BOATING BRIEFS

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Second Circuit: No maritime jurisdiction over boaters' brawl on floating dock

Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 2014 AMC 1581 (2d Cir. 2014)

The U.S. Court of Appeals for the Second Circuit has affirmed the dismissal of a limitation action brought by the owners of a boat whose passengers, after disembarking onto a floating dock, allegedly knocked another boater into the water and nearly drowned him. According to the court, an incident of this sort did not have a realistic potential to disrupt maritime commerce and was therefore not subject to maritime jurisdiction.

On a Memorial Day weekend, the owners of the 39-foot *Up and Over* docked their boat at a marina and walked with their passengers to a dockside restaurant for food and drinks. Also visiting the restaurant was another group of boaters who had moored their vessel at the marina's floating dock (some distance offshore and accessible only by water) and had ridden the marina's water taxi to the restaurant.

The trouble began when the two groups left the restaurant. As the owners and passengers of the *Up and Over* were getting back aboard their boat, one of the passengers fell into the water and sustained a scalp laceration. Members of the other group laughed at his misfortune, prompting the passengers on the *Up and Over* to respond with "presumably unfriendly comments." The *Up and Over* got underway, as did the water taxi carrying the other group of boaters back to the floating dock.

The *Up and Over* allegedly began pursuing the water taxi, with passengers on the *Up and Over* shouting and throwing a beer bottle at the water taxi. Each vessel then tied up to the floating dock, where passengers from both vessels disembarked and began brawling. During the fight, one of the people who laughed at the mishap outside the restaurant was himself knocked into the water and his head allegedly held underwater by a passenger from the *Up and Over*.

Alleging that the episode caused hypoxic brain injury and organ failure, the man sued the marina in state court on a variety of negligence and liquor-liability claims. The marina then joined the owners and passengers of the *Up and Over* as third-party defendants and asserted claims against them for contribution and indemnification. The injured man also asserted his own claims against them for negligence, negligent supervision, recklessness, assault and battery, and conspiracy. The *Up and Over*'s owners responded by filing a limitation action in federal court.

The federal district court dismissed the petition, holding that that the case satisfied neither the "location" nor "connection" tests for federal mari-

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

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time jurisdiction. In particular, the district court held that the location test was not met because the floating dock—being more or less permanently affixed to the harbor bottom—was effectively an extension of land. Moreover, the connection test was not met because, in the district court's view, this kind of incident did not have the potential to disrupt maritime commerce. The *Up and Over*'s owners appealed.

Under Second Circuit precedent, a federal court may entertain a limitation action only if the underlying claims as to which the owner seeks limitation are themselves subject to maritime jurisdiction. And, according to the U.S. Supreme Court, a tort gives rise to maritime jurisdiction only if (1) the tort occurs on navigable waters (or a shoreside injury is caused by a vessel on navigable waters); (2) considering "the general features of the type of incident involved," the incident has "a potentially disruptive impact on maritime commerce"; and (3) "the general character of the activity giving rise to the incident" has a "substantial relationship to traditional maritime activity."

As to the location of the tort, the Second Circuit noted that this incident was not confined to the floating dock but rather extended into the surrounding navigable water, where the claimant had allegedly almost drowned. Yet rather than decide "the difficult question of where the underlying tort (or torts) here occurred," the court moved directly to the second inquiry: did "the general features of the type of incident involved" have a realistic potential to disrupt maritime commerce?

The answer to that question of course depends on how one chooses to characterize "the general features of the type of incident involved." In this case, the Second Circuit focused on the immediate circumstances of the injury: "We conclude that the incident at issue in this case is best described as a physical altercation among recreational visitors on and around a permanent dock surrounded by navigable water."

With the "general features" of the incident so described, the court then observed that a fistfight between non-seafarers on and around a dock was unlikely to affect commercial shipping. And while "an incident of this sort might temporarily prevent commercial vessels from mooring at the permanent dock around which the fight occurred . . . , the potential impact of such a temporary disruption is simply too meager to support jurisdiction." Nor, in the court's view, would the need to rescue injured persons by boat constitute a realistic potential for disruption: "The risks to maritime commerce posed by a rescue operation at a dock are substantially lower than the risks to maritime commerce posed by a rescue operation at sea." Thus, perceiving little chance of commercial disruption flowing from a fistfight on and around a floating dock, the Second Circuit held that the district court was right to dismiss the case for lack of jurisdiction.

But what if one focuses not on the immediate cause of the injury, as the Second Circuit did, but on the substance of the claims underlying the limitation action? As described by the claimant, his injury was the culmination of several events involving vessels on navigable waters: (1) one vessel pursuing—and its passengers hurling a projectile at—another vessel; (2) vessel owners improperly supervising their passengers; (3) vessel owners conspiring with their passengers to harm another vessel's passengers; and (4) vessel owners discharging their passengers onto a floating dock where they were likely to assault people leaving another vessel. Based on the claimant's own allegations, the "general features" of the incident would have been more aptly characterized as a dockside assault by unruly passengers. So characterized, the incident should have been sufficient to sustain maritime jurisdiction. See *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963) (maritime jurisdiction exists if "the shipowner commits a tort while or before the ship is being unloaded, and the impact . . . is felt ashore at a time and place not remote from the wrongful act"). ■

In Texas, claim of negligent provision of alcohol to boat passenger is not subject to maritime law

Schlumberger Tech. Corp. v. Arthey, 435 S.W.3d 250 (Tex. 2014)

This case arose from an automobile accident that severely injured two motorcyclists, the Artheys. The offending automobile was driven by Huff, who earlier in the day had allegedly become intoxicated during a boating trip. The trip was part of a fishing retreat sponsored by the oilfield-services company Schlumberger.

Bringing suit in state court, the Artheys claimed that Schlumberger negligently allowed Huff to drink too much on the boat. The claim was based on maritime law, under which vessel operators have been held liable for serving alcohol to a passenger whose intoxication later causes injury to a third person. The trial court granted summary judgment for Schlumberger, holding that the claim was governed by Texas law, which does not recognize social-host liability. The Texas Court of Appeals reversed, concluding that maritime law applied and that factual disputes precluded summary judgment for Schlumberger.

On review in the Texas Supreme Court, the parties agreed that the Artheys could avail themselves of maritime law only if the case satisfied both the "location" and "connection" tests for maritime jurisdiction. An expert for the Artheys opined that Huff, given his blood-alcohol content at the time of the accident, must have been drinking on the boat. The court therefore had to assume that the location test was met.

Yet the court went on to hold that the case had an insufficient "connection with maritime activity" and was therefore not subject to maritime law. According to the court, a guest consuming alcohol on a small fishing boat poses no significant risk to navigation because such a guest is (typically) not operating the boat. And there was no demonstrated history of shipping being disrupted by drunken fishermen: "Drinking while fishing, if not a time-honored tradition, is certainly common enough that, if it posed more than a fanciful risk to commercial shipping, reports of disruptions to commerce would abound."

The Artheys cited cases that had considered the negligent provision of alcohol to seamen on ships or passengers on casino boats to be a maritime tort. But the Texas court drew a distinction between drinking on a large commercial vessel (which was more likely to disrupt maritime commerce) and drinking on a small recreational boat (which was less likely to do so). Such a distinction arguably runs afoul of the U.S. Supreme Court's admonition that maritime jurisdiction does not turn on the size of the vessel or the nature of its trade. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675-76 (1982).

The Artheys have petitioned the U.S. Supreme Court to review the Texas court's judgment. ■

Insurance

Jury finds for insurer due to misrepresentations in insurance application

Gamez v. ACE Am. Ins. Co., 2014 WL 3921366 (S.D. Fla. Aug. 11, 2014)

A cousin of the insured lent the insured's new fishing yacht to an acquaintance for a fishing trip. The acquaintance and the vessel mysteriously disappeared, and the insurer declined to cover the loss.

At trial the jury found for the insurer on the basis that the insured intentionally misrepresented material facts in his insurance application. The insured moved to set aside the verdict, arguing that Florida law did not allow a policy to be rescinded unless the insured breached or violated a term of the policy or insurance application and "such breach or violation increased the hazard by any means within the control of the insured." The vessel had disappeared mysteriously while outside the insured's control, the

nature of the "hazard" that befell it was unknown, and thus, the insured argued, there was no evidence to support a rescission defense.

But the court observed that under Florida law a misrepresentation in an insurance application is treated differently from a breach of warranty. A misrepresentation, even it does not increase the hazard, can nevertheless vitiate the policy if the misrepresentation affected the insurance company's ability to assess the risk and set the premium.

Here there was evidence that the insured made intentional and material misrepresentations on his application. These misrepresentations included: listing the wrong primary address for the vessel's location; listing only the insured as the owner when in fact the vessel was to be owned jointly by the insured and his cousin; listing the insured as the "primary operator" when in fact the cousin was to have greater control over the vessel; and misstating the insured's prior vessel-owning experience. Because these misrepresentations could affect the insurer's ability to properly assess the risk and set the premium, the jury's verdict stood. ■

Eleventh Circuit applies "wear and tear" exclusion to sinking

Miele v. Certain Underwriters at Lloyd's, 559 Fed. App'x 858 (11th Cir. March 17, 2014) (unpublished)

Plaintiffs' 32-foot yacht sank while docked. After a surveyor determined that the sinking was caused by water entering through a "degraded and rotten" air-conditioning hose, the insurers denied coverage. The denial was based on the policy's "wear and tear" exclusion, which stated that there would be no coverage for "losses and or damages arising (whether incurred directly or indirectly) from . . . [t]he cost of repairs or replacing any part of Your Boat by reason of wear and tear [or] gradual deterioration."

During discovery the insurers gave notice that they intended to rely on expert testimony from a materials and corrosion engineer. The engineer tested a sample of the hose and issued a report stating that the hose had been used beyond its service life and had failed due to deterioration.

The insurers moved for summary judgment and submitted a declaration by the engineer. In content the declaration was virtually identical to the report, but the declaration itself had not been previously shared with plaintiffs. Plaintiffs opposed the motion and moved to strike the declaration. The district court declined to strike the declaration and entered summary judgment for the insurers, concluding that the undisputed cause of the casualty was the failure of the air-conditioning hose, that the hose failure fell under "wear and tear" exclusion, and that coverage for the sinking was therefore excluded.

Affirming, the Eleventh Circuit observed that there was no question that the boat sank because of the hose failure. Moreover, the competent evidence showed that the hose failed due to wear and tear. Although the plaintiffs disputed that conclusion, they offered no evidence to support an alternative explanation for the hose failure. Plaintiffs did submit affidavits from several acquaintances attesting that the yacht was well maintained, but because these affidavits did not deal precisely with the condition of the hose, they did not raise a genuine issue of material fact.

Plaintiffs also argued that the "wear and tear" exclusion was ambiguous and should be construed as excluding only coverage for the cost of the hose rather than coverage for the entire sinking. The clause at issue excluded coverage for any loss relating to "[t]he cost of repairs or replacing any part of Your Boat by reason of wear and tear." Under plaintiff's reading, the exclusion pertained only to the cost of replacing the particular part that was worn and torn. But the vessel was "nothing but a sum of its parts," and under the Eleventh Circuit's reading, the exclusion applied to the entire collection of parts—the entire vessel—so long as the loss arose from wear and tear in at least one of the component parts. ■

Limitation of Liability

Alleged negligence by instructor does not bar sailing school's limitation action

In re Lake Champlain Community Sailing Center, Inc., 2014 WL 4060303 (D. Vt. Aug. 14, 2014)

A sailing class was out on a sailboat on Lake Champlain when bad weather caused the boat to capsize. The instructor in a nearby motorboat—rather than immediately coming to the rescue—allegedly instructed the students to try to right the sailboat. After some time in the water, the students were rescued by the Coast Guard.

One student sued the sailing center in state court, alleging that she was an inexperienced sailor and that she suffered permanent injuries due to various forms of negligence on the part of the center, whom she claimed did not heed the weather forecast, had too few safety boats and instructors on the water, did not properly train its instructors, and failed to rescue her after the capsizing.

As owner of the sailboat, the sailing center brought a limitation action in federal court. The student moved to dismiss the petition, arguing that the pleadings established "privity or knowledge" on the part of the sailing center and thus precluded any right to limitation. Specifically, she argued that the actions of the instructor supervising the class were imputable to the sailing center. She asserted that in assessing whether a corporation has privity or knowledge, a court must divide the corporation's employees into two groups—supervisory "managers" and ministerial "employees"—and that the instructor in this case was a manager whose negligence necessarily deprived the sailing center of any right to limit its liability.

But at this early stage of the litigation, the court noted that the record was limited to the facts alleged in the pleadings. The limitation petition, read in conjunction with the student's response and the pleadings from the state action, did not establish that the instructor was acting as a manager. Indeed, the sailing center denied that its employees had any supervisory role and also denied that there was any failure to train, to heed the weather report, or to provide a sufficient number of safety boats and instructors. Therefore, "even if the Court were to accept the supervisory/ministerial rubric," the sailing center had stated a plausible claim for limitation of liability, and the limitation action could not be dismissed. ■

Salvage

Court voids salvage contract and denies all recovery after finding that salvor misrepresented agreement

St. Claire Marine Salvage, Inc. v. Bulgarelli, 2014 WL 3827213 (E.D. Mich. Aug. 4, 2014)

Michael Bulgarelli ran aground on Lake St. Clair in a 36-foot Sea Ray that he had purchased a few months earlier. There were no injuries, and his boat was undamaged. Bulgarelli called for assistance, and a salvor responded. After an agreement was signed, the salvor freed the vessel. Its salvage invoice not having been paid, the salvor brought suit to enforce a salvage lien and to recover for breach of contract or quantum meruit/unjust enrichment. Aside from these basic facts, the parties seemingly agreed on little else.

The salvor testified that when he arrived on the scene he could see, based on the boat's waterline, that the Sea Ray was hard aground. He stated that the wind was blowing at 20-25 knots, the sea was extremely rough, and the Sea Ray was in a channel with a high current. He testified that he boarded the Sea Ray and told Bulgarelli that the cost to free the vessel would be $250 per foot (equivalent to $9,000) and, since the vessel was hard aground, that the cost would not be covered by Bulgarelli's TowboatUS policy. The salvor testified that he

handwrote "$250.00 FT" on the standard-form agreement before Bulgarelli signed it.

The salvor then maneuvered his vessel to the Sea Ray's bow, "tucked" his vessel under the grounded boat, and "dug out" the boat using the wash from his props. He contended that the risk level was "high" given the weather and the possibility that the Sea Ray could be damaged if it were simply pulled straight out. The extraction took about a half hour.

The salvor testified that, once the Sea Ray was freed, he returned to the marina and prepared an invoice to be sent to Bulgarelli's insurance company. He claimed that it was not his practice to give a signed copy of the salvage contract to a customer at the time of service. Rather, he prepared a written statement on a word processor, and this statement was then incorporated into the invoice.

On cross examination, the salvor reiterated that he determined this to be a "hard" grounding only after he arrived on the scene. He was then confronted with a copy of the invoice which read "Received a call from Boat US dispatch that a member was stranded hard aground . . . ." The salvor explained that, due to his familiarity with the bottom conditions in the area, he had assumed the boat was "hard" aground before seeing it. Cross examination then turned to the salvage company's involvement in other litigation against boaters in similar circumstances. In most of those cases, the salvage agreements had not contained any written statement of the amount to be charged for the service.

The Sea Ray interests called two witnesses. First, Kimberlie Jones testified that she was Mr. Bulgarelli's friend and accompanied him on the boat ride in question. She described the weather that day as "perfect"—in the 80s with calm water and little wind. She said that while Bulgarelli did sign a salvage agreement, nothing in the document suggested that the fee would be $250 per foot. In fact, she said that when Bulgarelli asked how much it would cost, the salvor told him $1,000 to $1,200. She also testified that the salvor simply tied a line to Bulgarelli's boat and pulled it off "within minutes."

Mr. Bulgarelli was next on the stand. He testified that he ran aground on a sandy bottom while going ahead slowly. He got into the water and tried to push the boat off, but was unsuccessful and then called TowBoatUS for a tow. He stated there were no rocks on the bottom and that the water was calm. According to Mr. Bulgarelli, the salvor indicated that the charge for the tow would be $1,000 to $1,200. While Bulgarelli thought the price was high, the salvor assured Bulgarelli that his insurance company would cover it. He testified that the salvor never mentioned a charge of $250 per foot and that the agreement he signed did not contain any handwritten notation of "$250.00 FT." He added that he would not have signed any agreement if he believed the charge was going to be $9,000.

Bulgarelli testified that his boat "came right off" in 5 to 10 minutes, using a single line, and that the salvor never churned up the area in front of the boat. Bulgarelli said that he was unaware of the $9,000 charge until he saw the invoice that was sent to his insurance company a couple of weeks later. He testified that his insurance company determined the service to be a "tow" and not "salvage" and offered to pay $1,000 for the claim but that the salvage company would not accept it.

The court evaluated, among other things, the demeanor of the witnesses, the plausibility and consistency of the testimony, and the witnesses' interests in the outcome of the case. The court noted that the salvor seemed reluctant to respond to some questions and denied knowledge of the underlying facts of a half-dozen similar lawsuits in which the salvage company was involved. According to the court, his account of when and how he determined the Sea Ray to be "hard" aground was implausible, and his narrative report appeared to be designed to persuade rather than to merely recount the facts. Lastly, the court thought it unlikely that the salvor would have boarded the Sea Ray if the seas were

truly as rough as he described. By contrast, the court found Mr. Bulgarelli's and Ms. Jones' testimony to be credible.

Noting an admiralty court's authority to set aside salvage contracts procured through fraudulent misrepresentation, the court held that the contract signed by Bulgarelli was unenforceable. In these circumstances, the court also dismissed the salvor's claim of lien and denied any recovery for quantum meruit or unjust enrichment. ■

Where boat owner challenged validity of salvage contract generally—but not the arbitration clause specifically—his claims of duress had to be arbitrated

Farnsworth v. Towboat Nantucket Sound, Inc., 2014 WL 3749157 (D. Mass. July 28, 2014)

Plaintiff was anchoring his yacht, the *Aurora*, in Weepecket Island anchorage in Buzzards Bay when he ran aground. He testified that his vessel remained undamaged and watertight. Plaintiff had a towing insurance policy covering tows, but not salvage, and he called Defendant for assistance.

Approximately one hour later, Defendant's tow vessel *Northpoint* arrived. Defendant maintained that a line of thundershowers was moving in with heavy rain, lightning, and winds around 20 knots gusting to 33 knots. Visibility was less than 300 feet, and the *Aurora* was in shallow water with a rocky bottom. Plaintiff allowed the *Northpoint* to give him a towline, which was secured to the *Aurora*. The *Northpoint*'s captain then called Plaintiff on his cell phone and explained that any towing services would not be covered under the towing policy due to the rocky location and the adverse weather.

Approximately six hours later, the tide had risen enough to pull the *Aurora* to deeper water. The *Northpoint* allegedly pulled the *Aurora* across some rocks, causing damage to the hull. Still, Plaintiff maintained that his vessel remained seaworthy. Once clear of the rocks, Plaintiff cast off the towline, sailed to the harbor in Woods Hole, and anchored there with the *Northpoint*. Two of Defendant's employees then boarded the *Aurora,* presented Plaintiff with a form of salvage contract, and allegedly told him they would not leave until he signed it. Plaintiff resisted, but eventually signed the document at around 3:30 a.m. He contended that he had no other option as he was alone aboard his vessel in a remote location in the middle of the night. The salvage contract contained an arbitration provision.

Plaintiff sought a preliminary injunction to bar Defendant from enforcing the contract's arbitration clause. The injunction request was stayed pending the outcome of the arbitration. Later, an arbitration panel awarded Defendant $50,000. The panel specifically found that Plaintiff was not under duress when he signed the contract. Defendant then asked the court to confirm the arbitration award.

Plaintiff maintained that the arbitration clause was unenforceable, as he was forced to sign the salvage contract under duress and, as such, the arbitration panel had no authority to decide the dispute. Defendant responded that Plaintiff's duress claim was itself arbitrable since it was nothing more than a general challenge to the contract itself and not a specific challenge to the arbitration clause. Defendant also maintained that, given the panel's finding that the contract was not signed under duress, the arbitration award should be confirmed.

The arbitration clause did not expressly require that its validity be determined through arbitration. But under the Federal Arbitration Act, the court wrote, an arbitration clause is severable from the contract in which it is contained, and the clause must be enforced according to its terms unless the party resisting arbitration makes a specific challenge to the enforceability of the arbitration clause itself. The court held that Plaintiff could not challenge the arbitration panel's authority simply by pleading that he signed the salvage contract under duress. Rather, to challenge the panel's authority, he would have needed to specifically allege that he agreed to the

arbitration clause under duress. Plaintiff's complaint was "devoid of any specific allegations that plaintiff agreed to the arbitration clause (as opposed to the contract itself) under duress."

The court noted that the salvage contract was undeniably signed "under circumstances that, to put it charitably, were not conducive to negotiation." Nonetheless, since the arbitration clause by its own terms covered "any dispute arising out" of the contract, the arbitration panel acted within its authority. The court held that, under the circumstances, it had no option but to confirm the arbitration award. ■

Torts

Washington Appeals Court rejects defense of parental immunity in tubing case

Woods v. H.O. Sports Co., 333 P.3d 455 (Wash. App. 2014)

Tori Woods was rendered a quadriplegic after a tubing accident. He and two friends were riding in an inflatable tube being towed by a boat driven by Tori's father. The three boys were all ejected when the tube hit a wake. One of the boys landed on Tori, breaking his neck. Tori filed suit against his father for negligence and against H.O. (the designer and maker of the tube) for product liability. The father moved for summary judgment on the basis of parental immunity. The trial court granted the father's motion.

The appellate court explained that the doctrine of parental immunity originally barred a personal-injury suit by a child against a parent, regardless of the parent's conduct. The purpose was to honor parents' exercise of discipline and discretion, which might otherwise be chilled through tort liability.

The court noted that parental immunity has more recently been held not to apply if the parent negligently operates an automobile, if the parent injures the child during a business activity, or if the parent "engages in willful or wanton misconduct or intentionally wrongful conduct." Additionally, the Washington Supreme Court declared in *Borst v. Borst*, 251 P.2d 149 (1952), that "when the parental activity . . . has nothing to do with parental control and discipline, a suit involving such activity cannot be said to undermine those sinews of family life."

Thus, a distinction needed to be drawn between the parent's decision to allow a child to participate in an activity (which would presumably still be covered by the parental-immunity doctrine) and the parent's actual participation in the activity, such as driving a vehicle. Here, because the father's actions while driving the boat did not involve matters of parental control, discipline, or discretion concerning how best to raise his child, the court decided that parental immunity should not apply. As a result, the claim against the father could proceed. ■

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