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Admiralty

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Admiralty: 1991 Survey of Florida Law

Robert M. Jarvis*

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I. INTRODUCTION

This survey collects and discusses Florida admiralty cases that were reported between October 1, 1990, and June 30, 1991.¹ Although

* Professor of Law, Nova University Shepard Broad Law Center. B.A., Northwestern University; J.D., University of Pennsylvania; LL.M., New York University. An early draft of this survey was presented in Orlando to the Admiralty Law Committee of The Florida Bar during the Bar's 1991 Annual Meeting. The author received many helpful comments from the members in attendance, and hereby expresses his appreciation.

1. Not included in this survey are cases that touch only incidentally on admiralty law. *See, e.g.,* *Belcher Oil Co. v. Florida Fuels, Inc.*, 749 F. Supp. 1104, 1991 AMC 911 (S.D. Fla. 1990) (South Florida fuel supplier that enjoyed dominant market position would not be heard to say that it had suffered an anti-trust injury when various cruise ship operators attempted to create competition by encouraging the formation of a rival fuel supplier); *Carner-Mason Assocs. v. Heller Fin., Inc.*, 581 So. 2d 1324 (Fla. 3d Dist. Ct. App. 1991) (foreclosure judgment was properly entered in favor of plaintiff who lent money to defendant so that it could build a marina on Miami Beach); *Stewart v. Stewart*, 581 So. 2d 246 (Fla. 3d Dist. Ct. App. 1991) (judgment ordering defendants to turn over their marina to the plaintiffs pursuant to a lease and option agreement reversed upon defendants' showing that they had terminated properly the

the survey period generated only a handful of decisions, the ones that it did produce were among the most unique issued in recent years.

Three opinions, each concerning the professional responsibility of admiralty lawyers, were particularly noteworthy. The first two dealt with the reprimanding of individual attorneys, while the third changed the manner in which those who practice admiralty law may advertise their services.

In *The Florida Bar v. Herrick*,² Peter S. Herrick, a seasoned admiralty practitioner,³ received a public reprimand from the Florida Supreme Court for attempting to solicit business. Herrick had learned that the United States Customs Service had taken possession of a vessel⁴ and was planning to forfeit it unless a claim and bond for \$2,500 were posted by the owners by August 15, 1985.⁵ He therefore sent to a couple who had an interest in the boat an unsolicited letter that said in pertinent part: "Our law firm specializes in Customs laws relating to vessel seizures. If you have any questions, please call."⁶

Herrick's actions were reported to The Florida Bar. After an investigation, a Bar referee recommended that Herrick be publicly reprimanded.⁷ In the view of the referee, Herrick had committed three violations of the Code of Professional Responsibility.⁸ First, his unsolicited

lease and extinguished the option); *Shofner v. Giles*, 579 So. 2d 861 (Fla. 4th Dist. Ct. App. 1991) (new trial on damages ordered in yacht buyer's fraud suit due to inconsistencies in the jury's verdict form); *City of Miami Beach v. Carner*, 579 So. 2d 248 (Fla. 3d Dist Ct. App. 1991) (new trial ordered to determine whether City of Miami Beach and the Miami Beach Redevelopment Authority had violated the terms of a thirty year lease under which the plaintiffs were to build and operate a marina on city property); *Sheridan v. Deep Lagoon Marina*, 576 So. 2d 771 (Fla. 1st Dist. Ct. App. 1991) (property owners who lived near site of proposed marina expansion project could challenge state's finding that the project complied with the Federal Water Pollution Control Act); *Black v. Marine Engineering Specialists*, 574 So. 2d 283 (Fla. 2d Dist. Ct. App. 1991) (engineer who had installed air conditioner and generator on yacht failed to prove that seller of yacht had been acting as the apparent agent of the buyer of the yacht).

2. 571 So. 2d 1303 (Fla. 1990), *cert. denied*, 111 S. Ct. 2798 (1991).

3. Herrick received a B.S. from the United States Merchant Marine Academy in 1961 and a J.D. from Georgetown University in 1967. He was admitted to practice in the District of Columbia in 1968 and in Florida in 1977.

4. The seized vessel was a thirty foot long 1981 Formula Thunderbird racing boat. *Id.* at 1304.

5. *Id.*

6. *Id.*

7. *Id.* at 1304-05.

8. Because Herrick's letter had been sent in 1985, his conduct was judged by the

letter did not contain a disclaimer indicting that it was an advertisement.⁹ Second, Herrick's letter stated that he was a specialist in customs law, thereby representing that he had competence in a particular area of law.¹⁰ Third, Herrick's letter claimed that he specialized in an area of law that had not been recognized by either the Florida Certification Plan or the Florida Designation Plan.¹¹

Upon learning of the referee's recommendation, Herrick appealed to the Florida Supreme Court.¹² The court, however, in a per curiam opinion,¹³ rejected the appeal and entered an order publicly reprimanding Herrick and requiring him to pay the costs of the proceeding.¹⁴

In its relatively lengthy opinion, the court first found that the requirement that all unsolicited letters from attorneys be stamped "Advertisement" was reasonable and did not violate any of Herrick's constitutional rights.¹⁵ The court then turned to the question of whether Herrick had held himself out as a specialist.¹⁶ According to Herrick, he had not claimed to be a specialist, but had merely indicated that he specialized in a particular area of law.¹⁷ As such, Herrick believed that

now superseded Code of Professional Responsibility. *Herrick*, 571 So. 2d at 1304 n.1.

9. *Id.* at 1305.

10. *Id.*

11. *Id.*

12. *Id.* at 1304.

13. By tradition, the court always issues per curiam opinions in attorney discipline cases.

14. *Herrick*, 571 So. 2d at 1307.

15. Herrick had claimed that the requirement violated his first amendment rights. *Id.* at 1305. The court, however, disagreed. Relying on *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), it explained:

[W]e believe that . . . [the rule] . . . is constitutional as one of these "less restrictive and more precise means" of regulation envisioned by the Supreme Court. The use of the term "Advertisement" printed on the letter acts to disclose the nature of the letter to the recipient. Its purpose is to assuage any concerns the recipient may have due to receiving a personalized letter from an attorney.

Herrick, 571 So. 2d at 1305-06.

16. Because it found that the charges against Herrick under count three were subsumed by those contained in count two, the court elected to treat the two together. *Id.* at 1307.

17. Herrick's argument rested on a dictionary definition of the word "specialize." In the dictionary relied on by Herrick, WEBSTER'S NEW COLLEGE DICTIONARY (1974), the word "specialize" was defined as meaning "to concentrate one's efforts in a special activity or field." *Id.* at 1306. Thus, Herrick sought to argue that when he claimed he specialized in customs law, he really was saying only that his practice concentrated on

he had not violated any ethical prohibition. The court, however, was not impressed with the tendered distinction. In finding that the referee's conclusion had been sound, the court wrote:

By prohibiting the general use of the term "specialist," the rule seeks to restrain advertising which can be false, deceptive, or misleading. By characterizing himself as a specialist, an attorney does more than merely indicate that he practices within a particular field. The term "specialist" carries with it the implication that the attorney has special competence and expertise in an area of law. We reject Herrick's argument that the word "specialize" carries a different connotation than "specialist."¹⁸

Peter Herrick was not the only experienced admiralty attorney to run afoul of the Bar's ethical rules during the survey period. In *The Florida Bar v. Huggett*,¹⁹ William T. Huggett, a twenty year veteran of the admiralty bar,²⁰ continued his fight with the Bar over his dealings with two injured seamen.

On December 7, 1989, the Bar had instituted disciplinary proceedings against Huggett by filing a four count complaint.²¹ counts one and two related to Huggett's solicitation in 1988 of a seaman who had been injured as a result of an accident involving petrochemical fumes. When the seaman died, Huggett, through his investigator, continued his attempt to be retained by soliciting the seaman's widow.²² Counts three and four grew out of Huggett's representation of Jonathan Chacon, a seaman who had been injured aboard a cargo vessel in February, 1982. While representing Chacon, Huggett allegedly advanced funds to Chacon for living expenses and paid six witnesses for their testimony contingent upon the outcome of the case.²³

such cases. *Id.*

18. *Id.* at 1307.

19. 16 Fla. L. Weekly S51 (1991).

20. Huggett received his A.B. from Emory University in 1962 and his J.D. from the University of Florida in 1965. He was admitted to practice in Florida in 1966.

21. *Id.* at S51.

22. *Id.*

23. *Id.* Although the jury found for Chacon, the judgment was reversed due to the prejudicial actions and statements of Huggett during the course of the trial. See *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1985). After the case was remanded for a second trial, the trial court ultimately dismissed the suit with prejudice because of Chacon's repeated failure to make himself available for depositions. Huggett then instituted suit in federal court. That suit was found to be

In February, 1990, the Bar served Huggett with a set of interrogatories and a document production request.²⁴ When Huggett refused to comply fully with the Bar's demands, the Bar filed a motion to compel discovery.²⁵ In May, 1990, a Bar referee entered an order granting the Bar's motion.²⁶ When Huggett failed to heed the order, the Bar in June, 1990 obtained a judgment of contempt that included a recommendation that Huggett be suspended from the practice of law for ten days and until such time as he had fully complied with the discovery order.²⁷ Upon receiving the referee's decision, Huggett petitioned the Florida Supreme Court for a review of the judgment while the Bar moved for approval and enforcement of the suggested sanction.²⁸

Before the court, Huggett made the same arguments that he had made before the referee. He contended that the discovery requests were improper because the information sought by the Bar was protected by the fifth amendment's privilege against self-incrimination, the attorney-client privilege, and the work product rule.²⁹ To buttress his position, Huggett submitted an affidavit from Adela Molian De Chacon, Jonathan Chacon's widow, that asserted that she would be put in great jeopardy if the ultimate outcome of her husband's suit were to become known in his native Guatemala.³⁰

After a careful and detailed review, the court agreed to an extent with Huggett. Although it found that most of the Bar's discovery requests were proper, it held that Huggett had a good faith basis for arguing that three of the Bar's interrogatories were likely to lead to evidence that Huggett had engaged in the illegal solicitation of legal

time-barred, however, and was dismissed despite Huggett's argument that the state suit had tolled the running of the statute of limitations. *See Chacon-Gordon v. M/V Eugenio "C"*, 1987 AMC 1886 (S.D. Fla. 1987). A short time later, the dismissal of Chacon's state suit was affirmed. *See Costa Line, Inc. v. Chacon-Gordon*, 530 So. 2d 312 (Fla. 3d Dist. Ct. App. 1988).

24. *Huggett*, 16 Fla. L. Weekly at S52.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at S51.

29. *Huggett*, 16 Fla. L. Weekly at S52.

30. *Id.* Although each of the suits instituted by Chacon had been thrown out one by one, *see supra* note 23, a partial settlement had been reached in 1986 while Chacon was still alive. According to his widow, it had been agreed at the time of the settlement that the terms would remain confidential "to protect the Chacones against extortion, theft and kidnapping, which . . . are common in Guatemala when it is learned that a person has acquired wealth." *Huggett*, 16 Fla. L. Weekly at S52.

business.³¹ Since such solicitation, if proved, would constitute a first degree misdemeanor,³² the court reversed the order of contempt.³³ Instead, it directed Huggett to comply with all aspects of the referee's discovery order, except for the three improper interrogatories, within twenty days.³⁴ The court further directed that if Huggett failed to do so within the stated twenty day period, he would be suspended from practice for ten days and continuously thereafter until he complied.³⁵

The final case of the survey period involving attorney ethics was *The Florida Bar: Petition to Amend The Rules Regulating The Florida Bar—Advertising Issues*.³⁶ The case grew out of a petition filed by the Bar that asked the Florida Supreme court to make a number of changes in the rules governing lawyer advertising.³⁷ Following a lengthy review period and the receipt of numerous public comments, the court, in an opinion written by Justice Overton and dissented from in part by Chief Justice Shaw and Justices Barkett and Kogan, granted the petition with certain modifications.³⁸ As modified, the new rules went into effect on April 1, 1991.³⁹

Because the Bar's petition recommended drastic changes in how attorneys may advertise on the radio and television,⁴⁰ almost no atten-

31. *Id.* at S53. The three interrogatories were numbered 20, 24, and 25g. Interrogatories 20 and 25g asked Huggett about his retention of an investigator and the matters assigned to the investigator. Interrogatory 24 asked Huggett to "list any seaman, religious or benevolence organization" in which he had been involved since 1988 and to identify the specific nature of his involvement. *Id.*

32. *Id.* (citing FLA. STAT. §§ 877.02(1), 775.15(2)(c) (1987)).

33. *Id.*

34. *Huggett*, 16 Fla. L. Weekly at S53.

35. *Id.* In an ironic twist, a short time after the supreme court's decision Huggett received The Florida Bar President's Pro Bono Service Award for his work with indigent seamen. See *Pro Bono Awards*, FLA. B. NEWS, Apr. 1, 1991, at 23, col. 1.

36. 571 So. 2d 451 (Fla. 1990).

37. *Id.* at 452.

38. *Id.*

39. The changes originally were scheduled to go into effect on January 1, 1991. This date was extended, however, when it was pointed out that many lawyers, as well as the Bar itself, would find it difficult to comply so quickly. See Mark D. Killian, *Court Adopts Bar Ad Restrictions*, FLA. B. NEWS, Jan. 15, 1991, at 1, col. 1. On April 2, 1991, a lawsuit was filed in federal court in Tallahassee by Professor Bruce S. Rogow challenging the constitutionality of the changes. See *Ad Rule Opponents Seek Injunction*, FLA. B. NEWS, May 1, 1991, at 1, col. 4. The suit remained pending at the close of the current survey period. See Elizabeth Willson, *A Troublesome Fly vs. The Bar*, FLA. TREND, July 1991, at 29.

40. *Advertising Issues*, 571 So. 2d at 452-54 (describing revised rule 4-7.2).

tion was paid to the remainder of the proposals. As a result, admiralty lawyers failed to object to the bar's suggested rewriting of rule 4-7.5(b).

Rule 4-7.5, entitled "Communication of Fields of Practice," had gone into effect on January 1, 1987, as part of Florida's switch from the American Bar Association's 1969 Model Code of Professional Responsibility to its 1983 Model Rules of Professional Conduct.⁴¹ Like its predecessors, rule 4-7.5(b) continued to carve out an exception for lawyers engaged in admiralty practice by permitting such lawyers to call themselves "proctors in admiralty" and to otherwise identify themselves as being admiralty practitioners.⁴² As the rule noted in its accompanying comment, this exception to the general ban on lawyers holding themselves out as specialists in a given field of law was rooted in the "long historical tradition associated with maritime commerce and the federal courts."⁴³

In 1975, Florida instituted a program under which attorneys can designate themselves as being competent in a given field if they met (and thereafter continued to meet) certain basic requirements.⁴⁴ Later, in 1982, Florida began a second program through which lawyers can be certified by the bar as having expertise in certain fields.⁴⁵

In 1990, the United States Supreme Court, in the Illinois case of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,⁴⁶ held that attorneys who are certified as proficient in a given area of law by a bona fide national organization cannot be denied the right to list such certifications on their letterheads and in their advertising.⁴⁷ Worried that rule 4-7.5 might be unconstitutional after *Peel*, the Bar's petition suggested that it be redrafted as well as renumbered. As amended, new rule 4-7.6 permits a lawyer who complies with the Flor-

41. See The Florida Bar re Rules Regulating the Florida Bar, 494 So. 2d 977, 1074 (Fla. 1986).

42. See *id.* at 1075. Rule 4-7.5(b) was patterned after canon 46 of the American Bar Association's 1908 Canons of Professional Ethics as well as Ethical Consideration 2-14 of the Model Code. See generally Robert M. Jarvis, *Rethinking the Meaning of the Phrase "Surviving Widow" in the Jones Act: Has the Time Come for Admiralty Courts to Fashion A Federal Law of Domestic Relations?*, 21 CAL. W. L. REV. 463, 479 n.58 (1985).

43. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5 comment.

44. See *In re The Florida Bar*, 319 So. 2d 1 (Fla. 1975).

45. See The Florida Bar, 414 So. 2d 490 (Fla. 1982).

46. 110 S. Ct. 2281 (1990).

47. *Id.* at 2293.

ida Certification Plan, "or who is certified by a national group with substantially similar standards to the Florida Certification Plan," to state that he or she has been so certified.⁴⁸

In their new versions, both the rule and the comment delete all references to admiralty and the admiralty exception, and neither offers a single word of explanation for the change. This is troubling for at least three reasons. First, the Florida Certification Plan does not currently operate in the area of admiralty law (although the Designation Plan does).⁴⁹ Second, there is no national organization that presently certifies admiralty lawyers.⁵⁰ Third, although the admiralty exception was excised, the similar exception for patent lawyers was retained (although the explanatory comment was not).⁵¹ Despite these facts, by the close of the survey period admiralty lawyers in Florida had not begun any efforts to have the exception reinstated.

48. *Advertising Issues*, 571 So. 2d at 454-55.

49. The Florida Certification Plan currently certifies Florida lawyers in the following seven areas: tax, civil trial law, marital and family law, estate planning and probate, criminal law, real estate law, and workers' compensation. *See The Florida Bar re Amendment to Rules Regulating The Florida Bar Chapter 6 (Legal Specialization and Education)*, 548 So. 2d 1120 (Fla. 1989).

50. The Maritime Law Association of the United States, a national bar group founded in 1899, comes the closest of any existing organization to certifying the competence of admiralty lawyers. At one time, all lawyers who joined the MLA became "proctor" members. Since the early 1980s, however, lawyers who join the MLA have become "associate" members. After four years, they may apply to become proctor members. In order to move from associate membership to proctor membership, a candidate must demonstrate "proficiency" in admiralty. Such proficiency can be shown in a variety of ways, including attendance at approved continuing legal education seminars, delivery of speeches or publication of articles on suitable topics, or serving as counsel in maritime proceedings. There is no written or oral test, however, and once a lawyer obtains proctor membership there is no further obligation except for payment of a small annual dues charge. *See Maritime Law Ass'n, Articles of Association and By-Laws—Document No. 684* § III, at 1 (Sept. 1990).

51. *Advertising Issues*, 571 So. 2d at 470. The comment to rule 4-7.5 had stated that patent law was a specialty because of the "long-established policy of the patent and trademark office." Although The Florida Bar once tried to challenge the policy, it was rebuffed by the United States Supreme Court in a landmark case. *See Sperry v. Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963). Justice Overton did not offer any explanation for why the patent law exception was being retained or for why the comment was being deleted.

II. CARRIAGE OF GOODS

There were three cases during the months under review that involved disputes arising under the Carriage of Goods by Sea Act (COGSA).⁵²

In *Insurance Company of North America v. Empresa Lineas Maritimas Argentinas, S.A.*,⁵³ a cargo of washing machine parts bound for Miami was damaged in Buenos Aires when the container in which they had been packed was dropped while under the control of the defendant, Empresa Lineas Maritimas Argentinas, S.A. (ELMA).⁵⁴ Subsequently, the Insurance Company of North America (INA), which had become subrogated to the plaintiff, filed suit to recover \$29,653.11.⁵⁵

Shortly after the case was started, INA moved for partial summary judgment.⁵⁶ In response, ELMA filed an opposing memorandum that argued that summary judgment was premature for three reasons: 1) the bill of lading had not been authenticated, 2) an essential paragraph of the bill of lading had not been translated into English, and 3) there was no proof that a higher freight rate had been charged.⁵⁷ ELMA further argued that even if summary judgment was appropriate, ELMA was entitled to the benefit of COGSA's \$500 package limitation.⁵⁸

In an exceedingly terse opinion, District Judge Moore rejected

52. 46 U.S.C. §§ 1300-1315 (1988). Under COGSA shipowners are excused from liability if goods in their possession are damaged due to certain specified causes. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-13, at 314-15 (1987).

53. 1991 AMC 1057 (M.D. Fla. 1990).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1059. The point of ELMA's third argument was explained by Judge Moore in the following manner: "In general, when a shipper wants the cargo to receive a higher value [than is provided under COGSA], the carrier offsets this increased liability by charging a higher freight rate." *Insurance Co. of N. Am.*, 1991 AMC at 1059. By paying a higher freight rate, the shipper avoids the COGSA package limitation. See *infra* note 58.

58. *Insurance Co. of N. Am.*, 1991 AMC at 1058. The package limitation, found at 46 U.S.C. § 1304(5) (1988), limits a defendant's liability to \$500 per package or customary freight unit unless the shipper has declared a higher value. If the defendant can invoke successfully the limitation, its liability will be drastically reduced and the plaintiff will be only partially compensated for its loss. See generally FRANE L. MARAIST, ADMIRALTY LAW IN A NUTSHELL 74-77 (2d ed. 1988).

each of ELMA's arguments and granted INA's motion.⁵⁹ Finding that the case was governed by COGSA due to the fact that the cargo had been bound for an American port and was traveling under a bill of lading,⁶⁰ Judge Moore focused his attention on the terms of the bill of lading. Although largely illegible, both parties agreed that the bill described the merchandise as 2,160 gear boxes with a per piece value of \$74.80.⁶¹ As such, the only real issue was whether ELMA could have the benefit of the package limitation.

Judge Moore found that ELMA was not entitled to the limitation for the very reasons that it had given in suggesting that the motion for partial summary judgment was premature. First, Judge Moore ruled that while the bill of lading was unauthenticated, ELMA had admitted that it accurately described the cargo.⁶² Second, although the paragraph in the bill of lading that ELMA contended might be relevant had not been translated, ELMA had neglected to offer any explanation for its failure to provide a translation in its response.⁶³ Third, while the record did not contain any proof that INA's insured had paid a higher freight rate, the lack of such proof, in Judge Moore's view, was "not determinative inasmuch as charging an increased freight rate is not a prerequisite to declaring a higher value of cargo."⁶⁴

The next cargo case of the survey period, *Z.K. Marine, Inc. v. M/V Archigetis*,⁶⁵ also involved construction of the COGSA package limitation. In September, 1987, five yachts were shipped from Taiwan to the United States aboard a vessel known as the M/V ARCHIGETIS.⁶⁶ At the time, the ARCHIGETIS was owned by Malvern Maritime, Inc. (Malvern), and was under charter to Federal Pacific Liberia, Ltd. (Fedpac).⁶⁷ The yachts had been manufactured by Offshore Marine,

59. *Insurance Co. of N. Am.*, 1991 AMC at 1059-60.

60. *Id.* at 1058. This is the threshold inquiry in any COGSA suit, of course, since the statute applies only to shipments traveling by sea to or from a United States port under a bill of lading. See 46 U.S.C. §§ 1300 and 1312 (1988).

61. *Insurance Co. of N. Am.*, 1991 AMC at 1058-59.

62. *Id.* at 1059.

63. *Id.* With more than a trace of irritation, Judge Moore wrote: "Defendant fails to indicate why an English translation of this supposedly essential paragraph, which could have been accomplished quickly and inexpensively, was not included in its response." *Id.* at 1059 n.1.

64. *Id.* at 1059.

65. 1991 AMC 1434 (S.D. Fla. 1991).

66. *Id.* at 1436.

67. *Id.* at 1435-36.

Inc. (Offshore), and were unloaded upon their arrival in the United States by Continental Stevedoring & Terminals, Inc. (Continental).⁶⁸ The five yachts were imported by four different Florida companies: Z.K. Marine, Inc., Southern Offshore Yachts, Jay Bettis and Co., and Miller Yacht Sales, Inc. (collectively, the plaintiffs).⁶⁹

Upon discovering that the yachts had arrived in a damaged condition, the plaintiffs filed suit against the ARCHIGETIS as well as Malvern, Fedpac, Offshore, and Continental.⁷⁰ In response, Malvern moved for summary judgment on the ground that the bills of lading clearly limited the carrier's liability to \$500 per package or customary freight unit or, in this case, per yacht.⁷¹ Fedpac and Continental then moved for partial summary judgment and the plaintiffs cross-moved for summary judgment.⁷²

Electing to resolve all of the motions together, District Judge Hoeveler held, in a case of first impression, that each yacht was in fact a COGSA package. As such, he granted the defendants' motions.⁷³

Judge Hoeveler began his opinion by first noting that COGSA was not directly applicable since the yachts had been carried on the ARCHIGETIS' decks, and COGSA does not apply to on-deck carriage.⁷⁴ He found, however, that since the bills of lading referred to The Hague Rules, the international version of COGSA, the parties would be deemed to have "stipulated by contract" to the application of COGSA.⁷⁵

Having disposed of the choice of law problem, Judge Hoeveler moved to the central issue: were the yachts COGSA packages? After a review of the existing caselaw on the subject, he concluded that they were because the carrier had attached each yacht to a cradle that had been manufactured by Offshore. According to Judge Hoeveler, by resting in a cradle, each yacht had become the functional equivalent of a package during the voyage. For support, he turned to a case in which Judge Spellman had found that air conditioning equipment that had been bolted to wooden skids but was not otherwise boxed was a

68. *Id.* at 1436.

69. *Id.* at 1435.

70. *Z.K. Marine*, 1991 AMC at 1436.

71. *Id.*

72. *Id.*

73. *Id.* at 1441.

74. *Id.* at 1437 (citing 46 U.S.C. § 1301(c) (1988)). For a general discussion of the law relating to deck cargo, see SCHOENBAUM, *supra* note 52, § 9-16, at 322-24.

75. *Z.K. Marine*, 1991 AMC at 1438.

COGSA package.⁷⁶ In Judge Hoever's view, the cradles were "analogous, for purposes of the package analysis, to skids."⁷⁷ Having so found, Judge Hoever summarily dismissed the remainder of the plaintiffs' arguments.⁷⁸

The final cargo case also involved the carriage of a yacht. In *Jumbo Navigation, N.V. v. Melchior*,⁷⁹ Jumbo Navigation, N.V. (Jumbo), an ocean carrier, filed an interpleader action to determine whether a yacht called the S/Y VALIA belonged to Cigisped, S.R.I. (Cigisped), an Italian freight forwarder, or to Albert Melchior, a Canadian citizen.⁸⁰ In September, 1988, Melchior had agreed to pay Cigisped \$75,000 in ocean freight, plus \$1,640 in preparation expenses, to ship his yacht from Genoa to Miami.⁸¹ Cigisped, in turn, retained Jumbo, and in October, 1988 Jumbo carried the VALIA to Miami aboard the M/V STELLA PRIMA pursuant to a bill of lading made out to Cigisped.⁸²

The STELLA PRIMA arrived in Miami on November 7, 1988, and discharged the VALIA into the water, during which the VALIA was damaged.⁸³ When Melchior demanded delivery of the yacht, Jumbo informed him that it was under orders from Cigisped to hold on to the VALIA until Melchior paid Cigisped and that as a result, the VALIA was being placed in the custody of the Merrill Stevens Dry Dock Company, Inc. (Merrill Stevens).⁸⁴ Following this exchange, Melchior filed an emergency motion for the release of the yacht, Merrill Stevens initiated its own interpleader action, and Cigisped filed cross-claims against Melchior.⁸⁵

In time, Melchior deposited \$80,000 into the registry of the court, Merrill Stevens completed extensive repairs on the yacht at Melchior's

76. See *Marante Forwarding v. C.A. Naviera de Transporte y Turismo*, 486 F. Supp. 636, 1982 AMC 2704 (S.D. Fla. 1980).

77. *Z.K. Marine*, 1991 AMC at 1440.

78. In particular, Judge Hoever rejected the plaintiffs' argument that they had had no opportunity to declare a higher value because they had purchased the bills of lading while the ARCHIGETIS was at sea and that Continental, as a stevedore, was not covered by the COGSA package limitation. *Id.* 1439-41.

79. 1991 AMC 1518 (S.D. Fla. 1991).

80. *Id.* at 1518.

81. *Id.*

82. *Id.*

83. *Id.* at 1519.

84. *Jumbo Navigation*, 1991 AMC at 1519.

85. *Id.*

request and was paid by Melchior's insurer, the Wausau Insurance Company (which then brought a suit against Jumbo in state court), Cigisped, which still had not been paid by Melchior, moved for summary judgment, and the case was transferred from the docket of District Judge Nesbitt to District Judge Moreno upon the latter's investiture in the fall of 1990.⁸⁶

In opposing Cigisped's motion for summary judgment, Melchior argued that there was a genuine issue of fact as to whether Cigisped had agreed that it would not be entitled to collect freight if the yacht was not delivered to Miami in perfect condition.⁸⁷ In just four brief paragraphs, however, Judge Moreno rejected Melchior's argument as "unpersuasive."

Relying on a recent decision by the Third District Court of Appeal,⁸⁸ Judge Moreno found that under both COGSA and Florida state law Melchior's sole recourse for the damages sustained by the VALIA was against Jumbo. He explained this result by writing: "Florida law is well established that a freight forwarder, such as Cigisped, does not incur liability for cargo damage while such cargo is in the possession and control of an ocean carrier."⁸⁹ As such, Judge Moreno granted Cigisped's motion and ordered the clerk of the court to release to Cigisped the money that Melchior had deposited into the court's registry.⁹⁰

III. CRIMINAL OFFENSES

As usual, the survey period produced a number of criminal cases involving ships.⁹¹ In the first, *National Marine Underwriters, Inc. v.*

86. *Id.*

87. *Id.* at 1520.

88. *See Golden Triad Carrier, Inc. v. Paco Am. Corp.*, 553 So. 2d 247 (Fla. 3d Dist. Ct. App. 1989).

89. *Jumbo Navigation*, 1991 AMC at 1520.

90. *Id.*

91. Some of these cases, however, had only a tangential connection to admiralty law. *See, e.g., United States v. Gutierrez*, 931 F.2d 1482 (11th Cir.), *cert. denied*, 112 S. Ct. 398 (1991) (defendants who had been arrested as a result of a sting operation in which federal agents portrayed Colombian drug smugglers with sailboats ready to transport cocaine into the country had been correctly adjudged guilty, but one of the defendants was entitled to be resentenced); *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1633 (1991) (record sustained the conviction of one defendant, but not the other, where both had been found guilty of attempting to smuggle cocaine into the country by means of an air drop to a waiting

Loring,⁹² a Chris Craft boat owned by Drs. Richard Krieger and Nolan Altman was stolen. After Krieger and Altman received payment from their insurer, Colonial Penn, they executed a release subrogating all of their rights to Colonial Penn.⁹³ Thereafter, Colonial Penn gave a power of attorney to National Marine Underwriters, Inc. (National Marine).⁹⁴ In turn, National Marine sued Keith S. Loring, claiming that he was responsible for the theft.⁹⁵

Loring responded to the suit by arguing that National Marine had failed to obtain a "managing general agent permit," as required under the Florida insurance code.⁹⁶ Finding that National Marine had in fact failed to obtain the permit, Circuit Judge Robinson struck National Marine's complaint as a sham pleading.⁹⁷

On appeal, however, District Judges Barkdull, Nesbitt, and Jorgenson reversed Judge Robinson and remanded the case to him for further proceedings. Although the panel agreed that there was some evidence in the record to support Loring's argument,⁹⁸ it refused to let him use it. In a short per curiam opinion, the panel wrote: "The claim brought by National Marine for Colonial Penn is as though Drs. Krieger and Altman had sued Loring. In such a subrogation claim, the third party causing injury to an insured cannot rely upon defenses that might have been raised between the insurer and the insured."⁹⁹

The next two criminal cases of the survey period arose out of Florida's continuing attempt to track down and seize vessels that are used in the drug trade. In *In re Forfeiture of One 31' Seahawk "Cigarette" Vessel*,¹⁰⁰ the City of Pompano Beach sought to forfeit a vessel that had been found without a hull identification number.¹⁰¹ Circuit Judge Dimitrouleas dismissed the complaint, however, on the ground that the

ship); *United States v. Castillo-Valencia*, 917 F.2d 494 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1321 (1991) (evidence supported conviction and sentencing of defendants who attempted to smuggle into the country 495 bales of marijuana stored in their ship's hold).

92. 568 So. 2d 1007 (Fla. 3d Dist. Ct. App. 1990).

93. *Id.* at 1007.

94. *Id.*

95. *Id.* at 1007-08.

96. *Id.* at 1007 (citing FLA. STAT. § 626.121(2) (1985)).

97. *National Marine*, 568 So. 2d at 1007.

98. *Id.* at 1007 n.1.

99. *Id.* at 1008.

100. 572 So. 2d 1038 (Fla. 4th Dist. Ct. App. 1991).

101. *Id.* at 1039.

City had failed to show that the vessel had been used in the commission of a felony.¹⁰² The City then filed an appeal.¹⁰³

In a per curiam decision that provoked a vigorous dissent, District Judges Glickstein and Oftedal affirmed the dismissal. After a review of the Florida Contraband Forfeiture Act's checkered legislative history,¹⁰⁴ they concluded that the statute required an affirmative showing of wrongdoing:

For the vessel in the instant case to be subject to forfeiture, the City was required to allege either guilty knowledge or intent. The verified amended complaint does not allege that the owners "knowingly or intentionally" concealed the vessel or misrepresented the identity of the vessel in violation of [the statute] The City was given the opportunity to amend further and chose not to do so.¹⁰⁵

In dissent, District Judge Anstead agreed with the majority that it had not been the legislature's intention to forfeit the ships of innocent owners.¹⁰⁶ But he argued that the burden was on the owner and not the government. He explained his position by writing: "[I]t appears to me that the legislature has put the burden on the innocent owner to establish his innocence. While there may be constitutional implications to this scheme, these issues have not been raised in this appeal and were not addressed below."¹⁰⁷

Several months later, another vessel forfeiture case made its way to the Fourth District. In *In re Forfeiture of One 1987 Velocity 30' Go-Fast Vessel*,¹⁰⁸ Broward County Sheriff Nick Navarro filed a complaint seeking to forfeit a boat and a boat trailer that belonged to Victor Dessberg because the boat lacked a hull identification number.¹⁰⁹ Circuit Judge Moriarty denied the petition and Navarro appealed.¹¹⁰

102. *Id.*

103. *Id.*

104. *Id.* at 1039-40. Shortly after the survey period ended, the Florida Supreme Court, in an opinion by Justice Barkett, upheld the Act while expressing grave doubts about its constitutionality. *See Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991).

105. *Seahawk*, 572 So. 2d at 1040.

106. *Id.*

107. *Id.*

108. 577 So. 2d 678 (Fla. 4th Dist. Ct. App. 1991).

109. *Id.* at 679.

110. *Id.*

In a brief per curiam opinion, a panel consisting of Chief Judge Hersey, District Judge Polen, and Senior District Judge Walden affirmed the denial.¹¹¹ Relying on *Seahawk*, they wrote: "In a recent opinion this court ruled that in order to support forfeiture some wrongdoing must be alleged in addition to mere possession of a vessel with altered or covered hull numbers. There must be either guilty knowledge or intent alleged."¹¹²

The final criminal case of the period also stemmed from the war on drugs. In *United States v. Thompson*,¹¹³ a United States Coast Guard boarding party had discovered 412 kilograms of cocaine during a documents and safety inspection aboard a cruiser-trawler named the MOLLY BETH while she was in the Windward Passage, approximately 500 miles from the United States.¹¹⁴ Subsequently, James M. Thompson, who had recently become the owner as well as the captain of the MOLLY BETH, was placed under arrest and charged with conspiracy to possess with intent to distribute cocaine while on an American vessel.¹¹⁵

Thompson moved to have the cocaine suppressed.¹¹⁶ When District Judge Aronovitz denied the motion, Thompson entered a conditional guilty plea and then appealed the denial of his motion.¹¹⁷ On appeal, Circuit Judge Cox, in an opinion joined in by Circuit Judge Kravitch and Senior Circuit Judge Henderson, affirmed the denial of Thompson's motion.¹¹⁸

Thompson had argued before the trial court and then again on appeal that the Coast Guard's search had violated his fourth amendment privacy rights under the United States Constitution as well as Article 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.¹¹⁹ Judge Cox, however, made short work of both of these arguments. With respect to the fourth amendment, he ruled that Thompson had no legitimate expectation of privacy during the Coast Guard's search because he had consented to the search, the search was

111. *Id.* at 680.

112. *Id.* at 679.

113. 928 F.2d 1060 (11th Cir.), *cert. denied*, 112 S. Ct. 270 (1991).

114. *Id.* at 1061.

115. *Id.*

116. *Id.* at 1063.

117. *Id.*

118. *Thompson*, 928 F.2d at 1061.

119. *Id.* at 1063. The Convention, which entered into force in the United States in 1964, appears at 15 U.S.T. 1606, T.I.A.S. No. 5639.

undertaken pursuant to statutory authorization, and the search occurred outside the territory of the United States where the strictures of the fourth amendment apply, if at all, only very slightly.¹²⁰ Having disposed of Thompson's first argument, Judge Cox devoted even less time to Thompson's other contention. Although noting that the United States is a party to the Geneva Convention, Judge Cox found that the Convention had not created any privately enforceable rights.¹²¹ As such, Judge Cox concluded that any objection based on the Convention missed the mark because "Thompson does not have standing to protest an alleged violation of the treaty."¹²²

IV. LIENS

The period under review produced two cases involving maritime liens. Although both presented rather straightforward fact patterns, they still made for interesting reading.

In *Stevens Technical Services, Inc. v. United States*,¹²³ the plaintiff, Stevens Technical Services, Inc. (Stevens) brought suit against the United States and Atlantic Sandblasting & Coatings, Inc. (Atlantic) for repairs it had performed on the U.S.S. SEALIFT ANTARCTIC. The ship, an auxiliary tanker, had been demise chartered to the United States through the Military Sealift Command (MSC) and was being operated by Marine Transport Lines, Inc. (MTL).¹²⁴ In 1985, she underwent a planned major overhaul at Atlantic's repair facility in Tampa, with half of the overhaul work being done by Atlantic and the rest carried out by Stevens.¹²⁵

The overhaul was completed as scheduled and, following various inspections by both MSC and MTL, the SEALIFT ANTARCTIC was

120. *Thompson*, 928 F.2d at 1063-66. In rejecting Thompson's Fourth Amendment argument, Judge Cox again made it clear that one's rights while on the water are not the same as those enjoyed on land: "At sea, a person's expectation of privacy may be severely restricted compared with expectations of privacy on land." *Id.* at 1064 (quoting *United States v. Lopez*, 761 F.2d 632, 635 (11th Cir. 1985)). For a further discussion, see Howard S. Marks, Comment, *The Fourth Amendment: Resting on the High Seas?*, 34 *MERCER L. REV.* 1537 (1983).

121. *Id.* at 1066.

122. *Id.*

123. 913 F.2d 1521, 1991 AMC 2497 (11th Cir. 1990).

124. *Id.* at 1525, 1991 AMC at 2502.

125. *Id.* The overhaul included "tank cleaning, repainting and coatings and major engine and machinery work." *Id.*

redelivered to the United States.¹²⁶ MTL then paid Atlantic in full, for which it later was reimbursed by MSC.¹²⁷ Atlantic failed to pay Stevens, however, and Stevens therefore filed suit against the United States and Atlantic.¹²⁸

The case was referred to visiting District Judge Alaimo, who conducted a bench trial.¹²⁹ Following the trial, he held that Stevens could recover against Atlantic,¹³⁰ but was barred by the Public Vessels Act (PVA)¹³¹ from recovering against the United States.¹³² Upon receiving the decision, Stevens filed an appeal.¹³³

The appeal was heard by a panel consisting of Circuit Judges Vance and Anderson and visiting Senior Circuit Judge Brown. Shortly after the oral argument, however, Judge Vance was assassinated. The opinion therefore was issued by Judges Brown and Anderson and was written by Judge Brown.¹³⁴ In it, Judge Brown reversed Judge Alaimo's conclusion that the PVA barred Stevens' suit against the government,¹³⁵ and remanded the case for a determination as to whether Stevens was entitled to assert a maritime lien against the SEALIFT ANTARCTIC.¹³⁶

Judge Brown began his decision by tracing the history of the PVA.¹³⁷ Based on this review, Judge Brown concluded that Stevens had the right to sue the government for the work it had performed and, with the exception of being barred from actually arresting the SEALIFT ANTARCTIC, was entitled to go forward in the same manner as if the vessel had been owned by a private party.¹³⁸

Having found that the PVA did not bar Stevens' suit, Judge Brown then turned to Stevens' assertion that the repairs it had performed gave rise to a maritime lien. Here Judge Brown found the rec-

126. *Id.* at 1525-26, 1991 AMC at 2502.

127. *Stevens*, 913 F.2d at 1526, 1991 AMC at 2502.

128. *Id.*, 1991 AMC at 2502-03.

129. *Id.*, 1991 AMC at 2503.

130. *Id.*

131. 46 U.S.C. §§ 781-790 (1988). The PVA and its sister statute, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1988), are described in detail in Fritz G. Faerber, *Admiralty Claims Against the United States*, 20 FORUM 122 (1984).

132. *Stevens*, 913 F.2d 1526, 1991 AMC at 2503.

133. *Id.*

134. *Id.* at 1523.

135. *Id.* at 1537, 1991 AMC at 2521.

136. *Id.*

137. *Stevens*, 913 F.2d at 1526-34, 1991 AMC at 2503-16.

138. *Id.* at 1534, 1991 AMC at 2515-16.

ord incomplete. Although it was clear that Stevens had done the work for which it was seeking payment,¹³⁹ it was open to dispute whether Stevens had relied on the credit of the SEALIFT ANTARCTIC, as opposed to the credit of Atlantic. Noting that reliance on a vessel is a basic requirement for assertion of a maritime lien, Judge Brown held that further proceedings at the trial court were necessary.¹⁴⁰

The other lien case of the survey period was *Kaleidoscope Tours v. M/V "Tropicana."*¹⁴¹ From December 1, 1988 to May 14, 1989, the plaintiff, Kaleidoscope Tours (Kaleidoscope), had provided embarkation services to the M/V TROPICANA, a passenger cruise ship, at the Port of Miami.¹⁴² These services consisted of collecting money and tickets from passengers, checking passports, embarking temporary crew members and ship's employees, and accounting for and delivering the fares to the ship's pier supervisors.¹⁴³ Although Kaleidoscope was paid for most of its services, it was not paid for those it rendered between March 27, 1989 and May 14, 1989.¹⁴⁴ In order to recover for these services, which it valued at \$20,350, Kaleidoscope asserted a lien against the TROPICANA and had her arrested.¹⁴⁵

Kaleidoscope's case was referred to District Judge Ryskamp, who conducted a bench trial.¹⁴⁶ After reviewing the pertinent facts, he decided that there were two key questions in the case: 1) was the contract under which Kaleidoscope had acted "maritime in nature," and, 2) were the services provided "necessaries" for purposes of the Federal

139. *Id.* at 1535, 1991 AMC at 2517-18.

140. *Id.* at 1536-37, 1991 AMC at 2519-21. Because it had not been argued at the trial court, Judge Brown did not reach the government's argument that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (1988), barred Stevens' suit. In dicta, however, Judge Brown stated that if the argument had been raised in a timely fashion, he would have rejected it on the ground that the CDA does not control a party's right to assert a maritime lien. *Stevens*, 913 F.2d at 1537, 1991 AMC at 2521. A short time later, in a case that had been held in abeyance pending *Stevens*, a panel consisting of Circuit Judges Fay and Edmondson and visiting Senior Circuit Judge Garza held that the CDA does not affect a party's right to claim a maritime lien. See *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370, 1991 AMC 2487 (11th Cir. 1991).

141. 755 F. Supp. 382, 1991 AMC 1462 (S.D. Fla. 1990).

142. *Id.* at 383, 1991 AMC at 1463.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Kaleidoscope*, 755 F. Supp. at 383, 1991 AMC at 1463.

Maritime Lien Act (FMLA)?¹⁴⁷ In a short and well-reasoned opinion, he concluded that the answer to both questions was yes:

[T]he collection of and accounting for passengers' fares and tickets and the checking of passports for immigration services are essential to the voyage of a cruise ship. "Without these, there can be no voyage" This court therefore concludes that the embarkation services performed by Kaleidoscope are "necessaries" which give rise to a maritime lien under the FMLA. Thus, the contract pursuant to which these services were performed is a maritime contract, and the court has jurisdiction to enforce the maritime lien.¹⁴⁸

V. PERSONAL INJURY

A. Longshore and Harbor Workers

Cases about longshore and harbor workers do not often make news, but *Robinson v. Jacksonville Shipyards, Inc.*¹⁴⁹ proved to be an exception. Lois Robinson had been a ship welder at two shipyards run by the defendant, Jacksonville Shipyard, Inc. (JSI).¹⁵⁰ She had joined JSI in September, 1977 as a third-class welder and had been steadily promoted until she reached the status of first-class welder.¹⁵¹

While working at JSI, Robinson was constantly surrounded by pictures of nude women and confronted by sexually-suggestive comments and graffiti.¹⁵² Although she complained about the working environment at JSI to her superiors,¹⁵³ the problems grew worse.¹⁵⁴ Finally, in

147. *Id.*, 1991 AMC at 1464. The text of the FMLA can be found at 46 U.S.C.A. §§ 31341-31343 (West, Supp. 1990).

148. *Kaleidoscope*, 755 F. Supp. at 385, 1991 AMC at 1466.

149. 760 F. Supp. 1486 (M.D. Fla. 1991).

150. *Id.* at 1491. Robinson worked at both the Mayport Yard, situated in the Mayport Naval Station, and at the Commercial Yard, located on the riverfront in downtown Jacksonville. *Id.*

151. *Id.*

152. *Id.* at 1493-94.

153. In addition to complaining to her superiors, Robinson filed a grievance with her union and registered a complaint with the Jacksonville Equal Employment Opportunity Commission (EEOC). The union, however, refused to pursue the matter and the EEOC sent Robinson a letter informing her that it had found that "no reasonable cause existed" to believe that she had been discriminated against on account of her sex. *Robinson*, 760 F. Supp. at 1516-17.

154. *Id.* at 1500-01.

September, 1986, Robinson filed a sexual discrimination lawsuit against JSI.¹⁵⁵ In her suit Robinson sought to force JSI to implement a comprehensive sexual harassment policy, pay her money damages, and delete from her employment record warnings that she had received for excessive absenteeism.¹⁵⁶

Robinson's case was assigned to District Judge Melton and culminated in an eight day bench trial in January and February, 1989.¹⁵⁷ Two years later, in March, 1991, Judge Melton issued his final judgment. In a highly-publicized opinion¹⁵⁸ that ran sixty-one published pages, Judge Melton ruled that Robinson had been subjected to a sexually hostile work environment.¹⁵⁹ After engaging in an exhaustive review of the voluminous and often-conflicting record, including testimony from Robinson's co-workers and the opinions of expert witnesses, Judge Melton concluded:

A reasonable woman would find that the working environment at JSI was abusive. This conclusion reaches the totality of the circumstances, including the sexual remarks, the sexual jokes, the sexually-oriented pictures of women, and the nonsexual rejection of women by coworkers. The testimony by Dr. Fiske and Ms. Wagner provides a reliable basis upon which to conclude that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions.¹⁶⁰

Having found that Robinson had been the victim of an illegal work environment, Judge Melton turned to the question of remedies. He first concluded that with respect to monetary compensation Robinson was entitled to only \$1.00 in nominal damages because she had failed to prove that JSI's conduct had caused her to sustain economic damages.¹⁶¹ He did find, however, that under federal law Robinson was

155. *Id.* at 1517. Robinson's suit was based on Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of gender. *Id.* at 1490. The Act is codified at 42 U.S.C. §§ 2000e (1988).

156. *Robinson*, 760 F. Supp. at 1519.

157. *Id.* at 1490.

158. Judge Melton's decision was reported by such diverse publications as *The Chicago Tribune*, *The New York Times*, *Newsday*, *The Seattle Times*, *The National Law Journal*, *Business Week*, *Playboy*, and *Time*.

159. *Id.* at 1491.

160. *Id.* at 1524.

161. *Id.* at 1532-34.

entitled to have JSI pay her attorneys' fees and costs since she had won nominal damages.¹⁶²

Judge Melton then moved to the subject of injunctive relief. Here he found that Robinson had met her burden of proof.¹⁶³ He therefore ordered JSI to adopt and enforce a policy for preventing sexual harassment. Because he was concerned that JSI's past history made it a poor candidate for devising an acceptable sexual harassment plan on its own, Judge Melton set forth in detail the elements that the plan would have to contain.¹⁶⁴

In justifying his hands-on approach, Judge Melton wrote:

The history of management's condonation and approval of sexually harassing conditions, together with the past failures to redress effectively those instances of sexual harassment of which management disapproved, argues forcefully for affirmative relief that provides guidance for all employees regarding acceptable and offensive conduct, provides confidence to female employees that their valid complaints of sexual harassment will be remedied, and provides male employees who transgress the boundaries of sexual harassment with notice that their conduct will be penalized commensurate with the seriousness of the offense.¹⁶⁵

162. *Id.* at 1538-39.

163. *Robinson*, 760 F. Supp. at 1534.

164. *Id.* at 1538. Recognizing that his plan might need certain modifications in order to be implemented successfully, Judge Melton gave JSI thirty days "to submit any specific objections that relate to its ability to implement and enforce the policy and procedures, as modified." *Id.* at 1537. Judge Melton cautioned JSI, however, that its objections were to be based solely on its ability to practically execute the court's mandate, and were not to "concern the substance" of the court's decision. *Id.*

165. *Id.* at 1534. Lois Robinson was not the first female plaintiff to use maritime law to strike a blow for sexual equality. For other such cases, see Robert M. Jarvis, *Sexual Equality Before the Silver Oar: Lifting the Fog on Women, Ships, and the Law of Admiralty*, 7 CARDOZO L. REV. 93 (1985). Shortly after the survey period ended, however, the Fifth Circuit affirmed the dismissal of a case very similar to *Robinson*. In *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991), Elizabeth Wilson, a motorhand, brought a Jones Act suit against her employer claiming that it had permitted a hostile work environment to develop and remain aboard its ships. Like the district court, the Fifth Circuit found that the claim was time-barred because it had been brought more than three years after the sexual harassment had occurred.

B. *Passengers*

The survey period produced three cases involving injuries to ship passengers. In the first, *Keefe v. Bahama Cruise Line, Inc.*,¹⁶⁶ the long-running saga of Rita Patricia Keefe appears to have finally come to an end. Keefe, a hairdresser, along with the other members of her bowling team, had been a passenger aboard the S/S VERA CRUZ during a two day "Cruise to Nowhere" in June, 1984.¹⁶⁷ While dancing on the ship's outdoor dance floor one night, she had slipped and injured herself.¹⁶⁸ A bench trial was held in March, 1988 before District Judge Kovachevich, who found that Keefe was entitled to recover \$10,657.60.¹⁶⁹ The owner of the VERA CRUZ, Bahama Cruise Line, Inc. (BCL), appealed Judge Kovachevich's decision to the Eleventh Circuit, and obtained an order remanding the question of liability and requiring Keefe to pay the costs of the appeal.¹⁷⁰

On remand, Judge Kovachevich readopted her earlier opinion and again entered judgment in favor of Keefe.¹⁷¹ BCL then took a second appeal. This time the Eleventh Circuit affirmed the judgment and ordered BCL to pay costs to Keefe.¹⁷² Keefe then filed a motion with Judge Kovachevich asking her to enter judgment in the amount of \$10,657.60, together with court costs, appellate costs, and interest at an annual rate of 6.71% from March 31, 1988, the date of the original judgment.¹⁷³ In response, BCL argued that interest and costs should run only from July 17, 1989, the date of Judge Kovachevich's second judgment.¹⁷⁴

Agreeing with the parties that there was a split in the law among the circuits,¹⁷⁵ Judge Kovachevich decided to side with Keefe:

166. 753 F. Supp. 349, 1991 AMC 1397 (M.D. Fla. 1990).

167. *Keefe v. Bahama Cruise Line, Inc.*, 682 F. Supp. 1191, 1192 (M.D. Fla. 1988).

168. *Id.* at 1192.

169. *Id.* at 1195. Judge Kovachevich awarded Keefe \$7,000.00 in compensatory damages and \$3,657.60 for medical costs. *Id.*

170. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989). This aspect of the *Keefe* litigation is discussed in Nathaniel G. W. Pieper & David W. McCreddie, *Cruise Ship Passenger Claims and Defenses*, 21 J. MAR. L. & COM. 151, 175 (1990).

171. *Keefe v. Bahama Cruise Line, Inc.*, 715 F. Supp. 1069 (M.D. Fla. 1989).

172. *Keefe v. Bahama Cruise Line, Inc.*, 902 F.2d 959 (11th Cir. 1990).

173. *Keefe*, 753 F. Supp. at 351, 1991 AMC at 1399.

174. *Id.*

175. *Id.* (citing *Chattem, Inc. v. Bailey*, 486 U.S. 1059 (1988) (White, J.,

In this case, the questions addressed in the first instance and on remand were resolved in the same manner. This Court found Defendant liable, found the claim not to be time-barred, and awarded identical damages The damages were meaningfully "ascertained" at the time of the original judgment The Court concludes that interest in this cause of action should appropriately be calculated from the date of the original judgment, March 31, 1988.¹⁷⁶

The next passenger case was *Perlman v. Valdes*.¹⁷⁷ Sherry Lynn Valdes had died from injuries sustained when the speedboat in which she was riding struck an unlighted, unused concrete pier.¹⁷⁸ Following her death her husband, Jose, and her parents, Jack and Linda Newton, brought a wrongful death suit against George D. Perlman, the trustee of the City Isles Trust (Trust), the owner of the pier, on the ground that it had been negligent in failing to light the pier in accordance with federal regulations.¹⁷⁹

The Trust moved for and received summary judgment on the Newtons' claim.¹⁸⁰ The remaining claims were then tried to a jury. The jury found that the Trust was guilty of negligence *per se* and that Jose and Sherry had been twenty-five percent negligent.¹⁸¹ Based on these findings, the jury awarded \$250,000 to Sherry's estate and \$250,000 to Jose.¹⁸² Although the Trust moved for a new trial and for remittitur of the award, Circuit Judge Gale entered final judgment in accordance with the verdict.¹⁸³ The Trust then took an appeal and the Newtons filed a cross-appeal.¹⁸⁴ In a brief opinion written by District Judge Baskin and joined in by District Judges Nesbitt and Cope, the judgment was affirmed in part and reversed in part.¹⁸⁵

Judge Baskin began her review by agreeing with the Trust that the damages won by Sherry's estate were excessive. She therefore reversed

dissenting)).

176. *Id.* at 351, 1991 AMC at 1400.

177. 575 So. 2d 216 (Fla. 3d Dist. Ct. App. 1990).

178. *Id.* at 217.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Perlman*, 575 So. 2d at 217.

183. *Id.*

184. *Id.*

185. *Id.* at 218.

the jury's award and remanded for remittitur or a new trial.¹⁸⁶ With respect to Jose's recovery, however, Judge Baskin decided that it was supported by the evidence and therefore refused to disturb it.¹⁸⁷

Having disposed of the appeal, Judge Baskin turned to the cross-appeal. Here she found that Judge Gale had been correct in dismissing the Newtons' claim because they had not relied on their daughter for financial support. Recognizing that the question was controlled by a very recent decision of the United States Supreme Court, Judge Baskin wrote: "The trial court properly granted summary judgment in the Trust's favor as the parents may not recover under general maritime law absent a showing of financial dependence on the decedent."¹⁸⁸

The final passenger case of the survey period was *Wilkinson v. Carnival Cruise Lines, Inc.*¹⁸⁹ Marjetta Wilkinson and Tracie Sanders had been travelling companions aboard the S/S TROPICALE, a cruise ship owned by Carnival Cruise Lines, Inc. (Carnival).¹⁹⁰ On the afternoon of September 30, 1983, after sunning herself for a short time by the pool on the Lido Deck, Wilkinson walked barefoot towards an electronic sliding glass door on the ship's port side.¹⁹¹ As she walked through the door, it closed, running over the toes of her right foot.¹⁹²

Wilkinson filed suit against Carnival claiming that it had failed to maintain the door properly and also had failed to warn her that the door could close suddenly.¹⁹³ The case was assigned to District Judge Zloch and the parties proceeded to discovery.¹⁹⁴ As the date for trial neared, Carnival made a motion for summary judgment.¹⁹⁵ Although the magistrate to whom the motion was referred recommended that it be granted, Judge Zloch ruled that while the plaintiff's case was weak, there was sufficient evidence to warrant a trial.¹⁹⁶

186. *Id.* at 217-18.

187. *Pertman*, 575 So. 2d at 218.

188. *Id.* (citing *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 1991 AMC 1 (1990)). The Supreme Court's decision is commented on in Ross Diamond III, *Wrongful Death Remedies After Miles v. Apex Marine Corp.*, 3 MAR. L. REP. 49 (1991), and C. Taylor Simpson, Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law: Miles v. Apex Marine Corp.*, 15 TUL. MAR. L.J. 449 (1991).

189. 920 F.2d 1560 (11th Cir. 1991).

190. *Id.* at 1562.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Wilkinson*, 920 F.2d at 1562.

195. *Id.*

196. *Id.* at 1563.

Much of the trial centered around the testimony of Sanders. She had not witnessed the accident, but claimed to have had a conversation with a cabin steward named Fletcher shortly after the accident. According to Sanders, Fletcher had told her that he had been aware of the door's propensity to malfunction and had been trying to fix it.¹⁹⁷ Carnival objected to the introduction of his testimony on the ground that it was inadmissible hearsay.¹⁹⁸ Wilkinson responded by arguing that it should be let in as a party admission.¹⁹⁹ After considering the matter, Judge Zloch concluded that the statement was admissible as a statement by a party's servant concerning a matter within the scope of his employment.²⁰⁰

The trial also focused on the testimony of several other witnesses who claimed that after Wilkinson's accident the door that had injured her was locked in an open position for the remainder of the cruise.²⁰¹ Initially, Judge Zloch ruled that this testimony was inadmissible because it constituted evidence of a subsequent remedial measure.²⁰² On the next day of the trial, however, Judge Zloch held that the testimony was admissible to impeach Rafael Marcialis, the ship's second officer, who had testified that when he inspected the door he had found it to be in "normal operating condition."²⁰³

Following the trial the jury returned a verdict in favor of Wilkinson and awarded her \$260,000, less twenty percent for her negligence.²⁰⁴ After Carnival's motions for a judgment notwithstanding the verdict, remittitur, and a new trial were denied, Carnival filed an appeal.²⁰⁵ On appeal, the judgment was reversed and the case was remanded for a new trial in an opinion written by Circuit Judge Fay and joined in by Circuit Judge Edmondson and Senior Circuit Judge Tuttle.²⁰⁶

Judge Fay turned first to the question of whether Fletcher's alleged statement should have been admitted. Noting that neither party

197. *Id.* at 1562-63.

198. *Id.* at 1563.

199. *Wilkinson*, 920 F.2d at 1563.

200. *Id.*

201. *Id.*

202. *Id.* at 1563-64.

203. *Id.* at 1564.

204. *Wilkinson*, 920 F.2d at 1564.

205. *Id.*

206. *Id.* at 1562.

had attempted to depose Fletcher or call him to the stand,²⁰⁷ Judge Fay did not question Sanders' contention that Fletcher had told her that the door had been malfunctioning. Instead, Judge Fay posed the question as being whether Fletcher was in a position to speak for Carnival about the door's operation.²⁰⁸ Relying on an affidavit submitted by Jack Stein, of Carnival's Operations Department, Judge Fay found that cabin stewards such as Fletcher were strictly prohibited from being in any of the ship's "passenger areas."²⁰⁹ Since the accident had taken place in such an area,²¹⁰ Judge Fay concluded that Fletcher's statement was not a party admission: "The magistrate found, and we agree, that Stein's affidavit established 'that the statement made by a room steward to Ms. Sanders did not concern a matter within the scope of his agency or employment,' and therefore was hearsay."²¹¹

Although agreeing with Carnival that as a practical matter the plaintiff's case was over, Judge Fay noted that there still was a slight chance that Wilkinson could find a way to get Fletcher's statement into evidence.²¹² Since another trial remained a theoretical possibility, Judge Fay reviewed Wilkinson's impeachment of the ship's second officer. Once again, he found reversible error. In explaining his conclusion, Judge Fay wrote:

207. *Id.* at 1562 n.3.

208. *Id.* at 1565. Judge Fay described the inquiry by writing: "The appropriate focus is instead upon whether the cabin steward's statement concerned a 'matter within the scope of [his] agency or employment' with Carnival." *Wilkinson*, 920 F.2d at 1565.

209. *Id.* at 1566.

210. *Id.*

211. *Id.*

212. Judge Fay explained the need to remand the case, rather than simply reverse, as follows:

If 801(d)(2)(D) were the only avenue through which plaintiff had attempted to offer the Fletcher statements, then we might well simply reverse and enter judgment for Carnival on this issue. Our examination of the record, however, reveals that following the magistrate's recommendation . . . plaintiff filed a Notice of Intent to Rely on Federal Rule of Evidence 803(24)

Because the district court overruled the magistrate's report and admitted the Fletcher statements as non-hearsay admissions of a party-opponent under Rule 801(d)(2)(D), it never considered the applicability of Rule 803(24), the so-called "Catchall" exception to the hearsay rule Accordingly, we leave it to the district court to determine whether the cabin steward's hearsay statements comport sufficiently with the criteria of Rule 803(24) to justify admission under that exception.

Id. at 1567 n.13.

Marcialis made no statements concerning the functioning of the door in the days subsequent to September 30. He did not assert that the *Tropicale's* crew or the cruise line had exercised "all reasonable care" in maintaining the door. Nor did he make representations that the door in question was in the "safest" or the "best" condition.

In short, the evidence of the subsequent remedial measure in this case impeached nothing in Marcialis' testimony. Moreover, admitting various witnesses' testimony to the fact of the doors being kept open likely gave rise to the precise inference of negligence that Rule 407 was designed to avoid. Accordingly, the evidence should have remained inadmissible.²¹³

C. *Seamen*

Two very unusual personal injury cases involving seamen were decided during the time covered by the survey. In *Tanker Management, Inc. v. Brunson*,²¹⁴ Darrel Allen, a merchant seaman, suffered a back injury in September, 1983 while working aboard the M/V CAROLE G. INGRAM.²¹⁵ Allen was treated by Dr. Bruce C. Brunson, who signed a certificate in February, 1984 stating that Allen could return to work in three weeks provided that he did not have to lift anything exceeding fifty pounds.²¹⁶ In December, 1984, Brunson signed a second certificate stating that Allen could resume work in two weeks with no weight restriction.²¹⁷ In August, 1985, Allen suffered a second back injury while working aboard the CAROLE G. INGRAM.²¹⁸

Allen subsequently sued Tanker Management, Inc., the operator of the CAROLE G. INGRAM, for both injuries. In time, Tanker

213. *Wilkinson*, 920 F.2d at 1568-69. Having dealt with the evidentiary questions posed by the appeal and having found that a new trial was necessary, Judge Fay ended his opinion by disposing of the final issue in short order. Carnival had argued that Judge Zloch had erred in failing to give one of its requested jury instructions. The instruction would have informed the jury that it could find that Wilkinson was a hypersensitive victim. *Id.* at 1569. Judge Fay ruled that the refusal had not been error because the instruction was covered by another instruction that was given and because Carnival had been allowed to argue in its closing statement to the jury that Wilkinson's injuries had been aggravated by a pre-existing condition. *Id.* at 1570.

214. 918 F.2d 1524 (11th Cir. 1990).

215. *Id.* at 1525.

216. *Id.*

217. *Id.*

218. *Id.*

Management settled Allen's lawsuit for \$150,000.²¹⁹ Its counsel then wrote to Brunson and demanded indemnity for the amounts it had paid in defending and settling the lawsuit.²²⁰ When Brunson refused to pay, Tanker Management filed suit against him. According to the complaint, Brunson, who had been paid by Tanker Management to treat Allen, had intentionally misrepresented Allen's condition (at Allen's behest) despite knowing that Tanker Management was relying on Brunson to advise them on whether Allen could return to work.²²¹

The case was assigned to District Judge Sharp and a bench trial was held. At the close of Tanker Management's case-in-chief Brunson moved for a directed verdict. Finding that Tanker Management had failed to make out a prima facie case, Judge Sharp granted the motion.²²² Because Tanker Management had rejected an offer of judgment from Brunson prior to the start of the trial, Judge Sharp also granted Brunson's subsequent motion for costs and attorneys' fees.²²³ Tanker Management then filed an appeal.²²⁴

In a rather scholarly opinion, Circuit Judge Clark, joined by Circuit Judge Hatchett and Senior Circuit Judge Morgan, affirmed Judge Sharp in all respects.²²⁵ Finding that Tanker Management's case had bordered on the frivolous,²²⁶ Judge Clark approved the granting of the directed verdict,²²⁷ the imposition of costs,²²⁸ and the awarding of attorneys' fees,²²⁹ as well as Judge Sharp's decision to add The London Steam-Ship Owner's Mutual Insurance Association Limited, Tanker Management's insurer, to the judgment so as to make it clear that it could not relitigate the matter by bringing a new suit in its own name.²³⁰

The other seaman's suit was *Gleneagle Ship Management Co. v.*

219. *Tanker Management*, 918 F.2d at 1525.

220. *Id.*

221. *Id.* at 1525-26.

222. *Id.* at 1526.

223. *Id.*

224. *Tanker Management*, 918 F.2d at 1526.

225. *Id.* at 1529.

226. *Id.* at 1527. Judge Clark observed dryly: "Appellant failed to present any evidence which supports the inference that Brunson failed to accurately state his opinion as to Allen's condition." *Id.*

227. *Id.* at 1526-27.

228. *Tanker Management*, 918 F.2d at 1527.

229. *Id.* at 1527-29.

230. *Id.* at 1529.

Leondakos.²³¹ Anthony Leondakos had injured himself when he fell off a stairwell on the M/V BRIDGETON while sailing in the Persian Gulf.²³² He and his wife Carol filed a Jones Act suit²³³ in state court against Gleneagle Ship Management Company (Gleneagle) and Chesapeake Shipping, Inc.²³⁴ In response, Gleneagle moved to dismiss the complaint on the ground that the trial court lacked personal jurisdiction.²³⁵

Before the motion to dismiss could be heard, Leondakos served a discovery request aimed at determining whether the trial court did have jurisdiction. When Circuit Judge Farnell ruled that Leondakos could engage in limited discovery for the purpose of determining whether jurisdiction existed,²³⁶ Gleneagle filed a writ of certiorari.²³⁷

In a short per curiam decision, Acting Chief Judge Ryder and District Judges Danahy and Parker denied the petition.²³⁸ After reviewing both federal and state case law on the issue and noting that a conflict existed between the two, the panel concluded that the discovery was appropriate: "We believe the federal rule represents the better approach to the question, and hold that 'jurisdictional discovery' is available during the pendency of jurisdictional issues, subject of course to the supervision of the trial court."²³⁹

VI. PILOTS

The survey period produced two cases involving pilots. In both, ad-

231. 581 So. 2d 222 (Fla. 2d Dist. Ct. App. 1991).

232. *Id.* at 223.

233. 46 U.S.C. § 688 (1988). The Jones Act, passed in 1920, reversed traditional maritime law by giving seaman the right to sue their employers for negligence. See William B. Milliken et al., *Personal Injury and Wrongful Death in FLA. B., MAR. L. & PRAC.* § 2.21, at 38 (1987).

234. *Gleneagle*, 581 So. 2d at 223.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Gleneagle*, 581 So. 2d at 223. In so holding, the panel explicitly rejected the contrary holding in *F. Hoffmann LaRoche & Co. v. Felix*, 512 So. 2d 997 (Fla. 3d Dist. Ct. App. 1987), by writing: "Notably, that panel expressed a preference for the policy followed in the federal judicial system The panel apparently considered itself bound by a previous decision of the same court, *Far Out Music, Inc. v. Jordan*, 438 So. 2d 912 (Fla. 3d Dist. Ct. App. 1983), and lacked support for revisiting that decision *en banc*." *Id.*

miralty issues took a back seat to administrative law issues as the courts grappled with the Board of Pilot Commissioners (BPC).²⁴⁰

In *Rabren v. Department of Professional Regulation*,²⁴¹ the BPC, through the Department of Professional Regulation (DPR), had brought professional misconduct charges against a state-licensed pilot named David E. Rabren. According to the DPR's administrative complaint, Rabren, as President of the Tampa Tri-County Pilots Association (TRICO), had on several occasions in 1986 violated a BPC rule that required state-licensed pilots to be used in vessel shiftings.²⁴² In particular, Rabren was accused of having assigned Gary Murphy, a TRICO pilot who held only a federal license, to shift the vessels M/V OCEAN LORD, M/V VOMAR, and M/V ASPEN.²⁴³

Rabren contested the charges and requested a formal hearing, which was held in January, 1988.²⁴⁴ At the hearing, Rabren admitted that the shifts involving the OCEAN LORD and the VOMAR had taken place.²⁴⁵ He contended, however, that no penalty was warranted because: 1) it was his wife, TRICO's business manager, who had given the assignments to Murphy, and, 2) the shifts had taken place at anchorages, not ports, and therefore were not covered by the BPC's rule.²⁴⁶

The hearing officer rejected Rabren's first argument on the ground that it was not supported by any evidence.²⁴⁷ With respect to his second defense, however, the hearing officer agreed with Rabren. He found that:

Gadsden Anchorage, C.F. Industries, Rockport and Big Bend are all located in the port of Tampa. Accordingly, vessels moving between these locations are not entering and leaving port, and under the specific provisions of [Florida Statutes] Section 310.141 do not require the presence of a licensed state pilot, or a deputy pilot, on

240. For a general discussion of the powers of pilot commissioners, see A. PARKS, *THE LAW OF TUG, TOW, AND PILOTAGE* 1086-99 (2d ed. 1982).

241. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

242. *Id.* at 1286. This was not Rabren's first run-in with the BPC over this issue. In 1984, Rabren had challenged an earlier BPC rule concerning vessel shiftings. For a detailed account, see James I. Crowley, *In the Wake of the Exxon Valdez: Charting the Course of Pilotage Regulation*, 22 J. MAR. L. & COM. 165, 187-89 (1991).

243. *Rabren*, 568 So. 2d at 1286.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

board during maneuvers²⁴⁸

Based on his finding that Murphy's shiftings were at places that were not ports, the hearing officer recommended that the charges against Rabren be dismissed.²⁴⁹

Several months later, in May, 1988, the BPC adopted the hearing officer's recommendation in a final order.²⁵⁰ The order, however, contained one very important change. Whereas the hearing officer had found that the anchorages at which Murphy had worked were outside the statutory definition of ports, the BPC included in its order the following conclusion of law: "In addition to the above Conclusions adopted from those of the Hearing Officer, the Board concludes that Gadsden Anchorage, C.F. Industries, Rockport and Big Bend are ports within the meaning of Section 310.002(4), Florida Statutes."²⁵¹ Upon receiving the BPC's order, Rabren filed a challenge to it in court.²⁵² In a well-written opinion that demonstrated a mastery over extremely complicated facts, District Judge Miner, joined by District Judges Nimmons and Barfield, agreed with Rabren and struck down the conclusion that the four facilities were ports.²⁵³

Judge Miner began his opinion by first finding that Rabren had standing to challenge the BPC's ruling even though the ruling had adopted the hearing officer's recommendation that the charges against Rabren should be dropped. Finding that new charges already had been brought against Rabren based on the order's redesignation of the anchorages as ports, Judge Miner concluded that Rabren ought to be allowed to challenge the order:

In terms of standing, we acknowledge that this is close to the boundary which separates injury in fact from mere illusory speculation However, the fact that there are pending charges against appellant based upon the legal conclusion contained in the final order serves to distinguish this case While standing here is not overwhelmingly clear, we hold that appellant has standing.²⁵⁴

248. *Rabren*, 568 So. 2d at 1287.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 1287-88.

253. *Rabren*, 568 So. 2d at 1290.

254. *Id.* at 1288.

Having resolved the standing issue, Judge Miner turned to the real question: had the BPC overstepped its boundaries by deciding that the anchorages should be considered ports? In doing so, he confronted the always hazy distinction between agency rulemaking and agency adjudication. The difference between the two in Florida has been described by one noted commentator as follows:

Generally, agencies can create legally binding policy by either using their rule making authority or by properly developing policy positions in adjudicatory proceedings. The latter have been labeled incipient rules by the courts, because they are developed in the case by case adjudicative process through a series of orders. There are several critical distinctions between the two processes. One such distinction is the type of record required to support agency policy developed in an adjudicatory proceeding [In order to withstand judicial challenge, the agency] must support in the record with competent substantial evidence *every* factual conclusion that is necessary to justify the agency's policy choice and detail the legal rationale for such policy choices.²⁵⁵

Although faced with a difficult question, Judge Miner found the answer rather easy. After considering the proceedings undertaken by the BPC and the DPR, he concluded that the record did not contain nearly enough evidence to support the BPC's redesignations. He explained his conclusion by writing:

In the instant case, there is no record foundation for the BPC's conclusion that CFI, Gadsden Anchorage, Rockport and Big Bend are ports. The transcript of the DOAH proceeding was not available, and the factual findings adopted in the BPC's final order tend to support a contrary conclusion. Neither does the order offer an explanation or justification for the policy. The BPC simply states in conclusory fashion that the facilities are ports. We find this conclusion to be unsupported by the record.²⁵⁶

255. Johnny C. Burris, *Administrative Law*, 14 NOVA L. REV. 583, 613-14 (1990) (emphasis in original).

256. *Rabren*, 568 So. 2d at 1289. Although it had no bearing on the case, by the time Judge Miner's decision was published the statute under which the BPC had proceeded had been amended. See FLA. STAT. § 310.141 (1990). The amendment, which will expire on October 1, 1996 unless reenacted, exempts vessel dockings, undockings, and shiftings from the rule requiring the use of a state-licensed pilot.

The other pilotage case of the survey period was *McDonald v. Department of Professional Regulation*.²⁵⁷ George H. McDonald, a licensed harbor pilot, was fined \$500 by the BPC and DPR for allowing the stern of the M/V KALLIOPE II, a vessel he was piloting with the assistance of the tugboats TAMPA and ORANGE out to Tampa Bay, to be towed into the west bank of the Cut D channel.²⁵⁸ Following the imposition of the fine, McDonald appealed the order.²⁵⁹

On appeal, a divided panel consisting of District Judges Ervin and Zehmer and Senior District Judge Wentworth produced three separate opinions. Judge Ervin wrote the majority opinion, in which Judge Zehmer joined by penning a special concurrence. Judge Wentworth objected to both the majority opinion and the concurrence in a short dissent.

Each member of the panel agreed that the issue before the court was whether the BPC had met its burden of proving that McDonald had been negligent. In finding negligence, the hearing officer had relied on an evidentiary presumption borrowed from a federal admiralty case: in the absence of severe weather conditions or mechanical difficulties, evidence that a vessel has been navigated outside the channel is prima facie evidence of negligence.²⁶⁰ The BPC accepted the hearing officer's recommendation that McDonald be found negligent, but modified the presumption to include, in addition to weather conditions and mechanical difficulties, "the absence of any exigent circumstances."²⁶¹

In reviewing the BPC's decision, Judge Ervin believed that both the BPC and the hearing officer had been wrong to rely on the presumption. He therefore reversed the decision and remanded the case for further proceedings in which the presumption could not be used.²⁶² In setting out the rationale behind his ruling, Judge Ervin wrote:

Under the principle of strict construction applicable to disciplinary statutes and the principles set forth in the cases cited above, it follows that without any provision for a legal presumption in the disciplinary statutes, the agency lacks authority to adopt a legal pre-

257. 582 So. 2d 660 (Fla. 1st Dist. Ct. App. 1991).

258. *Id.* at 661-62.

259. *Id.* at 662.

260. *Id.* The case from which the hearing officer and the BPC had borrowed the presumption was *Woods v. United States Department of Transportation*, 681 F.2d 988, 1985 AMC 2112 (5th Cir. 1982).

261. *McDonald*, 582 So. 2d at 662.

262. *Id.* at 664.

sumption that effectively relieves it from having to prove specific acts of misconduct and shifts the burden of proving innocence to the licensee. We have found no such statutory provision authorizing DPR or the Board to adopt or apply any presumption like that applied in this case. Thus, DPR, in urging the Board to adopt the presumption, and the Board, in applying the presumption to support the finding of guilt, greatly exceeded their statutorily delegated authority under Florida law.²⁶³

Although he agreed with Judge Ervin that reliance on the presumption had been error, Judge Zehmer in his concurrence explained that he believed that the case against McDonald was so weak that the order should have been reversed with directions to dismiss the charges.²⁶⁴

The panel's final opinion, by Judge Wentworth, came to an entirely opposite conclusion. Judge Wentworth concluded that the BPC had been correct to use the presumption and also had been correct in finding that McDonald had been negligent.²⁶⁵ Since the presumption was not a "conclusive" presumption, Judge Wentworth saw no reason that would bar its use and chastised Judge Ervin for making the BPC's job more difficult by prohibiting "the use of rebuttable evidentiary devices which are well rooted in the law of the subject matter regulated."²⁶⁶

VII. PRODUCTS LIABILITY

In recent years, the number of marine products liability suits has been rapidly increasing. The period under study produced two such cases, both of which turned out to be victories for the manufacturers and distributors of products that fail.

In *Ruano v. Water Sports of America, Inc.*,²⁶⁷ Nelson Atan, a fourteen year old, and his brother rented a jet ski known as a "wave jammer" from the defendant, Water Sports of America (WSA).²⁶⁸

263. *Id.*

264. *See id.* at 1593.

265. *Id.* at 676.

266. *McDonald*, 582 So. 2d at 676.

267. 578 So. 2d 385 (Fla. 3d Dist. Ct. App. 1991).

268. *Id.* at 385. Unlike other types of jet skis, a wave jammer is driven with the operator standing. *Id.* The Eleventh Circuit has found that jet skis are vessels for federal admiralty purposes. *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1990 AMC 609 (11th Cir. 1990). For a discussion of *Keys*, see Jeffrey S. Winder, Note, *On the*

Before being allowed to take out the jet ski, the boys were given operating instructions, provided with rudimentary safety precautions, and told to stay away from the swimming area.²⁶⁹

David Ruano, a swimmer, was sitting in Biscayne Bay near the Rickenbacker Causeway approximately five to eight feet from the shore.²⁷⁰ The area in which he was sitting was part of the established swimming area.²⁷¹ In an instant, he was hit in the head by the wave jammer, knocked unconscious for a few seconds, and sustained injuries to his ear and to other parts of his body.²⁷²

Following the June, 1988 mishap, Ruano brought suit against WSA for having negligently entrusted the wave jammer to a minor. Circuit Judge Turner granted a motion for summary judgment by WSA and Ruano appealed.²⁷³ In a short opinion, District Judge Barkdull, joined by District Judges Nesbitt and Jorgenson, affirmed the decision.²⁷⁴

WSA had moved for summary judgment on the ground that under Florida law liveries cannot be held liable for negligent entrustment. Judge Turner had agreed with WSA, and so did Judge Barkdull. Finding that WSA has complied fully with the law, he wrote:

The trial court properly entered summary judgment because section 327.54, Florida Statutes (1987), provides a complete defense, thus relieving the defendant from liability. The statute provides that the liability of a commercial lessor ceases upon compliance with the statutory safety requirements. The statute supplants the common law theories of vicarious liability and negligent entrustment. Moreover, even if the statute does not constitute a defense for negligent entrustment, there is no view of the facts which supports such a claim.²⁷⁵

A more traditional products liability claim was made in *American Universal Insurance Group v. General Motors Corporation*.²⁷⁶ In 1985,

Duty to Follow Precedent in Applying the Limitation of Liability Act: Keys Jet Ski, Inc. v. Kays, 15 TUL. MAR. L.J. 465 (1991).

269. *Ruano*, 578 So. 2d at 385.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 386.

274. *Ruano*, 578 So. 2d at 386.

275. *Id.*

276. 578 So. 2d 451 (Fla. 1st Dist. Ct. App. 1991).

Robert Cook purchased from Diesel Parts, Sales & Service, Inc. (Diesel Parts) a replacement oil pump that had been manufactured and distributed by the defendant, General Motors Corporation (GMC).²⁷⁷ Diesel Parts subsequently installed the pump aboard Cook's fishing boat, the F/V CAPTAIN SLEEPY.²⁷⁸ Two years later, on January 20, 1987, the pump's drive gear failed and burned up the CAPTAIN SLEEPY's engine while she was being operated off the coast of New Smyrna Beach.²⁷⁹

Pursuant to its insurance policy, the plaintiff, American Universal Insurance Group (American), paid Cook and his wife \$7,392.91.²⁸⁰ Meanwhile, Cook returned the engine to Diesel Parts, and they repaired it. When Cook failed to pay for the repairs, Diesel Parts sued him. In response, Cook claimed a set-off based upon Diesel Parts' alleged breach of its implied warranty of merchantability arising out of the original sale.²⁸¹ Cook also brought a third-party complaint against Diesel Parts and GMC.²⁸² American, having become subrogated to Cook on account of its payment to him, then filed an intervening complaint against both Diesel Parts and GMC.²⁸³

The case was assigned to Circuit Judge Beverly. She eventually dismissed American's complaint against GMC and also dismissed the negligence count in American's complaint against Diesel Parts.²⁸⁴ In response, American filed an appeal with respect to the dismissal of GMC.²⁸⁵ In a well-crafted opinion, District Judge Smith, joined by District Judge Booth, affirmed the dismissal.²⁸⁶ Although District Judge Zehmer dissented, he did not write an opinion.²⁸⁷

After a careful review of the case law, Judge Smith stated what has become the accepted rule in this state: "Florida law does not permit a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property

277. *Id.* at 451.

278. *Id.*

279. *Id.* at 451-52.

280. *Id.* at 452.

281. *American Universal*, 578 So. 2d at 452.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *American Universal*, 578 So. 2d at 455.

287. *Id.*

other than the allegedly defective goods.”²⁸⁸ Having set out the rule, Judge Smith turned to American’s argument for why the rule did not apply.

According to American, the oil pump had been the product that Cook had purchased and the engine was the “other property” that the product had damaged when it malfunctioned.²⁸⁹ Although the distinction drawn by American sounded reasonable enough, Judge Smith found that it did not comport with the facts of the case:

Here the object of the bargain was a repaired engine, not just a replacement oil pump. The oil pump furnished essential lubrication and heat protection to the engine—this is the part of the “bargain” purchased, not just the metal and parts making up the oil pump. The pump became an integral part of the repaired engine and when it damaged itself, and the engine parts, this was not damage to “other property.”²⁹⁰

VIII. SALVAGE

There was only one salvage case during the survey period, but it proved to be a dandy. In *Flagship Marine Services, Inc. v. Belcher Towing Co.*,²⁹¹ the tugboat E.N. BELCHER, JR., and her two barges became stranded on the morning of July 17, 1989, after striking an unidentified submerged object near Big Shell Island off the Southwest Florida coast. Realizing that he was in trouble, William Diamond, the BELCHER’s captain, notified the Coast Guard and then began trying to save his ship.²⁹² The Coast Guard relayed Diamond’s message to the Ft. Myers Fire Department, the Cape Coral Fire and Police Departments, and Flagship Marine Services, Inc., a private salvage company operating under the name Sea Tow Services of Lee County (Sea Tow).²⁹³ Within the hour, help began arriving.²⁹⁴

288. *Id.* at 453 (citing *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987)). As Judge Smith noted, this is the same standard as the one used in federal admiralty proceedings. *Id.* (citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986)); see also Symposium, *Products Liability in Admiralty*, 62 TUL. L. REV. 313 (1988).

289. *American Universal*, 578 So. 2d at 455.

290. *Id.* at 454.

291. 761 F. Supp. 792 (S.D. Fla. 1991).

292. *Id.* at 793.

293. *Id.*

When the first of three Sea Tow ships appeared on the scene, Diamond asked the Sea Tow representative how much his company would charge. Although a discussion ensued, no price was agreed on and Sea Tow eventually went to work with the issue left open.²⁹⁵ After four difficult hours, during which a diver was deployed to patch a hole in the BELCHER's hull, Sea Tow managed to save both the BELCHER and the barges.²⁹⁶

After the rescue, one of Sea Tow's fleet captains, a Captain Robinson, prepared but then did not send an invoice for \$24,281.²⁹⁷ Instead, Sea Tow filed a suit for salvage against Belcher Towing Company, Belcher Oil Co., the BELCHER, and the two barges. Following a four day bench trial in March and April, 1991, Judge Aronovitz found that Sea Tow was entitled to a salvage award. Although Captain Robinson's invoice had been found by Belcher in discovery and had been introduced, Judge Aronovitz decided that it was not important: "The invoice represents a calculation of what the salvage job would have cost had it been on a straight time and materials basis. It does not account for all of the elements of a salvage award."²⁹⁸ Judge Aronovitz also found that the conversation between Diamond and the Sea Tow representative did not bar Sea Tow's ability to claim salvage: "Furthermore, the conversations that took place between Sea Tow and Captain Diamond did not rise to the level of either a contract between the parties, or a special oral agreement."²⁹⁹

Having concluded that Sea Tow was entitled to claim salvage, Judge Aronovitz then considered the size of the award. Noting that the BELCHER and her barges were worth \$670,000 and that the equipment that had been used by Sea Tow (and therefore put at risk) was valued at \$250,000, Judge Aronovitz decided that an award of \$125,000 would be "fair recompense."³⁰⁰

294. *Id.* at 794.

295. *Id.*

296. *Flagship*, 761 F. Supp. at 794-95.

297. *Id.* at 796.

298. *Id.*

299. *Id.* (citing *Brown v. Johnson*, 881 F.2d 107 (4th Cir. 1989)).

300. *Id.* at 796-97. In so holding, Judge Aronovitz did not explain how he had reached the figure of \$125,000.00 or why such an amount was fair. This is not surprising, however, for rarely is there any logical explanation for the size of a salvage award. As has been noted elsewhere: "Eventually the trial judge will pull an arbitrary figure out of the air." GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* § 8-10, at 56 (2d ed. 1975). For a very interesting article that decries the current system

IX. CONCLUSION

As noted in the Introduction, this survey period contained an eclectic mix of the traditional as well as the unusual. Each of the cases are great reading, and all serve to illustrate the period's single most important lesson: to be successful in the highly specialized practice of admiralty law, it helps to be an accomplished generalist.³⁰¹

and attempts to provide a mathematical formula for computing salvage awards, see Note, *Calculating and Allocating Salvage Liability*, 99 HARV. L. REV. 1896 (1986).

301. The credit for this observation belongs to Mary C. Hubbard, Esq., a maritime lawyer with the New Orleans law firm of Phelps Dunbar, who related it to the author during the Southeastern Admiralty Law Institute's 1991 Annual Continuing Legal Education Seminar in Savannah, Georgia.