UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN ADMIRALTY

In the Matter of The Complaint **of** **Sea Star Line, LLC, d/b/a TOTE Maritime Puerto Rico, as Owners; and TOTE Services, Inc., as Owner *pro hac vice* of the S.S. EL FARO for Exoneration from or Limitation of Liability**	**Case No. 3:15-cv-1297-HES-MCR**

ORDER

THIS CAUSE is before the Court on Claimants' "Dispositive Motion of Claimants Riehm and Hatch for Summary Judgment on Shipowners' Complaint for Exoneration from or Limitation of Liability" (Dkt. 64, filed Dec. 14, 2015); Petitioners', Tote Maritime Puerto Rico, LLC f/k/a Sea Star Line, LLC, and Tote Services, Inc. (collectively "Petitioners"), Response in opposition to Claimants' motion for summary judgment (Dkt. 158, filed Jan. 25, 2016); Petitioners' "Motion to Strike the Affidavits of John Soutar and John Becker" (Dkt. 159, filed Jan. 25, 2016); and Claimants' Response in opposition to Petitioners' motion to strike (Dkt. 177, filed Feb. 8, 2016). Upon review of the parties' filings and the relevant case law, the Court determines the following.

I. BACKGROUND

This matter involves the sinking of the cargo ship *S.S. El Faro* ("*El Faro*"), which was lost at sea near the Bahamas on October 1, 2015. Unfortunately, all persons aboard the ship during its final voyage—twenty-eight crew members and five Polish nationals—were also lost at sea. The

vessel's remnants were later discovered on the ocean floor, but despite extensive search efforts, no survivors were ever found. Thereafter, Petitioners—the shipowners—initiated this Limitation of Liability proceeding ("the Limitation Action") pursuant to the Limitation Act, 46 U.S.C. §§ 30501–30512 (2006). Dozens of wrongful death and cargo claims have been filed against Petitioners in the Limitation Action.

Claimants are Tina Riehm, as Personal Representative of the Estate of Jeremie H. Riehm, deceased; and Tracey Hatch, as Personal Representative of the Estate of Carey Hatch, deceased. Claimants each assert negligence claims against Petitioners under the Jones Act, 46 U.S.C. § 30104, as well as wrongful death claims under the Death on the High Seas Act, 46 U.S.C. § 30301, *et seq.* (Dkt. 55 at 16–24; Dkt. 57 at 16–24).

In their motion, Claimants request the Court grant them summary judgment on Petitioners' limitation of liability claim. (Dkt. 64 at 1). Specifically, Claimants argue that no genuine issue of material fact exists as to whether Petitioners approval of the captain's plan was negligent, and that this negligence was within Petitioners' knowledge and privity. (*Id.* at 1–2, 12). According to Petitioners, several material facts are in dispute regarding what negligent acts, if any, resulted in the loss of the *El Faro*. (Dkt. 158 at 4). Petitioners have also moved the Court to strike the affidavits Claimants submitted to support their summary judgment motion. (Dkt. 159).

II. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307, (11th Cir. 2011) (citing *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986)). A "material" fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In other words, the entry of summary judgment is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. In making this determination, the Federal Rules of Civil Procedure require "the court [] examine any pleadings, depositions, answers to interrogatories, admissions, and affidavits in a light that is most favorable to the non-moving party." *Hillburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999) (citing Fed. R. Civ. P. 56(c)).

The reviewing court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Findwhat*, 658 F.3d at 1307. Thus, a court "may not weigh conflicting evidence or make credibility determinations of its own." *Id.* "[Where] the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Tullius v. Albright*, 240 F.3d 1317, 1320 (11th Cir. 2001) (quoting *Clemons v. Dougherty Cty.*, 684 F.2d 1365, 1369 (11th Cir. 1982)).

B. Limitation of Liability Standard

"The Limitation Act limits a vessel owner's liability for any damages arising from a maritime accident to the value of the vessel and its freight, provided that the accident occurred without such owners 'privity or knowledge.' " *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1062 (11th Cir. 1996); 46 U.S.C. § 30505. Put differently, a vessel owner is only entitled to limitation if it had no "privity or knowledge before the voyage of the acts of negligence or conditions of unseaworthiness that caused the accident." *Hercules Carriers, Inc. v. Claimant State*

of Fla., Dep't. of Transp., 768 F.2d 1558, 1563 (11th Cir. 1985). "A vessel owner's claim to limited liability must be adjudicated exclusively in the admiralty court, which sits without a jury." *Suzuki of Orange Park, Inc.*, 86 F.3d at 1063.

Whether a vessel owner is entitled to limitation requires a two-step analysis: "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." *Hercules Carriers, Inc.*, 768 F.2d at 1563–64 (internal citations and quotation marks omitted). Thus, negligence and the shipowner's knowledge or privity are questions of fact to be determined by the admiralty court. *See id.* at 1565.

III. ANALYSIS

In what can only be described as a misguided effort at judicial efficiency, Claimants' attorneys attempt—in just over two pages and almost entirely devoid of argument—to legally establish the acts of negligence that caused the *El Faro's* tragic demise. (*See* Dkt. 64 at 10–12). Relying almost exclusively on a near century-old Fifth Circuit decision—which involved a small vessel utilizing technology from the twilight of the steam era—Claimants' attorneys assert that the record conclusively establishes three acts of negligence on the part of Petitioners: (1) planning a voyage that would take the *El Faro* close to a dangerous storm; (2) sailing the vessel directly into the storm; and (3) ignoring multiple opportunities to avoid the storm. (*Id.*).

As Petitioners rightly point out, the three "negligent failures" cited by Claimants' attorneys, at best, establish that Petitioners breached a duty. On its own, this is insufficient to sustain a negligence claim, much less justify a grant of summary judgment. "To plead negligence in a maritime case, a plaintiff must allege that . . . the breach actually and *proximately caused* the

plaintiff's injury. . . ." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1253 (11th Cir. 2014) (citing *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012)) (emphasis added) (internal quotation marks omitted). Claimants' attorneys assumption that the "but for" causation element is satisfied is forgivable given the strictly temporal nature of the element. However—as all first-year law students and Claimants' attorneys are aware—there exists an important difference between "but for" and proximate causation. *See, e.g., In re Royal Caribbean Cruises Ltd.*, 991 F. Supp. 2d 1171, 1183 (S.D. Fla. 2013) (To establish proximate cause the breach of duty must "be a substantial factor in bringing about the harm."); *Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978) (" 'Substantial' means more than 'but for' the negligence, the harm would not have resulted. . . ."). Thus, in a motion for summary judgment, the attorney who fails to discuss proximate cause in his negligence analysis can expect to have his motion denied.

Nevertheless, setting aside the merits of the pleading itself,[1] and assuming *arguendo* that the "negligent failures" cited by Claimants' attorneys are sufficient on their own to sustain a claim, the Court still finds that Claimants have failed to carry their burden. In sworn declarations, Petitioners respond to Claimants' allegations with the following:

- "Given the weather data and available vessel track options, the decision to sail the [*El Faro*] from Jacksonville . . . was a reasonable one." (Dkt. 158-1 ¶ 9).
- "On the basis of [the October 1, 2015 forecast] the Master's estimation that the vessel would pass "under (south of) the storm's path, approximately 65 miles from its center, was accurate and manageable." (*Id.* ¶ 11).
- "[T]he Master's plan to adjust course so as to pass south of JOAQUIN . . . would have kept the vessel in the storm's navigable semi-circle. As the vessel would have remained well outside the radius of hurricane force winds . . . the Master's adjustment of the voyage plan to account for the predicted track of JOAQUIN is deemed reasonable." (*Id.* at ¶ 14).

[1] It has not escaped the Court's notice that, in all three appellate decisions cited by Claimants' attorneys as mandating summary judgment, the lower courts made findings of fact.

- Had the September 29, 2015 forecast held, the *El Faro* "would have been well outside the hurricane force winds of Joaquin." (Dkt. 158-2 ¶¶ 9–11).

- The "reported loss of propulsion, which loss was not foreseeable, could have been one of the potential factors that contributed to the loss of the vessel." (Dkt. 158-1 ¶ 15).

The Court concludes that a material dispute of fact exists as to what acts of negligence, if any, caused the loss of the *El Faro*. As such, the Court does not reach the second part of the analysis—whether Petitioners had "knowledge or privity" of the alleged negligent acts. Also, because the Court is denying summary judgment, it finds it unnecessary to address the merits of Petitioners' motion to strike Claimants' affidavits, which will be denied. Petitioners will, however, remain free to re-file their motion to strike at a later date, should they find it necessary to do so.

Accordingly, it is hereby **ORDERED**:

1. Claimants' "Dispositive Motion of Claimants Riehm and Hatch for Summary Judgment on Shipowners' Complaint for Exoneration from or Limitation of Liability" (Dkt. 64, filed Dec. 14, 2015) is **DENIED**;

2. Petitioners' "Motion to Strike the Affidavits of John Soutar and John Becker" (Dkt. 159, filed Jan. 25, 2016) is **DENIED without prejudice.**

DONE AND ORDERED at Jacksonville, Florida, this 13th day of October, 2016.

HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

Copies to:
Chester Hooper, Esq.
George D. Gabel, Jr., Esq.
Jennifer L. Kifer, Esq.
Jerry Dean Hamilton, Esq.
Lawrence Joseph Hamilton, II, Esq.
Michael A. DeIulis, Esq.
Suzanne M. Judas, Esq.
Michael M. Gropper, Esq.
Timothy J. Conner, Esq.
Vincent J. Foley, Esq.
Allan R. Kelley, Esq.
Karina Mabel Cerda-Collazo, Esq.

Cory D. Itkin, Esq.
Jason A. Itkin, Esq.
Michael P. Hamaway, Esq.
Thomas Albert Boyd, Jr., Esq.
Allen K. Von Spiegelfeld, Esq.
Joseph Frank Rich, Esq.
G.J. Rod Sullivan, Jr., Esq.
David L. Mazaroli, Esq.
William E. Cassidy, Esq.
Lawrence C. Glynn, Esq.
Martin Hayes Sitler, Esq.
Brian T. Scarry, Esq.
Thomas M. Eagan, Esq.
Paul Anthony Giordano, Esq.
Catherine Popham Decunto, Esq.
Matthew Edward Auger, Esq.
Stephen H. Durant, Esq.
Jason Robert Margulies, Esq.
Lawrence J. Roberts, Esq.
John H. Hickey, Esq.
Brett Douglas Sager, Esq.
Thomas K. Equels, Esq.
Judson H. Orrick, Esq.
Stephen J. Pajcic, Esq.
Thomas Fitzpatrick Slater, Esq.
Benjamin Edward Richard, Esq.
Michael Sather Pajcic, Esq.
Lloyd Johnson Sarber, III, Esq.
Daniel O. Rose, Esq.
Robert F. Spohrer, Esq.
Ralph Joseph Mellusi, Esq.
Raymond John Rotella, Esq.
David T. Maloof, Esq.
Patricia M. O'Neill, Esq.
Elizabeth P. Kagan, Esq.
Scott A. Wagner, Esq.
Lindsey C. Brock, III, Esq.
Marlin Kareem Green, Esq.
Willie Edward Gary, Esq.
Christoph M. Wahner, Esq.
Marc Alan Rubin, Esq.
Matthew D. Shaffer, Esq.
Jacob J. Munch, Esq.
Dennis Michael Campbell, Esq.
Michelle F. Zaltsberg, Esq.
Brian Mark Pederson, Esq.
Linda Marie Hester, Esq.
Wade Douglas Childs, Esq.
Christopher Charles Hazelip, Esq.
Robert E. Warren, Esq.
James F. Sweeney, Esq.
Robert A. Craven, Esq.
Mark A. Boyle, Sr., Esq.
Justin M. Thomas, Esq.
Mitchel E. Woodlief, Esq.
Daniel W. Matlow, Esq.
David Alexander Villarreal, Esq.
Richard E. Berman, Esq.
William R. Bennett, III, Esq.
Martin F. Casey, Esq.
Christopher E. Cotter, Esq.
Ronald J. Cullenberg, Esq.
Michelle Bedoya Barnett, Esq.
Craig Liszt, Esq.
David Harlen Sump, Esq.
Stephanie S. Penninger, Esq.
Robert W. Phelan, Esq.
Carole A.R. Rouffet, Esq.
Joseph W. Janssen, III, Esq.
Michael W. Leonard, Esq.
David Y. Loh, Esq.
Nathan T. Williams, Esq.
Gustavo Adolfo Martinez-Tristani, Esq.
Raul J. Chacon, Jr., Esq.
Joseph A. Parrish, Jr, Esq.
Ben Bireley, Esq.
Deborah R. Reid, Esq.
William S. Burns, Jr., Esq.
Jason Ari Smith, Esq.
David Weese Marston, Jr., Esq.
Christopher Kimbrough Smith, Esq.
Ruben Aquino, *pro se*