

## CLINTON RIVER CRUISE CO, LIMITATION PROCEEDINGS M/V

## CLINTON FRIENDSHIP

United States District Court, Eastern District of Michigan (Southern Division),

October 28, 2005

No. 03-73139

**COLLISION — 2321. Pennsylvania Rule (Statutory Violations) — PRACTICE — 287. Summary Judgment — SEAMEN — 114. Miscellaneous Employments — STATUTES — Federal — 46 U.S. Code §8101.**

The manning statute, 46 U.S.C. §8101, requiring a vessel to carry the crewmembers specified by its Coast Guard certificate of inspection is a statute intended to prevent accident, violation of which is negligence *per se* and engages the *Pennsylvania* Rule. A river boat carrying dinner cruise parties, required by its certificate to have two deckhands, one of whom at the relevant time was doing mainly customer service and could not be counted as a deckhand (although there is no statutory definition of the term), was in violation of the statute, and could be determined by summary judgment to have been negligent and subject to the *Pennsylvania* presumption of causation in the death of a passenger overboard.

**NEGLIGENCE — 11. Standard of Care — PASSENGERS — 125. Duties in Respect of Passenger's Safety — 17. Injury and Death — PERSONAL INJURY — 13127. Life Saving Equipment, Man Overboard — 1373. Intoxication.**

While a passenger vessel has not toward a passenger the heightened duty of care imposed by the Jones Act for seamen, it has a duty of care to detect the intention of an intoxicated passenger to dive overboard and prevent it or rescue him.

**NEGLIGENCE — 12. Breach of Duty — 133. Concurrent Cause — 141. Presumptions — PASSENGERS — 125. Duties in Respect of Passenger's Safety — 17. Injury and Death.**

Where a vessel is in violation of the manning statute by shortage of a crewmember who might otherwise have happened to be where he would have learned of the intention of an intoxicated passenger to dive overboard and might have prevented the dive or started rescue efforts, and its negligence *per se* engages the *Pennsylvania* Rule its presumption leads to the conclusion of concurrent causation by summary judgment because the missing crew member might have prevented the dive or effected a rescue and *semble*, it would be impossible to prove otherwise.

**LIMITATION OF SHIPOWNER'S LIABILITY — 15. Pleading and Practice — PRACTICE — 287. Summary Judgment.**

Where uncontested facts show vessel negligence *per se* by violation of statute and the impossibility of vessel owner's disproving causation, summary judgment of fault is appropriate.

## LIMITATION OF SHIPOWNER'S LIABILITY — 142. Privity — 15. Pleading and

Practice — PRACTICE — 287. Summary Judgment.

Where fault is established summarily in violation of the manning statute by involvement of one of two required deckhands in non-deckhand work, the owner must be in privity because he must know the (unspecified) extent to which his company sets forth the duties of the second deckhand and that they fall below the standard, and summary judgment of privity is appropriate.

Paul D. Galea for *Clinton River Cruise*

Dennis M. O'Bryan and Christopher D. Kuebler (O'Bryan Law Center) for *Claimant*

PAUL D. BORMAN, D.J.:

Presently before the Court are Petitioner's and Claimant's cross-motions for summary judgment. Petitioner is the Clinton River Cruise Company. Claimant is the personal representative of the decedent Rafael DeLaCruz.

### I. BACKGROUND

On August 18, 2003 Petitioner filed a Petition for Exoneration from or Limitation of Liability pursuant to 46 U.S.C. app. §183(a) and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. 46 U.S.C. app. §183(a) limits liability of an owner of a vessel for injury or bodily damage to the value of the owner's interest in the vessel and the vessel's freight. §183(a) states in pertinent part:

The liability of the owner of any vessel . . . for any loss or injury . . . shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Federal Rule of Civil Procedure F sets forth a procedure by which an owner of a vessel may limit its liability pursuant to §183(a) [sic]. To limit its liability under §183(a), the owner of the vessel, within 6 months of receiving a claim in writing, must file a complaint in district court pursuant to the procedure set forth in Federal Rule of Civil Procedure F, which Petitioner did.

Petitioner Clinton Cruise Co. is the owner and operator of the *Clinton Friendship*, a 65 foot river boat that operates in the waters of the Clinton River in the United States. Petitioner hosts dinner cruise parties on the *Clinton Friendship*. On June 3, 2002, decedent DeLaCruz jumped off the *Clinton Friendship* into the waters below. Petitioner alleges that the incident happened through no fault of its own, whereas Claimant maintains that Petitioner was negligent.

Claimant filed its claim on September 8, 2003, alleging negligence. On October 12, 2004, Claimant filed a motion for leave to file first amended claim, which the Court granted. Claimant's amended claim added a breach of warranty of workmanlike service claim.

On November 8, 2004, Claimant filed a motion for summary judgment. On December 7, 2004, Petitioner responded to Claimant's motion, and brought its own motion for summary judgment. On December 14, 2004, Claimant filed its reply brief to Petitioner's response and in opposition to Petitioner's motion for summary judgment.

## II. ARGUMENTS

Claimant argues that Petitioner's failure to provide the requisite number of deckhands on board the boat on June 3, 2002 was negligence *per se*, which would entitle it to summary judgment. Claimant contends that, under the *Pennsylvania* doctrine, Petitioner must show that its violation could not have been the cause of the accident. Claimant concludes that because Susan Bremer was not acting as a deckhand on the night of the accident, the vessel had only one deckhand, Carl Saad, and, therefore, Petitioner is liable for negligence *per se*.

Petitioner argues that the decedent's act of jumping off of Petitioner's vessel and attempting to swim to shore was so unreasonable that no liability may be imposed on Petitioner. Petitioner states that decedent was the proximate cause of his own death. Petitioner further argues that Claimant may not use the negligence *per se* doctrine because Susan Bremer qualified as a deckhand.

Petitioner also argues that it is entitled to exoneration in this case because it was not negligent and in no way contributed to the death of decedent. Petitioner claims that it had no privity and knowledge of the instantaneous navigation decisions and acts of the vessel's non-management employees.

## III. ANALYSIS

### A. Standard for Summary Judgment\*

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### B. Discussion

If a shipboard accident occurs in navigable waters, federal maritime law, not state law, determines the appropriate standard of care. *Beard v.*

\*Discussion omitted. — Eds.

*Norwegian Caribbean Lines*, 1991 AMC 444, 445, 900 F.2d 71, 73 (6 Cir. 1990). Federal district courts have exclusive admiralty jurisdiction over limitation of liability actions. 28 U.S.C. §1333; Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure F. The instant accident occurred in navigable waters.

Under the Limitation Act, 46 U.S.C. app. §183, "a ship owner is entitled to exoneration if he, his vessel, and crew are found to be completely free of fault." *New Conn. Bank & Trust v. Mussa (In re Cleveland Tankers)*, 1996 AMC 151, 154, 67 F.3d 1200, 1203 (6 Cir. 1995) (citing *In re Complaint of Caribbean Sea Transport, Ltd.*, 1985 AMC 1995, 1998, 748 F.2d 622, 626 (11 Cir. 1984), modified on other grounds, 1985 AMC 1995, 753 F.2d 948 (11 Cir. 1985)). "Even if not completely free from fault, the ship owner is entitled to limitation of liability if the ship owner had no knowledge of or privity to the ship's negligence or unseaworthiness." *Id.* (citing *S&E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 1982 AMC 2359, 2366-67, 678 F.2d 636, 642 (6 Cir. 1982); *MV Sunshine II v. Beavin*, 808 F.2d 762, 764 (11 Cir. 1987)). "The burden of proving negligence lies on the person claiming to be injured, but once negligence is established, the vessel's owner must prove lack of knowledge or privity to the negligence." *Id.* (citations omitted).

The elements of a negligence claim under admiralty law are essentially the same as those required to prove a land-based negligence claim. *Pearce v. United States*, 2001 AMC 2586, 2589, 261 F.3d 643, 647-648 (6 Cir. 2001). These elements are: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) the breach of that duty of care; (3) a causal connection between the offending conduct and the resulting injury, or proximate cause; and (4) actual loss, injury or damage suffered by the plaintiff. *Id.*

In *Ginop v. A 1984 Bayliner*, 2003 AMC 1200, 242 F. Supp.2d 482 (E.D. Mich. 2003), the plaintiff, a guest on a friend's pleasure boat, dove from the boat into shallow water and suffered a spinal cord injury. 2003 AMC at 1201, 242 F. Supp.2d at 485. The plaintiff contended that the defendant was negligent in failing to warn the plaintiff about the shallow depth of the water. 2003 AMC at 1202, 242 F. Supp.2d at 485. The court emphasized that "a defendant is not negligent when the plaintiff's behavior was the proximate cause of the accident." 2003 AMC at 1204, 242 F. Supp.2d at 486. The court found that it was not reasonable for the plaintiff, under any circumstances, to jump into the water if he did not know its depth. *Id.* The court concluded that the plaintiff's own negligence was the proximate cause of his injury. *Id.*

In *Pearce v. United States*, *supra*, the plaintiffs' deceased relatives were fishing in a boat near a dam opening. Nine warning signs were posted providing that life jackets were required and the water could suddenly rise and become violently turbulent. 2001 AMC at 2587, 261 F.3d at 646. Additionally, publicly available navigation charts listed the area as a danger area. *Id.* Despite the warning signs, the decedents went fishing inside the dam opening without life jackets. *Id.* When the dam opened, the decedents' boat was washed upwards and the decedents were thrown out of the boat. *Id.* The decedents drowned. *Id.*

The plaintiffs claimed that the defendants, the United States Army Corps of Engineers, negligently operated the dam by failing to audibly warn those in the dam's danger zone. 2001 AMC at 2588, 261 F.3d at 647. Despite the fact that the horn system was not working on the day of the accident, the Sixth Circuit upheld the district court's finding that the defendants were not negligent because they had satisfied their duty to warn by virtue of the clearly visible warning signs. 2001 AMC at 2592, 261 F.3d at 650.

In *Reyes v. Vantage Steamship Company*, 558 F.2d 238, 1979 AMC 1450 [DRO] (5 Cir. 1977) ("Reyes I") and on further appeal, 1981 AMC 1255, 609 F.2d 140 (5 Cir. 1980) ("Reyes II"), the plaintiff brought an action on behalf of the decedent's estate. The decedent, a seaman, was aboard a cargo ship off the coast of Libya. *Reyes I*, 558 F.2d at 239. Decedent dove off the ship's rail and swam approximately 280 feet from the ship and drowned. *Id.* at 240. *Reyes II* confirmed that decedent was legally intoxicated at the time. 1981 AMC at 1256, 609 F.2d at 141-42. The district court granted summary judgment to the defendant and found that the decedent was the proximate cause of his injury. 558 F.2d at 241. The Fifth Circuit reversed the district court's ruling. *Id.* at 243.

The Fifth Circuit found that the fatal flaw in the district court's opinion lay in its disregard for the ship's violation of the Coast Guard regulations, specifically 46 C.F.R. §94.45-1 *et seq.*, which requires that vessels maintain life throwing appliances for rescue operations. *Id.* at 242-43. The Fifth Circuit cited the *Pennsylvania* rule, finding that the defendant violated the Coast Guard regulation, and the regulation was clearly intended to regulate the risk of harm incurred on the decedent. *Id.* at 243. The Court found that the line throwing appliance clearly would have been able to reach the decedent at 280 feet from the ship. *Id.* Based on these findings, the Fifth Circuit found negligence per se. *Id.*

1. *Reyes II* modified certain portions of *Reyes I*.

There are a couple of notable aspects of the *Reyes* cases. First, the plaintiff asserted its claims under the Jones Act. In *Reyes II*, the court of appeals held that a ship owner's negligence under the Jones Act need not be the sole proximate cause of an injury to result in liability, but may merely be a contributing cause. 1981 AMC at 1262-63, 609 F.2d at 146. Therefore, according to the court of appeals, analysis under the Jones Act results in a "slight standard of causation" as opposed to the common law standard of proximate cause. 1981 AMC at 1263, 609 F.2d at 146.

In addition, the *Reyes* cases involve an employer ship owner's duty to its employee seaman. The holdings in both *Reyes I* and *Reyes II* rely upon this unique relationship to impose a higher standard of care than might otherwise be required. *See, e.g., Reyes II*, 1981 AMC at 1257, 609 F.2d at 142 (noting that the affirmative duty to rescue "is an expansive duty which derives from the seaman's celebrated status as a 'ward' of the admiralty . . ."). Therefore, the Court finds that the cases are inapplicable to the present proceedings which do not involve a claim under the Jones Act negligence standard.

In *Rainsford v. Washington Island Ferry Line, Inc.*, 702 F. Supp. 718, 723 (E.D. Wis. 1988), the district court only defines the term "seaman" for purposes of the Jones Act. Thus, this case is also inapplicable to the case at bar because what is at issue is Bremer's status as a deckhand, not a seaman.

### 1. Negligence Per Se

Claimant argues that it is entitled to summary judgment because Petitioner was negligent *per se*. Claimant contends that Petitioner violated the manning statute, 46 U.S.C. §8101, which mandates that a vessel carry the proper number of crewmembers required on the Coast Guard Certificate of Inspection. The Certificate of Inspection for the *Clinton Friendship* mandates that it have two deckhands. Under the *Pennsylvania*<sup>2</sup> doctrine, when a statutory rule intended to prevent an admiralty accident exists, such as 46 U.S.C. §8101, and a party violates the statute injuring the party whom the statute was created to protect, the violating party, to avoid liability, must show that its violation could not have been the cause of the accident. *Pearce*, 2001 AMC at 2590, 261 F.3d at 648.

2. The *Pennsylvania* doctrine originated from the venerable case *The Pennsylvania*, 86 U.S. 125, 1998 AMC 1506 (1873).

a. Violation of statute

Claimant argues that the manning statute was violated because only one deckhand was onboard the boat the night decedent drowned. Claimant contends that while the vessel had a crew of four, the only deckhand was Carl Saad. Petitioner contends that Susan Bremer was also a deckhand, and, therefore, it satisfied the requirements of the certificate. Nowhere in 46 U.S.C. §8101 itself is there any mention of the term "deckhand"; rather, §8101(a) states that "[t]he certificate of inspection issued to a vessel . . . shall state the complement of licensed individuals and crew (including lifeboatmen) considered by the Secretary to be necessary for safe operation." Additionally, there is no statutory definition of what constitutes a "deckhand"; none of the cases cited by Claimant<sup>3</sup> support its contention that Susan Bremer was not a deckhand. Instead, those cases merely recite the duties performed by the particular deckhands in question under circumstances much different from the case at bar.

The depositions of Carl Saad and Susan Bremer are quite revealing on the issue of whether Bremer acted as a deckhand on the night that decedent died. Both Petitioner and Claimant admit that Carl Saad was a deckhand, and Carl Saad refers to himself as a deckhand in his deposition. While he states that his responsibilities in that position included navigating the vessel, he admits that they also included "busboy type" activities, such as "bussing tables, clearing empty glasses, bottles," and "picking up plates."

Susan Bremer states in her deposition that she held the title of "crew" only. The following exchange took place during Bremer's deposition concerning her activities on the night in question:

Q: Did you engage in any — tell me what your activities were; were you like a bartender?

A: No, I can bartend at times, depends on where they need me. I was doing pizza that evening, food service.

Bremer states that she has no Coast Guard certification but that she had gone through a "man overboard drill," which entailed telling the captain that someone was in the water, throwing a life ring to that person, and monitoring the life ring. When counsel inquired whether she considered herself a deckhand, Bremer retorted, "I'm crew, that's what we call our-

3. Claimant cites *Tidewater Marine, Inc. v. Sanco International, Inc.*, 2001 AMC 2319, 113 F. Supp.2d 987 (E.D. La. 2000); *Rainford v. Washington Island Ferry Line, Inc.*, 702 F. Supp. 718 (E.D. Wis. 1988); and *Olsen v. American Steamship Co.*, 2000 AMC 90, 176 F.3d 891 (6 Cir. 1999).

selves," and stated that the crew that night consisted of four people including the captain. She describes the functions that she performed that night in the following manner:

" . . . I arrived and cleaned the boat, get ice, get pop, ice things up, make sure we have the paper products, help people boarding, then we leave the dock, then I walk around and make sure everything's okay."

She was aware that she had not engaged in deckhand-type duties on the night decedent drowned as evidenced by the following significant testimony:

Q: So your duties from the time you boarded, basically you've told us on that particular night is to do the pizza station and throw garbage away, stuff like that?

A: Uh-huh.

Q: No deckhand-type duties?

A: Not that night, no.

Q: What do you recognize to be deckhand-type duties?

A: Handling the lines, staying with the captain, checking with the captain periodically.

Q: Okay.

A: *Making sure no one's hanging over the side of the boat.*

(emphasis added). When asked who was working deckhand duties that night, Bremer responds unequivocally, "Carl." Based upon the combined deposition testimonies of Carl Saad and Susan Bremer, it is apparent to the Court that there was only one deckhand on board the *Clinton Friendship* on the night of June 3, 2002.

Petitioner contends that Bremer's training as a deckhand was sufficient to find that there were two deckhands on duty that night. Following that argument to its logical conclusion, one would have to conclude that, for example, a ship with a captain as a passenger could be deemed to have a captain on board as required by the Certificate of Inspection. That would not be the result intended by the Coast Guard's regulations. While Bremer may have been trained as a deckhand, she was not working in that capacity on the night decedent jumped from the boat.

Despite Petitioner's contention that Ms. Bremer qualified as a "seaman," neither party disputes that she was indeed a member of the crew or a seaman. As Claimant correctly states in its brief response to Petitioner's Supplemental Citation of Authority, "[e]very deckhand is a seaman, but not every seaman is a deckhand." In fact, the Certificate of Inspection

issued to the *Clinton Friendship* distinguishes between "ordinary seamen" on the one hand, and "deckhands" on the other.

Furthermore, Petitioner appears to be attempting to mislead the court with its assertion that Susan Bremer's deposition testimony and her subsequent affidavit are complementary. Bremer clearly affirms in her deposition that Carl Saad was the only deckhand on board the night that decedent drowned, and that she did not perform the duties of a deckhand on that particular night. Bremer's affidavit, to the contrary, implies that she did perform deckhand-type duties on the night in question. Petitioner cannot create a genuine issue of material fact by introducing an affidavit that is inconsistent with prior deposition testimony. *Lockard v. GMC*, 52 Fed. Appx. 782, 789 (6 Cir. 2002) (stating that "a party may not create a genuine issue of material fact by filing an affidavit that 'essentially contradicts his previous deposition testimony' after a motion for summary judgment has been made.") (citing *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6 Cir. 1997)).

Petitioner also submitted the affidavit of Paul Gallas, owner of the Clinton River Cruise Co. and of the *Clinton Friendship*. Gallas states in his affidavit that the number two crewmember on the vessel had the same responsibilities as the number one crewmember. However, Bremer contradicts this statement during her deposition when she stated that she did not act in the same capacity as the number one crewmember, Carl Saad, on the night of June 3, 2002. If the second crewmember on the *Clinton Friendship* generally does not act as a deckhand, performing the responsibilities that both Saad and Bremer stated were typical of a deckhand, then that fact only further persuades the Court that there was only one deckhand on the boat the night decedent drowned. Therefore, because the Court has concluded that the *Clinton Friendship* had only one deckhand on board the boat on the night of June 3, 2002, this conduct violated 46 U.S.C. §8101(a) and the Coast Guard's manning requirements for the *Clinton Friendship* per the Certificate of Inspection.

#### b. Intent of statute to prevent admiralty accidents

As stated above, the *Pennsylvania* doctrine also requires that the statutory rule that has been violated be "intended to prevent an admiralty accident" before the burden shifts to the violating party to show that its violation could not have been the cause of the accident. *Pearce*, 2001 AMC at 2590, 261 F.3d at 648. In *Roy Crook & Sons, Inc. v. Allen*, the Fourth Circuit provided a detailed legislative history of 46 U.S.C. §8101, finding that

"the Act of Congress which first provided for the inspection and licensing of steamboats engaged in interstate commerce did indicate . . . that Congress intended to 'provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam.' " 1986 AMC 2731, 2738, 778 F.2d 1037, 1042 (5 Cir. 1985). Based upon a lengthy examination of the manning statute and case law in other circuits, the court of appeals concluded that Congress meant for the statute to protect both passengers and crew aboard the vessel. 1986 AMC at 2738-40, 778 F.2d at 1042-43. Therefore, the Court finds that 46 U.S.C. §8101 was intended to prevent admiralty accidents.

#### c. Proximate cause of accident

Having concluded that Petitioner violated 46 U.S.C. §8101 by employing only one deckhand on the night that decedent died, and that Congress meant for the statute to protect passengers, the Court must now analyze whether it is a question of material fact whether Petitioner caused the accident. Petitioner bears the burden in this part of the analysis of proving that it was not the cause of decedent's death.

Petitioner contends that decedent was the proximate cause of his own death by jumping off the side of the boat. While Petitioner devotes many lines of its brief chiding decedent for his actions that night, this does not negate the fact that Petitioner may have played some role in decedent's drowning. From the record, it appears that there was no deckhand on the bottom deck. Based upon the testimony of several witnesses, "[p]rior to decedent diving in, there were three to five people congregating at the stern of the lower deck for three to five minutes, screaming and cheering until decedent dove in and drowned." (deposition testimony of four different witnesses cited). According to Bremer, a deckhand would have "[made] sure no [one was] hanging over the side of the boat." In addition, a second deckhand could have stopped the crowd from taunting decedent, notified decedent of the danger he faced, prevented decedent from jumping, told the captain to stop the ship after the dive and reverse thrust the propellers to be closer to decedent, and/or thrown a line out to decedent—as taught in "man overboard" training. Bremer stated that there were no warning signs telling passengers not to jump. Furthermore, while Petitioner makes much of the fact that decedent was not legally intoxicated, the toxicology report indicates that decedent had been drinking and that his blood alcohol level was just shy of the legal limit in Michigan of .08.

Thus, if Bremer had been the second deckhand on board the *Clinton Friendship*, she could have notified the captain promptly, thrown decedent a life ring, and kept watch, which are all standard procedures in a "man-overboard" situation. Accordingly, because Petitioner has not met its burden of proving that it was not the cause of decedent's death, the Court finds that Petitioner was negligent *per se* and grants Claimant's motion for summary judgment on this issue.

## 2. Privy or Knowledge of Negligence

Addressing the substance of Petitioner's motion for summary judgment, under the Limitation Act that governs Petitioner's petition, "a vessel owner may limit liability arising from a casualty to the value of the vessel if the casualty occurred 'without privy or knowledge of the owner.'" 46 U.S.C. app. §183(a) (1996). As noted above, once the claimant establishes negligence, the burden shifts to the vessel owner to prove lack of privy or knowledge of the negligence. *New Conn. Bank & Trust*, 1996 AMC at 154, 67 F.3d at 1203. "In the case of individual owners, it has been commonly held or declared that privy as used in [46 U.S.C. app. §183] means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury." *Coryell v. Phipps*, 317 U.S. 406, 411, 1943 AMC 18, 22 (1943) (citations omitted). The Court finds that Petitioner had knowledge of the negligence of employing only one deckhand.

Gallas, the owner of the *Clinton Friendship*, stated in his affidavit that he knew the responsibilities of Susan Bremer and that she was the number two crewmember on the night of June 3, 2002. However, to the extent that Clinton River Cruise Co. sets forth the duties of the second crewmember, and those duties fall below the standard of a deckhand, Petitioner certainly has knowledge of the negligent conduct with which it has been charged. Therefore, Petitioner's claim of lack of privy or knowledge of the negligence must fail, and Claimant is granted summary judgment on this issue. The Court denies Petitioner's Motion for Summary Judgment.

## IV. CONCLUSION

For the foregoing reasons, the Court hereby denies Petitioner's Motion for Summary Judgment on Claimant's negligence *per se* and lack of privy

claims, and grants Claimant summary judgment on the claim of negligence *per se*.