RECENT DEVELOPMENTS IN SALVAGE LAW

MARITIME LAW ASSOCIATION, SALVAGE COMMITTEE, SPRING 2013

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IN RE OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN THE GULF OF MEXICO, 2012 WL 5960192 (E.D. La., 2012). *Immunity for responders.*[1]

Plaintiffs asserted general maritime law and state law claims against defendants on behalf of individuals allegedly injured by exposure to oil and chemical dispersant as a result of the clean-up efforts following the DEEPWATER HORIZON oil spill. Defendants moved for summary judgment, arguing they were entitled to derivative governmental immunity and/or preemption of plaintiffs' claims under the Clean Water Act and the National Contingency Plan. The court granted defendants' motion for summary judgment and dismissed the claims against the responders, holding that the claims are preempted by the Clean Water Act and the National Contingency Plan. The court's decision indicates that a responder who acts in accordance with the National Contingency Plan and under the direction of a Federal On-Scene Coordinator is entitled to immunity for any harm allegedly incurred as a result of such actions.

HOEFLING V. CITY OF MIAMI, ET AL., 876 F. Supp.2d 1321 (11th Cir. 2012). *Qualified immunity to municipality and officers for removing (and destroying) derelict sailboat from state waters.*[2]

In this action brought pursuant to 42 U.S.C. 1983, the issue before the court was whether or not municipal law enforcement officers have qualified immunity for removing a vessel from state waters and destroying her in furtherance of their mandate.

Plaintiff owned a derelict sailboat that had no motor, sails, helm or rudder for propulsion or steering and had been advised that she needed to be removed or brought into compliance with state law. As a result of his failure to do so, plaintiff was issued three citations. Eventually state law enforcement caused the sailboat to be removed from state waters and destroyed.

Plaintiff sued for intentional destruction, negligent destruction, and violations of the U.S. Constitution. Defendants filed a motion to dismiss based, in part, on qualified immunity. The court determined that the officers were acting within their discretionary functions, particularly where plaintiff received several notices prior to his vessel and belongings being destroyed.

The court afforded the municipality and its officers qualified immunity; the officers did not owe a duty of care to the vessel owner where the officers acted within the confines of mandates, were enforcing laws, and notice was given to the vessel owner.

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DONJON MARINE CO. INC. V. WATER QUALITY INSURANCE SYNDICATE, 12-1887cv (2d Cir. 2013). *Salvor completed work but not clear whether debtor guaranteed payment under salvage agreement.*

WQIS's motion to stay a portion of the federal litigation (concerning whether Donjon failed to complete a portion of the work required of it under a salvage contract) pending arbitration was denied because it could not be shown that the proposed arbitration would conclude within a reasonable time.

WQIS disputed whether Donjon completed the work contemplated by the salvage agreement. WQIS offered no admissible evidence that Donjon failed to recover equipment in the general footprint of the sunken vessel, while Donjon supplied affirmative evidence that it had, in fact, done so.

The court found that WQIS was the guarantor of a debt for the salvage, it deemed it "far from clear that the pollution prevention services agreement was a guarantee under the same terms as the guarantee related to the Salvage Agreement" and vacated and remanded that limited portion of the lower court's ruling concerning the pollution prevention services agreement.

COLUMBUS-AMERICA DISCOVERY GROUP, INC. V. THE UNIDENTIFIED, WRECKED AND ABANDONED SAILING VESSEL, ET AL., 795 F. Supp.2d 395 (E.D. Va. 2011). *Court unseals inventory of treasure from wrecked vessel.*[3]

The court exercised its continuing jurisdiction over a protective order originally entered in 1990 in connection with a dispute over gold coins, bars, nuggets and dust recovered from the wreck of the *S.S. Central America*. In 1998, a detailed inventory of all items recovered from the vessel was filed under seal with the court. In a related case pending in the Southern District of Ohio, certain parties sought to have the author of the inventory produce the document at his deposition. Those parties moved the court for a modification of the protective order to unseal the inventory.

The court had previously ordered the inventory unsealed in 1998 - with a thirty-day delay to allow for immediate appeal – but was reversed by the Fourth Circuit which held that the premature release of the inventory could damage the value of the inventory and reversed the lower court ruling. However, the Fourth Circuit noted that the inventory would eventually be made public and that future motions should receive due consideration in the district court.

The court granted the motion to unseal. As all of the gold had been sold and the plaintiff in the original case had fully divested itself of its physical interest in the treasure, the concern over damaging the market for the inventory was deemed irrelevant. Additionally, no interested party objected to the release of the inventory. Thus, the court determined that "[t]he time has come for the public to 'judge the product of the courts' in this case by giving them access to the inventory of historic materials recovered from the *S.S. Central America* wreck" and ordered the release of the inventory.

FATHOM EXPLORATION, L.L.C. V. UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, 857 F. Supp.2d 1269 (S.D. Ala. 2012). *Shipwreck not DIXEY, provisionally AMSTEL, not yet determined whether abandoned.*[4]

In 2004, Fathom brought action against the *in rem* defendant consisting of what is believed to be multiple shipwreck sites near Mobile Bay. The action was stayed to afford a reasonable opportunity to identify the vessel(s) at issue. In 2011, the court lifted the stay as to the singular site identified as SHIPWRECK #1 believed by some litigants (including Fathom) to be the AMSTEL and others to be the ROBERT H. DIXEY. The court was left to decide from the known facts the identity of SHIPWRECK #1.

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DIXEY met its demise after being pushed 12 nm by a hurricane all the while breaking apart and losing cargo. In contrast, SHIPWRECK #1's cargo was found in a single tight grouping, organized and stacked on the sea floor. Such inconsistencies led the court to conclude that SHIPWRECK #1 is not DIXEY.

The facts about SHIPWRECK #1 are consistent with what was known about AMSTEL, but apparently there were too many uncertainties for the court to so hold. Instead it concluded, "SHIPWRECK #1 may be provisionally identified as the AMSTEL." Thus, Fathom was left to continue researching and to notify the court of findings that shed light on the vessel's identity.

Even if the vessel is further identified as the AMSTEL, Fathom's right to salvage may turn on whether AMSTEL had been abandoned under the Abandoned Shipwreck Act of 1987, 43 U.S.C. 2101, et seq. The parties were ordered to file a joint status report proposing a procedure to litigate and resolve the abandonment issue.

ODYSSEY MARINE EXPLORATION, INC. V. UNIDENTIFIED, SHIPWRECKED VESSEL, ITS-APPAREL, TACKLE, APPURTENANCES & CARGO LOCATED WITHIN CENTER POINT, 2012 WL 3541988 (M.D. Fla. 2012). *Claims as to purported MERCHANT ROYAL denied.*[5]

Plaintiff/Intervenor Keith Bray brought two claims pertaining to salvage rights for what it believed was the MERCHANT ROYAL, a British ship that foundered while transporting cargo worth $500 million.

The first claim sought rescission of a written contract entered into with plaintiff Odyssey. Bray sought to have a written agreement between himself and Odyssey rescinded on grounds of fraudulent inducement and mutual mistake. The court explained that rescission is not a cause of action but rather a remedy. However, Florida courts had sufficiently muddled the distinction between cause of action and remedy that rescission had become a well-recognized basis for a claim. Still, Bray failed to allege certain requisite elements to its claims. The claims for rescission, mutual mistake, and fraudulent inducement were dismissed.

Bray's second claim sought declaratory judgment for contractual rights to 7.5% of the prospective discovery of the vessel MERCHANT ROYAL. The court *sua sponte* inquired whether there was a case in controversy and standing in order to bring this claim within its jurisdiction. The court held that because the MERCHANT ROYAL remains undiscovered, and Bray will not incur any real or immediate injury before the vessel is recovered, to rule on this claim would amount to an advisory opinion and the action was dismissed.

SMITH V. TEXAS, 2012 WL 5868657 (S.D. Tex. 2012). *Plaintiff collaterally estopped from claims grounded in the theory that plaintiff had ownership interest in the alleged shipwreck.*[6]

Plaintiff asserted various causes of action against defendants arising from an injunction issued in a 2010 lawsuit barring plaintiff from attempting to excavate the treasure and contents of a historic vessel allegedly found by plaintiff. The crux of plaintiff's claims centered on an alleged conspiracy by defendants intended to deprive plaintiff of said vessel and its contents -- the underlying premise of all such claims being that the alleged shipwreck existed and that plaintiff had an ownership interest in the vessel as well as the right to excavate. Unfortunately for plaintiff, the issue of whether plaintiff had any claim to the alleged vessel or its contents had been litigated in 2007 and again in 2010. Because the issue of plaintiff's ownership interest in the alleged shipwreck had been adjudicated in two separate lawsuits, the court construed the plaintiff's claims as collateral attacks on the final judgments of the 2007 and 2010 actions, which would require the court to improperly review the prior final judgments.

[5] *Id*.

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Consequently, the court held that plaintiff's claims grounded in the theory that plaintiff had an ownership interest in the alleged shipwreck were precluded as a matter of law under the doctrine of collateral estoppel.

AQUA LOG, INC. V. LOST AND ABANDONED PRECUT LOGS AND RAFTS OF LOGS, 709 F.3d 1055 (11th Cir. 2012). *Georgia's Flint River is Navigable.*[7]

The Eleventh Circuit had to determine whether a timber company, Aqua Log, Inc., could assert a maritime salvage claim against the State of Georgia over Aqua Log's recovery of certain abandoned logs in the rural and inland Flint River and its tributary, Spring Creek.

As predicate to claiming salvage over the logs, Aqua Log had to show that its claims lay within the U.S. District Court's original admiralty jurisdiction. To that end, Aqua Log had to show the claim arose from a navigable waterway of the United States – the Flint River.[8] In brief, "navigable" is defined as crossing state lines. Georgia moved to dismiss the claim, arguing the Flint River was not "used" for navigation, even though it technically flowed into a lake in Florida and thereby crossed a state line. Accordingly, Georgia asserted the district court, absent its admiralty jurisdiction, lacked subject matter jurisdiction over the claim and the lawsuit must be dismissed. The district court considered the activities on the Flint River, agreed with Georgia, and dismissed the lawsuit.

Aqua Log appealed, correctly arguing the test was not whether a waterway was being used for navigation, but whether it was *capable* of being so used. The Eleventh Circuit agreed with Aqua Log, finding the Flint River was indeed a navigable waterway and holding that admiralty jurisdiction therefore existed, and the case was remanded for trial.

ESOTERIC, LLC V. M/V STAR ONE, ET AL, 2012 A.M.C. 2698, 2012 WL 2105611 (11th Cir. 2012). *Salvage need not be total to be compensable; salvage award affirmed where vessel contributed to success of salvage; award of attorneys' fees based on bad faith conduct of defendant reversed.*[9]

The plaintiff's yacht, *M/V ESOTERIC* responded to an emergency call in the Bahamas from the defendant's yacht, *M/V STAR ONE*, which was capsized and flooding in 1,000 fathoms of water in a busy sea lane and was at risk of sustaining further damage by drifting onto a nearby reef.

The *ESOTERIC* towed the *STAR ONE* to a safe anchorage, as directed by Bahamian authorities. Several days later, another salvor towed the *STAR ONE* to Miami for repairs. The plaintiffs, owners of the *ESOTERIC*, sued the defendant *M/V STAR ONE* and her owners, for salvage. Following a 2-day bench trial, the district court awarded the plaintiff $67,800.00 for salvage and $72,755.00 in attorneys' fees. The Eleventh Circuit Court of Appeals affirmed the salvage award and reversed on the award of attorneys' fees.

On appeal, the defendants contested that the plaintiff was successful in the salvage. However, the court observed that "to be successful, a party need not be responsible by itself from saving the property at issue; it is sufficient if his efforts contributed in some way to the ultimate success." *Id.* at * 641. (internal quotes and citations omitted). Applying this rule, the court found that absent the plaintiff's

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[8]It should be noted that Bowen Jones, U.S. Merchant Marine Academy class of 1997 and native of Griffin, Georgia, grew up with a cabin on the banks of the Flint River. Bowen was the most southern person this New Jersey native had ever met. Naturally, we were roommates. And of course we visited the cabin and canoed the Flint River several times with Mr. Jones and his family. In approximately 1995, a particularly curmudgeonly professor of navigation at Kings Point, the aptly named Capt. Douglas Hard, posed a series of questions on a final exam about navigation on, of all places, the Flint River. Although an engineering midshipman at the time, even I knew the questions were ludicrous: the river is barely knee deep. Bowen Jones, a deck major, was apoplectic. "Everyone knows you *cain't* navigate the Flint River." He said. "Capt. Hard is ridiculous." Fast forward nearly twenty years and the Eleventh Circuit Court of Appeals closes the loop for all of us! Capt. Hard was right after all.
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efforts, the *STAR ONE* likely would have sunk in 6,000 feet of water, or, in the alternative, fetched up on the reef and sustained further damage. The *ESOTERIC*'s efforts saved the *STAR ONE* to fight another day, allowing professional salvors to pump the vessel dry and tow for repairs in Miami. Accordingly, the court upheld the salvage award.

Finally, the court addressed the lower court's award of attorneys' fees based on its finding that defendant had acted in bad faith. The district court had determined that defendant had no basis for disputing ESOTERIC's salvage claim and had no cognizable defense in law. After noting that attorneys' fees are not generally recoverable in admiralty cases, the court found that a challenge to the success element for salvage based on testimony that the vessel's condition had remained unchanged (capsized and mostly submerged) after the ESOTERIC's efforts did not constitute an abuse of the legal system, especially considering the fact-intensive nature of a salvage effort, and reversed the award of fees.

RELIABLE SALVAGE AND TOWING, INC., V. BIVONA, 476 Fed. Appx. 852 (11th Cir. 2012). *Court allows attorneys' fees for bad faith defense where vessel owner concedes salvor's right to compensation.*[10]

The issue before the court was whether to allow attorneys' fees where a contractual salvage claim was denied and pure salvage was allowed. The attorneys' fees at issue were 2.5 times the salvage award ($35,592.50 and $14,000.00, respectively).

After confirming that attorneys' fees are generally not permitted, the court affirmed the award of attorneys' fees because the vessel owner's defense (that the vessel was not in peril) was made in bad faith. The vessel owner was successful on the contractual salvage claim (contract terms were substantially insufficient), and contended that a pure salvage award can only be determined after consideration of many factors with a burden on the plaintiff. Unfortunately, his defense of lack of peril was deemed not well founded. Further, the vessel owner did not dispute that the claimant had a right to be compensated for salvage and admitted it should only have taken him 6-8 weeks after his insurer denied coverage to meet with the claimant to negotiate some type of arrangement for payment. The vessel owner did not argue that the salvage award was excessive. Accordingly, the defense to the pure salvage claim was deemed to be made in bad faith. Essentially, although the contractual salvage claim was denied, since pure salvage was awarded and the owner conceded that the salvor had a right to compensation, the defendant was stuck with the plaintiff's attorneys' fees.

LUIS E. CAYERE V. MALTA MEDITERRANEAN SHIPPING CO., 2012 WL 3112330 (D.P.R. 2012). *Salvor must post security for vessel owner's counterclaim*.[11]

Seeking marine salvage damages, plaintiffs filed suit *in rem* against the luxury yacht M/Y TROTTER and her owner, Malta Mediterranean Shipping Co. Plaintiffs rendered assistance when the TROTTER became grounded on the rocks near Culebrita Bay. Shortly after the rescue, plaintiffs filed suit against the *Trotter* and the vessel's owners. During the preliminary hearing, the Salvors requested an award of $150,000.00. Furthermore, the defendants filed a counterclaim for $294,774.12 in damages.

At the hearing, the court found there were "reasonable grounds" for the vessel's arrest because the plaintiffs were entitled to a maritime lien, enforceable by an *in rem* action against the vessel. Consequently, the court granted the plaintiffs' bond request at $250,000.00.[12] However, the court also granted the defendants' request for security for their counterclaim using the same formula prescribed to

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[12]The Rules require that a special bond for the vessel's release be in an amount sufficient to satisfy the amount of the plaintiff's claim plus accrued interest, but the principal of the bond may not be greater than the lesser of twice the plaintiff's claim or the value of the property on due appraisement. *See* Supp. R. Admiralty & Maritime E(5)(a).

set the security for the affirmative claim. The court based its order on Supplemental Rule E(7)(a) which "requires counter-security and staying the original claim until it is given".[13] The plaintiffs were then barred from pursuing their claim until they posted the counter-security.

The court elected not to decline counter-security despite the last clause of Rule E(7)(a) which other courts have apparently interpreted to allow them broad discretion in whether or not to order countersecurity.[14] However, the court's ruling also clearly reminded the parties they are free to negotiate and stipulate to appropriate amounts of security, or stipulate that no security is necessary at all.[15]

LAY V. HIXSON, ET AL., 2012 WL 3778279 (S.D. Ala. 2012). *Claimant denied salvage award due to failure to establish existence of maritime peril when vessel towed from secure location.*[16]

This action arose when the plaintiff brought a cause of action to obtain a salvage award under general maritime law after he voluntarily towed a barge miles from its original position, where it had been securely moored for over three years. The court found that to establish a claim for a salvage award, the potential salvor must demonstrate three standard elements: (1) existence of maritime peril from which property could not have been saved without the salvor's assistance; (2) voluntary act on part of salvor; and (3) salvor's success in saving property.

After review of the first principle, the court determined it was improbable that the barge would have been damaged, destroyed, or was at any reasonable risk to injury had the plaintiff not taken it into his own possession. The barge was securely attached to another barge, which was moored to the creek bed by spuds embedded into the mud below to a depth of approximately five to eight feet and was regularly monitored by its owners. Thus, due to the plaintiff's failure to demonstrate that the barge was in maritime peril, the court ruled that the plaintiff was not entitled to a salvage award under general maritime law.

R.C. FISCHER AND COMPANY V. CHARLES CARTWRIGHT, 2011 WL 7628682 (N.D. Cal. 2011). *Evidence sufficient that vessel was in peril to justify a salvage award.*[17]

Plaintiff brought this action for indemnity against defendant arising from a collision between two sailing vessels, QUARK SPEED and INKATU, in the San Francisco Bay on June 24, 2007. Plaintiff insurer paid for a portion of the repairs to the QUARK SPEED on behalf of her owners. The parties disputed whether plaintiff was entitled to payment of the salvage claim of $5,500.00 relating to the tow of QUARK SPEED from the collision site. Plaintiff provided evidence that QUARK SPEED was in peril. The testimony revealed that the only experienced sailor on QUARK SPEED had been thrown overboard in the collision and that the crew members left aboard had no sailing experience and were unable to bring down the mainsail on their own.

Defendant pointed to testimony regarding the location of QUARK SPEED on the bay to demonstrate it was not in peril when it was towed. However, the court ruled that even though the evidence may have shown that QUARK SPEED was not in imminent peril of colliding with Alcatraz, it did indicate that she was adrift and moving fast away from the accident site with inexperienced sailors aboard. Therefore, the court concluded that the QUARK SPEED was in peril to justify a salvage award.

The court then addressed the salvage damages claimed by the plaintiff and held that although

[13]Supp. R. Admiralty & Maritime E(7)(a): "When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise."
[14]*See e.g., DSND Subsea AS v. Oceanografia, S.A. de C.V.*, 569 F. Supp.2d 339 (S.D.N.Y. 2008).
[15]*See* Supp. R. Admiralty & Maritime E(5)(a) & (c).
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there was no evidence that the tow vessel expended a particularly high level of labor, incurred a particularly high degree of risk, or that the tow vessel was exposed to a particularly high level of danger, there was evidence that the tow vessel was promptly on the scene and was able to get a line on QUARK SPEED even though the evidence demonstrated that she was sailing in circles near Alcatraz. Therefore, the court concluded that the relatively modest sum of $5,500.00 for the salvage claim was reasonable.

ROBERT KLENNER V. M/Y EL PRESIDENTE, 2012 WL 3150050 (S.D. Fla. 2012). *Lien for necessaries allowed where implied bailee's salvage claim fails.*[18]

After several unregistered title transfers, the ownership of a vessel was disputed following the suicide of occupant Larry Abromovich. The individual who took possession of the vessel, Robert Klenner, filed an action for determination of ownership or, in the alternative, a salvage award. An alleged owner, Michael Waldo, intervened. The court ultimately held that Waldo was the owner of the vessel, the occupant's death did not amount to abandonment of the vessel, and Klenner was entitled to a lien for the provision of necessaries up until the expiration of his role as bailee.

Klenner rendered certain services to the vessel such as towing, repairs, and incurred docking fees. Klenner failed to prove that he was entitled to salvage. He offered no proof that the *EL PRESIDENTE* was in peril or that peril was reasonably apprehended. The court found that it is not reasonable to apprehend peril for a safely docked ship that is not rapidly taking on water, absent any other extreme circumstances.

Based on the value of necessaries provided by Klenner prior to the date he was to vacate the vessel, the court found that Klenner was entitled to a maritime lien for necessaries in the amount of $8,080.00. However, the court did not allow a lien for necessaries afforded after the expiration of the bailment.

AMERICAN STEAMSHIP CO., ARMSTRONG STEAMSHIP CO. V. HALLETT DOCK CO., ET AL., 862 F. Supp.2d 919 (D. Mn. 2012).[19] *Defendants' claim for salvage and allegation of plaintiffs' contributory negligence prevent summary judgment for plaintiff.*

This case involved claims by the owners of the WALTER J. McCARTHY, JR., a freight ship which was damaged when it struck debris as it attempted to berth at a Superior, Wisconsin dock. The accident opened a large gash in the McCARTHY's hull and was alleged to have caused more than four million dollars in damage. Plaintiffs sought summary judgment alleging they established over $4 million in "undisputed expenses" as a direct result of the holing and flooding of the McCARTHY. However, the defendants argued that summary judgment was inappropriate because they intended to assert contributory negligence and salvage claims.

The court concluded that it did not need to address defendants' arguments about plaintiffs' contributory negligence and defendants' salvage claims because depending on the facts presented at trial, those claims may allow defendants to reduce or offset liability for the damage caused to the McCARTHY.

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