IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

IN RE: *SKANSKA HURRICANE SALLY CASES*

Case No. 2023 CA 011000

Pertains to: *Economic Loss Plaintiffs Only*

ORDER ON DEFENDANTS' MOTION TO DISMISS BASED ON *ROBINS DRY DOCK & REPAIR CO. v. FLINT* PER THIS COURT'S ORDER ENTERED JULY 10, 2023

THIS MATTER came before the Court on January 4, 2024, for a hearing on Defendants' Motion to Dismiss ("Motion to Dismiss"), which is based on *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), and was filed by Skanska USA Civil Southeast, Inc. and Skanska USA, Inc. (jointly "Defendants" or "Skanska") on September 6, 2023. The Court, having reviewed the Motion to Dismiss, Plaintiffs' Opposition to the Motion to Dismiss filed on October 6, 2023, Defendants' Reply to Plaintiffs' Opposition filed on December 5, 2023, and having heard the arguments of counsel, finds as follows:

Factual Background

Skanska contracted with the Florida Department of Transportation ("FDOT") on July 29, 2016, to build the new Pensacola Bay Bridge. Because the bridge was being built over water, Skanska used a fleet of barges to build the bridge. At the time of Hurricane Sally in September 2020, the fleet consisted of 55 barges. Twenty-seven of these barges broke away in Hurricane Sally, and four allided with and damaged the Pensacola Bay Bridge, forcing closure of the bridge for a number of months.

Prior Proceedings

Skanska filed proceedings in United States District Court for the Northern District of Florida, Pensacola Division, for each of the barges that had broken away, including the four barges that had struck the Pensacola Bay Bridge. In those proceedings, Skanska sought exoneration from or limitation of its liability under the Limitation of Liability Act, 46 U.S.C. § 30523 (the "Limitation Act Proceedings"). As is common in Limitation Act Proceedings, the district court entered an injunction against filing suit in any other forum.

In the Limitation Act Proceedings, Claimants included those alleging that one or more of the barges had struck and damaged their property ("the Property Damage Claims"), businesses alleging they had suffered economic losses as a result of the closure of the Pensacola Bay Bridge, and commuters alleging they had suffered additional expenses ("the Economic Loss Claims"). Claimants and Skanska filed motions to dismiss the Limitation Act Proceedings in the federal case. Claimants sought to dismiss the Limitation Act Proceedings, arguing that the court lacked subject matter jurisdiction. Skanska moved to dismiss the Economic Loss Claims based on the rule set forth in *Robins Dry Dock* and cases following that decision, which bar claims for economic loss arising out of property damage, unless the party making the claim has a proprietary interest in the damaged property. Since none of the Economic Loss Claimants had alleged a proprietary interest in the Pensacola Bay Bridge, Skanska asserted that these claims should be dismissed. The district court deferred ruling on Skanska's motion to dismiss.

The district court held a bifurcated trial on the issues of whether Skanska's hurricane preparation constituted negligent acts, and whether such acts were undertaken without knowledge and privity such that Skanska could limit its damages to the value of the vessels. The trial ended

with Skanska renewing its motion to dismiss, and the district court taking the *Robins Dry Dock* issue under advisement.

In its Order and Final Judgment, entered on December 29, 2021, the Court found that Skanska had been "negligent" and had privity and knowledge with respect to the barge breakaway, dismissed the Limitation Act Proceedings, and dissolved the injunction against proceeding in other forums. The Order and Final Judgment did not reference *Robins Dry Dock*, did not rule on Skanska's prior motion to dismiss, and did not address the question of whether Skanska owed a duty to the Economic Loss Claimants. In finding that Skanska had not exercised reasonable care, the district court applied principles of general maritime law, including the "Louisiana Rule" whereby a moving vessel that breaks free from its mooring and allides with a fixed object is presumed to be at fault. The district court cited no Florida jurisprudence in reaching its decision.

Skanska appealed the judgment to the United States Court of Appeals for the Eleventh Circuit. On August 2, 2023, the Eleventh Circuit affirmed the decision of the district court and remitted the question of whether Skanska owed a duty to the Economic Loss Claimants to this Court. *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, No. 21-13850, 2023 WL 4917108 (11th Cir. Aug. 2, 2023).

Issues

The instant Motion to Dismiss applies to only to Economic Loss Claimants. Claims for economic loss are based on "pecuniary damage" or "disappointed economic expectations" that do not involve physical injury or property damage. *See* Restatement (Third) of Torts: Liab. for Econ. Harm § 2 (2020); *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 401 (Fla. 2013). It is undisputed that Plaintiffs had no proprietary interest in the Pensacola Bay Bridge at the time their claims arose. Defendants argue that claims for negligence, intentional misconduct, gross negligence, private nuisance, and private claims for public nuisance are barred

under *Robins Dry Dock*. Defendants' Motion to Dismiss does not address negligence per se claims made under Florida law pursuant to §§ 376.041 and 376.313, Florida Statutes, nor does it apply to claims for third-party beneficiary rights. Pursuant to the Admiralty Extension Act, maritime jurisdiction applies to Plaintiffs' claims because the alleged injuries or damages were caused by a vessel on navigable waters, even though the injuries or damages were done or consummated on land. *See* 46 U.S.C. § 30101 (formerly 46 App. U.S.C. § 740); *Gutierrez v. Waterman S. S. Corp.*, 373 U.S. 206, 209–10 (1963).

Standard of Review

The Court must confine its review to the four corners of Plaintiffs' Complaint(s), must assume the allegations in the Complaint(s) are true, and must draw all reasonable inferences arising from the allegations in Plaintiffs' favor. *See Mlinar v. United Parcel Serv.*, 186 So. 3d 997, 1004 (Fla. 2016). However, Plaintiffs must allege sufficient ultimate facts showing entitlement to relief, and mere conclusory allegations are insufficient. *See Stein v. BBX Capital Corp.*, 241 So. 3d 874, 876 (Fla. 4th DCA 2018). The Court should grant the Motion to Dismiss if Defendants conclusively demonstrate that Plaintiffs could prove no set of facts whatsoever to support their causes of action. *See Almarante v. Art Inst. of Fort Lauderdale, Inc.*, 921 So. 2d 703, 705 (Fla. 4th DCA 2006).

Jurisdiction and Applicable Law

Maritime law is "an amalgam of traditional common-law rules, modifications of those rules, and newly created ones." *E. River S.S. Co. v. Transamerica Delaval*, 476 U.S. 858, 865 (1986). It predates the adoption of the United States Constitution, has its own unique history, and is generally not regulated by state law because that would defeat "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse

of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. 558, 574-55 (1874). "[S]tate law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with maritime law." *Floyd v. Lykes Bros. S.S. Co., Inc.*, 844 F.2d 1044, 1047 (3d Cir. 1988). State law conflicts with maritime law when it "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

The Saving to Suitors Clause reserves "all other remedies" to which a complainant in admiralty is "otherwise entitled." *See* 28 U.S.C. § 1333(a). Nevertheless, state common law cannot supplant maritime law in a case where maritime jurisdiction applies.

> The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918). While the Saving to Suitors Clause allows state courts to hear *in personam* maritime cases, state law remedies for maritime injuries are limited by the so-called "reverse-Erie" doctrine, which requires substantive remedies provided by state law to adhere to federal maritime standards. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222–23 (1986). This principle applies just as much to rights asserted by litigants who are defending against claims under maritime law as it does to rights asserted by those who are prosecuting claims. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) ("If by its

practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure."); *see also Robins Dry Dock & Repair Co. v. Dahl,* 266 U.S. 449, 457 (1925). When maritime jurisdiction applies and a state common law rule is mutually exclusive to a right or rule recognized under federal maritime law, it is the maritime law rule that applies. *See Pope & Talbot v. Hawn*, 346 U.S. 406, 408–09 (1953); *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630–32 (1959); *Gibbs ex rel. Gibbs v. Carnival Cruise Lines,* 314 F.3d 125, 128–29 (3d Cir. 2002). Therefore, if maritime jurisdiction applies and maritime law bars a claim, Florida law may not be applied to circumvent such bar. *See Frango v. Royal Caribbean Cruises, Ltd.*, 891 So. 2d 1208, 1210 (Fla. 3d DCA 2005).

Robins Dry Dock & Repair Co. v. Flint

The instant Motion to Dismiss is dispositive of Plaintiffs' economic loss claims. Under the *Robins Dry Dock* rule, a maritime tort to a person or a person's property generally does not make a tortfeasor liable to a third party merely because, unknown to the tortfeasor, the injured person was under a contract with such third party. *See* 275 U.S. at 308–09. *Robins Dry Dock* does not bar an action for intentional interference with a contract. *See id.* (citing *Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U.S. 1 (1894)). The *Robins Dry Dock* rule has been broadened by federal appellate courts to require physical damage to a proprietary interest for the recovery of economic losses due to an unintentional maritime tort. *See State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1021 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986). This rule is vastly different than Florida's rule for torts involving purely economic losses, which bars such claims only in product liability cases. *See Tiara Condo. Ass'n,* 110 So. 3d at 407.

State courts are generally not bound to follow the decisions of intermediate federal courts. *See Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007). However, when a state court presides over a case where maritime *in personam* jurisdiction applies, a state court may not alter substantive maritime law in a manner that "interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994)). Therefore, this Court must follow the broadened version of the *Robins Dry Dock* rule if failing to do so would interfere with the proper harmony and uniformity of maritime law in its international and interstate relations. *See id.* at 470-71.

This Court's broad survey of federal legal authority leads it to conclude that the interpretation of the *Robins Dry Dock* rule provided in *M/V TESTBANK*, 752 F.2d 1019, has been generally adopted by federal courts and is a uniform federal maritime law. Notably, it is similar to the economic loss rule for unintentional torts that is provided in the Third Restatement of Torts, which says: "Except as provided elsewhere in this Restatement, a claimant cannot recover for economic loss caused by: (a) unintentional injury to another person; or (b) unintentional injury to property in which the claimant has no proprietary interest." Restatement (Third) of Torts: Liab. for Econ. Harm § 7 (2020). The Court relied upon the below federal authority and all other cases cited in this order in reaching its conclusion.

- *Barber Lines A/S v. M/V DONAU MARU*, 764 F.2d 50 (1st Cir.1985)
- *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994)
- *Am. Petrol. & Transp., Inc. v. City of New York*, 737 F.3d 185 (2d Cir. 2013)
- *Getty Refin. & Mktg. Co. v. MT FADI B*, 766 F.2d 829 (3d Cir. 1985)
- *Rederi A/B Soya v. Evergreen Marine Corp.*, 1972 A.M.C. 1555 (E.D. Va. 1971), *aff'd*, 1973 A.M.C. 538 (4th Cir. 1972)
- *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978)
- *Yarmouth Sea Products Ltd. v. Scully*, 131 F.3d 389 (4th Cir. 1997)
- *IMTTGretna v. Robert E. Lee SS*, 993 F.2d 1193 (5th Cir. 1993)
- *Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, Inc.*, 444 F.3d 371 (5th Cir. 2006)
- *In re Bertucci Contracting, LLC*, 712 F.3d 245 (5th Cir. 2013)
- *Matter of Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980)

- *Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1992)
- *Green Turtle Bay, Inc. v. Zsido*, 5:08-CV-00004-R, 2010 WL 797852 (W.D. Ky. Mar. 3, 2010)
- *City of Joliet v. S. Towing Co.*, 387 F. Supp. 2d 911, 914 (N.D. Ill. 2005)
- *Cahokia Marine Serv., Inc. v. Am. Barge & Towing Co.*, 635 F. Supp. 830 (E.D. Mo. 1986), *aff'd sub nom. Cahokia Marine v. Am. Barge*, 815 F.2d 711 (8th Cir. 1987)
- *In re Am. Milling Co.*, 270 F. Supp. 2d 1112 (E.D. Mo. 2003)
- *Matter of Williamson Leasing Co.*, Inc., 577 F. Supp. 890 (E.D. Mo. 1984)
- *Channel Star Excursions, Inc. v. S. Pac. Transp. Co.*, 77 F.3d 1135 (9th Cir. 1996)
- *Nautilus Marine, Inc. v. Niemela*, 170 F.3d 1195 (9th Cir. 1999)
- *E. Shore Marine, Inc. v. Platt*, CA 08-0023-CG-C, 2008 WL 11425654 (S.D. Ala. Sept. 22, 2008)
- *Kingston Shipping Co., Inc. v. Roberts*, 667 F.2d 34 (11th Cir. 1982)
- *Hercules Carriers, Inc. v. State of Fla.*, 720 F.2d 1201 (11th Cir. 1983), *on reh'g*, 728 F.2d 1359 (11th Cir. 1984)

This Court is not alone in concluding that the broad *Robins Dry Dock* rule attributed to *M/V TESTBANK*, 752 F.2d 1019, is a uniformly accepted rule in federal maritime law. While the United States Supreme Court has never explicitly adopted the broad version, the most current version of *Admiralty & Maritime Law*, a treatise frequently cited by admiralty courts, indicates the broad interpretation of *Robins Dry Dock* is the law while acknowledging special exceptions exist, such as in cases that involve oil spills and fishermen. *See* 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 14:8 (6th ed. 2018). In *Canadian National Railway v. Norsk Pacific Steamship Co.*, 1992 A.M.C. 1910 (Can. S.C.C.), the Canadian Supreme Court conducted an exhaustive comparative review of the maritime economic loss rule and, while it rejected this approach, acknowledged that pure economic loss is generally not compensable without damage to a proprietary interest under the maritime laws of both the United States and the United Kingdom.

The instant case is not the first time a state court has dealt with claims for economic losses due to a bridge closure caused by an unintentional maritime tort. In *Harp v. Pine Bluff Sand & Gravel Co.*, residents and business owners who used a state-owned bridge that was damaged by a barge sued the barge owner and the State of Louisiana for economic losses caused by closure of

the bridge for repairs. *See* 750 So. 2d 226, 227-28 (La. Ct. App. 1999). The Louisiana Third Circuit Court of Appeals held that *Robins Dry Dock* and principles of uniformity in maritime law barred recovery under Louisiana state law. *See id.* at 229-30. Notably, cases involving claims for economic losses due to bridge closures resulting from unintentional maritime torts consistently result in denial of relief for claimants under *Robins Dry Dock*. *See Bertucci*, 712 F.3d 245; *Southern Towing*, 387 F. Supp. 2d 911; *Williamson Leasing*, 577 F. Supp. 890; *Pine Bluff*, 750 So. 2d 226.

Based upon the foregoing authority, the Court holds that Plaintiffs' unintentional tort claims are barred by federal maritime law. The Court does not need to reach the issue of whether *Robins Dry Dock* applies to intentional torts because Plaintiffs have not stated any cause of action for an intentional tort.

Plaintiffs' nuisance claims are not pled as intentional torts. "An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." Restatement (Second) of Torts § 825 (1979). Plaintiffs' "Private Claim[s] for Public Nuisance" were pled as being due to Defendants' "negligence." Plaintiffs' claims for "Private Nuisance" were pled as being due to Defendants' "unreasonable, negligent, and reckless" conduct. Torts caused by negligence or even recklessness are not intentional torts. *See Vision Air Flight Serv., Inc, v. M/V Nat'l Pride,* 155 F.3d 1165, 1176 n.13 (9th Cir. 1998). Plaintiffs' nuisance claims are facially alleged as unintentional torts and are therefore barred by *Robins Dry Dock* just as Plaintiffs' negligence claims are.

Plaintiffs' intentional misconduct claims are not pled as intentional torts. Plaintiffs pled that Defendants "had actual knowledge of the high probability that injury or damage to Plaintiff[s] would result from its wrongful conduct," "exhibited a reckless, conscious disregard for the

wellbeing of [Plaintiffs' businesses]," had "knowledge of the wrongfulness of [their] conduct and high probability of injury or damage to businesses in the region," and "intentionally pursued a course of action to forego [their] Plan and instead advance production, which resulted in the Pensacola Bay Bridge's closure and resulting damage to public and private property throughout Pensacola Bay, and economic damage to [Plaintiffs' businesses]." Plaintiffs do not plead that Defendants desired or purposely acted to cause Plaintiffs' businesses to be economically damaged, nor do they plead that Defendants believed or even should have believed such economic damages to Plaintiffs were substantially certain to result from their actions. *See Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972) ("Where a reasonable man would believe that a particular result was [s]ubstantially certain to follow, he will be held in the eyes of the law as though he had intended it.") (citing Restatement (Second) of Torts, § 8A (1965)).

The intentional misconduct claims in Plaintiffs' Complaint(s) also discuss spoliation of evidence. First-party spoliation claims are claims "in which the defendant who allegedly lost, misplaced, or destroyed the evidence was also a tortfeasor in causing the plaintiff's injuries or damages." *Shamrock-Shamrock, Inc. v. Remark,* 271 So. 3d 1200, 1203 n.1 (Fla. 5th DCA 2019) (quoting *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346 n.2 (Fla. 2005)). Under Florida law, "[a]n independent cause of action does not exist for first-party spoliation of evidence." *See id.* (citing *Martino*, 908 So. 2d at 347)). Likewise, federal law does not permit an independent cause of action arising out of an alleged spoliation of evidence. *See Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 372 F. Supp. 3d 709, 724–25 (N.D. Ind. 2019).

Based upon the foregoing findings, it is hereby,

ORDERED AND ADJUDGED:

1. Plaintiffs' claims for negligence and gross negligence are dismissed with prejudice.

2. Plaintiffs' claims for intentional misconduct, private nuisance, and public nuisance are dismissed without prejudice. If Plaintiffs can do so with legal sufficiency and good faith, they have leave to amend these claims to state intentional torts within twenty (20) days of the date of this Order.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida.

02/21/2024 14:39:03

signed by CIRCUIT COURT JUDGE JAN SHACKELFORD 02/21/2024 02:39:03 xGEJdWv9

HON. JAN SHACKELFORD
CIRCUIT JUDGE

02/21/2024 14:36:27

signed by CIRCUIT COURT JUDGE JENNIFER J FRYDRYCHOWICZ 02/21/2024 02:36:27 iTEYoBVL

HON. JENNIFER J. FRYDRYCHOWICZ
CIRCUIT JUDGE

02/21/2024 14:33:56

signed by CIRCUIT COURT JUDGE AMY P. BRODERSEN 02/21/2024 02:33:56 S07VPrkh

HON. AMY P. BRODERSEN
CIRCUIT JUDGE

JS/JJF/APB/ejr

Conformed Copies to:

All Counsel of Record