crater, an atoll off the coast of Maui. Before the tour, plaintiff and his wife each signed a waiver document releasing rights to sue defendants. Defendants asserted waiver and release as an affirmative defense to claims based on simple negligence. The district court struck the defense on the basis that the liability waivers were void under 46 U.S.C. § 30527(a), which prohibits certain liability waivers regarding "vessel[s] transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country."

Citing *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002) (finding jurisdiction to review the district court's grant of partial summary judgment limiting the defendant's liability in accordance with a clause [**2] on the back of a cruise ship ticket), the panel held that it had jurisdiction to review the district court's interlocutory order under 28 U.S.C. § 1292(a)(3) because the order determined the rights and liabilities of parties in an admiralty case.

On the merits, the panel held that, under the plain meaning of "between ports in the United States," § 30527(a) does not apply to liability waivers as to vessels that transport passengers away from and back to a single port without stopping at any other port.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge Collins wrote that he would dismiss the appeal for lack of jurisdiction because the majority greatly expanded the court's already overbroad construction of 28 U.S.C. § 1292(a)(3). He would hold that *Wallis* is distinguishable because there, the district court imposed an across-the-board limitation on the defendants' liability. Judge Collins also disagreed with the majority's interpretation of 46 U.S.C. § 30527(a).

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Judges: Before: Carlos T. Bea, Daniel P. Collins, and Kenneth K. Lee, Circuit Judges. Opinion by Judge Bea; Dissent by Judge Collins.

Opinion by: BEA

Opinion

[*846] BEA, Circuit Judge:

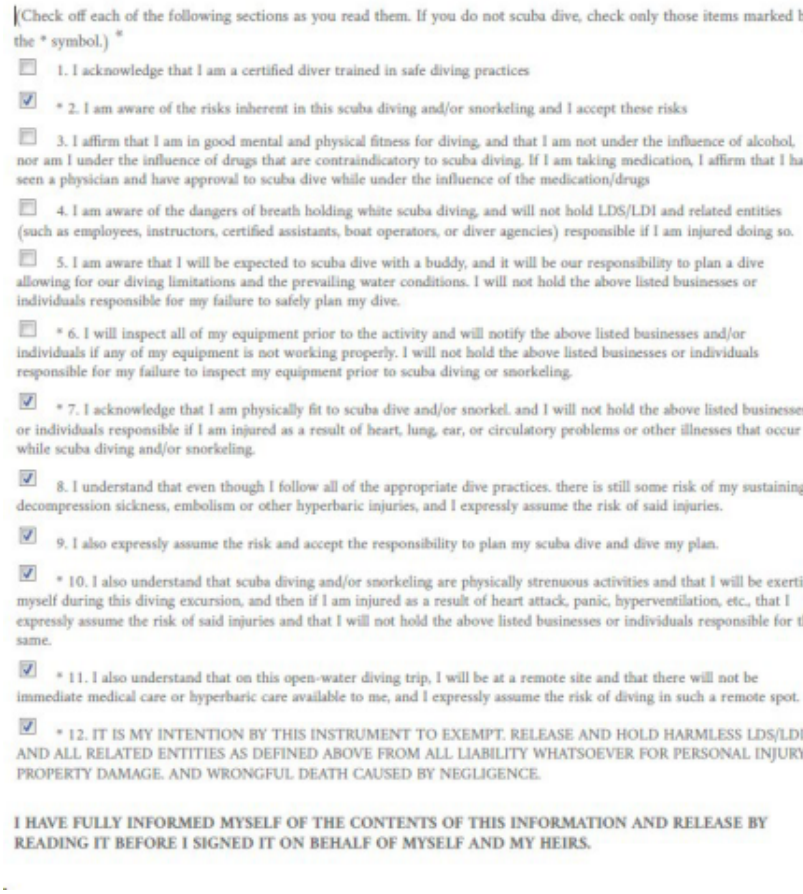
The question in this case is whether *46 U.S.C. § 30527(a)*, [1] which prohibits certain liability waivers regarding "vessel[s] transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country," applies when a vessel transports passengers away from and back to a *single* port in the United States without stopping at any other port. We hold that it does not. The plain meaning of "between ports in the United States" is *between at least two separate ports in the United States*, and *§ 30527(a)* therefore does not apply to liability waivers as to vessels that transport passengers away from and back to a single port without stopping at any other port.

[1] At the time of the relevant events and the time this case was filed, this statute was codified as 46 U.S.C. § 30509. As of December 23, 2022, the statute has moved to *46 U.S.C. § 30527*. This opinion uses the updated citation. Other than the citation, the statute has not changed.

I. BACKGROUND[2]

On September 14, 2021, Maureen Anne Ehart and her husband, William McMein Ehart, Jr., went on a chartered scuba and snorkeling tour to Molokini Crater. Molokini Crater is a crescent-shaped volcanic atoll located about 2.5 miles off the south coast of [**5] Maui, Hawaii. The Eharts boarded the *Dauntless*—a boat owned by Lahaina Divers, Inc.—at Lahaina Harbor and traveled on the boat to Molokini Crater along with 14 other paying passengers and a three-person crew. The crew included the master of the *Dauntless*, Cory Dam, and two scuba instructors, Kaitlin Miller and Julianne Cricchio.

Prior to the excursion, the Eharts had each signed a separate waiver document, which stated: "THIS IS A RELEASE OF YOUR RIGHTS TO SUE LAHAINA DIVE & SURF, LLC, AND/OR LAHA[I]NA DIVERS INC. (LDS/LDI), AND ITS OWNERS, EMPLOYEES, AGENTS AND ASSIGNS FOR PERSONAL INJURIES OR WRONGFUL DEATH THAT MAY [OCCUR] DURING THE FORTHCOMING DIVE ACTIVITY [*847] AS A RESULT OF THE INHER[ENT]RISKS ASSOCIATED WITH SCUBA DIVING AND/OR SNORKE[LI]NG OR AS A RESULT OF NEGLIGENCE." The waiver then instructed participants to check boxes. Maureen Ehart checked the following boxes (William Ehart checked all of the boxes):



(Check off each of the following sections as you read them. If you do not scuba dive, check only those items marked b the * symbol.) *

☐ 1. I acknowledge that I am a certified diver trained in safe diving practices

☑ * 2. I am aware of the risks inherent in this scuba diving and/or snorkeling and I accept these risks

☐ 3. I affirm that I am in good mental and physical fitness for diving, and that I am not under the influence of alcohol, nor am I under the influence of drugs that are contraindicatory to scuba diving. If I am taking medication, I affirm that I ha seen a physician and have approval to scuba dive while under the influence of the medication/drugs

☐ 4. I am aware of the dangers of breath holding white scuba diving, and will not hold LDS/LDI and related entities (such as employees, instructors, certified assistants, boat operators, or diver agencies) responsible if I am injured doing so.

☐ 5. I am aware that I will be expected to scuba dive with a buddy, and it will be our responsibility to plan a dive allowing for our diving limitations and the prevailing water conditions. I will not hold the above listed businesses or individuals responsible for my failure to safely plan my dive.

☐ * 6. I will inspect all of my equipment prior to the activity and will notify the above listed businesses and/or individuals if any of my equipment is not working properly. I will not hold the above listed businesses or individuals responsible for my failure to inspect my equipment prior to scuba diving or snorkeling.

☑ * 7. I acknowledge that I am physically fit to scuba dive and/or snorkel. and I will not hold the above listed businesse or individuals responsible if I am injured as a result of heart, lung, ear, or circulatory problems or other illnesses that occur while scuba diving and/or snorkeling.

☑ 8. I understand that even though I follow all of the appropriate dive practices. there is still some risk of my sustaining decompression sickness, embolism or other hyperbaric injuries, and I expressly assume the risk of said injuries.

☑ 9. I also expressly assume the risk and accept the responsibility to plan my scuba dive and dive my plan.

☑ * 10. I also understand that scuba diving and/or snorkeling are physically strenuous activities and that I will be exerti myself during this diving excursion, and then if I am injured as a result of heart attack, panic, hyperventilation, etc., that I expressly assume the risk of said injuries and that I will not hold the above listed businesses or individuals responsible for t same.

☑ * 11. I also understand that on this open-water diving trip, I will be at a remote site and that there will not be immediate medical care or hyperbaric care available to me, and I expressly assume the risk of diving in such a remote spot.

☑ * 12. IT IS MY INTENTION BY THIS INSTRUMENT TO EXEMPT, RELEASE AND HOLD HARMLESS LDS/LDI AND ALL RELATED ENTITIES AS DEFINED ABOVE FROM ALL LIABILITY WHATSOEVER FOR PERSONAL INJURY PROPERTY DAMAGE, AND WRONGFUL DEATH CAUSED BY NEGLIGENCE.

I HAVE FULLY INFORMED MYSELF OF THE CONTENTS OF THIS INFORMATION AND RELEASE BY READING IT BEFORE I SIGNED IT ON BEHALF OF MYSELF AND MY HEIRS.

[*848] Below the questionnaire, the Eharts each again signed the waiver. [3]

The *Dauntless* traveled across the water from Lahaina Harbor to Molokini Crater, where it tied up to a mooring buoy. At Molokini Crater, the scuba instructors (Miller and Cricchio) escorted two groups of divers [**6] on separate scuba tours. Instead of joining the scuba tour members, Maureen Ehart and two other passengers snorkeled separately from the scuba tours in the waters of the Crater. Dam remained on the *Dauntless* to maintain an anchor watch, serve as a lookout, monitor the weather, supervise the passengers' snorkeling activities, and act as a lifeguard, among other duties.

[2] Except where otherwise indicated, these facts are taken from the pleadings and are accepted as true. *See* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 n.2 (9th Cir. 1992); Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

[3] The waiver language and questionnaire are taken from an exhibition attached to the Plaintiff's concise statement of facts in support of the motion to strike. The parties do not dispute the accuracy of the waiver language or questionnaire.

The winds, waves, and currents inside the Crater increased, and the two other snorkelers who had gone with Maureen returned to the *Dauntless*, while Maureen stayed in the water. Dam, preoccupied by other duties, "lost track of [Maureen] and permitted her to drift away unsupervised and unseen." When Dam realized he had lost sight of Maureen, he did not recall the scuba tour members, call the Coast Guard, or conduct an immediate search; instead, he waited for both scuba tours to return to the boat and then ordered Miller and Cricchio to search for Maureen. This search, which lasted approximately 30 minutes, was "poorly planned, improperly equipped, and ultimately unsuccessful." Dam eventually called for assistance from the Coast Guard and local authorities. The Coast Guard and Maui County Emergency Services searched for Maureen [**7] for three days, but she was never found.

Plaintiff filed an action under admiralty jurisdiction in the District of Hawaii asserting six causes of action against Lahaina Divers and Dam ("Defendants") [4] : (1) a wrongful death claim based on gross negligence; (2) a wrongful death claim based on simple negligence; (3) a survival claim based on gross negligence; (4) a survival claim based on simple negligence; (5) a reckless infliction of emotional distress claim; and (6) a negligent infliction of emotional distress claim.

In their Answer to the Complaint, Defendants asserted waiver and release as an affirmative defense. [5] Plaintiff moved to strike the defense, arguing that the liability waiver signed by the Eharts was void under *46 U.S.C. § 30527(a)* and *Hawaii Revised Statute ("HRS") § 663-1.54*. Defendants opposed the motion on the grounds that (1) *46 U.S.C. § 30527(a)* does not apply here because the *Dauntless* was [*849] not "transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country"; and (2) federal admiralty law precludes application of the Hawaii state statute in this case.

The district court granted Plaintiff's motion to strike the affirmative defense on the basis that the liability waivers signed by [**8] the Eharts were void under *§ 30527(a)*. In its decision granting the motion to strike, the district court held that *46 U.S.C. § 30527(a)* applies to the *Dauntless* because the *Dauntless* was conveying passengers from Lahaina Harbor to Molokini Crater and back. The district court did not make a determination as to whether Molokini Crater is a "port." Instead, it reasoned that *§ 30527(a)* applies "not only to the transportation of passengers between Port A and a different port but also to the transportation of passengers from Port A . . . on an excursion that returns to Port A even if there is no intervening different port." Because the *Dauntless* transported passengers away from and back to Lahaina Harbor—which the parties do not dispute is a "port"—the district court concluded that *§ 30527(a)* applies to the *Dauntless* and renders the liability waivers void. The district court then explained that the Hawaii statute does not provide an alternate basis to strike the affirmative defense because there remains a question of fact as to whether the liability waiver was inapplicable under the

[4] Plaintiff also brought the following claims against Miller and Cricchio: (1) a wrongful death claim based on simple negligence; (2) a survival claim based on simple negligence; and (3) a negligent infliction of emotional distress claim. However, Miller and Cricchio did not raise the affirmative defense of waiver and release and are not parties to the present appeal.

[5] In their Answer to the Complaint, Defendants appeared to raise the affirmative defense of waiver and release against all six causes of action (including those based on gross negligence). But in their Opening Brief on appeal, Defendants appeared to acknowledge that the waiver pertained only to simple negligence, not gross negligence.

Hawaii statute. [6]

Defendants sought reconsideration of the district court's order to strike the affirmative defense or, in the alternative, to have the court [**9] certify an interlocutory appeal with respect to the striking of that defense. The district court denied the motion and declined to certify the interlocutory appeal. Defendants then filed this interlocutory appeal.

II. STANDARD OF REVIEW

We review questions of statutory interpretation de novo. *United States v. Doe, 136 F.3d 631, 634 (9th Cir. 1998)*. We review a district court's ruling on a motion to strike for abuse of discretion. *El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003)*. We review de novo a district court's holding as to whether an affirmative defense is applicable as a matter of law. *In re Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1000 (9th Cir. 2008)*.

III. JURISDICTION

The district court declined to certify an interlocutory appeal under *28 U.S.C. § 1292(b)*. [7] However, this court has jurisdiction over the interlocutory appeal under *28 U.S.C. § 1292(a)(3)*. Under *28 U.S.C. § 1292(a)(3)*, a court of appeals has jurisdiction over "[i]nterlocutory decrees of . . . district courts . . . determining the rights and liabilities of the parties to the admiralty cases in which appeals from final decrees are allowed." This court has previously exercised jurisdiction under *§ 1292(a)(3)* in interlocutory appeals to review [*850] the enforceability of an affirmative defense based on the existence of a maritime contract limiting liability. *See Wallis v. Princess Cruises, Inc., 306 F.3d 827, 832-34 (9th Cir. 2002)* (finding jurisdiction to review the district court's grant of partial summary judgment limiting the defendant's [**10] liability in accordance with a clause on the back of a cruise ship ticket); *Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1168 (9th Cir. 1998)* (finding jurisdiction to review the district court's grant of partial summary judgment limiting the defendant's liability pursuant to the Carriage of Goods at Sea Act); *Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 899 (9th Cir. 1989)* (same). Because this court "ha[s] jurisdiction over an interlocutory appeal under *§ 1292(a)(3)* where, as here, only the validity and applicability of a provision limiting liability has been determined," this court has jurisdiction over the present interlocutory appeal. [8] *Wallis, 306 F.3d at 834*.

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[6] The Hawaii statute provides that liability waivers regarding recreational activities will not be valid unless the owner or operator of the activity: (1) provides full disclosure of the inherent risks of the activity; and (2) takes reasonable steps to ensure that the patron is physically able to participate in the activity and is given the necessary instructions to participate safely. *Haw. Rev. Stat. § 663-1.54*. The district court held that there was a question of fact as to whether each of these conditions was satisfied.

[7] "*Section 1292(b)* provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." *In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1025-26 (9th Cir. 1981)*.

[8] The dissent characterizes our exercise of jurisdiction in this case as an expansion of *Wallis*. To distinguish *Wallis* from this case, the dissent emphasizes that the liability waiver at issue here does not cover Plaintiff's gross negligence claims, whereas the liability waiver in *Wallis* pertained to the plaintiff's only claim that survived the defendants' motion for summary judgment, the plaintiff's Death on the High Seas Act ("DOSHA") claim. But we do not see a meaningful difference between this case and *Wallis*. In *Wallis*, this court exercised appellate jurisdiction under *§ 1292(a)(3)* where the district court had "only decided that, if Princess [the defendant] were liable, its liability would be limited pursuant to the contract" at issue. *Wallis, 306 F.3d at 833*. The dissent argues this limitation was an "across-the-board" cap. *See* Diss. Op. at 34. But surely the panel in *Wallis*, which was decided in 2002, did not think such a provision could be an absolute, across-the-board limit on liability, when this Circuit had recently held that

IV. *46 U.S.C. § 30527*

46 U.S.C. § 30527(a) is a section of the Shipowner's Limitation of Liability Act ("the Act") that prohibits certain contractual provisions limiting liability for personal injury or death. *Section 30527(a)* provides:

> **(a) Prohibition**.--
>
> **(1) In general**.--The owner, master, manager, or agent of *a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country*, may not include in a regulation or contract a provision limiting
>
> **(A)** the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or [**11] agents; or
>
> **(B)** the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
>
> [*851] **(2) Voidness**.--A provision described in *paragraph (1)* is void.

46 U.S.C. § 30527(a) (emphasis added). The question before us is whether *§ 30527(a)* applies where a vessel departs from and returns to a single port in the United States without stopping at any other port. We hold that the language "between ports in the United States" requires transport between *at least two* ports in the United States.

A statute's language is the starting point for its interpretation. *Dyer v. United States, 832 F.2d 1062, 1066 (9th Cir. 1987)*. "When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" *FCC v. AT&T Inc., 562 U.S. 397, 403, 131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011)* (quoting *Johnson v. United States, 559 U.S. 133, 138, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)*). "To determine the 'plain meaning' of a term undefined by a statute, resort to a dictionary is permissible." *San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)*. *46 U.S.C. § 30527* does not define the term "transporting passengers between ports," nor is it a term of art with a particular legal definition, *see Williams v. King, 875 F.3d 500, 503 (9th Cir. 2017)*, so we apply the term's plain meaning.

The plain meaning of the term "transporting passengers between ports" is transporting passengers from one port to another port (Port A to Port B), not transporting passengers away from and back to a single port (Port A to Port A). This meaning stems from the combination of the [**12] word "between" and the plural form of "ports." The use of the plural "ports" is not determinative on its own because "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise*-- . . . words importing the plural include the singular." *1 U.S.C. § 1* (emphasis added). But here, the word "between" suggests that the plural "ports" does not

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"a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence." *See* *Royal Ins. Co. v. Sw. Marine, 194 F.3d 1009, 1016 (9th Cir. 1999)*. On appeal, the effect of the *Wallis* panel's exercise of jurisdiction to review a contractual liability limitation was to determine "what [the plaintiff would] have to prove to recover" beyond the contract's liability limitation. *See* Diss. Op. at 35 (emphasis removed). The same is true here: if the liability waiver applies, then Plaintiff would need to prove that Defendants were grossly negligent to recover; if the liability waiver is prohibited by statute, then Plaintiff need only prove that Defendants were negligent. The dissent agrees that "we reaffirmed in *Wallis* that an order determining 'the validity and applicability of a provision *limiting* liability' counts as a 'decree[] . . . determining the rights and liabilities of the parties' within the meaning of *§ 1292(a)(3)*." Diss. Op. at 31 (alterations and emphasis in original) (citing *Wallis, 306 F.3d at 834*). That is what the district court's order determined in this case. We see no meaningful distinction between the posture of this case and *Wallis*. Hence, we are bound by *Wallis* and have appellate jurisdiction.

include the singular "port." *See* *Witkowski v. Niagara Jet Adventures, LLC, 2020 U.S. Dist. LEXIS 16551, 2020 WL 486876, at *4 n.4 (W.D.N.Y. Jan. 30, 2020)* (reasoning that, in § 30527, "the word 'between' . . . necessarily provides context that the plural cannot include the singular."). Further, the use of the word "ports" when referring to ports in the United States and "port" when referring to a port in the United States and a port in a foreign country in the same sentence of the Act imports the meaning that "ports" is not used to denote the singular under *1 U.S.C. § 1*. *See* ANTONIN SCALIA & BRYAN A. GARNER, *Presumption of Consistent Usage, in* READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

In holding otherwise, the district court relied on three dictionary definitions of the word "between": (1) "[i]n or through the position or interval separating"; [9] (2) [c]onnecting spatially"; [10] and (3) "in the time, space, or interval that separates." [11] The district court appears [**13] to have handpicked [*852] these definitions from the eight definitions of "between" in the American Heritage Dictionary and the eleven definitions in the Merriam-Webster Dictionary without explanation. But even these definitions, and their corresponding examples, nonetheless support a holding that the phrase "between ports" refers to multiple ports. Each of these definitions involves a relationship between one thing and something else. Put more simply, the word "between" implies more than one.

Of the eleven definitions of "between" found in the Merriam-Webster Dictionary, the definition that best fits the context of *§ 30527(a)* is "from one to another of," [12] for example, "air service *between* Miami and Chicago." *Between*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/between [https://perma.cc/8HJL-9KDG] (emphasis in original). This definition demonstrates that, in the transportation context, the word "between" necessarily implies at least two locations. *See* ANTONIN SCALIA & BRYAN A. GARNER, *Ordinary-Meaning Canon, in* READING LAW: THE INTERPRETATION OF LEGAL [**14] TEXTS 70 (2012) ("Most common English words have a number of dictionary definitions . . . . One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise.").

The district court attempted to avoid this conclusion by reasoning that "[h]ad Congress intended to require different ports when it used the word 'ports,' it could have easily indicated that by using the phrase 'between different ports.'" This argument fails because, as discussed, the word "between" indicates that Congress intended to reference multiple ports. Multiple ports are, by definition, different one from the other; adding "different" would be tautological. *See* ANTONIN SCALIA & BRYAN A. GARNER, *Surplusage Canon, in* READING LAW:

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[9] E.g., "between the trees" or "between 11 o'clock and 12 o'clock." *Between*, THE AMERICAN HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=between [https://perma.cc/45AZ-WV7D]. Notice: there is more than one tree or one hour.

[10] E.g., "a railroad between the two cities." *Between*, THE AMERICAN HERITAGE DICTIONARY. Notice: there are two cities.

[11] E.g., "the alley *between* the butcher shop and the pharmacy" or "should arrive *between* 9 and 10 o'clock." *Between*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/between [https://perma.cc/8HJL-9KDG] (emphasis in original). Notice: there are two shops and two times.

[12] The other definitions are as follows: (1) "by the common action of : jointly engaging"; (2) "in common to : shared by"; (3) "in the time, space or interval that separates"; (4) "in intermediate relation to"; (5) "serving to connect or unite in a relationship (such as difference, likeness, or proportion)"; (6) "setting apart"; (7) "in preference for one or the other of"; (8) "in point of comparison of"; (9) "in confidence restricted to"; and (10) "taking together the combined effect of." *Between*, MERRIAM-WEBSTER DICTIONARY.

THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("[No word] should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

The district court next attempted to skirt the plain meaning of the phrase "between ports" by reasoning that limiting the statute's application to vessels transporting passengers between *different* ports would result in "absurd results." The district [**15] court reasoned:

> [A]pplying "ports" only when journeys are between Port A and Port B leads to odd and absurd results. For example, a vessel may take passengers a few hundred yards from one side of a river to the other (Port A to Port B). Waivers of negligence for the short journey between Port A and Port B would be prohibited by § 305[27], as the journey would involve transportation of passengers "between ports of the United States." However, if the same vessel left Port A for a 10-hour sightseeing tour and then returned to the same port (Port A), then, under Defendants' argument, waivers of negligence for such a journey would not be prohibited by § 305[27]. It makes little sense to think that Congress intended to prohibit a waiver only for the first (very brief) journey. Both involve the transportation [*853] of passengers between ports. In the latter example, the vessel is conveying the passengers from one port out for a boat tour and then back to the same port, with the tour being the interval between embarkation and disembarkation at the same port.

We reject this reasoning for two reasons. First, both examples do not "involve the transportation of passengers between ports." The vessel that departs from Port [**16] A and returns to Port A might involve the transportation between a port and *the water*, but it does not involve the transportation of passengers between ports (plural). Second, nothing in the text of the statute indicates that its applicability is tied to the length of the journey, but the phrase "between ports" does indicate that the statute's applicability is dependent on the transportation of passengers between different ports. [13]

In summary, we conclude that the plain language of § 30527 limits its application to vessels transporting passengers *between at least two ports* and does not apply to vessels transporting passengers away from and back to a single port. Because the *Dauntless* was not transporting passengers between two ports, but away from and back to a single port

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[13] The district court also cited the *General Slocum* disaster as a reason to believe that Congress intended that § 30527(a) apply to vessels that depart from and return to the same port. The *General Slocum* was a steamship that caught fire in New York Harbor in 1904, resulting in the death of 957 of its 1,388 passengers and crew members. LAWRENCE O. MURRAY ET AL., U.S. DEP'T COM. & LAB., REPORT OF THE UNITED STATES COMMISSION OF THE INVESTIGATION UPON THE DISASTER TO THE STEAMER "GENERAL SLOCUM" 25 (1904). The district court observed that the *General Slocum* disaster was discussed during testimony before Congress during the hearings regarding the predecessor to *46 U.S.C. § 30527*. The district court reasoned that the *General Slocum* was chartered to take passengers from the harbor to a picnic area and back to the harbor, and "[t]hus, in enacting [the predecessor to § 30527], Congress was well aware of vessels taking passengers on day trips to and from the same port."

Because the meaning of the statute is clear from its text, the district court's review of the legislative history was unnecessary and improper. ***CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017)***. But even were the legislative history a suitable basis for statutory interpretation, the district court's reasoning misses the mark. The *General Slocum* may have planned to depart from and return to the same port, but it also planned to stop at another port along the way. According to the record, the steamship was chartered to transport passengers between its origin port on Manhattan to a picnic ground with its own pier on Long Island (from which pier the passengers would depart), and later back to the origin port. Thus, the *General Slocum*'s intended route was from Port A (Manhattan) to Port B (Long Island) to Port A, not merely from Port A to Port A.

(Lahaina Harbor), § 30527 does not apply. [14]

[*854] [**17] **V. HAWAII REVISED STATUTE § 663-1.54**

Plaintiff argues that the liability waiver signed by the Eharts is void under HRS § 663-1.54 and that Hawaii state law thus provides an alternate basis to affirm the district court's decision striking the affirmative defense of waiver. HRS § 663-1.54 states:

> [O]wners and operators of recreational activities shall not be liable for damages for injuries to a patron resulting from inherent risks associated with the recreational activity if the patron participating in the recreational activity voluntarily signs a written release waiving the owner or operator's liability for damages for injuries resulting from the inherent risks. No waiver shall be valid unless:
>
> (1) The owner or operator first provides full disclosure of the inherent risks associated with the recreational activity; and
>
> (2) The owner or operator takes reasonable steps to ensure that each patron is physically able to participate in the activity and is given the necessary instruction to participate in the activity safely.

HRS § 663-1.54(b). The district court held that it is unclear based on the pleadings and present record whether conditions of the statute were satisfied, including whether Defendants provided "full disclosure of the inherent risks" of snorkeling, whether [**18] Defendants took "reasonable steps to ensure that [Maureen] was physically able to participate in the activity," and whether Maureen was "given the necessary instruction to participate in the activity safely."

Plaintiff forfeited any argument that the district court erred in finding that there was a question of fact as to whether the conditions of the statute were satisfied because Plaintiff failed to raise this issue in the answering brief. *See Clem v. Lomeli, 566 F.3d 1177, 1182 (9th Cir. 2009)*. Thus, on this record, HRS § 663-1.54 does not provide an alternate basis for upholding the district court's decision striking the affirmative defense of waiver. [15]

VI. CONCLUSION

For the reasons stated above, we reverse the district court's order granting Plaintiff's motion to strike the affirmative defense of waiver or release, and we remand for further proceedings.

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[14] Plaintiff asserts in conclusory terms that Molokini Crater is a "port." We disagree as a matter of law. The ordinary meaning of the word "port" is a place where vessels may load or unload cargo or passengers from or onto *land*—not a mooring buoy where passengers can depart from the ship into *water*. *See Port*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/port [https://perma.cc/BD46-NXJR]; *Port*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/port (last visited Jan. 18, 2024); *Port*, NATIONAL GEOGRAPHIC, https://education.nationalgeographic.org/resource/port/ [https://perma.cc/EV8T-BGW8]; *Port*, AMERICAN HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=port [https://perma.cc/HUW2-5SAW]; *Port*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/port [https://perma.cc/8498-5Q85]. And "port" is not a term of art with "a particular meaning in legal parlance" such that the court should depart from the ordinary usage of the word. *Williams v. King, 875 F.3d 500, 503 (9th Cir. 2017)* (quoting *United States v. Guerrerio, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987)*, in explanatory parenthetical).

[15] Defendants argue that HRS § 663-1.54 conflicts with federal admiralty law and is therefore preempted in this context. While Defendants raise a substantial question about federal preemption, we need not resolve it here given that the district court found that there is a question of fact whether the conditions of the Hawaii statute were met. The district court did not address the preemption issue and the parties provided only cursory arguments in their briefs. Thus, we decline to exercise our discretion to resolve the issue now.

REVERSED AND REMANDED.

Dissent by: COLLINS

Dissent

COLLINS, Circuit Judge, dissenting:

In asserting jurisdiction over this interlocutory appeal from an order striking an affirmative defense from an answer, the majority greatly expands this circuit's already overbroad construction of *28 U.S.C. § 1292(a)(3)*'s narrow grant of interlocutory appellate jurisdiction in admiralty cases. That construction has been rejected by at least four other circuits, [**19] but the majority nonetheless erroneously extends it in ways that even our prior decisions cannot justify. Having thus improperly asserted jurisdiction that we do [*855] not have, the majority then erroneously resolves an important question of law by holding that Congress's prohibition of liability waivers for passenger-carrying vessels, *see* *46 U.S.C. § 30527*, does not apply to day-trip excursions that start and end at the same port without visiting another port. Because all of this is wrong, I respectfully dissent.

I

Plaintiff William Ehart ("Plaintiff" or "William"), his wife Maureen, and "fourteen other paying passengers" set out from Maui's Lahaina harbor aboard the "dive boat" *Dauntless* early on the morning of September 14, 2021 for a "dive tour." [1] The *Dauntless* is owned by Defendant Lahaina Divers, Inc. ("Lahaina Divers"). However, the boat was chartered by a separate entity, Lahaina Dive and Surf, LLC ("Lahaina Dive & Surf"), which is also the entity that operated the dive tour and employed the crew. [2] The crew included the captain, Defendant Cory Dam, as well as two "open-water-scuba instructor[s]" certified by the Professional Association of Diving Instructors, namely, Defendants Kaitlin Miller and Julianne [**20] Cricchio.

Dam guided the *Dauntless* to the "Molokini Crater, a crescent-shaped islet in the ocean off the southeast coast of Maui." However, the vessel was not tied directly to the crater or to any structure attached to the crater; instead, Dam tied the boat "to a mooring buoy known as 'Reef's End' at the Crater." At that point, Miller and Cricchio led two groups of passengers, including William, into the water for their separate scuba excursions. After they did so, several remaining passengers, including Maureen, went into the water in order to snorkel. At that time, Dam "was the sole crew member aboard to maintain a lookout, . . . oversee the snorkeling activities, recall the divers and snorkelers if necessary, and provide rescue if necessary." The complaint alleges that, after the other snorkelers got back in the boat, Maureen stayed in the water

[1] Because this case arises on a motion to strike an affirmative defense as "insufficient" under *Federal Rule of Civil Procedure 12(f)*, we must take the facts as alleged by the non-moving party—here, the Defendants—as true for purposes of evaluating the adequacy of the challenged defense. *See* *Rev Op Grp. v. ML Manager LLC (In re Mortgages Ltd.), 771 F.3d 623, 630-32 (9th Cir. 2014)* (holding that, in evaluating whether denials in an answer "were a sufficient defense" under *Rule 12(f)*, the "factual allegations" contained in those denials "must be presumed to be true"). Accordingly, I take as true the version of facts reflected in Defendants' paragraph-by-paragraph answer responding to the factual allegations of the original complaint. Although an amended complaint and answer were filed after the district court's ruling that is challenged in this interlocutory appeal, the allegations that we must take as true have not been materially altered by those filings, except to correct (in accordance with Defendants' answer) the names of two of the crew members named as Defendants. Those subsequent filings are therefore of no consequence to this appeal.

[2] Lahaina Dive & Surf has been added as an additional Defendant in the subsequently filed amended complaint, but it is not a party to this interlocutory appeal.

alone and ultimately drifted away in the current unnoticed. The two scuba groups returned of their own accord, and at no point did Dam "recall the scuba divers or snorkelers." After Maureen's disappearance was finally noticed, Miller and Cricchio swam in the area in an unsuccessful effort to locate her. Dam also sought assistance on the [**21] emergency marine radio channel, and the Coast Guard and Maui County responders used "various resources" in a fruitless attempt to locate Maureen. Maureen was never found and is presumed dead. The *Dauntless* returned to Lahaina with its remaining passengers.

Invoking the district court's maritime jurisdiction under *28 U.S.C. § 1333*, William brought this suit on behalf of himself [*856] and his wife's estate, naming as Defendants Lahaina Divers, Dam, Miller, and Cricchio. Invoking theories of negligence and gross negligence, the complaint alleged claims for wrongful death, claims for "survival damages" for the injuries Maureen experienced before her death, and claims for William's emotional distress. In answering the complaint, Defendants Lahaina Divers and Dam (hereafter "Defendants") asserted, as an affirmative defense, that William and Maureen had "waived and released the claims" asserted. As further elaborated in connection with Plaintiff's subsequent motion to strike this affirmative defense, the defense was based on written waivers that William and Maureen had each signed before boarding the *Dauntless*. The relevant language in those releases stated, *inter alia*, that the signatory intended to "exempt, release [**22] and hold harmless" Lahaina Divers, Lahaina Dive & Surf, and related entities and agents "from all liability whatsoever for personal injury, property damage, and wrongful death caused by negligence."

In moving to strike this affirmative defense of waiver and release, Plaintiff contended, *inter alia*, that the waivers were void under what is now *§ 30527 of title 46 of the United States Code*. [3] That statute provides:

> (a) Prohibition.—
>
> (1) In general.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—
>
> (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
>
> (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
>
> (2) Voidness.—A provision described in *paragraph (1)* is void.

46 U.S.C. § 30527(a). Concluding that the written waivers signed by Plaintiff and Maureen were covered by *§ 30527(a)(1)*, the district court on May 10, 2022 held that the waivers were void under *§ 30527(a)(2)*. Accordingly, the court granted Plaintiff's motion to strike Defendants' defense of waiver and release [**23].

Defendants timely filed a motion for reconsideration of the district court's order, and in that motion they also asked, in the alternative, that the district court certify that

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[3] At the time of the relevant district court proceedings, this provision was contained in § 30509 of title 46. However, in December 2022, Congress redesignated § 30509 as *§ 30527*. *See* ***Pub. L. No. 117-263, § 11503(a)(3), 136 Stat. 2395, 4130 (Dec. 23, 2022)***. Prior to the enactment of title 46 as positive law in 2006, the predecessor provision to § 30509 was contained in § 4283B of the Revised Statutes and was classified to § 183c of the unenacted version of title 46. The underlying prohibition on liability waivers was first enacted as § 4283B in 1936. *See* ***Ch. 521, § 2, 49 Stat. 1479, 1480 (June 5, 1936)***.

order for immediate interlocutory appeal under 28 U.S.C. § 1292(b). The district court denied the motion. Contending that the order granting the motion to strike was nonetheless immediately appealable as of right under 28 U.S.C. § 1292(a)(3), Defendants filed a timely notice of appeal.

II

In my view, we lack interlocutory jurisdiction over this appeal, and I therefore would dismiss it without reaching the merits.

[*857] **A**

"From the very foundation of our judicial system, the general rule has been that the whole case and every matter in controversy in it must be decided in a single appeal." Microsoft Corp. v. Baker, 582 U.S. 23, 36, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017) (simplified). Under this "general rule," that "single appeal" is "to be deferred until final judgment has been entered," at which time "claims of district court error at any stage of the litigation may be ventilated." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994). This "final-judgment rule," now codified in 28 U.S.C. § 1291, is based on the recognition that "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court [**24] judges, who play a 'special role' in managing ongoing litigation." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (citations omitted).

Congress, however, has recognized several statutory exceptions to that general rule by expressly "authoriz[ing] review of certain interlocutory decisions" in the various provisions of 28 U.S.C. § 1292. Baker, 582 U.S. at 27 n.1. After unsuccessfully attempting to persuade the district court to invoke one of those exceptions—namely, § 1292(b)'s discretionary authority to allow interlocutory appeals of orders resolving certain "controlling question[s] of law"—Defendants asserted that they could take an immediate appeal as of right under a different subsection of § 1292. Specifically, Defendants invoked subsection (a)(3) of that statute, which authorizes appeals of:

> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C. § 1292(a)(3). Accordingly, whether we have jurisdiction over this appeal turns dispositively on whether the district court's order striking the affirmative defense counts as an "[i]nterlocutory decree[] . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *[**25] Id.* There is no question that this is an "admiralty case[]," nor is there any doubt that this is a case in which, when a final decree is entered, an "appeal[] from [that] final decree[] [is] allowed." *Id.* There is likewise no dispute that the district court's order here is "[i]nterlocutory." *Id.* The only question, then, is whether it counts as a "decree[] . . . determining the rights and liabilities of the parties." *Id.*

This distinctive phrase traces back verbatim to the enactment of the predecessor to § 1292(a)(3) in 1926. *See* Ch. 102, 44 Stat. 233 (Apr. 3, 1926) (adding, to § 129 of the Judicial Code, language stating that "[i]n all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the

parties"). In explaining the primary purpose of the provision, we have stated:

> It was a common practice for the admiralty court to determine first the issue of liability and, if it found liability, to refer the parties to a commissioner for the determination of damages. The purpose of § 1292(a)(3) was to permit a party found liable to take an immediate appeal from that finding and thereby possibly avoid an oftentimes [**26] costly and protracted trial of the damages issue.

Seattle First Nat'l Bank v. Bluewater P'ship, 772 F.2d 565, 568 (9th Cir. 1985) (quoting 9 MOORE'S FEDERAL PRACTICE [*858] ¶ 110.19[3], at 209-10 (1985)); *see also* Stark v. Texas Co., 88 F.2d 182, 183 (5th Cir. 1937) (similar). In a series of early decisions, the Second Circuit suggested that the interlocutory jurisdiction granted by the statute extended little, if at all, beyond that paradigmatic context—*i.e.*, one in which liabilities have been fully adjudicated, "leaving only the question of damages for determination." *H. Lissner & Co. v. Oceanic Steam Nav. Co., 30 F.2d 290, 290 (2d Cir. 1929)*; *see also* The Maria, 67 F.2d 571, 571 (2d Cir. 1933) ("That statute was primarily intended to avoid the expense and delay of a reference to compute damages, since it is always possible that the libelant may later turn out to have no right to recover at all; and, although it would perhaps be too much to say that it covers that situation alone, it is hard to imagine other instances.").

This narrow understanding also comports with the statutory language. An order that has not yet found whether a plaintiff *in fact* has a "right" to recover from a defendant and whether a defendant *in fact* has a "liability" to a plaintiff cannot be said to have "*determined* the rights and liabilities of the parties." 28 U.S.C. § 1292(a)(3) (emphasis added). *See Determine*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 711 (1939) ("To settle a question or controversy about; to [**27] decide by authoritative or judicial sentence; as, the court has *determined* the cause."). Anything less than such a determination of rights and liabilities is simply the resolution of some preliminary issue and does not come within the statutory language. And that remains true even if the order resolves an important substantive legal question touching upon the merits of the controversy. Any more expansive reading of the statute would violate the settled rule that, as an exception to "the final judgment rule," § 1292(a)(3) must be "construed narrowly" to embrace only what comes within its plain terms. *Seattle First, 772 F.2d at 568*; *see also* Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 458, 55 S. Ct. 475, 79 L. Ed. 989 (1935).

Under this understanding of the statute, the jurisdictional issue in this case is easy. An order striking a particular defense as being inapplicable to the case at bar simply does not "determin[e]" the "rights and liabilities of the parties" under any reasonable reading of those words. [4] As the district court correctly observed in denying Plaintiff's request to authorize a discretionary appeal under § 1292(b), the striking of Defendants' affirmative defense of waiver neither established nor precluded Defendants' liability for *any* of the relief sought. That was true, the district court noted, because [**28] it was undisputed that the

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[4] I express no view on the question whether, under the statutory language, *all* of the "rights and liabilities" of *all* of "the parties" must first be resolved before an appeal under § 1292(a)(3) would be authorized. *See* Chem One, Ltd. v. M/V Rickmers Genoa, 660 F.3d 626, 640-41 (2d Cir. 2011) (adopting the "majority view" that § 1292(a)(3) "permits an interlocutory appeal when rights and liabilities have been determined between two of a number of parties, notwithstanding that disputes remain between one of them and others, as, for example, between the plaintiff and one of several defendants, or between a defendant and third-party defendant" (simplified)).

asserted defense of waiver did *not* apply to Plaintiff's claims based on *gross* negligence. *See* Royal Ins. Co. v. Southwest Marine, 194 F.3d 1009, 1016 (9th Cir. 1999) (holding that "a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence"). Because the motion to strike thus merely resolved whether Plaintiff would have to show gross negligence, rather than mere negligence, it did not settle in any respect whether or not Defendants [*859] are actually liable to Plaintiff. The district court's order thus plainly does not fall within the scope of § 1292(a)(3).

B

But matters are not so easy, at least in this circuit. As we noted in Wallis v. Princess Cruises, Inc., 306 F.3d 827 (9th Cir. 2002), the Third, Fourth, and Fifth Circuits have all held—consistent with what I have sketched above—"that § 1292(a)(3) requires a determination of *actual* liability [or non-liability] by the district court." Id. at 833-34 (emphasis added) (citing *Evergreen Int'l (USA) Corp. v. Standard Warehouse, 33 F.3d 420, 424 (4th Cir. 1994)*; Bucher-Guyer AG v. M/V Incotrans Spirit, 868 F.2d 734, 735 (5th Cir. 1989); and *Burgbacher v. Univ. of Pittsburgh, 860 F.2d 87, 88 (3d Cir. 1988)*). However, we also correctly noted in *Wallis* that Ninth Circuit precedent had already departed from that narrow understanding of the jurisdiction conferred by § 1292(a)(3). Id. at 832-33 (citing Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897 (9th Cir. 1989), and *Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165 (9th Cir. 1998)*). In line with those cases, we reaffirmed in *Wallis* that an order determining "the validity and applicability of a provision *limiting* liability" counts [**29] as a "decree[] . . . determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3). Id. at 834 (emphasis added).

Although this court in *Carman Tool* and *Vision Air* had simply asserted jurisdiction under § 1292(a)(3) without any analysis, we offered the following explanation in *Wallis* for upholding such jurisdiction over appeals of orders concerning "the validity and applicability of a provision limiting liability":

> If a district court holds that a limitation of liability clause is valid and applicable, that determination will, as a practical matter, usually end the case. For example, in a COGSA [Carriage of Goods at Sea Act] case, if the district court has held that a plaintiff can recover no more than $500 if actual liability is established, an economically rational plaintiff will not ordinarily pursue the case to judgment, and the correctness of the district court's determination of applicability of the liability limitation will never be reviewed.
>
> Limitation of liability provisions are common in maritime cases, not limited to cases brought under COGSA. As we read § 1292(a)(3), it takes into account the practical problem posed by limitations of liability. Its explicit text of § 1292(a)(3) authorizes [appeals of] "interlocutory [**30] decrees." If the phrase "determination of the . . . liabilities," which occurs later in the same text, were construed to exclude a determination of limitations of liability from "interlocutory decrees," such a construction would make interlocutory appeals impossible in many admiralty cases, and would do so in precisely those cases where such appeals are most needed. We therefore hold that we have jurisdiction to decide this interlocutory appeal.

Wallis, 306 F.3d at 834.

As this excerpt makes clear, the reasoning in *Wallis*'s atextual and policy-based analysis rests on what has sometimes been described as the "death knell" theory of appellate

jurisdiction—*i.e.*, that an interlocutory appeal should be allowed when the practical effect of an adverse ruling makes it economically infeasible or impractical for the losing party to continue litigating to final judgment. *See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 466, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*. However, in its subsequent decision in *Baker*, the Supreme Court reaffirmed its longstanding [*860] rejection of any such "death-knell doctrine" as a basis for recognizing exceptions to the final judgment rule. *Baker, 582 U.S. at 29*. Among other points, the Court emphasized that *§ 1292(b)* expressly authorized *discretionary* appeals of certain "controlling question[s] of law" whose [**31] appellate resolution would "materially advance the ultimate termination of the litigation," *28 U.S.C. § 1292(b)*, and employing the death-knell doctrine to authorize immediate appeals, as of right, of potentially case-dispositive issues improperly "circumvented *§ 1292(b)*'s restrictions." *Baker, 582 U.S. at 29* (simplified). As the instant case starkly illustrates, *Wallis*'s death-knell-based expansive reading of *§ 1292(a)(3)* contravenes *Baker*'s admonition against construing appellate jurisdictional provisions in a manner that would circumvent the limitations of *§ 1292(b)*. *Wallis* thus relied dispositively on reasoning that was later emphatically rejected by the Supreme Court. As a result, the continued validity of our holding in *Wallis*—which remains the subject of a lopsided circuit split—seems highly doubtful, to say the least. [5]

But even assuming *arguendo* that *Wallis* is not "clearly irreconcilable" with *Baker, see Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003)* (en banc), I disagree with the majority's further expansion of *Wallis* in this case. In asserting interlocutory appellate jurisdiction under *§ 1292(a)(3)*, our published opinions in *Wallis, Carman Tool*, and *Vision Air* each characterized the respective district court orders in those cases as having effectively imposed an *across-the-board* limitation [**32] on the defendants' liability. Thus, in both *Carman Tool* and *Vision Air*, we stated that the respective district court orders had accepted the defendants' argument that any liability in the case, on *any* theory, was limited to a small, fixed amount. *See Vision Air, 155 F.3d at 1168* ("The district court granted [the defendants'] motion and issued an order granting partial summary judgment, limiting [the defendants'] liability to $1000.00."); *Carman Tool, 871 F.2d at 899* (stating that "[a]ll parties moved for partial summary judgment as to whether defendants' liability is limited to $500 per package" and that "[t]he district court granted partial summary judgment in favor of defendants"). [6] In *Wallis*, we similarly explained that, because the district court ruling limited the defendants' liability in the case to $60,000, *Wallis* was "procedurally and jurisdictionally *identical* to *Carman Tool*":

> As an affirmative defense, Princess asserted that its liability, *if any*, for the death of Mr. Wallis *is limited to roughly*

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[5] Since our decision in *Wallis*, the Eleventh Circuit has expressly rejected it and instead adopted the contrary position of the Third, Fourth, and Fifth Circuits. *See Wajnstat v. Oceania Cruises, Inc., 684 F.3d 1153, 1155-56 (11th Cir. 2012)*. Moreover, the Third and Fifth Circuits have reaffirmed their contrary positions and expressly rejected *Wallis*. *SCF Waxler Marine, L.L.C. v. ARIS T M/V, 902 F.3d 461, 466 (5th Cir. 2018)* (rejecting *Wallis*); *Estate of Hager ex rel. Hager v. Laurelton Welding Serv., Inc., 124 F. App'x 104, 106-07 (3d Cir. 2005)*. Either in this case, or in a subsequent case, we should consider eliminating this circuit split by overruling *Wallis* en banc.

[6] In *Vision Air*, we held that negligence, gross negligence, and recklessness provided no basis for evading the liability cap in that case, but that *intentional* conduct was not subject to the cap. *See 155 F.3d at 1175*. And because we concluded that there was a triable issue as to whether some of the damages were intentionally caused, we reversed, to that limited extent, the district court's imposition of a *complete* cap on liability. *Id. at 1176*. In *Carman Tool*, we affirmed the district court's ruling and agreed that "defendants are entitled to COGSA's $500 per package limitation." *871 F.2d at 901-02*.

> *[*861] $60,000 pursuant to its Passage Contract*. Princess moved for partial summary judgment as to whether its liability is so limited, and the district court *granted* the motion. As in *Carman Tool*, the district court in our case has not decided [**33] whether Princess is actually liable for plaintiff's wrongful death claim. It has only decided that, if Princess were liable, its liability *would be limited pursuant to the contract*.

306 F.3d at 833 (emphasis added).

It is perhaps at least plausible to say—as these cases did—that, when a district court has determined that the defendants *in fact* had *no liability* for the entire category of damages above the relevant fixed amount, such a ruling has "*determin*[*ed*] the rights and liabilities of the parties" with respect to such further damages. 28 U.S.C. § 1292(a)(3) (emphasis added). But the same cannot be said in this case. As noted earlier, all that is at stake here is whether Plaintiff's claims for *negligence* will be knocked out of the case, leaving him only with his claims for gross negligence. Merely removing one legal theory of liability from a case does not "determin[e]" anything at all about Defendants' ultimate liability for any class of damages. Regardless of how Plaintiff's motion to strike is resolved, Defendants' liability *vel non* for any and all claimed damages remains entirely undecided, because the only issue at stake in that motion *is what Plaintiff will have to prove [**34] to recover*. The majority's expansion of *Wallis* to *that* distinct context blows a gaping hole in the final judgment rule in admiralty cases.

The majority does not and cannot dispute that, as written, our opinion in *Wallis* asserted jurisdiction under § 1292(a)(3) on the theory that, as in *Carman Tool* and *Vision Air*, the district court's ruling imposed a cap on the defendant's liability. Instead, the majority insists that, because this court had previously held that "a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence," Royal Ins. Co., 194 F.3d at 1016, the district court order at issue in *Wallis* must be understood as having left available to the plaintiffs for trial an *un-capped* claim for gross negligence. *See* Opin. at 12 n.8. With that additional "fact" engrafted into *Wallis*'s description of the facts of that case, the majority reasons, *Wallis* would then be on all fours with this case. The problem with this argument is that it rewrites *Wallis* to stand for something very different from what that opinion actually says. The *Wallis* opinion says nothing at all about any such exception for claims of gross negligence; indeed, that opinion affirmatively implies that the *Wallis* plaintiff's [**35] sole remaining claim under the Death on the High Seas Act ("DOHSA") was based *only* on negligence. *See* Wallis, 306 F.3d at 832 (stating that "the district court left for trial the issue of whether Princess was liable for a *negligent* search under DOHSA" (emphasis added)). Moreover, far from stating that the case involved only a *partial* liability cap that applied only to certain theories of liability and not to others, we said in *Wallis* that the district court order there involved a limitation of liability that was "*identical*" to the *across-the-board caps* at issue in *Carman Tool* and *Vision Air*. *See* Wallis, 306 F.3d at 833 (emphasis added). Contrary to what the majority seems to suggest, *Wallis* is binding precedent based only on the facts and rationale as we described them (rightly or wrongly) in that decision. Because our opinion in *Wallis* asserted jurisdiction based on the clearly stated premise that the district court's order there was an across-the-board limitation of liability, that precedent provides no justification for the [*862] majority's extension of *Wallis*'s

rule beyond that context. [7]

The majority's unduly expansive reading of § 1292(a)(3) also largely renders the limitations of § 1292(b) a dead letter in admiralty cases. If, [**36] as the majority claims, § 1292(a)(3) allows interlocutory appeals of pretrial orders that merely resolve the legal viability of one or more *alternative theories* of liability or defense, there is no practical need ever to resort to § 1292(b) in admiralty cases. The sort of threshold legal issues that the majority now brings within § 1292(a)(3)'s appeal-as-of-right are precisely the kind of "controlling question[s] of law" that come within the purview of § 1292(b), but that statute does not authorize an appeal unless the follow conditions are met: "there is substantial ground for difference of opinion"; an immediate appeal might "materially advance the ultimate termination of the litigation"; and both the district court and the court of appeals exercise their respective discretion to allow the appeal. 28 U.S.C. § 1292(b). None of those additional limitations in § 1292(b) makes any difference in admiralty cases under the majority's overbroad reading of § 1292(a)(3), as this case vividly illustrates: here, the district court expressly held that these additional requirements were not met, but Defendants took the appeal anyway. Thus, in addition to being unsupported by the text of the statute or our caselaw, the majority's flawed reading of § 1292(a)(3) improperly "circumvent[s] [**37] § 1292(b)'s restrictions." Baker, 582 U.S. at 29 (simplified).

Because we lack jurisdiction over this interlocutory appeal, I would dismiss Defendants' appeal and would not reach the merits.

III

The majority, however, concludes that we do have jurisdiction, and it therefore proceeds to issue a binding precedential opinion as to the scope of the ban on liability waivers in § 30527. In my view, the majority's construction of the statute is wrong.

A

As noted earlier, § 30527 declares to be "void" any "provision" in a "contract" that "limit[s] . . . the liability of the owner, master, or agent" of a covered vessel "for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents." 46 U.S.C. § 30527(a)(1)(A), (2). In holding that the statute is inapplicable here, the majority relies only on the threshold determination that the "vessel" in question—the *Dauntless*—does not fall within the subset of vessels that are covered by the statute. [8] I disagree with that conclusion and with the [*863] construction of § 30527 on which it is based.

The statute states that its prohibition on liability waivers applies to any "vessel transporting passengers between ports in the United States, or between a port in the United States

[7] As it turns out, the majority may be correct in speculating that our opinion in *Wallis* may have misdescribed the facts of that case. The answering brief of the defendants in *Wallis* described the district court order there as having "limit[ed] plaintiff's damages to approximately $60,000, unless she can prove [the defendants'] conduct was reckless." Brief of Appellees, *Wallis v. Princess Cruises, Inc.*, No. 01-56700, 2002 WL 32139357, at *6. But our opinions have precedential force only as written and not based on how (in light of research into the underlying case files) they *should* have been written. It is particularly problematic to extend *Wallis* to a fact pattern that we never mentioned in our opinion in that case and to which our stated rationale does not apply.

[8] The majority does not dispute that the *Dauntless* is a "vessel," and it clearly is. For purposes of the U.S. Code, the term "vessel" expressly "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

and a port [**38] in a foreign country." 46 U.S.C. § 30527(a)(1). [9] The plain language of the statute thus describes the covered "vessel[s]" by reference to the *travel* by which they "transport[] passengers": a "vessel" is covered only if it either "transport[s] passengers between ports in the United States" or transports them "between a port in the United States and a port in a foreign country." 46 U.S.C. § 30527(a)(1). This language confirms that two things must be true for the vessel to be covered.

First, the vessel must be "transporting" "passengers" "between" ports—meaning that, if the vessel was never intended to be taken out into the water with its passengers, then it is not covered. The statute would thus not apply to, say, a visit to the *Queen Mary* at its permanent mooring in Long Beach. That makes sense, because if there is no plan for the ship ever to leave port, then the dangers associated with such transportation—which are ultimately what underly the rule against liability waivers—would never be implicated. In this respect, it is important to recognize that the enactment of § 30527's predecessor in 1936 partly served to codify the longstanding rule of maritime law and common law that, in order to ensure that common carriers by sea or by land [**39] would exercise "the highest degree of carefulness and diligence" with "regard to passengers," such carriers were barred from disclaiming liability towards such passengers. *See* Liverpool & G.W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 439-40, 9 S. Ct. 469, 32 L. Ed. 788 (1889); id. at 443-61 (rejecting the view that maritime law, at least in the United States, applied a different rule); *see also* New York Cent. R.R. Co. v. Lockwood, 84 U.S. 357, 384, 21 L. Ed. 627 (1873) (holding that a common carrier "cannot lawfully stipulate" to "exemption from responsibility for the negligence of himself or his servants" and that this rule applies "both to carriers of goods and carriers of passengers for hire, and with special force to the latter"); The Oregon, 133 F. 609, 630 (9th Cir. 1904) (holding, in an action for personal injuries suffered by passengers during a voyage, that if the "provision of the contract, relieving the carrier from responsibility for the negligence of the carrier . . . can be held to be applicable, it is clearly void by reason of being against public policy").

Second, the statute specifies that at least one of the ports in question must be a United States port. The obvious import of this requirement is to impose a *jurisdictional* element that excludes vessels transporting passengers entirely between *foreign* ports. *See* Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 914-15 (3d Cir. 1988) (stating that § 30527's predecessor was enacted to settle the "jurisdictional scope" of [**40] the maritime-law anti-liability-waiver rule and did so by "delimit[ing] the reach of American public policy to contracts of passage for voyages that touch the United States"), *overruled on other grounds by* Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 109 S. Ct. 1976, 104 L. Ed. 2d 548 (1989).

This particular aspect of § 30527(a)(1) traces back to the predecessor statute enacted [*864] in 1936,[10] and it reflected an important change in then-existing law. *Cf.* Mendoza-Linares v. Garland, 51 F.4th 1146, 1164 (9th Cir. 2022) ("Congress . . . is presumed to know

[9] Effective December 23, 2022, § 30527 does not apply "to covered small passenger vessels" as defined in 46 U.S.C. § 30501(1). *See* 46 U.S.C. § 30502(b). No party has contended that this exception is relevant to our resolution of this appeal, and I express no view on that question.

[10] *See* ***Ch. 521, 49 Stat. 1479, 1480 (June 5, 1936)*** (enacting § 4283B of the Revised Statutes) (stating that the prohibition on liability waivers generally applied to "any vessel transporting passengers between ports of the United States or between any such port and a foreign port").

the law."). Specifically, by excluding wholly foreign voyages from the statute's anti-liability-waiver rule, Congress thereby abrogated the Second Circuit's 1925 split decision in *Oceanic Steam Navigation Co. v. Corcoran, 9 F.2d 724 (2d Cir. 1925)*. There, the plaintiff, a passenger on the *Canopic* as it traveled from Montreal to Liverpool, was seriously injured due to the alleged negligence of a ship steward. *Id. at 725-26*. Her ticket contained a liability-limiting provision, but the Second Circuit held that, because the contract was made in the United States, that provision was void. *Id. at 726-27, 733*. As the court explained, "[u]nder the admiralty law of the United States, a common carrier by sea cannot by any contract it makes exempt itself from all responsibility for loss or damage by perils of the sea arising from the negligence of its officers or crew." *Id. at 727*. Notably, the Second Circuit applied [**41] U.S. law on this point, even though application of English law would have led to a different conclusion; the contract expressly stated that it was governed by English law; and the ship was traveling exclusively between foreign ports. *Id. at 728-33*. Judge Hough dissented, arguing that the majority's application of U.S. law was "the apex of unreason." *Id. at 733*.

Under *§ 30527* and its 1936 predecessor, the now-codified rule voiding liability waivers for vessels transporting passengers would *not* apply to the sort of wholly foreign voyage at issue in *Oceanic Steam*, because that voyage did not involve transportation of passengers either "between ports in the United States" or "between a port in the United States and a port in a foreign country." *46 U.S.C. § 30527(a)(1)*. *See Hodes, 858 F.3d at 914-15* (noting that *Oceanic Steam* was a departure from the then-existing caselaw and that Congress abrogated it by limiting the liability-waiver rule to "voyages that touch the United States").

Viewed against this backdrop, *§ 30527* clearly applies to the *Dauntless*. Because the *Dauntless* was "transporting passengers" from Lahaina (a "port[] in the United States"), out into the water, and then back to Lahaina (again, a "port[] in the United States"), the travel was "between ports in [**42] the United States." *46 U.S.C. § 30527(a)(1)*. The prohibition in that section therefore applies to the *Dauntless* as a threshold matter, leaving only the question of whether the substantive rule contained in *§ 30527(a)* prohibits the type of liability waiver contained in *this* release. [11]

B

The majority nonetheless concludes that, in addition to partly codifying the established maritime rule against liability waivers and excluding its application to wholly foreign voyages, Congress in *§ 30527* went further and also categorically excluded, from the coverage of that rule, any excursion trip that starts and ends in the *same* U.S. port. That is incorrect.

[*865] First, the majority's view would effectively rewrite the statute as applying only to "transporting passengers between *different* ports in the United States." As we have explained in another context, "[h]ad Congress intended to impose such a limitation, it could easily have added that simple word. But it did not do so, and we cannot rewrite the statute to insert an additional restriction that Congress omitted." *See Charboneau v. Davis, 87 F.4th 443, 454 (9th Cir. 2023)*. And under the language Congress wrote, there is no such different-ports requirement. In maritime usage, a "port" can refer either to a "port [**43] of departure," which is "[t]he port from which a

[11] As I note below, Defendants alternatively contend that *§ 30527(a)* only precludes waiving liability that relates to the vessel's *transportation* of passengers and that the statute therefore does not preclude waivers of liability concerning *additional* potentially high-risk activities, such as scuba diving or snorkeling. *See infra* section III(C).

vessel departs on the start of a voyage," or to a "port of destination," which is "[t]he port at which a voyage is to end." *Port*, BLACK'S LAW DICTIONARY (11th ed. 2019). Transportation "between ports" would thus be understood as transportation "between" a "port" of departure and a "port" of destination, and there is no conceivable logical reason why those ports cannot be the same. And when, as here, they are the same, and that port happens to be in the United States, then the resulting travel is "between ports in the United States."

The majority contends that the requirement that the port of departure and the port of destination be *different* arises from the use of the word "between," which it says "implies more than one." *See* Opin. at 16. In support of this contention, the majority notes, for example, that in the dictionary's illustrative phrases "the alley *between* the butcher shop and the pharmacy" and "should arrive *between* 9 and 10 o'clock," there are necessarily "two shops and two times." *See* Opin. at 15 n.11 (citation omitted). But it simply is not true that "between" *always* connotes two *different* reference points, as a few counter-examples [**44] will demonstrate. A runner halfway through a 400-meter race on a 400-meter oval running track is "between" the starting line and the finish line, even though they are the same line. Someone halfway through *Finnegans Wake* is "between" the beginning and the end of the novel, even though it ends where it began. And Benjamin Harrison, like every past President except Washington, served "between" Presidents, even though in Harrison's case, those Presidents were the same person (Grover Cleveland). The difference in the two reference points in the majority's examples does not flow from anything inherent in the concept of "between"; rather, it is an artifice of these particular examples. Because there is no such thing as time travel, one cannot arrive, after a journey, at the *same* moment that one left; the times will necessarily be different. And if one describes an "alley" by reference to *its two physical sides* on the ground, those sides will necessarily be different, even if (to change the majority's example) the alley bisects a single shop. The point is that, although "between" is frequently used to link things that cannot be said to be the same, the majority is wrong in insisting that [**45] the word "between" "*necessarily*" implies that the two reference points must be distinct in all relevant senses. *See* Opin. at 16 (emphasis added). And, in particular, there is nothing peculiar about saying that a passenger is being transported "between ports" if he leaves the port of Lahaina, travels around the Molokini Crater, and returns to the port of Lahaina.

Second, the majority's reading of the statute violates the rule that a "textually permissible interpretation that furthers rather than obstructs the [statute's] purpose should be favored." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012). The majority's reading of the statute is not compelled by its language, and we should not adopt it when it produces irrational distinctions that would pointlessly thwart [*866] the statute's evident objective. Even agreeing (as I do) that the majority is correct that a mooring buoy does not count as a "port," *see* Opin. at 19 n.14, the majority's refusal to apply the statute to an excursion that returns to the same port would produce distinctions that make no conceivable rational sense. The following hypotheticals illustrate the point:

> • Two snorkel boats leave a Hawaiian harbor, [**46] headed to a pristine area off an adjacent island where sea turtles are known to swim. The first docks at an old wooden pier stretching out from the island; the second docks a hundred feet away, at a floating mooring buoy. On the majority's view, the passengers on the first ship are

protected by § 30527(a), while the passengers on the second ship are not.

• Two ships leave the Port of Long Beach for identical day-long whale-watching trips off the California coast. The first is scheduled, upon its return, to dock at a different berth in the Port of Long Beach. The second is scheduled, upon return, to dock at a nearby berth that is technically in the adjacent Port of Los Angeles. On the majority's view, the passengers on the second ship are protected by § 30527(a), while the passengers on the first ship are not.

• A riverboat line offers scenic day tours with two slightly different itinerary options. On the first, an on-board five-star chef prepares lunch, allowing passengers to enjoy the scenery without ever leaving the ship. On the second, the ship docks for an hour at a pier that hosts a well-known local restaurant where the passengers will have lunch. The voyages otherwise travel the same distance, show [**47] passengers the same sights, last for the same period of time, and return to the same port. On the majority's view, the passengers on the second ship are protected by § 30527(a), while the passengers on the first ship are not.

None of these distinctions makes even the slightest bit of sense. As noted above, the self-evident objective of the statute—like the maritime rule it partly codified—is to preclude operators of vessels that carry passengers into the "perils of the sea" from disclaiming their responsibilities to exercise due care towards those passengers. *See* Oceanic Steam, 9 F.2d at 727. Viewing the statute in that light, it makes no sense to say that the vessel operator's duty to protect against such perils turns on whether the ship touches a distinct port. Congress, of course, is free to enact seemingly irrational statutes, subject to minimum constitutional limits. But we should not lightly assume that Congress has chosen that route—particularly where a perfectly rational alternative construction is available, compatible with the statutory text and context, and supported by the maritime-law principles underlying the statute. The majority opinion assumes that Congress chose to be irrational in this instance. I do [**48] not.

Accordingly, I conclude that the *Dauntless* counts as a "vessel transporting passengers between ports in the United States." 46 U.S.C. § 30527(a)(1).

C

The key remaining merits question is whether Defendants are correct in alternatively contending that, even if § 30527(a) applies as a threshold matter to the *Dauntless*, the statute does not void a liability waiver *for snorkeling or scuba diving*. In support of this argument, Defendants cite the Eleventh Circuit's decision adopting this view, at least with respect [*867] to additional activities that do not occur on the ship itself. *See* Shultz v. Fla. Keys Dive Ctr., Inc., 224 F.3d 1269, 1271 (11th Cir. 2000) (holding that the predecessor to § 30527 did not apply to a "liability release to participate in the recreational and inherently risky activity of scuba diving"); *cf*. Johnson v. Royal Caribbean Cruises, Ltd., 449 F. App'x 846, 848-49 (11th Cir. 2011) (holding, without citing Shultz, that § 30527's predecessor applied to an *on-board* "simulated surfing and body boarding activity," because "[t]he statute contains no exceptions regarding the type of activity—whether recreational, ultra hazardous, or otherwise—in which the passenger is partaking when the injury occurs"). Defendants also note that, in addressing the common law liability of common carriers prior to the enactment of § 30527's predecessor, the Supreme Court had

held that the common law prohibition [**49] of liability waivers for common carriers did not extend to "*special engagements* which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation." *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 185, 33 S. Ct. 474, 57 L. Ed. 787 (1913)* (emphasis added); *see also id.* ("Manifestly, this rule [against liability waivers] has no application when a railroad company is acting outside the performance of its duty as a common carrier."). Plaintiff counters that Defendants' proposed restriction on the scope of *§ 30527*'s anti-liability-waiver rule simply lacks any basis in the statutory text and therefore was properly rejected by the district court.

Under the unique circumstances of this appeal, I decline to address this question. As I have explained, in my view, we lack jurisdiction over this appeal, and we therefore lack the power to say anything about its merits. Given that the majority has concluded that we *do* have jurisdiction and has issued a binding precedential opinion holding that *§ 30527* does not apply to excursions to and from the same port, I nonetheless think it is appropriate for me—despite my dissent on the jurisdictional [**50] issue—to proceed to point out why the majority's conclusion on *that* particular merits issue is incorrect and should not have been made the binding law of this circuit. But having done so, I see no reason why I should say anything more. Doing so would be to further exercise a jurisdiction that I do not think we have in order to gratuitously provide my views on additional merits issues that the majority has *not* discussed. I therefore decline to say anything further concerning the merits of the remaining issues concerning *§ 30527* that the majority found unnecessary to reach. [12]

* * *

For the reasons I have set forth, I would dismiss this appeal for lack of jurisdiction. To the extent that the majority does otherwise, I respectfully dissent.

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[12] I agree with that majority's holding that, to the extent we have jurisdiction over this appeal, the district court did not err in concluding that Plaintiff had failed to show, as a matter of law at the pleading stage, that Defendants would be unable to establish facts that would defeat the applicability of the distinct anti-liability-waiver provision in *Hawaii Revised Statutes § 663-1.54*.

DAMAGES RECOVERABLE IN MARITIME MATTERS

— SECOND EDITION —

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CHAPTER 15

Recreational Boating Remedies

B. Otis Felder[1]

§ 15-1 INTRODUCTION

While legal matters arising from the operation of pleasure craft once may have been viewed as insufficient to be considered cognizable within admiralty jurisdiction,[2] this perspective has been abandoned as demonstrated by the continued growth of significant decisions arising in recreational boating cases during the past sixty years. With overlap from other chapters being applicable here, this chapter focuses on some of the issues specific to maritime damages and remedies arising out of cases involving "recreational vessels"[3] under general maritime law.[4]

Since the 1960s when access to recreational boating had dramatically increased in the United States, the federal courts, sitting in admiralty,[5]

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[2] See Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661 (1963).

[3] 46 U.S.C. § 2101(34) (1988).

[4] For general discussion of various subtopics in this area, see THEUT, RECREATIONAL BOATING LAW (New York 1992).

[5] The terms "maritime law" and "admiralty" are now used more or less interchangeably. GILMORE & BLACK, THE LAW OF ADMIRALTY, 1 (2d ed. 1975). Traditionally, however, "admiralty" refers to "a specialized tribunal and practice in litigation . . . while 'maritime law' defines and regulates conduct outside of courts—substantive law." *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 524 (E.D.N.Y. 1967).

began regularly hearing more recreational boating cases.[6] Starting in 1982, the United States Supreme Court reformulated admiralty jurisdiction in *Foremost Insurance Co. v. Richardson*,[7] where it held that the collision between a bass boat and a ski boat on the Amite River in Louisiana was a maritime tort. Then, in *Sisson v. Ruby*,[8] it held that a fire that spread from a pleasure yacht docked at a marina on Lake Michigan also arose within admiralty jurisdiction. Most recently, in *Yamaha Motor Corp., U.S.A. v. Calhoun*,[9] the court held that the categories of damages available in federal maritime wrongful death claims from a collision between a jet ski and a vessel not only existed but also could be supplemented with state law remedies.[10] These cases confirmed the jurisdictional reach of admiralty over recreational boating cases, and their holdings set precedent for other traditional maritime cases.

The importance of cases concerning recreational vessels within general maritime law continues to develop, especially as other types of admiralty practice have declined. While the principles explained in the preceding chapters still govern when a matter is brought in admiralty, the interplay with state law in recreational cases often creates confusion and discord

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[6] As observed by Professor David Robertson, the United States Supreme Court had only decided two cases between 1790 and 1950 concerning noncommercial vessels, *Just v. Chambers*, 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903 (1941) and *Coryell v. Phipps*, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363 (1943), although the latter was actually a houseboat intended to be used for charter. *See* Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 281-82 (1998).

[7] 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982).

[8] 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990).

[9] 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).

[10] As the court explained in *Calhoun*, "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." 516 U.S. at 215–16. In fact, Section 7 of the Death on the High Seas Act (DOHSA), which does not apply to deaths in state territorial waters, confirms "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." *Id.* at 217 (*citing* 46 U.S.C. app. § 767). *See also Garofalo v. Princess Cruises*, 85 Cal. App. 4th 1060, 1081, 102 Cal. Rptr. 2d 754 (2000) (explaining that "a DOHSA-specific saving clause [section 7] was required because the "saving to suitors" clause in 28 United States Code section 1333(1) did not necessarily preserve jurisdiction over wrongful death claims, which were not traditional common law remedies.") (*citing Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222–23, 106 S. Ct. 2485, 91 L. Ed 2d 174 (1986) (establishing that section 7 of DOHSA expressly provides that claims governed by the substantive provisions of DOHSA may be brought in state court, with state wrongful death statutes providing the jurisdictional basis for the exercise of saving clause jurisdiction by the state courts).

with the principles of maritime uniformity. As predicted more than a quarter decade ago:

> By whatever name, pleasure boat or recreational vessel, the non-commercial vessel is becoming an increasingly important part of the maritime commerce of the United States, the maritime economy, and, hence, admiralty law. With the pleasure boat, post-*Sisson*, now firmly established within the realm of the admiralty jurisdiction of the United States, recreational vessels and their associated issues (*e.g.*, marinas and products liability) will become an important part of admiralty practice even as more traditional "blue water" aspects of the practice diminish.
>
> There are many unresolved issues with regard to pleasure boating, ranging from federal/state conflicts to the impacts of new applications of technology to recreational vessels. . . . The opportunities for the attorney, for both accomplishment and disaster, are tremendous.[11]

§ 15-2 ADMIRALTY JURISDICTION OVER RECREATIONAL BOATING

Remedies available in cases involving recreational boating are primarily determined based on general maritime law, which first requires assessing whether a matter is governed by admiralty principles or not. As the Supreme Court stated, "[w]ith admiralty jurisdiction comes the application of substantive maritime law."[12] Absent a relevant federal statute, this judicially developed law is drawn from "state and federal sources," as an "amalgam of traditional common-law rules, modifications of those rules, and newly created rules."[13] "Despite the well-intentioned goal of uniformity in maritime legal theory, admiralty practice and rulings by courts continue to create various remedial measures depending on the method used to determine the governing law."[14] This is especially true in recreational boating cases.

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[11] Anderson & Famulari, *Practice Guide: Pleasure Boats*, 4 U.S.F. MAR. L.J. 99, 145 (1992).

[12] *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

[13] *Id.*

[14] Felder, *Unifying Choice-of-Law Rules and Their Effects on Maritime Remedies*, 11 U.S.F. MAR. L.J. 213, 214 (1999).

"A federal court's authority to hear cases in admiralty flows initially from the Constitution, which 'extend[s]' federal judicial power 'to all Cases of admiralty and maritime Jurisdiction.'"[15] Furthermore, "Congress has embodied that power in a statute giving federal district courts 'original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction.'"[16] With respect to establishing federal admiralty jurisdiction pursuant to 28 U.S.C. § 1331(1) over a tort claim, a party seeking to do so must satisfy conditions both of location (tort occurring on navigable waters), known as the "location test," and "of connection with maritime activity," also known as the "connection test."[17] Admiralty jurisdiction also arises from certain maritime contracts, such as to transport a person aboard a vessel or chartering one.[18] Under both examinations, a vessel is involved.

The Rules of Construction Act, codified at Section 3 of Title 1 of the US Code, provides the controlling definition as follows: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[19] The United States Supreme Court has addressed the issue of what is and what is not a vessel in recent cases in determining applicability of maritime principles.[20] The basic difference is assessed by whether the craft was regularly, but not primarily, used (and designed in part to be used) for persons to go over water while others are not designed (to any practical degree) to serve a transportation function and did not do so.[21] A problem with this approach is the subjectivity into the determination of purpose

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[15] *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) (quoting U.S. Const. art. III, § 2).

[16] *Grubart*, 514 U.S. at 531 *quoting* 28 U.S.C. § 1333(1) (1988).

[17] *Id.* §§ 531, 534.

[18] *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427, 18 L. Ed. 397 (1867); *Morewood v. Enequist*, 64 U.S. (23 How.) 491 (1860). *See also Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 125 S. Ct. 385, 160 L. Ed. 283 (2004).

[19] 1 U.S.C. § 3 (1988). *See also* 46 U.S.C. § 115 (1988) ("In this title, the term "vessel" has the meaning given that term in section 3 of title 1."); 33 C.F.R. § 83.03(a) ("The word vessel includes every description of water craft, including non-displacement craft, WIG craft and seaplanes, used or capable of being used as a means of transportation on water.").

[20] *Compare Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496, 124, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005) (floating platform whose primary purpose was not transportation, but still capable of it, is a vessel) *with Lozman v. City of Riviera Beach*, 568 U.S. 115, 129, 133 S. Ct. 735, 184 L. Ed. 2d 604 (2013) (articulating "reasonable observer" test in "borderline cases where 'capacity' to transport over water is in doubt").

[21] *Lozman*, 568 U.S. at 125, 133 S. Ct. 735, 184 L. Ed. 2d 604.

of the craft, which can be affected by a court's perspective on the role of admiralty law.

Whether a particular recreational watercraft is or is not a vessel affects the determination of whether general maritime law will apply. Courts have found all types of recreational boats meet the statutory definition of "vessel," including surfboards, kneeboards, boogey boards, kayaks, rowboats, and other manual-powered vessels.[22] Given the wide range of types of recreational watercraft already in use and those being developed, including kiteboards, electric hydrofoil surfboards,[23] and the like, examining the vessel issue along with the other bases for application of maritime law is critical in determining the availability of remedies.

§ 15-3 SAVINGS TO SUITORS

Under the general "Savings to Suitors" clause found in Section 1333, of Title 33 of the US Code, codifying the jurisdiction grant of authority to resolve maritime cases in federal courts, a state court may exercise concurrent jurisdiction in a maritime case only where at the time of the adoption of the Constitution, the common law provided a remedy.[24] The clause therefore "saves" state common law remedies from being preempted by the general maritime law and allows a party to pursue a remedy for a maritime claim in a state court "to which they are otherwise entitled." The general maritime law in recreational maritime personal injury cases would generally follow state tort law, to the extent that it does not conflict with a characteristic feature of federal maritime law.[25]

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[22] *Spencer v. Lunada Bay Boys*, 2016 WL 6818757, at *6 (C.D. Cal. July 22, 2016). *But see In re Complaint & Petition of Blue Water Boating*, 2018 WL 6075356 (C.D. Cal. Mar. 27, 2018) (finding activity involving operating surfboards and standup paddleboard too attenuating to apply admiralty rules).

[23] As an example of the future, which is actually already two years old, see: https://www.youtube.com/watch?v=3ah6FQP5ozk&feature=youtube.

[24] *See C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153, 63 S. Ct. 499, 87 L. Ed. 663 (1943); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 443–44, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001) ("In the intervening years, Congress has revised the language of the saving to suitors clause, but its substance has remained largely unchanged.").

[25] Because the limitations of the savings clause of Section 1333 require that the common law remedy exist at the time of the adoption of the Constitution, subsequent creation of maritime rights by statute, such as the DOHSA, require their own "savings" clause to create concurrent state court jurisdiction. *See supra,* note 10.

Consequently, where there is no common law remedy, there is no concurrent jurisdiction in state court. For example, limitation proceedings may be initiated only in federal court because this remedy was created by statute and did not exist at common law.[26] Likewise, state courts may not adjudicate *in rem* causes of action against a vessel, which is common in maritime practice and procedure in federal court but not a remedy that could be pursued in state court under common law.[27] Similarly, a claim for wrongful death is widely recognized as not having existed under common law.[28] General maritime law recognition of these remedies does not convey state court concurrent jurisdiction, as they were not allowed at common law but only available in proceedings in admiralty. Thus, in examining remedies for recreational boating cases, it is critical to appreciate the constraints federal versus state court fora can have on what relief can be pursued.

§ 15-4 PREEMPTION

The Constitution extends federal judicial power "to all Cases of admiralty and maritime jurisdiction."[29] The Supreme Court has stated that through application of the Necessary and Proper Clause of the United States Constitution,[30] Congress:

> has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further, that in the absence of some controlling statute, the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.[31]

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[26] *Ex parte Green*, 286 U.S. 437, 439-40, 52 S. Ct. 602, 76 L. Ed. 1212 (1932).

[27] *Lewis*, 531 U.S. at 444–45, 121 S. Ct. 993, 148 L. Ed. 2d 931 (citing *Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 571–72, 18 L. Ed. 451 (1867)).

[28] *Yamaha Motor Corp.*, 516 U.S. at 206, 116 S. Ct. 619, 133 L. Ed. 2d 578 ("common law in the United States, like the common law of England, did not allow recovery 'for an injury which results in death'" and "no country had 'adopted a different rule on this subject for the sea from that which it maintains on the land. . . .'") (citation omitted); *Moragne v. States Marine Lines*, 398 U.S. 375, 384, 90 S. Ct. 1772, 26 L. Ed. 339 (1970) (American courts generally adopted the English rule as prohibiting wrongful death claim under the common law of this country as well.).

[29] U.S. CONST. art. III, § 2, cl. 1 (amended 1795).

[30] *Id.* art. I, § 8, cl. 18.

[31] *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086 (1917) (citations omitted).

Southern Pacific Co. v. Jensen reestablished the principle of uniformity in maritime law, wherein the court struck down the application of state law on the principle that no state legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution.[32]

In later cases, the Supreme Court backed away from uniformity and softened the preemption of state law in maritime matters. Courts have applied state statutes that create liens, which provide for the survival of actions, that govern the specific performance of arbitration agreements, and that regulate the effect of a breach of warranty under contracts of maritime insurance as rules of decision in admiralty cases.[33] In each instance, even when the state law at issue conflicted with a general rule of maritime law, the court found that the maritime law did not require uniformity.[34] It is hard to reconcile these cases with the principle announced in *Jensen*, and the Supreme Court has acknowledged that doing so is difficult to determine when state law will apply in admiralty and maritime cases.[35] Despite the resulting confusion when state law will or will not apply, the Supreme Court has declined to create a bright-line test, instead focusing on competing, legitimate interests.[36] Thus, state law will not apply if it conflicts with the general maritime law. In certain instances, however, a court may apply state law, even when it conflicts with the general maritime law, when the maritime law does not require uniformity.[37]

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[32] *Id.* at 216, 37 S. Ct. 524, 61 L. Ed. 1086.

[33] *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373–74, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) (summarizing cases that have applied state law in an admiralty context).

[34] *Id.* at 374.

[35] *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) ("It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence.")

[36] *See Yamaha Motor Corp.*, 516 U.S. at 210 n.8, 116 S. Ct. 619, 133 L. Ed. 2d 578 ("We attempt no grand synthesis or reconciliation of our precedent."); 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 4-2 (4th ed. 2004) ("The Supreme Court has also refrained from setting out its own reconciliation of the cases and has been content to oversee a case-by-case development of often diverging lines of precedent.").

[37] *Norfolk & Portsmouth Belt Line R.R. Co. v. M/V Marlin*, No. 2:08cv134, 2009 U.S. Dist. LEXIS 61538, at *13, 2009 WL 197428 (E.D. Va. Apr. 3, 2009).

§ 15-5 ASSUMPTION OF RISK

Before examining recovery in recreational boating cases, also critical to understanding is that in many activities, there is the potential for a lack of a legal duty to be found, which is generally identified under the doctrine of *assumption of risk*. As explained by one court with respect to participation in a recreational water sporting activity:

> As a matter of common knowledge, jet skiing is an active sport involving physical skill and challenges that pose a significant risk of injury, particularly when it is done—as it often is—together with other jet skiers in order to add to the exhilaration of the sport by racing, jumping the wakes of the other jet skis or nearby boats, or in other respects making the sporting activity more challenging and entertaining.[38]

In proving a case for negligence, a plaintiff must first show there was a duty owed by the defendant by statute or a special relationship. "Under general principles of negligence law, 'persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person.'"[39] "However, under the doctrine of primary assumption of risk, 'plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. . . .'"[40] The doctrine "embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk."[41]

In determining the doctrine's applicability, courts "disregard 'whether plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct;' '[i]nstead, our resolution of this issue turns on whether, in light of the nature of the sporting activity in which defendant and plaintiff were engaged, defendant's conduct breached a legal duty of

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[38] *Whelihan v. Espinoza*, 110 Cal. App. 4th 1566, 1572, 2 Cal. Rptr. 3d 883 (2003). *See also Ford v. Gouin*, 11 Cal. Rptr. 2d 30, 834 P.2d 724 (1992) (applying doctrine to water skiing); *Record v. Reason*, 73 Cal. App. 4th 474, 475, 85 Cal. Rprt. 2d 547 (1999) (same as to "tubing" while being pulled by a boat).

[39] *Whelihan*, 110 Cal. App. 4th at 1572, 2 Cal. Rptr. 3d 883 (quoting *Knight v. Jewett*, 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992)).

[40] *Id.* (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824–25, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975)).

[41] *Id.* (citing *Knight v. Jewett*, 3 Cal. 4th 296, 308 (1992)).

care to plaintiff.'"[42] When an inherent sports risk is involved, the defendant is liable only if he or she intentionally injures another player or engages in conduct that is so reckless that it is totally outside the range of the ordinary activity involved in an active sport.[43]

The term "assumption of risk" has been used in connection with two classes of cases that often can be confused, namely:

> those in which the issue is whether the defendant actually owed the plaintiff a duty of care (*primary assumption of risk*); and those in which it has been determined that the defendant breached a duty of care, and the remaining issue is whether the plaintiff chose to face the risk of harm created by the defendant's breach of duty *(secondary assumption of risk)*.[44]

In the former class involving primary assumption of risk, the plaintiff's claim is completely barred as a matter of law because of a legal determination that the defendant did not owe any duty to protect the plaintiff from the particular risk of harm involved in the claim.[45] In the latter class of cases (secondary assumption of risk), the plaintiff's knowing and voluntary acceptance of the risk functions as a form of contributory negligence that does not operate as a complete bar to recovery but may be resolved by applying principles of comparative fault.[46] It is this latter type, secondary assumption of risk, that maritime law rejects as a defense.[47]

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[42] *Id.* (quoting *Knight v. Jewett*, 3 Cal. 4th 296, 314 (1992)); *Bushnell v. Japanese-Am. Religious & Cultural Center*, 43 Cal. App. 4th 525, 534, 50 Cal. Rptr. 2d 671 (1996) ("plaintiff's knowledge or expectations are not relevant to the defense of primary assumption of risk").

[43] Particularly in the area of athletics and recreation, the doctrine of primary assumption of the risk prevents lawsuits among participants who are knowingly engaged in the normal activities, and inherent risks, of an active sport or recreational activity. By eliminating liability for unintended accidents, the doctrine ensures activities that will not be chilled by the constant threat of litigation from every misstep, and on a larger scale, encourages recreational activity that is a socially desirable and improves the mental and physical well-being of its participants. The freedom to make such choices to enjoy recreational activity is preserved through application of the primary assumption of the risk doctrine.

[44] *Peart v. Ferro*, 119 Cal. App. 4th 60, 71, 13 Cal. Rptr. 3d 885 (2004).

[45] *Id.*

[46] *Id.*

[47] Severance, *Most Courts Are Getting It Wrong: There Is no Well-established Federal Maritime Rule Against the Doctrine of Assumption of Risk in Recreational Boating*, 25 U.S.F.

Case law recognizes that assumption of risk can be express or implied. Express assumption of risk is a contractual matter and comes into play where the plaintiff expressly agrees in advance not to expect the potential defendant to act carefully.[48] The result is that the plaintiff, in advance, has given express consent to relieve the defendant of an obligation of conduct toward him, such that the defendant is relieved of legal duty to the plaintiff.[49] While an exculpatory clause serves as a complete release of liability, as a matter of law, an indemnity (or hold harmless) clause may not be invalidated based on acts of gross negligence.[50] The standards that a release such as this one must meet are well established: "To be effective . . . a release need not achieve perfection; [a]s long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient."[51] Given the wide use of releases in the watercraft rental business, examination of these agreements and the case law upholding them is important to evaluating potential remedies in cases involving recreational boating.

§ 15-6 REMEDIES

In general, a legal remedy is the means with which a court enforces a right, imposes a penalty, or makes an order to impose its will. The law of remedies, including under general maritime law, concerns the character and extent of relief to which a party is entitled once the appropriate procedure has been followed. The four basic types of remedies are (1) damages, (2) restitution, (3) injunctive relief, and (4) declaratory remedies. As discussed in the preceding chapters and earlier in this chapter, all of the remedies available under general maritime law have developed over time and may be supplemented by state law, especially with respect to damages as discussed in the next section.

While a complete list of the means through which an admiralty court seeks to enforce a right under general maritime law would be difficult to

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MAR. L.J. 195 (2013); Lindh & Lovell, *The Primary Assumption of the Risk Doctrine is Consistent with Maritime Law*, 28 U.S.F. MAR. L.J. 93 (2016).

[48] *Coates v. Newhall Land & Farming*, 191 Cal. App. 3d 1, 7, 236 Cal. Rptr. 181 (1987).

[49] *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 755, 29 Cal. Rptr. 2d 17 (1993).

[50] *See Palla v. L M Sports, Inc.*, No. 2:16-cv-02865-JAM-EFB, 2018 U.S. Dist. LEXIS 179466, 2018 WL 5099690 (E.D. Cal. Oct. 18, 2018).

[51] *Paralift*, Cal. App. 4th at 755.

create, such an accounting would likely include the following common ones applicable to maritime personal injury cases involving recreational boating: (1) a vessel owner that violates a safety statute has the obligation of proving that the violation could not have caused the accident (*The Pennsylvania Rule*)[52]; (2) the owner of a recreational vessel may limit recovery provided the liability occurred without privity or knowledge of the owner[53]; (3) comparative fault applies[54]; (4) there is joint and several liability among joint tortfeasors[55]; (5) there is no right of contribution from a settling tortfeasor, but nonsettling tortfeasors are entitled to a *pro rata* set-off of the percentage of fault assigned to settling tortfeasors[56]; and (6) punitive damages, when available, are limited to a 1:1 ratio of compensatory damages.[57] In addition to these and those discussed in earlier chapters, recreational boating has multiple considerations with respect to remedies.

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[52] *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L. Ed. 148 (1873). *See also* Ketuuenen, *Use of the Pennsylvania Rule in Recreational Boating Accidents: An Enormous Aid to Litigants*, MICH. B. J. (Sept. 2009).

[53] *See In re Fun Time Boat Rental & Storage, L.L.C.*, 431 F. Supp. 2d 993 (D. Ariz. 2006).

[54] *De Sole v. United States*, 947 F.2d 1169, 1175 (4th Cir. 1991). *See also The Max Morris*, 137 U.S. 1, 14–15, 34 L. Ed. 586, 11 S. Ct. 29 (1890).

[55] *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408, 95 S. Ct. 1708, 1715-16, 44 L. Ed. 2d 251 (1975) ("when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of fault. . . .")

[56] *McDermott, Inc. v. Amclyde*, 511 U.S. 202, 210, 217, 114 S. Ct. 1461, 1466, 1470, 128 L. Ed. 2d 148 (1994); *see also Exxon Co. v. Sofec*, 517 U.S. 830, 837, 116 S. Ct. 1813, 134 L. Ed. 2d 113 (1996) ("There is nothing internally inconsistent in a system that apportions damages based upon comparative fault only among tortfeasors whose actions were proximate causes of an injury. Nor is there any repugnancy between the superseding cause doctrine, which is one facet of the proximate causation requirement, and a comparative fault method of allocating damages.")

[57] Punitive damages are limited to cases where "a defendant's conduct is 'outrageous' owing to 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' or behavior even more deplorable." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) ("we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases."). *See also* Felder, *Conflict Continues Between Federal and State Views on Punitive Damages*, 14-4 BENEDICT'S MAR. BULL. (Nov. 1, 2016).

§ 15-7 DAMAGES

Separate from the other procedural and substantive remedies is the issue of damages that may be recovered. The largest and often most complicated area of examination when it comes to damages is related to personal injury claims involving recreational vessels, although other areas, such a collision, warranties, and repair may present similar problems concerning the application of general maritime law and state law supplementing remedies. As discussed in previous chapters, many of the same federal general maritime rules will apply in recreational boating cases.

Admiralty courts have long recognized claims for personal injury, and as discussed earlier, when admiralty jurisdiction exists, courts are bound to apply the substantive maritime law, whether the injured party is involved in a commercial or recreational activity on the water. Damages that may be recovered in maritime personal injury cases include (1) loss of past and future wages; (2) loss of future earning capacity; (3) past and future medical expenses; and (4) pain, suffering, and mental anguish, in addition to other condition-related expenses.[58] As discussed in previous chapters, all damages may be recoverable depending on the type of claim and whether maritime law has adopted a general rule that requires uniform treatment.

§ 15-8 CONCLUSION

As discussed previously, one of the most pervasively difficult issues in admiralty practice is the extent to which state law is displaced by the federal general maritime law and to what extent it may supplement or limit recovery.[59] Applying the "wrong" law can have substantial outcome-deciding effects. As a general rule, federal maritime law should apply to all maritime torts occurring on navigable waters, including cases involving a recreational vessel as well as disputes arising under maritime contracts, including rental agreements for such pleasure craft. While many judges often are more comfortable with the law of the jurisdiction in which they deal on a daily basis, application of general maritime practice and procedure will ultimately and rightly lead to uniform results.

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[58] *See Downie v. U.S. Lines, Co.*, 359 F.2d 344, 347 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966).

[59] David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 27 J. MAR. L. & COM. 325 (1995).