BOATING BRIEFS

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Ninth Circuit: Boat owner had no duty to keep lookout when riding as a passenger

Holzhauer v. Golden Gate Bridge Highway & Transportation District, 899 F.3d 844 (9th Cir. 2018)

Harry Holzhauer was driving a speedboat owned by his friend, David Rhoades. Rhoades was a passenger that day, and he occasionally assisted Holzhauer in operating the boat. While in Richardson Bay, the speedboat collided with a ferry. Holzhauer died from his injuries, and Rhoades was seriously injured. A witness later testified that, at the time of the collision, neither Rhoades nor Holzhauer was looking in the direction that the boat was traveling.

Mrs. Holzhauer brought suit against Rhoades and the Golden Gate Bridge Highway and Transportation District (GGB), which owned the ferry. Rhoades brought a cross-claim against GGB and a counterclaim against the Holzhauer estate. GGB filed a cross-claim against Rhoades and a counterclaim against the estate.

At trial, Rhoades moved for judgment as a matter of law and argued that there was no evidence that Rhoades was negligent in his role as owner/passenger. The motion was granted, and the court instructed the jury that Rhoades was no longer a defendant and that his conduct should not be considered. The jury found Holzhauer 70% at fault for the accident and GGB 30% at fault. It awarded Holzhauer $546,747 in economic damages and $1,000,000 in non-economic damages. Rhoades was awarded $2,229,559 in economic damages and $1,500,000 in non-economic damages. Holzhauer and GGB appealed.

On appeal, Hozhauer and GGB argued that the district court applied the incorrect legal standard regarding Rhoades's duty of care. The circuit court noted that the duty of care that applies to a boat owner while riding as a passenger in his own boat was a question of first impression. The court decided that, while every vessel owner has a duty of reasonable care under the circumstances, a passenger as a general rule has no duty to keep a lookout on behalf of the operator of the boat. Two exceptions to that general rule exist: (1) where the passenger "knows from past experience or from the manner in which the vessel is being operated on the particular trip, that the driver is likely to be inattentive or careless" and (2) where the passenger "jointly operated the vessel, meaning he had active responsibility for and control over certain aspects of navigation of the boat."

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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The appellate court noted that Rhoades did have a duty to act reasonably in entrusting operation of the boat to Holzhauer but that an owner/passenger has no duty to keep a lookout unless the operator of the boat is known to the passenger to be inattentive or careless in its operation or if the passenger is jointly operating the boat. Rhoades was not jointly operating the boat when the accident occurred or immediately preceding it, and no evidence was introduced at trial to show that Rhoades believed Holzhauer was inattentive or careless in operating the vessel.

GGB argued that the lack of radar reflectors on Rhoades's boat limited the ferry's ability to detect it. The court held that, while having radar reflectors is a good practice, "good practice does not create liability absent facts to support that the practice is an operational standard in the relevant community of small boat owners." There was no such evidence in this case, and the circuit court therefore affirmed the ruling of the trial court. ■

Insurance

Houseboat policy exclusion barred coverage for injury caused by another vessel

Guyaux-Mitchell v. Old United Casualty Co., 2019 WL 451361 (D. Colo. Feb. 5, 2019)

The federal district court in Colorado has held that a houseboat liability policy's exclusion for injuries "caused by the use of any property that is not covered by this policy" relieved the insurer of any defense or indemnity obligation for injuries sustained by a guest who was struck by another vessel.

Several friends were vacationing on a houseboat on Lake Powell. Among the vacationers was the houseboat owner himself. The plaintiff, one of the houseboat owner's guests, was floating on an inflatable kayak tethered to the houseboat. A nearby powerboat—rented by the houseboat owner but being operated by another vacationer—accidentally went into reverse and struck the kayak, pulling the plaintiff under the water and severing her leg.

The plaintiff brought a negligent-entrustment action against the houseboat owner, alleging that the powerboat's operator was unfamiliar with the controls and was under the influence and that the houseboat owner should not have allowed him to operate it. The houseboat insurer declined to defend or indemnify, taking the position that the policy did not cover injuries caused by the use of vessels other than the houseboat.

The insured resolved the plaintiff's suit through a so-called *Nunn* agreement, by which the plaintiff established the extent of her damages via an arbitration in the amount of $5.68 million, which award was entered as a judgment against the insured, who subsequently assigned to plaintiff any claims he had against the insurer, in exchange for the plaintiff's agreement not to enforce the judgment against the insured personally. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010).

The plaintiff, as assignee, then sued the insurer in federal court, asserting claims for breach of the insurance contract and common-law bad faith. The insurer moved for summary judgment, arguing that the policy did not provide coverage since the injuries were caused by the use of the powerboat and not the houseboat.

The policy provided liability coverage in respect of "bodily injury or property damage caused by an accident arising out of the ownership, maintenance, or use of the covered property," i.e., the houseboat. But the policy excluded coverage in respect of injury "caused by the use of any property that is not covered by this policy."

There was no dispute that the immediate cause of the accident was the powerboat operator's re-

versing into the kayak. There was also no dispute that the powerboat was not "property . . . covered by" the policy. But the plaintiff offered two arguments why the exclusion for injuries "caused by the use of" non-covered property should not apply.

First, since the plaintiff's underlying complaint alleged that her injuries "arose out of her use of the houseboat," the plaintiff contended that her injuries were, for purposes of the exclusion, "caused by" the use of the houseboat and not the powerboat. The court acknowledged that Colorado law recognizes two types of causation in the negligence context: "cause in fact" (or but-for cause) and "proximate cause" (or legal cause). But in the court's view, the complaint's use of the phrase "arose out of" was describing cause in fact, whereas any ordinary person would understand the exclusion's use of the term "caused by" as referring to proximate cause, not cause in fact. While one could construct a whole series of but-for causes (e.g., the plaintiff's decision to take a vacation on the houseboat) absent which the incident would not have occurred, the use of the powerboat was the legal cause of the injuries. Moreover, the underlying complaint's assertion that the plaintiff's injuries "arose out of her use of the houseboat" was a conclusion, not a fact, and the insurer was not required to defend or indemnify based on mere conclusory assertions in the complaint.

Second, the plaintiff argued that the insurer's interpretation of the exclusion would render coverage illusory "whenever other property that is not covered by the Policy is involved." The court disagreed, reasoning that if the mechanism causing the injury had been "covered property" (i.e., the houseboat), then the incident would have been covered. But because the mechanism of injury in this case was not a piece of property covered by the policy, the policy did not afford coverage—regardless of plaintiff's status as a visitor to the houseboat. Since the mechanism of injury was the powerboat and not the houseboat, the exclusion precluded coverage. ■

Racing exclusion inapplicable to official's boat ride before regatta

Van Horn v. Chubb Insurance Co., 2018 WL 5312669 (E.D. La. Oct. 26, 2018)

Ms. Van Horn boarded a boat operated by David Rubin, who was supposed to transport her to her post as a race official at a regatta on Lake Pontchartrain. Van Horn was injured during the boat ride, when Rubin allegedly accelerated into swells and caused the boat to go airborne. She and her husband sued for damages under general maritime law and Louisiana Law, claiming that her injuries were caused by Rubin's negligence and that of the race organizers.

Progressive, as Rubin's liability insurer, denied coverage for her claims and moved for judgment on the pleadings, on the basis that the policy excluded coverage for injuries sustained during race preparations. In particular, the exclusion stated that there was no coverage for:

> Bodily injury or property damage resulting from or sustained during practice or preparation for: (a) any pre-arranged or organized racing, stunting, speed, or demolition contest or activity; or (b) any driving, riding, navigation, piloting, or boating activity conducted on a permanent or temporary racecourse.

Progressive argued that there was no coverage since Ms. Van Horn's injuries were "sustained during ... preparation for ... [a] pre-arranged or organized racing ... contest or activity."

The court disagreed, holding that the exclusion applied only to injuries that were a direct result of the activities listed in the exclusion. The term "preparation" had to be read within the context of

the risky activities that were the focus of the clause. Transporting Van Horn to her station to officiate the race was not "preparation for" the race itself. According to the court, the interpretation urged by Progressive would lead to absurd results by excluding from coverage accidents occurring during ordinary boating activity that had only a tenuous relation to a racing event. ■

Pyrolysis without flame is not a fire, and damage by a well-meaning stranger is not vandalism

National Liability & Fire Ins. Co. v. Jablonowski, 2018 WL 4623027 (D. Conn. Sept. 26, 2018)

The owner of a 1962 wooden auxiliary yacht submitted a claim for total loss as a result of long-term pyrolysis in the boat's shore power connection, which eventually cut off the electricity supply to an onboard space heater, which in turn led to mold growth in the yacht's interior. The insurers denied coverage, but agreed to pay as an investigative cost an invoice for mold cleanup.

Three days after the denial and eight days before the policy expired, the insured submitted a second claim for alleged vandalism due to an unknown person's sanding of the yacht's interior, which allegedly exacerbated the mold problem. The insurers agreed to consider the second claim and reconsider the first claim, and the insured submitted to a pre-litigation examination under oath. The insurers subsequently denied the claims and filed an action for declaratory judgment.

The policy covered property damage from any accidental cause, including vandalism. At the same time, however, the policy excluded coverage for any losses caused by mechanical or electrical breakdown and mold or mildew, but covered immediate consequential property damage resulting from fire or explosion, among other things.

With respect to the first claim, the insurers argued—based on their expert's uncontroverted opinion—that there was no "fire" and therefore no coverage for any consequential damage resulting from the loss of power. The expert opined that the shore-power cable underwent pyrolysis but that there was never any ignition or combustion. According to the expert, the pyrolysis was the result of a poor contact and arcing with the hot lead on the connector. The insured admitted that he never saw any smoke but contended that the shore-power connection underwent a slow burn which was sufficient to constitute a "fire." The court disagreed, noting that in contrast with the authorities cited by the insured, the immediate damage from the heat in this case did not extend beyond the shore-power connection. Although the action of fire in charring or scorching may be covered even though no flame is seen, the peril of fire requires that combustion have actually existed. Because there was no evidence of actual combustion, the first claim was not covered.

With respect to the second claim, the insurers argued that in the absence of any evidence of willful or malicious destruction, the mere sanding of the interior cabin by an unknown person did not amount to vandalism.

Because vandalism was not defined in the policy, the court employed the Connecticut rules of construction and gave the term its ordinary meaning. One common dictionary definition of vandalism is "willful or malicious destruction or defacement of things of beauty or of public or private property." The insured admitted that the work of the "mystery sander" may have been a benevolent effort to clean off the mold. Since there was no evidence of malicious intent, the work of the mystery sander did not constitute vandalism.

In addition, the court agreed with the insurers that the mold exclusion further supported the denial of coverage. While the mold exclusion excepted immediate consequential property damage

resulting from fire or explosion, no such exception existed for vandalism. ■

Limitation of Liability

Notice of claim, unquantified but with pictures, started 6-month period for bringing limitation action

Complaint of Brown, 2019 WL 1312158 (5th Cir. March 21, 2019) (unpublished)

A sailboat owner brought a limitation action in the Southern District of Texas after his sailboat broke its moorings and crashed into a marina during Hurricane Harvey. The Fifth Circuit affirmed the district court's dismissal of the action as untimely because the owner did not file it within six months of receiving the marina's initial notice of claim.

One month after the hurricane, an attorney for the marina sent a letter to the sailboat owner advising him that the sailboat had damaged the marina's docks, that the marina was making a claim for damages, and that he should notify his insurer. Enclosed with the letter were photographs showing the sailboat wedged against the damaged docks.

Shortly thereafter, the sailboat's insurer informed the marina's attorney that the claim was being denied because the incident was an "Act of God" or "inevitable accident." Several months later, the marina's attorney sent a second letter, listing the amount of damages sought ($85,000) and specifically describing the sailboat owner's alleged negligence.

The sailboat owner then filed a limitation action, seeking to limit his liability to the post-incident value of his vessel: $2,000.

On the recommendation of the magistrate judge, the district court dismissed the suit as untimely because it was filed more than six months after the sailboat owner first received notice of the claim. The Fifth Circuit affirmed.

A limitation action must be filed "within 6 months after a claimant gives the owner written notice of a claim." 46 U.S.C. § 30511(a). In this case, if the first letter from the marina's attorney constituted "written notice of a claim," then the limitation action was untimely.

Under Fifth Circuit precedent, a communication starts the 6-month clock if it "reveals a reasonable possibility that the claim will exceed the value of the vessel." The sailboat owner argued that the initial letter did not constitute notice of a claim because it did not quantify the damages and did not allege that the sailboat owner was negligent. The Fifth Circuit disagreed, reasoning that this level of detail is not required for a letter to constitute "notice of a claim." The initial letter disclosed that a claim was being made and asked the sailboat owner to notify his insurer. And while the letter did not state the amount of the claim, the photographs accompanying the letter showed substantial damage to the marina's property—damage that was likely to exceed the sailboat's post-incident value.

In these circumstances, the initial letter was sufficient written notice of the claim, and the limitation action was therefore untimely. ■

Torts

Jet-ski rental company exonerated in claim for fall on floating dock

Fury Management, Inc. v. Luviano, 2018 WL 3884824 (S.D. Fla. July 14, 2018)

Rosenda Luviano was injured during an "Ultimate Adventure" jet-ski excursion operated by Fury. Before the event, she signed a Release of Liability, Assumption of Risk, Waiver of Claims &

Indemnification Agreement. To board the jet-ski, Luviano had to use a ride-up dock that was level with the water and attached to a barge anchored in the Gulf of Mexico. While attempting to board the jet-ski, she slipped and fell.

Fury filed an action for exoneration or limitation of liability. Luviano filed a negligence claim against Fury, alleging that the ride-up dock was unreasonably slippery and unstable and that Fury failed to warn her of the hazard. Fury moved for summary judgment, arguing that Luviano waived the claims, that the alleged hazard was open and obvious, and that Fury had no notice of any hazard.

First, by applying the location and the connection tests, the court determined that the claims were subject to admiralty jurisdiction. Though the opinion does not make clear whether the jet ski was in or out of the water at the time of the accident, the court decided that since the ride-up dock was "adjacent to the jet ski," and the process of boarding the jet ski was the immediate prerequisite to actually riding the jet ski through the water, the location test was met. And because jet-ski excursions and rentals are part of maritime commerce and because Fury provided access to a host of traditional maritime activities on the water, the connection test was met as well.

Applying maritime law, the court decided that summary judgment was appropriate. Because Luviano failed to respond to Fury's motion, the court took reasonable admissions that were supported by the record and found insufficient evidence to conclude that the ride-up dock was unreasonably slippery.

The court held that the presence of water on the dock's surface and the unstable nature of the platform were conditions that a reasonable person in Luviano's position would have been aware of. Fury had no duty to warn her that the partially submerged deck might be slippery and unstable, because one would expect that a platform partially submerged in water is likely to be slick and susceptible to motion. Thus, those conditions were open and obvious, relieving Fury of an obligation to warn Luviano that it would be slick and unstable.

The court also held that Fury had no control over the movement and slipperiness of the dock. Thus, it was not caused by Fury's actionable conduct. Because the accident was not caused by actionable conduct, Fury was entitled to exoneration. ■

Claims for punitive damages and loss of consortium allowed for passenger injury in state waters

Morgan v. Almars Outboards, Inc., 316 F. Supp. 3d 828 (D. Del. 2018)

Lisa Morgan brought a products-liability lawsuit against Almars Outboards, a boat dealer, relating to an accident she had on a Bentley pontoon boat in state waters. Her pinkie and ring fingers were amputated when she entered the water from the boat and her hand got caught in the boat's gate. The design of the gate had previously caused several laceration and dismemberment injuries on similar vessels, and the manufacturer had issued two recalls to its dealers. The dealer that sold this particular boat claimed it did not know about the recalls. Morgan sought punitive damages and her husband asserted a loss-of-consortium claim. The question was whether maritime law permitted such claims in the negligence context.

The court decided that both remedies were indeed available. Applying the framework set forth in *Atlantic Sounding Co. v. Townsend,* 557 U.S. 404 (2009), the court determined that because punitive damages were historically available in maritime cases, they should remain available unless precluded by statute. Neither the Jones Act (ap-

plicable only to seamen) nor any other federal statute barred claims for punitive damages and loss of consortium for passenger injuries occurring in territorial waters. And in any event, the analogous state law remedies would be available to supplement maritime law in this case. ■

Procedure

No interlocutory appeal where plaintiff designated case as non-admiralty

Buccina v. Grimsby, 889 F.3d 256 (6th Cir. 2018)

Nancy Buccina was invited to take a boat trip with Linda Ann Grimsby aboard Grimsby's 17-foot motorboat. The boat hit an unexpected wave. Nancy was thrown from her seat and sustained injury. Buccina sued Grimsby and invoked the court's diversity and admiralty jurisdiction. To secure the benefit of a jury trial, Buccina pleaded that "this action is not to be deemed an 'admiralty and maritime claim' within the meaning of" Rule 9 of the Federal Rules of Civil Procedure.

Ultimately, the jury found that Grimsby was not negligent. Buccina moved for a new trial and the district court granted the motion. Grimsby appealed, and Buccina cross-appealed.

Generally, appellate jurisdiction extends only to judgments that are "final." As the trial court granted Buccina's motion for a new trial, no "final" judgment had been rendered. Both parties argued that the appellate court nevertheless had jurisdiction under an admiralty exception to the final-judgment rule. The exception permits appeal of "interlocutory decrees ... determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Traditional civil procedure gives a plaintiff the right to a trial by jury in a maritime case with diversity jurisdiction. Admiralty procedure provides no right to a jury trial but confers remedies such as attachment and garnishment and provides special procedures for actions brought against vessels or property.

The circuit court found that plaintiffs like Buccina have two options: (1) "They may use admiralty procedures to govern a substantive admiralty claim," or (2) "They may pursue a hybrid action in which customary civil procedures govern their substantive admiralty law action." Federal Rule 9(h) provides that, if a claim is cognizable under admiralty or maritime jurisdiction as well some other basis of subject-matter jurisdiction, the plaintiff may designate the claim as an admiralty or maritime claim.

As Buccina pleaded that "this action is not to be deemed an 'admiralty and maritime claim' within the meaning of" Rule 9, the appellate court found that the parties were *not* entitled to invoke any of the special procedures or remedies of admiralty, including the right of interlocutory appeal. The circuit court therefore dismissed the appeal and cross-appeal and remanded the matter to the district court for further proceedings. ■

Fall from gangway entitled plaintiff to arrest vessel

Minott v. M/Y Brunello, 891 F.3d 1277 (11th Cir. 2018)

John Minott was employed by a marine engineering firm that was hired to perform maintenance and repairs on the yacht *Brunello* while it was docked on navigable waters in Dania, Florida. When Minott was walking up the gangway, the vessel's captain or crew put the engines in gear. The gangway detached from the vessel, and Minott fell overboard and sustained injuries.

Minott filed a complaint to enforce a maritime lien for damages arising from a maritime tort. His

complaint asserted an *in rem* claim against the *Brunello* and *in personam* claims against other defendants. In accordance with the usual procedure, Minott moved the district court to direct the clerk to issue a warrant for the arrest of the vessel. But the district court denied the motion and found that Minott "failed to establish good cause for the issuance of a warrant *in rem*." Relying on 46 U.S.C. § 31342, which grants a lien to "a person providing necessaries to a vessel," the court also held that a maritime tort cannot form the basis of a maritime lien. The court also questioned whether it lacked jurisdiction because Minott's activity "was not significantly tied to maritime activity and his accident had minimal potential to disrupt maritime commerce." Minott sought reconsideration, but the district court denied it.

Minott appealed and invoked the circuit court's interlocutory jurisdiction. As the district court's refusal to arrest the *Brunello* prejudiced Minott's substantive right to proceed *in rem*, leaving him unable to proceed against the *Brunello*, the circuit court had interlocutory jurisdiction.

Next, the circuit court examined whether it had admiralty jurisdiction. A court has admiralty jurisdiction if the tort "occurred on navigable water or occurred on land but was caused by a vessel on navigable water, and if the tort had sufficient connection with maritime activity." Minott's accident occurred while he was on the gangway, which is traditionally considered to be part of the vessel. And the accident was allegedly caused by the captain or crew of the *Brunello* putting the vessel's engines in gear. An injury caused by a vessel in navigable waters *is* a maritime tort.

The circuit court also held that Minott's injury had "a potentially disruptive impact on maritime commerce." His injury "threatened to disrupt further repairs of the vessel, not to mention the repairs of vessels being worked on at the same dock and vessels waiting to be worked upon."

Supplemental Rule C provides that "an action in rem may be brought ... to enforce any maritime lien." A lien is created as soon as the claim comes into being, and a maritime lien gives the victim a right to proceed against the vessel by operation of the general maritime law. Therefore, the district court's reliance upon 46 U.S.C. § 31342 was misplaced.

The circuit court reversed the district court and remanded the case with instructions for the district court to enter an order directing the clerk to issue a warrant for the arrest of the *Brunello*. ■

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