IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20252

IN THE MATTER OF NASSAU BAY WATER SPORTS, INC., Owner of Yamaha Jet Ski Boat Vin, Etc.,

Plaintiff-Appellee,

and

NASSAU BAY WATER SPORTS INC.,

Plaintiff-Appellee Cross-Appellant,

v.

FORREST McCLELLAND and BRENDA McCLELLAND,

Claimants-Appellants Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(CA-H-92-416)

(July 19, 1995)

Before KING, GARWOOD, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Forrest and Brenda McClelland appeal the district court's judgment in favor of Nassau Bay Water Sports, Inc. and the court's

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

order of limited liability for Nassau Bay. Nassau Bay cross-appeals from the district court's order of limited liability, contending that the district court should have granted it complete exoneration from liability. Having reviewed the arguments, we affirm the district court's judgment for Nassau Bay, but we modify the order of limited liability so as to grant Nassau Bay complete exoneration.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 1991, two jet skis[1] owned by Nassau Bay collided on Clear Lake. David Walker, an employee of Nassau Bay, had rented jet skis to Ronald Shrader and to Forrest and Brenda McClelland. At the time of the collision, Jonathon Johnson was operating the jet ski rented by Shrader, and Forrest McClelland, with Brenda McClelland as a passenger, was operating another jet ski. The jet skis collided, and Johnson's jet ski struck Forrest McClelland's left leg, resulting in a compound fracture that required surgical repair and a later bone graft procedure. Brenda McClelland received minor injuries to her left leg.

The McClelland's filed a lawsuit in Texas state court against Nassau Bay, Shrader, and Johnson to recover for their injuries. Nassau Bay subsequently filed a "complaint for exoneration from or limitation of liability" in federal district court pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §§ 181-88 (the "Limitation Act"). The McClellands filed a motion to dismiss

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[1] We use the term "jet ski" to refer to the generic class of jet-propelled, open-sided vessels.

the complaint and a motion for summary judgment, and Nassau Bay responded by filing a cross-motion for summary judgment. The district court denied the McClelland's motion for summary judgment, granted Nassau Bay's motion for summary judgment, and ordered that Nassau Bay's liability be limited to $7,400 -- the value of the two jet skis involved in the accident. As the court concluded:

> [The McClelland's] assertion that [Nassau Bay] was negligent in not determining Johnson's skill level is without merit. Though [Nassau Bay] did not choose to determine Johnson's skill level through a written question on the rental agreement, Walker orally questioned Johnson and observed him riding the jet ski. Such actions are certainly adequate and are not less thorough in this instance than a written question.
>
> This Court also disagrees with [the McClelland's] argument that it was negligence to not provide some sort of instruction to Johnson. Walker determined that Johnson was a very good jet skier. In this case, [Nassau Bay] did not have a duty to provide advanced lessons or safety review classes to Johnson.
>
> Accordingly, it is hereby ORDERED . . . that [Nassau Bay's] Cross-Motion for Summary Judgment is GRANTED, and [Nassau Bay's] liability is limited to $7,400.00.

Pursuant to Federal Rule of Civil Procedure 59, the McClellands filed a "Motion for New Trial and Motion to Reconsider" the order granting summary judgment for Nassau Bay. The district court denied the motion, and the McClellands appealed. Subsequently, Nassau Bay appealed as well.

II. STANDARD OF REVIEW

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court." <u>Gulf States Ins. Co. v. Alamo Carriage Serv.</u>, 22 F.3d 88, 90 (5th Cir. 1994) (internal quotations

omitted). Summary judgment is proper "when no genuine issue of material fact exists that would necessitate a trial." Id. Rule 56(c) of the Federal Rules of Civil Procedure prescribes that the party moving for summary judgment bears the initial burden of informing the district court of the basis for its motion and of identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Norman v. Apache Corp., 19 F.3d 1017, 1023 (5th Cir. 1994). If the moving party meets its burden, the burden then shifts to the nonmoving party who must establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87 (1986); Norman, 19 F.3d at 1023. Notably, the non-moving party cannot carry its burden by simply showing that there is some metaphysical doubt as to the material facts. Matsushita, 475 U.S. at 586. If, however, "the evidence is such that a reasonable jury could return a verdict for the non-moving party," summary judgment will not lie. Anderson, 477 U.S. at 248.

III. ANALYSIS AND DISCUSSION

A. The Limitation Act

The McClellands argue that the district court improperly granted summary judgment for Nassau Bay because, inter alia, a jet ski is not a "vessel" within the meaning of the Limitation Act. Specifically, they contend that although "jet skis comport with the definition of `vessel' defined in 46 U.S.C. § 183, the application

of the Limitation of Liability Act to pleasure crafts such as jet skis fails to serve the underlying purposes of the Act."[2]

Congress enacted the Limitation Act in 1851 to promote investment in the domestic commercial shipping industry. The Limitation Act restricts the financial liability of a shipowner to the value of the vessel and its freight when the vessel is involved in an accident caused without the shipowner's "privity or knowledge."[3] See Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1227 (11th Cir. 1990). In 1886, Congress amended the Act to extend its application to "all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." See 46 U.S.C. § 188; Kays, 893 F.2d at 1228. In its first case interpreting the Limitation Act, the Supreme Court explained the Act's purpose in the following manner:

> The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships,

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[2] In response to a question posed to counsel for the McClellands at oral argument, counsel stated that the McClellands do not challenge the existence of admiralty jurisdiction.

[3] The Act provides in the following relevant part:

> The liability of the owner of ***any vessel*** . . . for any embezzlement, loss, or destruction . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (emphasis added).

> incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount.

Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 121 (1871).

Based on this expression of the Act's purpose, the application of the Limitation Act to pleasure craft has been criticized. See, e.g., Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 10-23, at 880-84 (2d ed. 1975). Nevertheless, even we have sanctioned an extension of the Limitation Act to cover pleasure craft. In Gibboney v. Wright, we made the following observations:

> [W]e acknowledge that contemporary thought finds little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic -- for the injured claimants -- provisions of the Limitation Act. Nevertheless, the cases, as well as Congress, have spoken with a clear voice. And we must heed their words.
>
> [T]he weekend sailor is as privileged to limit liability for damages committed by his yacht as are hard-pressed commercial owners . . . plying their trade across the crowded shipping lanes . . . .

517 F.2d 1054, 1057 (5th Cir. 1975) (citations omitted) (footnotes omitted). Indeed, a 1990 Eleventh Circuit opinion concluded that the coverage of the Limitation Act extended specifically to the owners of a jet ski rental company. As the Eleventh Circuit noted:

> The modern trend, while critical of the Act, nevertheless follows the application of the Limitation Act to pleasure craft. All reported circuit court decisions apply the Limitation Act to pleasure craft. In addition, the vast majority of district court cases have also applied the Limitation Act to pleasure craft.
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> While we might agree in this case with the district court that extension of the Limitation Act to pleasure craft such as jet skis is inconsistent with the historical purposes of the Act, restriction of its applicability requires congressional action. Despite repeated calls

> for amendment of the Limitation Act, Congress has failed to remove pleasure craft from the statute's protection.

Kays, 893 F.2d at 1229 (citations omitted) (footnote omitted); see also Foremost Ins. Co. v. Richardson, 457 U.S. 668, 676 (1982) ("Congress defines the term `vessel,' for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity."); Gorman v. Cerasia, 2 F.3d 519, 523 n.3 (3d Cir. 1993) ("[E]very court of appeals to have considered the issue has held that, in light of its unambiguous language, the Act applies to pleasure craft." (citing cases)); Kroemer v. Guglielmo, 897 F.2d 58, 60 (2d Cir. 1990) ("It is also significant that every court of appeals that has explicitly addressed the issue has applied the Act to pleasure craft." (citing cases)).

It is also noteworthy that Congress has excluded "pleasure yachts" and other vessels from the coverage of other sections of the Limitation Act. See 46 U.S.C. § 183(f) ("As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term `seagoing vessel' shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels . . . ."). The fact that a specific exclusion was made for "pleasure yachts" implies that the Act was understood to cover at least some types of pleasure vessels; otherwise, there would be no reason to carve out an explicit exclusion. Moreover, Congress did not apply these exceptions to the general "any vessel" language of § 183(a); thus, it can be inferred that Congress did not intend to limit the

broad coverage of this particular provision of the Act. As the Guglielmo court explained:

> [E]xclusion from the term "seagoing vessel" of "pleasure yachts," along with thirteen other varieties of vessels for purposes of Sections 183(b)-(e), strongly suggests that Congress did not intend courts to invent fine distinctions among vessels under Section 183(a) based on presumed legislative intent.

897 F.2d at 60.

Finally, we emphasize that Nassau Bay -- the owner of the jet skis involved in this lawsuit -- is the party seeking the protection of the Limitation Act. From Nassau Bay's perspective, the jet skis are not "pleasure craft"; instead, they are part of Nassau Bay's business and are a revenue source in their own right. For all of these reasons, we are satisfied that the Limitation Act applies to this case, as the coverage of the Act does extend to the jet skis at issue. Thus, we now turn to applying the Limitation Act to the situation before us.

B. The Application of the Limitation Act

Even if the Limitation Act applies to jet skis, the McClellands argue that Nassau Bay is not entitled to limited liability because their injuries were caused by Nassau Bay's negligence in not determining Johnson's experience and ability with jet skis, and in not sufficiently instructing Johnson on the proper operation of jet skis. According to the McClellands, these alleged acts of negligence establish that the accident occurred with Nassau Bay's "privity or knowledge." We conclude, however, that the McClelland's case falters even before reaching the "privity or knowledge" inquiry.

The determination of whether a shipowner is entitled to limitation employs a two-step process. First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. This initial burden of proving negligence or unseaworthiness rests with the injured party. See Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10 (5th Cir. 1976). Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. The shipowner has the burden of proving a lack of privity or knowledge. See id.; see also Brister v. A.W.I., Inc., 946 F.2d 350, 355 (5th Cir. 1991) ("In a limitation proceeding, once an injured seaman establishes that negligence or unseaworthiness caused his injuries, the burden shifts to the vessel owner to establish lack of privity or knowledge of the dangerous condition that caused the injury."). Before the burden shifts to the vessel owner to establish its lack of privity, therefore, the injured plaintiff must first establish negligence or unseaworthiness. The McClellands, however, did not raise the issue of unseaworthiness in the district court, nor did they brief the issue on appeal. Thus, we only address the McClelland's allegations of negligence.

To prove negligence under the general maritime law, the plaintiff must demonstrate the following: 1) there was a duty owed by the defendant to the plaintiff; 2) the duty was breached; 3) the plaintiff sustained injury; and 4) there is a causal connection between the defendant's conduct and the plaintiff's injury. See Abshire v. Gnots-Reserve, Inc., 929 F.2d 1073, 1077 (5th Cir.

1991). The McClellands focus the bulk of their argument, if not all of it, on the alleged negligence of Nassau Bay in failing to ascertain Johnson's experience with jet skis. Perhaps because of this focus on Nassau Bay, the McClellands have failed to adduce sufficient summary judgment evidence to indicate that ***Johnson*** was negligent and that his negligence caused the jet skiing accident. Indeed, the only evidence in the record indicates that the parties did not see each other, and there is no evidence that Johnson was travelling at an unsafe rate of speed or was otherwise operating the jet ski in a dangerous or negligent manner.[4] Because the evidence fails to show that acts of negligence by Johnson caused the accident, we turn to an examination of Nassau Bay's conduct to determine if its negligence caused the accident.

Even if we assume that Nassau Bay owed and breached a duty to insure that renters of its jet skis had adequate experience, and owed and breached a corresponding duty to provide them with training if they were not properly skilled, the McClellands have

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[4] "Collision liability is based on fault; the mere fact of impact has no legal consequence." Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 7-2, at 486 (2d ed. 1975); see The Java, 81 U.S. (14 Wall.) 189, 190-92, 198-99 (1871); Turecamo Maritime, Inc., v. Weeks Dredge No. 516, 872 F. Supp. 1215, 1229 (S.D.N.Y. 1994) ("Maritime collision liability is predicated upon such a finding of fault (i.e., a finding of negligent conduct) and the mere fact of physical impact has no legal consequence."); Williamson Leasing Co. v. American Commercial Lines, Inc., 616 F. Supp. 1330, 1341 (E.D. La. 1985) (same); Hogge v. S.S. Yorkmar, 434 F. Supp. 715, 727 (D. Md. 1977); see also Thomas J. Schoenbaum, Admiralty and Maritime Law § 14-2, at 254 (2d ed. 1994) ("Liability for collisions . . . is based upon a finding of fault that caused or contributed to the damage incurred." (footnote omitted)).

not adduced sufficient summary judgment evidence to establish the requisite causal connection between the "failure to inquire and train" and the accident. Simply put, there is no evidence in the record to indicate that Johnson was an incompetent jet ski operator; thus, ***even if*** Johnson had been instructed and trained on operation and safety techniques, there is no evidence to indicate, or even to suggest, that this instruction would have prevented the collision. In other words, there is no evidence suggesting that but for the alleged lack of instruction, the accident would not have occurred. As mentioned, the only evidence in the record indicates that the parties failed to see each other, and there is no evidence that Johnson showed any signs of a lack of ability on a jet ski.[5] Because the McClelland's allegations do not establish

[5] There is evidence that Johnson was operating his jet ski for a short time outside of Nassau Bay's designated area for jet ski use. Straying outside of the designated area for a brief period of time, however, does not indicate incompetence in operation, and without more (such as evidence that Johnson was out-of-bounds because he had lost control of his vehicle), the causal connection between the alleged lack of instruction and the accident is not established.

Moreover, the McClelland's reliance on Guglielmo is misplaced. In Guglielmo, there was clear summary judgment evidence that Guglielmo's son -- the operator of the boat in question -- was incompetent at the time of the accident. As the Second Circuit noted:

> The son admitted in his deposition to drinking beer with his friends on the boat prior to the accident. He further stated that at the time of the accident he was operating the boat but was looking back at the waterskier and did not see the Kroemer boat until after the collision.

897 F.2d at 61. This type of evidence is not present in the record before us; thus, Guglielmo is not sufficiently analogous to the McClelland's situation.

a negligence cause of action, either on the part of Johnson or Nassau Bay, the burden never shifted to Nassau Bay to establish its lack of privity. Following Farrell Lines and Brister, therefore, a limitation of liability for Nassau Bay was justified.

C. Exoneration

On cross-appeal, Nassau Bay contends that the district court erred in granting it limited liability rather than complete exoneration from liability. According to Nassau Bay, "[t]he McClellands' failure to establish a prima facie case of negligence on the part of Nassau Bay -- issues on which they bore the burden of proof at trial -- means that Nassau Bay is entitled not merely to judgment limiting its liability to the value of the two jet skis, but also to judgment that it is not liable to the McClellands at all." The district court neither discussed nor mentioned the possibility of exoneration for Nassau Bay.

In Rautbord v. Ehmann, 190 F.2d 533 (7th Cir. 1951), the court made the following observation:

> [I]t appears to be rather firmly established that the owner of a boat operated by another party is entitled to exoneration from all liability for damages occasioned without fault or negligence on the part of the operator, and to a limitation of liability even though the damages were occasioned by the fault or negligence of the operator, providing the incident giving rise thereto was "without the privity or knowledge of such owner."

Id. at 537; see also id. ("The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. . . . If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends." (internal quotation

omitted)). As mentioned, the McClellands have failed to produce evidence indicating that Johnson, the operator of the jet ski, was negligent or incompetent. Thus, without proof of fault or negligence on the part of Johnson, there is no liability, and Nassau Bay was entitled to complete exoneration.

IV. CONCLUSION

For the foregoing reasons, the district court's judgment in favor of Nassau Bay is modified to grant Nassau Bay complete exoneration, and as so modified is AFFIRMED. Costs shall be borne by the McClellands.