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## Admiralty

John P. Kavanagh Jr.

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# Admiralty

John P. Kavanagh, Jr.\*

The cases discussed herein represent decisions from the United States Court of Appeals for the Eleventh Circuit, as well as district courts within the Circuit, issued in 2021. While not an all-inclusive list of maritime decisions during that timeframe, the Author identifies and provides summaries of key rulings of interest to the maritime practitioner.<sup>1</sup>

## I. SHIPOWNER'S LIMITATION OF LIABILITY

Two related companies, Skanska USA Civil Southeast, Inc. and Skanska USA, Inc. (collectively Skanska), were under contract with the Florida Department of Transportation to build new spans for the Pensacola Bay Bridge, a “major transportation link between the cities of Pensacola and Gulf Breeze, and between Escambia and Santa Rosa counties.”<sup>2</sup> Skanska’s work required the use of multiple barges “to transport workers and materials to and from the work site.”<sup>3</sup> In fact, there were fifty-five barges on site in September of 2020.<sup>4</sup>

Hurricane Sally made landfall on September 16, 2020, as a Category 2 storm near Gulf Shores, Alabama.<sup>5</sup> This hurricane was approximately thirty-five miles west of Pensacola Bay Bridge. Twenty-seven of the fifty-five Skanska barges broke loose, causing significant damage to the

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\*Partner, Burr & Forman LLP; Co-Chair of the firm’s Transportation and Maritime Practice Group. University of South Alabama (B.A., summa cum laude, 1989); Tulane University School of Law (J.D., magna cum laude, 1992). Member and Proctor, Maritime Law Association of the United States; Southeastern Admiralty Law Institute; Propeller Club (Port of Mobile). Member, State Bars of Mississippi and Alabama.

1. For an analysis of admiralty law during the prior Survey period, see John P. Kavanagh, Jr., *Admiralty, Eleventh Circuit Survey*, 72 MERCER L. REV. 997 (2021).

2. *In re Skanska USA Civil Southeast Inc.*, No. 3:20cv5980/LAC/HTC, 2021 U.S. Dist. LEXIS 251691, at \*10 (N.D. Fla. 2021).

3. *Id.* at \*10–11.

4. *Id.*

5. *Id.* at \*10.

bridge and other properties in and around the area.<sup>6</sup> Skanska filed an admiralty complaint under the Limitation of Vessel Owners Liability Act in the United States District Court for the Northern District of Florida.<sup>7</sup>

*In re Skanska*<sup>8</sup> is an interesting case because it contains a thorough discussion of a limitation claim in the context of anticipated heavy weather, with the interplay of presumed fault under the Louisiana Rule.<sup>9</sup> Generally, the Louisiana Presumption arises when a moving vessel strikes a stationary object; the moving vessel is presumed at fault.<sup>10</sup> This evidentiary device shifts the burden of persuasion to the offending vessel.<sup>11</sup> To overcome its presumed fault, the vessel's interests must demonstrate that the allision was the fault of the stationary object, that the offending vessel acted with reasonable care under the circumstances, or that the allision was an unavoidable accident.<sup>12</sup> Here, Skanska essentially argued that (1) it was caught unaware by the arrival of Hurricane Sally, given the forecast track leading up to the storm's arrival; (2) efforts to secure the barges ahead of the storm were reasonable; and (3) Hurricane Sally was a *vis major*, an unexpected and unforeseeable risk against which all reasonable precautions would not have prevented the loss.<sup>13</sup>

The court walked through the National Hurricane Center's (NHC) warnings for the five days before Hurricane Sally's landfall on September 16, 2020.<sup>14</sup> While less than certain, it was clear that the Pensacola area was at risk on (at least) September 11, 2020:

In fact, as is shown by the entirety of the NHC advisories from Friday afternoon [September 11, 2020] to Wednesday morning [September 16, 2020] when Hurricane Sally made landfall, the Pensacola Bay area was at all times either in the cone of the storm's

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6. *Id.* at \*11.

7. *Id.* at \*9 (citing 46 U.S.C. §§ 30501–30512 (2006)).

8. *In re Skanska USA Civil Southeast Inc.*, No. 3:20cv5980/LAC/HTC, 2021 U.S. Dist. LEXIS 251691, at \*1 (N.D. Fla. 2021).

9. *See id.* at \*23 (discussing the “Louisiana Presumption,” or the “Louisiana Rule.”).

10. *Id.* at \*23–24.

11. *Id.* at \*24.

12. *Id.* (citing *Bunge Corp. v. Freeport Marine and Repair, Inc.*, 240 F.3d 919, 923 (11th Cir. 2001)).

13. *Id.* at \*24–25, \*31–33, \*43.

14. *Id.* at \*33.

predicted path or was under a watch or warning for tropical storm winds or greater.<sup>15</sup>

With respect to the second argument, security of barges, the court pointed out that Skanska actually had a detailed “Hurricane Preparedness Work Plan” (Hurricane Plan).<sup>16</sup> The plan called for Skanska to move its barges to a designated location (Butcherpen Cove or Bayou Chico) once an approaching storm posed a sufficient threat.<sup>17</sup> Rather than implement the plan and move the barges to the designated area(s), Skanska elected to secure them to pilings near the bridge.<sup>18</sup> This turned out to be a disastrous decision, but the court pointed out that, “while failure to abide by the Plan might violate the terms of that contract [the Florida DOT contract], it does not of its own force establish negligent conduct, which is the concern of this litigation.”<sup>19</sup>

Going past the four corners of the contract, however, the court concluded that the safe harbor locations identified therein would have provided “substantially more storm protection than the pilings next to the bridge that Skanska used.”<sup>20</sup> After a thorough analysis, the court concluded that Skanska’s decision to use piling stations near the worksite was negligent.<sup>21</sup>

Skanska’s final argument to exculpate itself from liability was the *force majeure* or *vis major* nature of Hurricane Sally.<sup>22</sup> Skanska claimed the presumption of fault under the Louisiana Rule was rebutted because, despite all appropriate and reasonable efforts, Hurricane Sally was “an inevitable force that caused the breakaway of its barges.”<sup>23</sup> The court again rejected this argument, noting that Skanska’s negligence in failing to take reasonable precautions prevented it from successfully utilizing the *vis major* defense.<sup>24</sup>

Finally, having concluded that negligence was demonstrated, Skanska could not establish any lack of privity or knowledge with respect to the acts or omissions constituting negligence.<sup>25</sup> This is the second step of a limitation action; that is, to determine whether or not

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15. *Id.*

16. *Id.* at \*17–18.

17. *Id.* at \*18.

18. *Id.* at \*17.

19. *Id.* at \*27.

20. *Id.* at \*28.

21. *Id.* at \*30.

22. *Id.* at \*43.

23. *Id.*

24. *Id.* at \*44.

25. *Id.* at \*46.

Skanska was able to limit its liability to the value of the vessels involved.<sup>26</sup> “Here, Skanska must be able to demonstrate that it had no knowledge of the acts of negligence or was not in privity with them.”<sup>27</sup> Skanska could not carry its burden of proof with respect to this charge as the negligence precipitating the loss “sprung wholly from executive decision-making that resulted in the failure to take reasonable measures to protect its barges from the impending storm.”<sup>28</sup> Skanska was unable to establish the necessary lack of privity or knowledge and was therefore unable to limit its liability to the value of the barges.<sup>29</sup>

At the conclusion of its order, the district court dismissed the limitation complaint and lifted the injunction against the various state court actions related to the barge breakaway.<sup>30</sup> The limitation claimants were thus able to return to their original choice of forum and pursue claims arising out of the September 16, 2020 maritime casualty.<sup>31</sup>

## II. CRUISE LINE PASSENGER CLAIMS

The Eleventh Circuit reiterated that a cruise ship passenger need not show the vessel owner had actual or constructive knowledge of a risk-creating condition for claims premised on vicarious liability or employee negligence.<sup>32</sup> A cruise ship passenger, Joann Yusko, was injured during a “Dancing with the Stars” activity aboard the Norwegian Cruise Line (NCL) vessel, *Norwegian Gem*. For the activity, Yusko was paired with a crewmember and professional dancer, Michael Kaskie. During their performance, Kaskie let go of Yusko, and the sixty-four-year-old lady fell and struck her head, suffering a traumatic brain injury resulting from the fall.<sup>33</sup>

A suit was filed against the vessel owner, NCL (Bahamas) Ltd.<sup>34</sup> However, the district court granted summary judgment for the cruise line, holding that Yusko failed to demonstrate the ship owner had actual or constructive knowledge of the risk-creating condition that

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26. *Id.* at \*45.

27. *Id.*

28. *Id.* at \*46.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Yusko v. NCL (Bah.), Ltd.*, 4 F.4th 1164, 1166 (11th Cir. 2021).

33. *Id.*

34. *Id.*

caused the passenger's injury, namely, "Kaskie's allegedly negligent dancing."<sup>35</sup>

The Eleventh Circuit reversed, holding that maritime negligence claims preceding on theories of vicarious liability—as opposed to claims involving direct liability against a ship owner—do not require a showing that the vessel owner was aware of the hazard.<sup>36</sup> The court explained that NCL erroneously conflated "the very different concepts of direct and vicarious liability."<sup>37</sup> Maritime law requires a vessel owner to exercise the duty of ordinary care to prevent injury to passengers.<sup>38</sup> The direct breach of this duty by the vessel owner results in liability for injuries caused to passengers.<sup>39</sup> Pursuant to the doctrine of vicarious liability, however, the "innocent" ship owner can still be held liable for the negligence of its employees: "When the tortfeasor is an employee, the principle of vicarious liability allows 'an otherwise non-faulty employer' to be held liable 'for the negligent acts of that employee acting within the scope of employment.'"<sup>40</sup>

The *Yusko* decision would likely open up a host of issues, allowing claims to advance via allegations of vicarious liability or employee negligence absent the requirements of actual or constructive notice of a shipboard hazard. After all, is every hazardous condition not ultimately traced back to an act or omission of an employee? The court in *Yusko* acknowledged this conundrum but was unpersuaded by the argument.<sup>41</sup>

Interestingly, in a decision issued at the end of 2021, the Southern District of Florida squarely addressed this issue.<sup>42</sup> The plaintiff, Sherri Britt, was a passenger aboard the Carnival *Glory* when she slipped and fell on an exterior staircase.<sup>43</sup> She filed a lawsuit against Carnival that contained five counts, including an allegation of "negligence against Defendant for the acts of its employees based on vicarious liability

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35. *Id.*

36. *Id.* at 1167.

37. *Id.* at 1169.

38. *Id.* at 1168.

39. *Id.* (citing *inter alia* *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989)). *Keefe* also involved an injury to a dancing passenger. However, in that case the passenger fell on a wet surface while dancing and sued the vessel owner for (essentially) premises liability (negligently maintaining its floor). *Keefe*, 867 F.2d at 1320 (cited in *Yusko*, 4 F.4th at 1168).

40. *Yusko*, 4 F.4th at 1169 (quoting *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011)).

41. *Id.* at 1170.

42. *Britt v. Carnival Corp.*, No. 1:21-cv-22726-KMM, 2021 U.S. Dist. LEXIS 248263 (S.D. Fla. 2021).

43. *Id.* at \*2.

(Count V).<sup>44</sup> Carnival moved to dismiss Count V for failure to state a claim upon which relief could be granted.<sup>45</sup>

Citing *Yusko*, the district court agreed, reasoning that the plaintiff essentially sought to hold Carnival responsible for its employees' "negligent mopping."<sup>46</sup> "At bottom, the employees' negligent mopping allegedly created a dangerous condition on the premises of the ship . . . . Therefore, the employees' negligent mopping is in fact a claim for negligent maintenance of Defendant's premises and negligent failure to warn."<sup>47</sup> The district court rejected a broad reading of *Yusko* as permitting claims for negligent maintenance or failure to warn under the guise of a vicarious liability claim.<sup>48</sup> "Thus, *Yusko* contemplates, and this Court agrees, that claims stemming from the negligent maintenance of a ship's premises or failure to warn will be made out under a direct liability theory, which requires notice."<sup>49</sup>

The Eleventh Circuit addressed the enforceability of a forum selection clause in a cruise ticket, taking into consideration the unique circumstances of the post COVID-19 world.<sup>50</sup> The plaintiff, Paul Turner, along with his cruise mates, filed a class-action lawsuit following his cruise aboard the *Costa Luminosa*, a vessel owned by the defendant, Costa Crociere S.P.A. Turner, completed a transatlantic voyage during which they were apparently exposed to COVID-19; when the passengers disembarked in France, "thirty-six of the seventy-five passengers tested positive for COVID-19."<sup>51</sup> It turned out that the prior cruise of the *Costa Luminosa* carried passengers who were infected with the COVID-19 virus.<sup>52</sup>

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44. *Id.* at \*3.

45. *Id.* (citing FED. R. CIV. P. 12(b)(6)).

46. *Id.* at \*8–9.

47. *Id.* at \*9–10.

48. *Id.* at \*10.

49. *Id.* at \*11. The Southern District of Florida previously issued a decision using a similar vein of reasoning. In *Quashen v. Carnival Corp.*, the court rejected the plaintiff's efforts to plead negligent maintenance and failure to warn claims under a vicarious liability theory. No. 1:20-cv-22299-KMM, 2021 U.S. Dist. LEXIS 241507 (S.D. Fla. 2021).

If Plaintiff were permitted to assert a negligent maintenance claim premised on a vicarious liability theory, that would allow Plaintiff to bypass the notice requirement simply by identifying an employee involved in Carnival's mere creation or maintenance of a defect. Such a ruling would entirely dilute the notice requirement—which is a mainstay of Federal maritime tort law.

*Id.* at \*52–53.

50. *Turner v. Costa Crociere S.P.A.*, 9 F.4th 1341 (11th Cir. 2021).

51. *Id.* at 1345.

52. *Id.* at 1344.

Turner filed suit in the Southern District of Florida, seeking damages for himself and the class of fellow passengers aboard the *Costa Luminosa*.<sup>53</sup> The claims were based on the cruise line's negligence in failing to protect the passengers from COVID-19.<sup>54</sup> The cruise ticket contained a forum selection clause requiring claims to be filed in Italy. The cruise line moved to dismiss Turner's putative class action on *forum non conveniens* grounds, arguing that the forum selection clause was valid and required Turner's claims to be litigated in the designated venue, Italy. The district court granted the motion, and the instant appeal followed.<sup>55</sup>

Federal courts routinely enforce forum selection clauses in cruise tickets, including those which require claims to be filed in a foreign venue.<sup>56</sup> Turner made the novel argument that enforcing the forum selection clause would be fundamentally unfair, as it would expose him and other litigants to the previously unknown health hazards associated with international travel.<sup>57</sup> To address this argument, the cruise line produced an affidavit from an Italian attorney explaining that litigants are not required to attend routine proceedings in person.<sup>58</sup> Even for those events requiring in-person attendance, alternative arrangements could be made for the appointment of a special attorney to attend on the litigants' behalf.<sup>59</sup> Turner did not submit any evidence to counter these points.<sup>60</sup> Citing the heavy burden of proof to avoid enforcement of an otherwise valid forum selection clause, the Eleventh Circuit had no problem accepting the district court's findings and conclusions, and it affirmed the dismissal of Turner's lawsuit.<sup>61</sup>

### III. JONES ACT SEAMAN'S CLAIMS

The Eleventh Circuit addressed evidentiary considerations, construing disputed medical evidence in a Jones Act case, with its decision in *Witbart v. Mandara Spa (Haw.), LLC*.<sup>62</sup> Witbart was

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53. *Id.* at 1345.

54. *Id.*

55. *Id.*

56. *Id.* at 1347; see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

57. *Turner*, 9 F.4th at 1346.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The appellate court also affirmed the district court's determination that the use of the Italian courts did not violate public policy, nor did the lower court err in applying the *forum non conveniens* analysis. *Id.* at 1347–48.

62. 860 F. App'x 175 (S.D. Fla. 2021).



employed by Mandara Spa and filed a lawsuit under the Jones Act and General Maritime Law following an injury to her neck and spine.<sup>63</sup>

After an eight-day bench trial, the district court determined that the Jones Act employer, Mandara Spa, successfully proved its affirmative defense, relying on *McCorpen v. Central Gulf S.S. Corp.*<sup>64</sup> The court in *McCorpen* held that a seaman who misrepresents a medical condition, in which false information is relied on by their employer, can forfeit rights to maintenance and cure.<sup>65</sup> The district court determined that Witbart had a serious, debilitating medical condition that she failed to disclose to her employer.<sup>66</sup>

On appeal, Witbart argued the district court failed to construe the disputed medical evidence in her favor, relying on *Vaughan v. Atkinson*,<sup>67</sup> a decision by the Supreme Court of the United States.<sup>68</sup> Witbart argued that *Vaughan* requires disputed medical evidence to be construed in favor of the seaman. The appellate court observed, “[t]his is an incorrect reading of the case [*Vaughan*].”<sup>69</sup> The Eleventh Circuit pointed out that “*Vaughan* resolved an ambiguity in favor of a seaman regarding the amount of maintenance and cure owed by the shipowner.”<sup>70</sup> *Vaughan* does not dictate that all evidentiary ambiguities be resolved in the seaman’s favor. Directing such action would “strip district courts of their ability to make credibility determinations when confronted with conflicting evidence during a bench trial.”<sup>71</sup>

#### IV. LONGSHORE AND HARBOR WORKER’S CLAIMS

The Eleventh Circuit affirmed the grant of summary judgment in favor of a vessel owner in an action involving the death of a diver hired to clean a ship’s hull.<sup>72</sup> Brizo, LLC owned the *M/V Honey*, a 164-foot yacht. Brizo contracted with Eastern Marine Services, a commercial

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63. *Id.* at 176 (citing 46 U.S.C. § 30104 (2008)). There was no discussion in the decision about the vessel upon which Witbart was employed.

64. *Witbart*, 860 F. App’x at 176 (citing *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968)).

65. *McCorpen*, 396 F.2d at 548.

66. *Witbart*, 860 F. App’x at 176.

67. 369 U.S. 527 (1962).

68. *Witbart*, 860 F. App’x at 176 (citing *Vaughan*, 369 U.S. at 527).

69. *Id.* at 176.

70. *Id.* (citing *Vaughan*, 369 U.S. at 532–33).

71. *Id.* at 176.

72. *Brizo, LLC v. Carbajal*, No. 20-11204, 2021 U.S. App. LEXIS 32400, at \*1–2 (11th Cir. 2021).

diving company, to clean the vessel's hull.<sup>73</sup> On June 21, 2017, Eastern Marine sent an email to *M/V Honey's* captain advising that the cleaning "was coming up approximately 6/26 at 7:00 P.M . . ."<sup>74</sup> The email further informed the vessel's captain that the date was an estimate, subject to change.<sup>75</sup>

Eastern Marine sent Luis Gorgonio Ixba to clean the hull of the *M/V Honey*.<sup>76</sup> However, Ixba arrived at the vessel on June 27, 2017, one day after the estimated arrival date sent to *M/V Honey's* captain. Tragically, Ixba did not notify the vessel's crew upon his arrival at the vessel. He began his underwater cleaning unknown to anyone aboard the yacht.<sup>77</sup> Without knowledge that Ixba was in the water cleaning the hull, the chief mate started the bow thruster to move the vessel closer to the dock. Ixba was killed as a result of this action.<sup>78</sup>

Ixba's estate filed a wrongful death action in the United States District Court for the Southern District of Florida.<sup>79</sup> The vessel owner filed a complaint for the limitation of liability.<sup>80</sup> After discovery in the federal limitation suit, the district court granted summary judgment in favor of the vessel owner after first addressing whether or not the Longshore and Harbor Workers' Compensation Act (LHWCA)<sup>81</sup> governed the decedent's claims for negligence.<sup>82</sup>

The dispositive and controlling fact was undisputed: Ixba did not alert vessel personnel to his presence.<sup>83</sup> The legal argument centered on whether or not the LHWCA would apply to Ixba's claim. The duties owed by a vessel owner to individuals covered by the LHWCA are narrowly confined by case law.<sup>84</sup> The touchstone of all these duties "is that the vessel crew *knows* that workers are present to work on the vessel."<sup>85</sup>

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73. *Id.* at \*2–3.

74. *Id.* at \*3.

75. *Id.*

76. *Id.*

77. *Id.* at \*3–4.

78. *Id.* at \*4.

79. *Id.* at \*2.

80. *Id.* (citing 46 U.S.C. §§ 30501–30512 (2006)).

81. 33 U.S.C. §§ 901–980 (1984).

82. *Brizo, LLC*, 2021 U.S. App. LEXIS 32400, at \*2, \*4–5.

83. *Id.* at \*5–6.

84. *Id.* at \*5 (citing *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) (listing the well-known *Scindia* duties a vessel owner owes to workers aboard its vessel)).

85. *Id.* at \*5 (emphasis in original).

The decedent's estate argued that the LHWCA's recreational vessel exception applied, excluding Ixba from coverage under the LHWCA. Thus, Ixba's estate should be allowed to pursue general negligence claims under the maritime law, "which imposes a general duty of reasonable care."<sup>86</sup> The *M/V Honey* was a recreational vessel. The LHWCA's scope does not cover individuals employed to repair recreational vessels.<sup>87</sup> However, the exemptions enumerated in this section apply only to individuals "subject to coverage under a State workers' compensation law."<sup>88</sup> There was no evidence in the record indicating Ixba was covered by any state workers' compensation law, and summary judgment in favor of the vessel owner was affirmed.<sup>89</sup>

#### V. MARINE INSURANCE

In 2021, the Eleventh Circuit revisited the wake of uncertainty left by the Supreme Court's direction that state law applies to marine insurance contracts in the absence of established maritime precedent.<sup>90</sup> The *M/Y My Lady* was a ninety-two foot Hatteras yacht insured by Travelers. The hull insurance policy contained two express warranties: (1) Owners are required to employ a full-time professional captain approved by Travelers, and (2) owners are required to employ one full or part-time professional crew member.<sup>91</sup> Neither one of these requirements was followed by the owner of the *M/Y My Lady*.<sup>92</sup>

Hurricane Irma approached Florida in September 2017.<sup>93</sup> When efforts to move the vessel to a safe harbor failed, the owner took steps to shore-up the vessel's moorings. This effort was to no avail; during the storm, a dock piling gave way, allowing the yacht to drift into other pilings. The *M/Y My Lady*'s hull was eventually punctured, and the vessel sank.<sup>94</sup> It was declared to be a total constructive loss.<sup>95</sup>

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86. *Id.* at \*7–9.

87. 33 U.S.C. § 902(3)(f) (2009). This section includes the definitions relevant to the LHWCA. It specifically excludes a number of work classifications, including individuals employed to build or repair recreational vessels.

88. 33 U.S.C. § 902(3).

89. *Brizo*, 2021 U.S. App. LEXIS 32400, at \*9, \*19.

90. *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC (Travelers I)*, 996 F.3d 1161 (11th Cir. 2021); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

91. *Travelers I*, 996 F.3d at 1163.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Travelers filed the instant action and also denied coverage for the loss, pointing to the breach of the captain and crew warranties cited above.<sup>96</sup> The owner of the vessel, Ocean Reef, argued that Florida's "anti-technical statute" should apply, which would forgive breaches of the warranties if the violations thereof were unrelated to the loss.<sup>97</sup> The district court held that federal maritime law applied to the claim and that established maritime jurisprudence required strict adherence to the warranties in the insurance policy. Travelers's motion for summary judgment was granted, and the owner filed the instant appeal.<sup>98</sup>

The Eleventh Circuit provided a comprehensive overview of the Supreme Court's seminal decision on marine insurance, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*<sup>99</sup> In this 1955 opinion, the Supreme Court "concluded that there was no established federal maritime rule 'requiring strict fulfillment of marine insurance warranties . . .'"<sup>100</sup> Lower courts were directed to apply state law to marine insurance contracts in the absence of entrenched federal precedent.<sup>101</sup> Consequently, the Eleventh Circuit read *Wilburn* to require a threshold determination "if the *specific* warranty at issue is (or should be) the subject of a uniform or entrenched federal admiralty rule."<sup>102</sup>

In reaching its decision, the district court relied on two cases: *Lexington Insurance Co. v. Cooke's Seafood*,<sup>103</sup> and *Hilton Oil Transport v. Jones*.<sup>104</sup> Both cases involved violations of navigational limit warranties which exclude coverage even if the breach was unrelated to the loss. The district court read these cases as establishing a blanket rule requiring strict adherence to all warranties in marine insurance policies.<sup>105</sup> However, the Eleventh Circuit explained that this holding is contrary to *Wilburn* and would "eviscerate" the Supreme Court's

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96. *Id.*

97. *Id.* at 1164 (quoting Fla. Stat. § 627.409(2)) ("A breach . . . does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.").

98. *Id.*

99. *Travelers I*, 996 F.3d at 1164 (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

100. *Id.* (quoting *Wilburn*, 348 U.S. at 314).

101. *Id.* at 1165 (citing *Wilburn*, 348 U.S. at 314–16).

102. *Id.* at 1167 (emphasis in original) (quoting *Great Lakes Reinsurance (UK) v. Rosin*, 757 F. Supp. 2d 1244, 1257 (S.D. Fla. 2010)).

103. 835 F.2d 1364 (11th Cir. 1988).

104. 75 F.3d 627 (11th Cir. 1996); *Travelers I*, 996 F.3d at 1167–68.

105. *Travelers I*, 996 F.3d at 1168.

directive that there is “no established federal maritime rule requiring strict fulfillment of all warranties in marine insurance policies.”<sup>106</sup>

The Eleventh Circuit surveyed maritime jurisprudence for the specific warranties—captain and crew warranties.<sup>107</sup> Finding none, the court was confined by the *Wilburn* directive to employ Florida law, including the state’s anti-technical statute.<sup>108</sup> The lower court’s decision was reversed, and the case was remanded with directions to apply the Florida statute and consider the relevant issues in light thereof.<sup>109</sup>

On remand, the district court changed course and granted summary judgment in favor of the insured.<sup>110</sup> The defendant (insured) presented expert testimony that its storm preparations were reasonable and that the lack of a full-time captain did not increase the hazard that caused the vessel’s loss.<sup>111</sup> The burden shifted to the insurance company to demonstrate an issue of material fact. However, Travelers’s request to use testimony from its rebuttal expert witness was not allowed.<sup>112</sup> The court awarded the insured \$2,000,000—the full coverage of the vessel.<sup>113</sup>

Note that the Eleventh Circuit specifically invited the Supreme Court to revisit its decision in *Wilburn*.<sup>114</sup> The Supreme Court may have the opportunity to address the legacy of confusion created by *Wilburn*. It appears that the insurance company filed an appeal to the Eleventh Circuit from the most recent summary judgment order.

In *Great Lakes Insurance SE v. Sunset Watersports, Inc.*,<sup>115</sup> another case addressing the enforceability of warranties in marine insurance policies, the district court granted summary judgment in favor of underwriters and concluded the subject insurance policies provided no coverage for multiple personal injuries and wrongful death claims.<sup>116</sup>

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106. *Id.*

107. *Id.* at 1168–70.

108. *Id.* at 1171.

109. *Id.*

110. Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters (*Travelers II*), LLC, No. 18-CIV-81270-RAR, 2021 U.S. Dist. LEXIS 206429, at \*1–2 (S.D. Fla. 2021).

111. *Id.* at \*7.

112. *Id.* at \*7–8.

113. *Id.* at \*9–10.

114. *Travelers I*, 996 F.3d at 1171. The Eleventh Circuit points out that the Supreme Court itself has provided little guidance on the *Wilburn* issue (entrenched precedent versus state law): “In the 65 years since *Wilburn Boat* was decided, the Court has cited the case just 13 times. Only two of those cases are relevant here, and neither one dealt with an express warranty in a marine insurance policy.” *Id.* at 1166.

115. No. 20-CIV-61630-WPD, 2021 U.S. Dist. LEXIS 215725 (S.D. Fla. 2021).

116. *Id.* at \*3, \*12.

The facts of the case are somewhat confusing because there are numerous insurance policies covering multiple policy years, along with four separate personal injury and wrongful death claims.

The first issue was whether misrepresentations or omissions made in the policy applications would void coverage *ab initio* under the doctrine of *uberrimae fidei*.<sup>117</sup> The court recognized the doctrine of *uberrimae fidei* was controlling in the Eleventh Circuit.<sup>118</sup> This doctrine imposes the duty of “utmost good faith” on the insured to identify all facts material to the risk, “regardless of whether the insurer, underwriter, or application specifically inquires into them.”<sup>119</sup> In the instant case, underwriters argued that the insured failed to disclose multiple losses and claims over several years when it obtained and renewed the policies at issue.<sup>120</sup>

Defendants, meanwhile, argued that *uberrimae fidei* had never been applied by the Eleventh Circuit in the protection and indemnity (P&I) context, namely, third-party liability claims.<sup>121</sup> This was a distinction without a difference because New York law and the applicable policy language obligated full disclosure of risks bearing on the acceptance or continuance of the insurance in question.<sup>122</sup> Ultimately, the court decided there were factual issues precluding summary judgment on the issue. Both parties presented underwriting experts who differed on whether the disclosures would have played a role in issuing the policies in the first place.<sup>123</sup> Summary judgment was denied on this ground, but the court addressed the other arguments supporting the plaintiff’s position—lack of coverage.<sup>124</sup>

Specifically, the two wrongful death claimants were transported to an offshore location by the defendant’s vessel, *Party Cat*, and then transferred to a parasail vessel, *Parasail V*.<sup>125</sup> The line parted from their parasail, causing the unfortunate victims to crash into the ocean and sustain fatal injuries.<sup>126</sup> Underwriters argued that there was no coverage under the insurance policy issued for the *Party Cat* because

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117. *Id.* at \*10–11.

118. *Id.* at \*12.

119. *Id.* at \*12–13.

120. *Id.* at \*20–22.

121. *Id.* at \*15.

122. *Id.* at \*14. The insurance policies called for application of New York law in the event maritime law did not apply. *Id.* at \*14 n.7 (quoting choice of law clause found in policies).

123. *Id.* at \*24–25.

124. *Id.* at \*26.

125. *Id.* at \*28.

126. *Id.*

the loss did not arise “as a result of [the] ownership or operation of the Scheduled Vessel.”<sup>127</sup> Again, there was no dispute that the decedents were not on the *Party Cat* when their fatal injuries occurred. The court rejected arguments that coverage existed due to ownership or operation of the *Party Cat*.<sup>128</sup>

There was a second policy which may have applied, presumably furnishing coverage for losses arising out of the operation of *Parasail V*.<sup>129</sup> However, this policy included a navigational warranty which precluded the vessel from traveling more than one mile from the coast of Florida.<sup>130</sup> It was undisputed that the accident occurred outside of this navigational restriction. Federal maritime law is entrenched and established because it requires strict and absolute enforcement of express navigational warranties.<sup>131</sup> “In fact, ‘the breach of a navigation limit warranty bars coverage as a matter of maritime law even when the breach is unrelated to the loss.’”<sup>132</sup>

A final claim for coverage of a personal injury claim was denied because the passenger failed to sign a release before boarding the insured’s vessel.<sup>133</sup> The policies issued to the defendants required that participants in any activity sign a release prior to boarding a watercraft. The injured passenger did not sign a release and was injured while boarding the vessel when she slipped on the gunwale and hurt her ankle.<sup>134</sup> The court deemed the requirement to be unambiguous and enforced it as written, as required by New York law.<sup>135</sup> “Accordingly, because [the passenger] never signed a release prior to boarding the *Parasail V*, and the policy warranted that a release be signed, the unambiguous language voids coverage for the Manderson Claim.”<sup>136</sup>

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127. *Id.* at \*28–29.

128. *Id.* at \*29, \*35.

129. *Id.* at \*35–36.

130. *Id.*

131. *Id.* at \*36.

132. *Id.* at \*36–37 (quoting *Travelers I*, 996 F.3d at 1168).

133. *Id.* at \*47.

134. *Id.*

135. *Id.*

136. *Id.* at \*49.

## VI. MARITIME LIENS

Fine art affixed to the wall of a luxury yacht was held to be an “appurtenance” of the vessel to which a maritime lien attached.<sup>137</sup> The *M/Y Blue Star* is a 143-foot luxury yacht. In 2020, the Rybovich Boat Company arrested the vessel for failure to pay its bills.<sup>138</sup> The vessel was eventually sold at a United States Marshal’s sale, but fourteen paintings previously secured to the vessel’s interior walls were not included. Claimants moved to sell the artwork because the sale proceeds were insufficient to cover all liens. The vessel owner opposed this effort, arguing that the paintings were his personal property to which maritime liens did not attach.<sup>139</sup>

The fundamental question was whether the artwork constituted an “appurtenance” to the vessel.<sup>140</sup> Maritime liens attach not only to a vessel; all equipment that is “essential to the ship’s navigation and operation, is subject to maritime liens, . . . regardless of who the actual owner of the equipment may be.”<sup>141</sup>

An appurtenance is an item “essential to the ship’s navigation, operation, or mission.”<sup>142</sup> To determine whether an item is an appurtenance, the court looks to the relationship the item bears to the service or the work of the vessel.<sup>143</sup> The district court distilled a three-part inquiry to determine whether the artwork constituted an appurtenance subject to a maritime lien: (1) whether the artwork was a specifically identifiable item; (2) whether it was used aboard a specifically identifiable vessel; and (3) whether it was “essential to the vessel’s navigation, operation, or mission.”<sup>144</sup> The first two elements were not in dispute. The artwork was easily identifiable and was used aboard the *M/Y Blue Star*, having been affixed to the vessel’s walls for at least ten years.<sup>145</sup>

The final criteria—whether the artwork was essential to the vessel’s navigation, operation, or mission—was subject to debate.<sup>146</sup> The *M/Y*

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137. Rybovich Boat Co., LLC v. M/Y Blue Star, No. 20-80136-CIV-ALTMAN, 2021 U.S. Dist. LEXIS 227511, at \*2–3 (S.D. Fla. 2021).

138. *Id.* at \*3.

139. *Id.* at \*4–6.

140. *Id.* at \*5.

141. *Id.* at \*7 (quoting *Motor-Servs. Hugo Stamp, Inc. v. M/V Regal Empress*, 165 F. App’x 837, 840 (11th Cir. 2006)).

142. *Id.* at \*8 (quoting *Gonzalez v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1354 (S.D. Fla. 2000)).

143. *Id.* (citing *Anderson v. U.S.*, 317 F.3d 1235, 1238 (11th Cir. 2003)).

144. *Id.* at \*9 (quoting *Gonzalez*, 102 F. Supp. 2d at 1356).

145. *Id.* at \*9–11.

146. *Id.* at \*9.



*Blue Star* was a “pleasure yacht,” per the court, and its mission was to “bring pleasure to its occupants.”<sup>147</sup> The district court noted that the artwork was an integral part of the overall aesthetic of the vessel: “It [complemented] the fully furnished, multi-cabin superyacht’s wood-paneled interiors, its five marble bathrooms (each with capacious soaking tubs), its stainless-steel appliances, its lavish dining room (staffed with a dedicated chef and multiple stewardesses), and its opulent main deck.”<sup>148</sup>

The court rejected the defendant’s argument that the artwork did not assist with the actual operation of the ship.<sup>149</sup> Federal courts have long recognized that appurtenant items can be essential to a ship’s mission “even though the items have little to do with the ship’s navigation or operation.”<sup>150</sup>

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147. *Id.* at \*11, \*14.

148. *Id.* at \*14.

149. *Id.* at \*11–12.

150. *Id.* at \*13.