RECENT DEVELOPMENTS IN SALVAGE LAW

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Northern Voyager Limited Partnership, et al. v. Thames Shipyard and Repair Company, et al., 2006 A.M.C. 2431, 2006 WL 2711508 (D. Mass. September 22, 2006). Coast Guard did not increase harm to sinking vessel despite interested salvor.

On November 2, 1997, the F/V NORTHERN VOYAGER, a 144-foot fishing vessel, sank a few miles off the coast of Gloucester, Massachusetts after she lost a rudder and took on water faster than her pumps could handle. The Captain called the Coast Guard at 8:45 am. Michael Goodridge, the owner and operator of a marine towing and salvage company, claimed he heard the distress call and 49 minutes later, called Station Gloucester and informed the watchstander that he was headed to the scene. The watchstander informed him that "the Coast Guard was handling the situation, that they were very busy and that they were all set." At 2434. Goodridge already had another salvage job lined up for that morning and was getting ready for it but continued to monitor the radio traffic concerning the F/V NORTHER VOYAGER. The Coast Guard,

[1] Author's notes: A special thank you to Rountree, Losee & Baldwin, L.L.P. and its staff for their assistance with this undertaking; on citations: citations to the cases which are the subject of this update are cited as follows: "At [A.M.C. or, if no A.M.C. cite, other reporter page number];" questions or comments should be directed to Jason R. Harris of Rountree, Losee & Baldwin, L.L.P.; 2419 Market Street; Post Office Box 1409; Wilmington, North Carolina 28402-1409; (910) 763-3404; facsimile (910) 763-0320; jharris@rlblawfirm.com. Please note that this update is not exhaustive nor is it necessarily limited to the period since the last update authored in the Fall of 2006.

with two utility boats and one Cutter, delayed the sinking and rescued the sinking vessel's personnel. The vessel capsized at 11:22 a.m.

The Plaintiff sued the shipyard that installed the rudder for negligence and the Coast Guard for interfering with the prospective salvor. An advisory jury found that both Defendants and the Plaintiff were negligent but that neither Defendants' negligence caused the loss. The Court found that the Coast Guard "did not impair any chances [Mr. Goodridge] suggests he had of saving the vessel and did not cause her to sink...and that, in any event, the evidence does not support the underlying premise that Mr. Goodridge would have been able to effectively aid and, indeed, save the vessel." At 2432.

The best case scenario put Mr. Goodridge arriving at the vessel shortly before 11:00 a.m. He planned to plug the hole with a lobster pot buoy or a life jacket which he contends would have taken only a matter of minutes, then swim around the vessel to look for other holes in the hull. However, since no one was aboard, he was concerned because he did not know if the engines had been shut off which, if they had not, would have made it unsafe to dive near the propellers. The Court was not persuaded that the operation could have been accomplished as easily as Mr. Goodridge contended, particularly in light of 7-8 foot swells and Mr. Goodridge's inexperience in such a large salvage operation.

Hoff v. Pacific Northern Environmental Corp., et al., 2006 WL 3043111 (D. Or. October 23, 2006). Negligent salvage by Coast Guard not subject to discretionary function immunity despite undying concern with presence of fuel.

On September 4, 2003, the ENOLA M caught fire and drifted from her mooring until she grounded. Salvage efforts were undertaken by a private salvor and the Coast Guard. The Coast Guard elected to pump fuel out before de-watering the vessel despite advice to the contrary from the private salvor. The vessel owner claimed negligent salvage and the United States asserted discretionary function immunity.

Discretionary function immunity requires dismissal of an action if the challenged conduct was: (1) discretionary in the sense that it was not governed by a mandatory statute, policy or regulation and (2) the type of action that Congress meant to protect – that is, it involved a decision susceptible to social, economic, or political policy analysis. At 2. The parties agreed that the challenged conduct was not governed by a mandatory statute, policy or regulation, so the second element was the issue to be decided.

The Coast Guard failed to show how its personnel weighed any safety concerns when they declined to de-water the vessel before pumping the fuel out[2]. Its decisions were based on the structural integrity of the vessel, her condition, the fuel, the fire, the location, the grounding and the effect of the subsurface on the stability of the vessel. Such decisions "involve professional judgments about salvaging and vessel stability, and the application of objective scientific or technological standards. They do not implicate social, economic, or political policies." At 3. The Coast Guard failed to adhere to accepted professional standards and their negligence arose from a misapplication of scientific and technological standards rather than a balancing of policy considerations or safety concerns. The Court adopted a Magistrate Judge's findings and recommendations and concluded that the discretionary function exception did not apply.

[2] A Petty Officer testified that her main assignment was removing fuel from the boat but that she was not given instructions about whether it should be removed before or after the water.

Williamson v. Recovery Limited Partnership, 2006 WL 3483966 (S.D. Ohio, November 30, 2006). Ohio proper venue for claims of contractual entitlement to share of salvage proceeds.

Certain Plaintiffs who provided service, equipment or other assistance filed suit in Ohio State Court claiming that they were promised a percentage of the proceeds of the treasure salvaged from the shipwrecked S.S. CENTRAL AMERICA, a sidewheel steamer that sank in the Atlantic Ocean in 1857. The case was removed to the Southern District of Ohio because the Plaintiffs' maritime contract claims sounded in admiralty.

The Defendants moved for a change of venue to the Eastern District of Virginia at Norfolk for many reasons including: it is the Court that presided over and retains jurisdiction over the Defendants and the insurers; it has familiarity with the issues surrounding the recovery of the treasure; it is aware of the need to maintain secrecy about the Defendants' methods of operation and the terms under which the treasure was to be marketed; and, the terms of 28 USC 1391(b) (an action may be brought in any district where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property which is the subject of the action is situated).

Plaintiffs argued against a change of venue because: many Defendants were Ohio residents; the contracts were signed in Ohio; the contracts included a forum selection clause providing that any dispute concerning the contracts be resolved by the United States District Court, Southern District of Ohio; at least two of the District Court Judges who presided over the Virginia case were deceased, and transfer was legally impermissible under 28 USC 1404(a) (case may be transferred only to a judicial district in which the case might properly have been brought); and *Hoffman v. Blaski*, 363 U.S.

335 (1960) (no jurisdiction by transferee Court if Plaintiffs did not have right to bring action even if objections to transfer waived), regardless of the Defendants' consent to a transfer.

The Court noted that in accordance with F.R.Civ.P. 82 (an admiralty action is not treated as a civil action for purposes of 28 U.S.C. 1391-1392), statutes relating to *changing* venue apply in admiralty cases but the statutes for *determining* venue (i.e., 28 U.S.C. 1391-1392) do not. Venue in admiralty is proper wherever the defendant has property. Neither party addressed this issue. The Court chose not to predicate its decision on *Hoffman v. Blaski*. Instead, it applied a "totality of the circumstances" test in concluding that a change of venue was not appropriate.

Triplecheck, Inc. v. Creole Yacht Charters Limited, 2007 WL 917276 (S.D. Fla., March 25, 2007). Agent had apparent authority to contract for professional salvage; award of $30,000.

On February 19, 2005, the M/Y ANACONDA S began to take on water while docked. A commercial salvor arrived on scene along with a Captain[3] of the vessel, Mr. O'Hare. The commercial salvor dispatched two vessels and six employees. After one hour and fifteen minutes of pumping and an employee diving underwater to inspect the bottom of the boat, the M/Y ANACONDA S was towed to a boat yard and monitored for several days by the salvor until she was hauled out.

In the meantime, O'Hare signed the salvor's U.S. Open Form Salvage Agreement. The Court concluded he was an apparent agent with such authority because he dealt with the salvor's representatives, coordinated the choice of boatyards, gave instructions

[3] Apparently not "the" Captain, but he "had performed a few odd jobs on the ANACONDA." At 1.

on where to haul the boat, accompanied the salvor to the boatyard, and signed the storage and repair agreement with the boat yard as "captain."

Plaintiff's initial demand was for $118,000.00 but was reduced to $90,000.00. Defendant contended an appropriate award would be $15,000.00. The Court found minimal risk to the salvor noting that the vessel would not have totally submerged[4], the repair work was not extensive and the danger faced by the workers was minimal. It awarded $30,000.00, being 5% of the vessel's post-casualty value based on a 3% recovery rate plus a 2% uplift because the salvor was a professional. Prejudgment interest from the date of the incident was also awarded and the issue of attorneys' fees was left open.

Joseph v. J.P. Yachts, LLC, 2006 A.M.C. 2786, 436 F.Supp.2d 254 (D. Mass., June 9, 2006). $80,000 pure salvage award despite towing contract.

Downplaying (some might say, misrepresenting) your peril may have the effect of voiding your effort to secure contractual towing services of your professional salvor.

In the early morning of September 2, 2003, the M/Y LADY MAZIE, an 85' yacht purchased in 2000 for $2,960,000.00, grounded in Cuttyhunk's outer harbor. Ralph Joseph d/b/a New Bedford Marine Rescue, an affiliate of Tow Boat U.S., successfully freed the vessel. The vessel owner, a Tow Boat U.S. member, called the salvor reporting a simple dragging anchor but *not* that the ship was aground. Having been misled to believe the situation required merely towing services and only one boat, the salvor quoted the owner the discounted Tow Boat U.S. member daytime rate of $125.00 per hour for towage.

[4] Interesting distinction drawn by Defendant's expert between sinking and flooding; at 3.

Upon arrival at the scene, the salvor "immediately discovered that the services required were starkly different than what he had been sent to perform." At 2803. The vessel was listing perilously close to the rocky shore, and aground with the waves and wind (gusting over 20 knots) pushing her stern broadside toward shore.[5] Under such circumstances, the Court concluded that the scope of the initial towing agreement did not extend to the services rendered. A second vessel was dispatched and, during the rescue, sustained damages as a result of capsizing. A salvor dove into the water to get clear of the vessel that capsized, thereby facing significant risk and danger of drowning.

The Court found that despite the vessel being soft aground, and an oral agreement for the tow, the situation involved a salvage. The issue was whether this was a contractual salvage or a pure salvage. The vessel owner argued that the parties initially agreed to a salvage contract. However, the Court concluded that: the vessel owner failed to meet its burden of establishing a salvage contract; there was merely a towing contract for a ship that dragged and simply needed to be towed to deeper waters, which situation was inaccurate; and this was a pure salvage situation.

The Court applied the BLACKWALL factors and described the salvor's skill as "not exemplary and the effort expended only slightly above average." At 2809. However, it did take into account that the salvor was a professional. The Court also considered the skill and effort in preventing or minimizing environmental damage but concluded that it "would not alter the award." At 2809. The pure salvage award was in the amount of $80,000.00 plus prejudgment interest from the time the services were rendered and costs.

[5] A small craft advisory was issued two hours after the salvor's arrival.

H.R.M., Inc. v. M/V SKYZ THE LIMIT, et al., 2006 A.M.C. 2276, 2006 WL 3623235 (Arbitration, New York, August 8, 2006). Offering owner opportunity to talk with insurer during contract negotiations proves beneficial to salvor.

The M/V SKYZ THE LIMIT, a 2003 32' Sea Ray became stranded in a rocky area in Great Salt Pond, Block Island about ¼ mile west of Champlin Marina's westernmost dock. One of her props was fouled with a lobster trap marker, buoy, and line rendering her inoperable. Winds were 15-20 knots with higher gusts. Small Craft Advisories were in effect. H.R.M., Inc., d/b/a Safe/Sea, a commercial salvor, responded.

There was substantial radio traffic between the salvor and owner of the stranded vessel including negotiations about the terms of salvage. The salvor offered the captain an opportunity to speak with his insurer and even offered to speak directly to the insurer. Eventually, the owner rejected an offer for an open form salvage and the salvor and owner orally contracted for salvage at the rate of 15% of the insured value of the vessel. A Rhode Island Standard Form Marine Salvage Contract was executed. It incorporated the 1989 International Convention on Salvage (SALCON 1989). Article 7 of SALCON 1989 provides: "A contract or any terms thereof may be annulled or modified if: (a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or (b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered."

The freeing operation took 3 minutes, 9 seconds, totaling 40 minutes from start to finish. The majority of the Panel found no undue influence, no influence of danger (noting that the "weather was relatively calm and the vessel was not in immediate peril

at the time the salvage negotiations took place,[6]") and that the terms of the agreement were equitable in light of the negotiation. They awarded $19,275.00 (15% of the insured value, $128,500.00), interest, plus attorneys' fees (as allowed by the terms of the agreement) in the amount of $11,128.52. Punitive damages (sought for the vessel's efforts to avoid the contract and related civil litigation) were denied.

The dissenting arbitrator would not have voided the contract but would have modified the award. Pursuant to the terms of SALCON 1989, he would not have awarded pre-judgment interest or attorneys' fees and costs and the salvage award would have been "around $5,000.00." At 2284. The dissenter relied on *H.R.M., Inc. v. Arcadia Insurance*[7], in which the same commercial salvor freed a 50 foot vessel with a value of $175,000.00 within 40 minutes and salvage was awarded in the amount of $8,000.00, just 4.5% of the vessel's value. The dissent concluded that the owner and agent of the M/V SKYZ THE LIMIT "got taken." At 2284.

Offshore Marine Towing, Inc. and M/V WILMA'S IDEA, et al., 2006 A.M.C. 1726, 2006 WL 3019465 (Arbitration, Philadelphia, May 23, 2006). Sinking at dock is a marine peril; award of $10,167.74.

It was probably not Wilma Smith's idea to pay a commercial salvor's attorneys' fees, but that is what the business owned by her and her husband were required to do. The M/V WILMA'S IDEA is a 1979 58' Hatteras Motoryacht. On July 21, 2005, she began taking on water while docked in Port Everglades, Florida and made a VHF broadcast for assistance. Offshore Marine Towing, Inc. responded within 10 minutes, found the source of the leak and deployed pumps resulting in a successful salvage. The

[6] At 2282.
[7] Boat U.S. Salvage Arbitration Case No. 04-0112 (June 9, 2005).

post-casualty value of the vessel was deemed to be $295,020.78. The salvor claimed an award in excess of $90,000.00, a 10% equitable uplift, attorneys' fees in the amount of $6,390.32 and prejudgment interest. The owner claimed that quantum meruit for the services rendered was the appropriate form of relief and that the value was $380.00.

The panel of arbitrators concluded that, although the depth at the dock was 10-12 feet and the vessel would not have sunk completely underneath the surface, the vessel would have suffered substantial damage absent the salvor's prompt action. To satisfy the requirement of existence of a peril, the peril need not be immediate but only "pending" or that a danger "reasonably. . .be apprehended." At 1732, citations omitted.

The owner signed a Standard Form Marine Salvage Contract. One paragraph of the contract required compensation to be paid in accordance with the 1989 International Convention on Salvage; however, another paragraph required arbitration under the BoatUS Arbitration Program which includes criteria for a salvage award. The panel deemed the two methods to be "almost identical." At 1733.

The panel found "no very great skill in deploying the pumps or finding the source of the leak[8]" in fair weather, and awarded $5,000.00 for salvage services (apparently inclusive of an "uplift" in recognition of the involvement of a professional salvor but noting that salvage is not a "cost plus" operation[9]). Attorneys fees were reduced to 75% of the amount claimed so as not to "make the award of fees a 'blank check' for parties to litigate a matter when reasonable minds could reach an equitable settlement." At 1737. Interest at Florida's legal rate was also awarded.

[8] At 1735.
[9] At 1737.

#9 Marine Towing and Salvage, Inc. – M/V JERSEY DEVIL, et al., 2006 A.M.C. 1739, 2006 WL 3019529 (Arbitration, New York, May 11, 2006). Salvage, not a tow; award of $18,000.

The M/V JERSEY DEVIL, a 56-foot fiberglass walk-around charter fishing vessel with 34 passengers aboard was approaching Barnegat Light Inlet in dense fog and rain, light winds, and a 2-4 foot swell on a return from a charter fishing excursion when an error in navigation resulted in the vessel's running gear striking submerged rocks thereby disabling the rudders, shafts and propellers. A May Day distress call was issued. Meanwhile, the captain anchored the vessel with her bow facing seaward to prevent further drift towards the beach. The passengers were evacuated. A commercial salvor arrived within 25 minutes and the vessel was eventually towed away from the surf zone and into deep water.

It was debated whether the vessel was grounded. The arbitrator indicated that whether or not she was actually aground "is not determinative of salvage" in concluding she was disabled and in "peril." At 1741. Although "[s]ometimes there can be a fine line between a tow and salvage," the arbitrator found the services amounted to salvage. At 1744.

The salvor claimed salvage warranting an award of 30% of her post-casualty value (found to be $142,322.08), plus interest, an "uplift," and attorneys' fees all in the total amount of $64,055.18. The owner claimed the effort was a tow worth $125.00 per hour for about two hours of service.

The arbitrator denied an equitable uplift to the salvor because "other than the shallow draft...a towing line, and a skillful skipper, no such special equipment, machines

or appliances were utilized." At 1745. Attorneys' fees were denied, particularly because the Boat US Salvage Arbitration Plan did not provide for such award and there was no other contract or agreement permitting them. Prejudgment interest in the amount of $2,341.00 was added to a salvage award of $18,000.00 for a total award of $20,341.00.

Odyssey Marine Exploration, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels, 2006 WL 3091531 (M.D. Fla. October 30, 2006). Preliminary injunction granted to salvor.

Plaintiff believed it found a "17th century merchant ship lying at a depth of approximately 100 meters beyond the territorial waters or contiguous zone of any sovereign nation, approximately 40 miles from Lands End near the English Channel." At 1. Injunctive relief was granted on claims based on the law of finds and salvage. This case may be helpful to practitioners in preparing pleadings seeking similar relief.

Great Lakes Exploration Group, LLC v. The Unidentified, Wrecked and (for Salvage-Right Purposes), Abandoned Sailing Vessel, etc., 2006 WL 3370878 (W.D. Mich. November 20, 2006). Failure to file precise location of sunken vessel results in dismissal.

Plaintiff sought an arrest warrant for a shipwreck in Lake Michigan which may be the 17th century vessel, the GRIFFIN, which sank in approximately September 1679. The Plaintiff attempted to identify the location in three separate descriptions, the most recent including that it was "located within three circular areas." At 2. The Michigan Department of Environmental Quality intervened and filed a Motion to Dismiss. The Intervenors sought to determine whether the shipwreck was embedded in the

submerged lands so that the title was transferred to them pursuant to the Abandoned Shipwreck Act of 1987[10]. After several unsuccessful opportunities for the parties to engage in discussions about a cooperative investigation, the Plaintiff failed to file a more precise location.

The Plaintiff argued that the shipwreck did not rest at a single geographical point, and had been identified as precisely as permitted by the circumstances. It also argued that *Fathom Exploration LLC v. The Unidentified Shipwrecked Vessel or Vessels*[11] supported issuance of an arrest warrant prior to resolving deficiencies in identifying the location. The Court distinguished *Fathom* by noting that the arrest warrant in that case had already been issued before the intervenors moved for a more definite statement and the Plaintiffs had recovered several artifacts allowing *in rem* jurisdiction. The Court dismissed the claim *without* prejudice.

Lower River Marine, Inc. v. BARGE USL-497, et al., 2006 A.M.C. 2564, 2006 WL 3704781 (E.D.La. October 23, 2006). Salvage claim survives summary judgment motion.

In July of 2006, principals of Lower River Marine, Inc. ("LRM") discovered BARGE USL-497 at the lower end of their Mississippi River fleeting facility. Apparently, at the instruction of the owner of the barge, a third party towed the barge to LRM's facility. LRM alleged that the barge was "improperly moored to an LRM crane barge"[12] and that their crane barge and an adjacent mooring dolphin were damaged as a result of improper towing and/or mooring of BARGE USL-497. At 2564.

[10] 43 US.S.C. 2105
[11] 352 F.Supp.2d 1218 (S.D. Ala. 2005)
[12] At 2564.

The barge owner filed a Motion to Dismiss for failure to state a claim, which motion encompassed Plaintiff's salvage claim. The motion was denied because material facts existed regarding whether the barge was in a "safe or perilous situation, at risk to herself and/or to other vessels and shore structures when LRM moved [her]." At 2570.

Fuesting v. Lafayette Parish Bayou Vermilion District, et al., 2006 A.M.C. 2856, 470 F.3d 576 (5th Cir., November 14, 2006). Municipality not immune for failed wreck removal effort when boater injured as a result of the obstruction.

A shrimp boat had been deteriorating at dock since 1994 and eventually sank to the riverbed but remained visible. Citizens complained of the eyesore and in January 2001, the Lafayette Parish Bayou Vermilion District obtained permission from the shrimp boat owners to refloat the boat. The attempt failed and the boat remained partially submerged. Although the shrimp boat was moved at least a few feet and rotated, it remained partially submerged and unmarked with buoys or lights. In July 2001, Michael Fuesting was operating a small pleasure craft when he allided with the shrimp boat near the bank of the Vermilion River in Lafayette Parish, Louisiana.

Fuesting sued the District under the Wreck Act[13] which requires "the owner, lessee, or operator" of a sunken craft to mark it, maintain the mark and commence removal. The District Court granted summary judgment because it could not support a finding that the District was an "operator." The District did not contest the fact that a vessel towing a sunken vessel owned by another can violate the Wreck Act and therefore be responsible for removal. Instead, the District contended that there was no written

[13] 33 U.S.C. 409

towage contract with the owner of the shrimp boat. Of course, oral contracts are valid in admiralty. *See Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

The 5th Circuit reversed the District Court and held that: "[a]n entity that enters a towing contract but subsequently fails to tow the vessel as far as intended does not escape operator status because of its failure." At 2862. The Court's rationale was that the intent of the Wreck Act was not to limit the sources of recovery and the pool of responsible parties but instead was to facilitate the marking or removal of dangerous obstructions in navigable waters and "to increase the ability of the Corps of Engineers to recover wreck-removal expenses." At 2861.

Despite a Louisiana statute purporting to immunize the District for discretionary acts within the course and scope of their lawful powers and duties[14], the Court cited authority[15] for the proposition that admiralty law is not displaced by local law and municipalities do not enjoy Eleventh Amendment sovereign immunity unless acting as an arm of the State.

[14] La. Rev. Stat. 9:2798.1(B)

[15] *Workman v. City of New York*, 179 U.S. 552 (1900); *N. Ins. Co. of New York v. Chatham County*, 547 U.S. 189 (2006)(sovereign immunity does not bar a suit against a city and rejecting a county's sovereign immunity defense in an admiralty suit).