IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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In the Matter of the Complaint of
SKIPPERLINER INDUSTRIES, INC.
Owner of the Sea Ray 310 Sundancer
for Exoneration from or Limitation of Liability,

Plaintiff,

JOHN L. FROHMADER;
MAUREEN DuMOND;
SHAWN A. CARNEY;
JOHN M. CARNEY;
CYNTHIA A. CARNEY;
BARBARA JORDAN; and
NOEL JORDAN,

OPINION AND ORDER
00-C-0730-C

Claimants and Third-Party Plaintiffs,

v.

SEA RAY, a division of Brunswick Corporation, and
CENTEK INDUSTRIES, INC.,

Cross/Counter-Claimants and Third-Party Defendants.

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This is a civil action in which plaintiff SkipperLiner Industries, Inc. filed a complaint under the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 183(a), to exonerate or limit its liability to $141,889, the alleged value of the vessel at issue in this case (a Sea

Ray 310 Sundancer), which was involved in a carbon monoxide poisoning accident that resulted in the death of two persons and injury to another.

Procedurally, this cause of action was brought pursuant to Fed. R. Civ. P. Supp. R. F, which governs certain admiralty and maritime claims. As a result of plaintiff SkipperLiner's Rule F and § 183(a) filing, claimants John L. Frohmader, Maureen DuMond, Shawn A. Carney, John M. Carney, Cynthia A. Carney, Barbara Jordan and Noel Jordan filed their respective claims against plaintiff SkipperLiner regarding its limitation of liability action, as required under Fed. R. Civ. P. Supp. R. F(5). Claimants also filed third-party complaints against plaintiff SkipperLiner; defendant Sea Ray, a division of Brunswick Corporation; and defendant Centek Industries, Inc., alleging claims sounding in negligence, strict liability and products liability pursuant to Fed. R. Civ. P. 14(c). Defendants Centek and Sea Ray each filed counterclaims or cross-claims against plaintiff SkipperLiner and claimant Noel Jordan, alleging claims sounding in contribution and indemnification. Defendant Sea Ray filed a counterclaim against Barbara Jordan, in her capacity as administrator of the estate of Christopher Jordan, the alleged "captain" of the boat. Plaintiff SkipperLiner then filed counterclaims or cross-claims against defendants Sea Ray and Centek, alleging claims sounding in contribution and indemnification.

Presently there are seven motions before the court: (1) plaintiff SkipperLiner's motion for partial summary judgment in which plaintiff contends that this case is subject to

admiralty jurisdiction and seeks to limit its liability; (2) claimant Barbara Jordan's motion for partial summary judgment, supporting plaintiff's position that admiralty jurisdiction applies and opposing plaintiff's effort to limit its liability; (3) claimants DuMond's and Frohmader's motion for partial summary judgment, supporting admiralty jurisdiction and opposing plaintiff's effort to limit its liability; (4) claimants DuMond's and Frohmader's motion for partial summary judgment, in which claimants contend that Minnesota law should apply with respect to remedies; (5) claimant Noel Jordan's motion for summary judgment, in which he contends that no prima facie case has been established regarding his alleged liability under the theories of unseaworthiness, negligence and negligent entrustment; (6) defendant Centek's motion for summary judgment, in which it contends that no prima facie case has been established regarding Centek's alleged products liability; and (7) defendant Sea Ray's motion to strike testimony of plaintiff's expert, Thomas Crane, as untimely under Fed. R. Civ. P. 16(b).

I find that admiralty jurisdiction exists, giving this court subject matter jurisdiction under 28 U.S.C. § 1331(1). As a consequence, I will grant plaintiff's and claimants Barbara Jordan's, DuMond's and Frohmader's motions as to this issue. Because plaintiff has not met its burden of showing that it was without privity or knowledge under § 183(a), I will deny its motion to limit its liability and will grant claimants Barbara Jordan's, DuMond's and Frohmader's cross-motions as to this issue. Because Minnesota remedies law is applicable,

I will grant claimants DuMond's and Frohmader's motion for partial summary judgment. Because no prima facie case has been made out on the issues of unseaworthiness and negligence, I will grant in part claimant Noel Jordan's motion for summary judgment on these two issues; however, I will deny his motion on the issue of negligent entrustment. Because a prima facie case has been made out on the issue of products liability, I will deny defendant Centek's motion for summary judgment. Because defendant Sea Ray will have an opportunity to address its concerns regarding Crane's opinions at trial, I will deny its motion to strike the expert testimony of Thomas Crane.

From the parties' proposed findings of fact and the record, I find that the following material facts are undisputed.

## UNDISPUTED FACTS

### A. Parties

Plaintiff SkipperLiner Industries, Inc. is a Wisconsin corporation located in La Crosse, Wisconsin.

Claimant Noel Jordan is the president, chief executive officer and sole shareholder of plaintiff SkipperLiner and is a resident of Wisconsin. Claimants John L. Frohmader and Maureen DuMond are residents of Wisconsin and the parents of Bradford Frohmader, who was killed in the accident that gave rise to this case. Claimants Barbara Jordan and Noel

Jordan are residents of Wisconsin and the parents of Christopher Jordan, who was killed in the accident. Barbara Jordan is the administrator of Christopher Jordan's estate. Claimant Shawn A. Carney was injured in the accident. He and his parents, claimants John M. Carney and Cynthia A. Carney, are residents of Wisconsin. All claimants are also third-party plaintiffs.

Plaintiff employed Bradford Frohmader as marine manager, Christopher Jordan as assistant marine manager and the claimant Shawn Carney as dock boy and supervisor of the rental boat operations.

Defendant Sea Ray is a division of Brunswick Corporation, a Delaware corporation with its principal place of business in Knoxville, Tennessee. Defendant Sea Ray is the manufacturer of the subject vessel. Defendant Centek Industries, Inc. is a Pennsylvania corporation with its principal place of business in Thomasville, Georgia. Defendant Centek is the manufacturer of the generator muffler that had been installed in the subject vessel.

B. The Subject Vessel

The vessel at issue in this case is a Sea Ray 310 Sundancer, identified as hull number USFERT7132E000 310DA1619. Plaintiff purchased the boat from defendant Sea Ray on May 18, 2000, titled it in its name and has not resold the boat. The boat was delivered to plaintiff on May 23, 2000. Plaintiff rigged the boat on June 2, 2000. The accident occurred

eight days later, in the morning hours of June 10, 2000.

Claimant Noel Jordan used the vessel as a demonstration boat. Claimants Noel Jordan and Barbara Jordan are the only two SkipperLiner executives who have exclusive use of their own demo boats; other SkipperLiner executives have shared use of demo boats. SkipperLiner executives who are entitled to use the demo boats are given a memorandum each year that describes the program. Demo boats are used frequently for customer demonstrations and are always available for sale.

### C. Rigging Protocol

Rigging is the process by which a vessel is commissioned for use. To rig a boat, a retailer must install, test and inspect several components of a boat, including propellers, screws, drain plugs, hoses, hose clamps, heat exchange, antennas, batteries, carbon monoxide detector, engine clamps as well as add water, gasoline and power steering fluids. As part of the rigging process, a retailer tests and inspects the boat to insure that all systems are operational and intact before releasing a boat to a customer. To insure that all screws and drain plugs have been installed properly, a retailer further inspects the boat with the generator running in order to check for exhaust and water leaks. To do this, the service technician must climb into the engine compartment while the boat's engine and generator are running and inspect the systems for exhaust and water leaks.

Under plaintiff's agreement with defendant Sea Ray, after plaintiff purchases a boat from Sea Ray, plaintiff is responsible for rigging, prepping and delivering the boat to the customer. Defendant Sea Ray provides a rigging checklist to its retailers, including plaintiff, in order to insure that its boats are rigged properly. According to William Ray, plaintiff's service department manager, rigging checklists are his "primary vehicle" for assuring himself that the service technicians have rigged a boat properly. Claimant Noel Jordan relies on Ray to supervise the rigging process. At plaintiff SkipperLiner, the person who delivers the boat to the customer is called the delivery captain. The delivery captain signs off on the rigging checklists and asks the customer to sign off on the checklists as well. According to Ray, the delivery process is a double-check on the rigging process.

D. Rigging the Subject Vessel

On June 2, 2000, Troy Holzer, senior service technician at plaintiff SkipperLiner, began the initial rigging of the subject vessel at 8:30 a.m. Randy Kessel, another service technician, took over the rigging job when Holzer left at 12:15 p.m. Service department manager Ray did not provide either technician with the manufacturer rigging checklists that defendant Sea Ray and Mercury Marine had provided to plaintiff. Plaintiff had a practice of not using a manufacturer's rigging checklist on demo boats in order to avoid triggering the warranty before the boat was sold. This enabled the company to provide a full

manufacturer's warranty when the demo boat was ultimately sold. According to Linda Nelson, plaintiff's Rule 30(b)(6) designee, sending a completed rigging checklist to defendant Sea Ray initiates the warranty, not simply completing the checklist. (It is unclear from the proposed facts whether completing the checklist at the time a demo boat is rigged, dating it as of that date, and later mailing it to the manufacturer when the boat is ultimately sold would have a retroactive impact on the date the warranty period begins to run).

While rigging the vessel, service technician Holzer observed only one muffler drain hole, which had been plugged. (The parties dispute whether plaintiff received another drain plug in the packet of materials that accompanied the boat's delivery and whether defendant Sea Ray always removes one drain plug before shipping the boat to the retailer). When Holzer turned over the rigging to technician Kessel, he expected Kessel to start and run the generator and exhaust systems. Kessel assumed that Holzer had tested and inspected the generator before turning over the rigging responsibilities to him. Kessel did not check to see whether any drain plugs were in place. Kessel tested the carbon monoxide detector in the boat's cabin and found it working properly. After the boat had been rigged, claimant Noel Jordan asked Bradford Frohmader and Shawn Carney to check the boat, fuel it and make sure it was operational.

E. The Muffler Drain Plugs

The subject vessel is equipped with a generator. The generator's exhaust muffler was manufactured by defendant Centek and required two drain plugs corresponding to its two drain holes. Defendant Centek shipped the muffler to defendant Sea Ray with both drain holes plugged. Defendant Sea Ray removed one drain plug from the muffler after water testing the boat at its facilities (as part of its de-rigging process) and before shipping it to plaintiff. In the past, this type of boat has been equipped with a muffler that had only one drain hole, requiring only one drain plug.

At defendant Sea Ray's direction, defendant Centek added a second drain hole to the muffler's design in order to ease access to a drain plug regardless of the muffler's placement in the various models of Sea Ray boats. Both United Laboratories and American Boat and Yacht Council standards require that a drain plug be installed in a "wet" muffler, which is the type of muffler installed in the subject vessel. A wet muffler is standard in marine applications.

No party to this lawsuit has identified a defect in the muffler itself. Defendant Sea Ray did not inform any of its retailers, including plaintiff, that a second drain hole had been added to the muffler's design.

F. The Carbon Monoxide Detector

During the evening of June 2, 2000, the same day plaintiff rigged the subject vessel, Noel Jordan discovered several problems with the boat, including a loose bilge pump, faulty gauges (including speedometer, fuel and oil), tight shifting and an inoperative spotlight.

That same evening, when claimant Noel Jordan was exiting the beach club slip after dinner in the subject vessel, the carbon monoxide detector sounded. The detector is located in the passenger compartment. The generator was not in use at the time. Claimant Noel Jordan hit the reset button on the detector, opened the top hatches and closed the cabin door. He attributed the sounding of the carbon monoxide detector to the "station wagon effect." The station wagon effect usually occurs when casting off from a pier and is the result of carbon monoxide fumes emitted from the engine that come over the stern and drift into the cabin. (Noel Jordan and defendant Sea Ray dispute whether it is a common occurrence on Sea Ray boats for the carbon monoxide detector to sound because of the station wagon effect.) The boat was approximately 100 feet from the slip when the detector stopped sounding.

On June 3, 2000, plaintiff SkipperLiner performed a follow-up service on the boat to address these problems. Claimant Noel Jordan cannot recall whether he discussed the carbon monoxide detector with the service department.

On the evening of June 3, 2000, claimant Noel Jordan traveled to dinner at the beach club in the subject vessel with his girlfriend, Carol Blagsvedt, and his son, Robert. Nothing

unusual happened and the carbon monoxide detector did not sound.

On the evening of June 9, 2000, claimant Noel Jordan and Blagsvedt once again traveled to dinner at the beach club in the subject vessel. The carbon monoxide detector sounded. (Claimant Noel Jordan recalls it sounding as they left his condominium slip. Blagsvedt recalls it sounding as they left the beach club slip.) In response, the cabin door was shut and the vents were opened. The detector stopped sounding. (According to claimant Noel Jordan, the carbon monoxide detector was still connected when he turned the boat over to Christopher Jordan and Bradford Frohmader later that evening.)

G. The Accident

On June 9, 2000, sometime between 10:00 p.m. and 10:30 p.m., claimant Noel Jordan turned the subject vessel over to Christopher Jordan and Bradford Frohmader in order for them to travel to an overnight outing on Coney Island. A third, unidentified man picked the boat up with Christopher Jordan and Bradford Frohmader. (Although it is unclear when Shawn Carney joined Christopher Jordan and Bradford Frohmader in the vessel, it is undisputed that Noel Jordan was aware that Shawn Carney would be joining them and using the boat that evening.) Noel Jordan knew that the young men were going to the island to "party" and that other people would be on the island.

Claimant Noel Jordan watched the men leave his condominium slip, with Bradford

Frohmader at the helm, and saw the boat exit the channel and enter the Mississippi River without incident. Claimant Noel Jordan does not recall whether he had discussed the carbon monoxide detector with Christopher Jordan or Bradford Frohmader before they took the boat.

Coney Island is located in Minnesota and in the main channel of the Mississippi River. The Mississippi River is used heavily for interstate commerce and as a commercial waterway. Christopher Jordan and Bradford Frohmader (who was still at the helm) picked up several friends at the Seventh Street Boat Landing in La Crosse, Wisconsin, and traveled with them to Coney Island where the boat was beached and anchored on the island. There was no trouble with the subject vessel as it traveled from the landing to the island. The subject vessel was beached next to a large houseboat where a group of people drank beer and listened to a band. Christopher Jordan, Bradford Frohmader and Shawn Carney each consumed alcohol that evening.

Later that evening, Christopher Jordan, Bradford Frohmader and Shawn Carney slept in the passenger cabin of the boat with the air conditioner running while the boat remained beached and anchored to the island. All the windows, hatches and doors were closed. Three other men slept on the deck of the subject vessel. On June 10, 2000, sometime between 2:30 a.m. and 11:00 a.m., carbon monoxide fumes overtook the three men in the cabin. Christopher Jordan and Bradford Frohmader died and Shawn Carney was injured. The air

conditioner had been powered by the generator, which was the source of the carbon monoxide fumes.

The La Crosse Fire Department Heavy Rescue crew arrived at the Seventh Street Boat Landing and went by boat to the island accompanied by two tri-state medics. In addition, La Crosse County (Wisconsin) and Houston County (Minnesota) law enforcement officers responded to the scene.

## H. Post-Accident Investigation

After the accident, Allen E. Hansen, master marine surveyor, inspected the boat at the request of the Houston County Sheriff's Department while it was docked at the Lawrence Marina in La Crescent, Minnesota. Hansen started the generator and observed a hole in its muffler from which water and gas exited on the forward side toward the bulkhead.

Hansen also discovered that the boat's carbon monoxide detector had been disconnected. Hansen reconnected the carbon monoxide detector; it self-tested and was in working order.

In addition, Hansen removed loose-fitting plywood boards that held the seat cushions down and found two holes in the bulkhead of the boat: one was completely unsealed and the other had wires running through it but was otherwise unsealed. Hansen believes that

these holes would allow generator exhaust fumes to pass through to the cabin. (Defendant Sea Ray disputes that these unsealed holes permitted carbon monoxide to reach the three men and asserts that "additional testing established that the subject boat could not have been in the same condition as existed at the time of the accident.") No seaworthy recreational vessel has a completely airtight bulkhead between the engine compartment and the passenger cabin.

## OPINION

### A. Subject Matter Jurisdiction

The Constitution extends to federal courts the power to hear "all Cases of admiralty and maritime jurisdiction." U.S. Const. art III, § 2. This power has been codified and provides for "original jurisdiction" over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1). Defendants Sea Ray and Centek argue that this court lacks subject matter jurisdiction because the incident does not fall within admiralty jurisdiction.

Before 1972, there was little question that this cause of action would have fallen within admiralty jurisdiction because such jurisdiction extended to all torts involving vessels on navigable waters. See Sisson v. Ruby, 497 U.S. 358, 361 (1990). The Supreme Court used the long-standing "locality," or "situs," test under which "'every species of tort, however

occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.'" Id. (quoting The Plymouth, 3 Wall. 20, 36 (1866)). In 1972, the Supreme Court supplemented the locality test with the "connection," or "nexus," test in a case in which an airplane crashed into the navigable waters of Lake Erie after striking a flock of seagulls on take-off. See Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972). Although the facts in Executive Jet met the locality test, the Supreme Court held that there was no admiralty jurisdiction because claims arising from airplane accidents are cognizable in admiralty only when the "wrong bear[s] a significant relationship to traditional maritime activity." Executive Jet, 409 U.S. at 268. Although the Court limited the connection test explicitly to aviation disasters, some courts applied it more broadly. See Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225, 227 (7th Cir. 1993) (collecting cases and noting Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), as court that applied connection test more broadly). Ten years after Executive Jet, the Supreme Court stated unequivocally that the connection test was not limited to aviation disasters. Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982). In Foremost, two pleasure boats collided on a navigable river in Louisiana. The Court expanded its holding in Executive Jet by concluding, among other things, that "traditional maritime activity" was not limited to commercial maritime activity. Foremost, 457 U.S. at 674. The Court found in Foremost that admiralty jurisdiction existed because the pleasure boat collision had a "potentially

disruptive impact" on maritime commerce. Id. at 675. The Court noted that "[n]ot every accident in navigable waters that might disrupt maritime jurisdiction will support federal admiralty jurisdiction." Id. at 675 n.5. For example, in Executive Jet "the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate." Id.

In Sisson v. Ruby, 497 U.S. 358 (1990), and Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), the Supreme Court established and honed a two-prong test to determine whether admiralty jurisdiction extends to tort claims occurring on navigable waters. Today, in order to invoke federal admiralty jurisdiction over a tort claim, the moving party must satisfy both the "location" and "connection" tests with respect to maritime activity. See Grubert, 513 U.S. at 534; Sisson, 497 U.S. at 363-64.

1. Location test

In this case, the location test is readily satisfied because the alleged tort occurred while the boat was anchored to an island in the middle of the Mississippi River, a navigable waterway. See Grubart, 513 U.S. at 534 ("A court applying the location test must determine

whether the tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water."); see also Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 382 (7th Cir. 2001) (citing The Daniel Ball, 10 Wall. 557 (1871), seminal case on defining navigable rivers). Moreover, defendant Centek concedes that the location test has been met, Dft. Centek's Br. in Opp., dkt #151, at 3, and defendant Sea Ray considers it "unnecessary" to argue location, Dft. Sea Ray's Br. in Resp., dkt #148, at 3 n.1. Instead, defendants Centek and Sea Ray (the only parties contesting admiralty jurisdiction) argue that claimants and plaintiff SkipperLiner fail to meet the connection test.

2. Connection test

The connection test has two prongs. First, the court must assess the "'general features of the type of incident involved' in order to determine whether the incident has 'a potentially disruptive impact on maritime commerce.'" Grubart, 513 U.S. at 534 (quoting Sisson, 497 U.S. at 363, 364 n.2). In determining whether this requirement has been met, the court must consider the incident giving rise to the claim at an "intermediate level of generality." Grubart, 513 U.S. at 538. Second, the court determines whether "the character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 534. See also Weaver, 255 F.3d at 382.

a. Potential impact on maritime commerce

In Sisson, the Supreme Court held that there was admiralty jurisdiction over a case in which a fire erupted in the washer-dryer area of a pleasure yacht while it was docked at a recreational marina on Lake Michigan. Sisson, 497 U.S. at 360. The fire spread and damaged several neighboring pleasure vessels and the marina itself. Id. No commercial vessels were damaged because none were docked at the marina and no commercial vessels were ever likely to be docked at such a recreational marina. Id. at 363. The Court characterized the general features of the incident as "a fire on a vessel docked at a marina on navigable waters." Id. The court concluded that "[c]ertainly, such a fire has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels." Id. at 362. In Grubart, the Supreme Court refined this position, stating that the potential effects inquiry turns on a "description of the incident at an intermediate level of possible generality." Grubart, 513 U.S. at 538. Specifically, the court held that "[t]o speak of the incident [in Sisson] as 'fire' would have been too general to differentiate cases; at the other extreme, to have described the fire as damaging nothing but pleasure boats and their tie-up facilities would have ignored, among other things, the capacity of pleasure boats to endanger commercial shipping that happened to be nearby. [In Sisson, the Court] rejected both extremes and asked instead whether the incident could be seen as being within a class of incidents that posed more than a fanciful

risk to commercial shipping." Id. at 539. In Grubart, the Court further held that the focus of the potential effects inquiry is "not [on] the specific facts at hand but on whether the 'general features' of the incident were 'likely to disrupt commercial activity.'" Id. at 538 (quoting Sisson, 497 U.S. at 363). The Court held that admiralty jurisdiction existed in a case in which pilings were driven from a barge into the river bed, which later caused a breach in the roof of a freight tunnel that ran beneath the Chicago River, a navigable waterway. The Court described the general features of the incident as "damage by a vessel in navigable water to an underwater structure." Id. at 539.

Defendants argue that there could be no potential disruption to maritime commerce in this case because the incident involved the exposure of individuals to carbon monoxide while the boat was anchored to the shore of an island. In other words, the incident was confined to the boat and posed no danger to anyone other than those sleeping aboard and, therefore, could not have disrupted maritime commerce. In support of their argument, defendants point to H2O Houseboat Vacations v. Hernandez, 103 F.3d 914 (9th Cir. 1996), a case in which the Court of Appeals for the Ninth Circuit held that admiralty jurisdiction was lacking in a case in which family members were injured by carbon monoxide while they slept aboard a houseboat that was tied to the shore of a navigable lake. The court held that, unlike a fire on a boat, carbon monoxide "fumes would not be dangerous if they escaped" and concluded that the facts were far different from those in Sisson, in which "the

fire had the potential to spread to other boats and the marina." Id. at 916. The court acknowledged that it was possible to speculate that the houseboat would have posed a hazard to maritime commerce if it had slipped its tie to shore and drifted onto the lake or if the passengers had been overcome with carbon monoxide fumes and lost consciousness while navigating on the lake, but that such speculation "would require it to ignore the actual 'incident' that caused the injury." Id. at 916-17; cf. Just v. Chambers, 312 U.S. 383, 384 (1941) (holding that there was no question that maritime jurisdiction applied to carbon monoxide poisoning of guests on vessel that was navigating). In H2O Houseboat, the court characterized the general features of the incident as "the emission of carbon monoxide fumes encapsulated within the houseboat tied to shore." Id. at 917. Claimants and plaintiff SkipperLiner argue that in H2O Houseboat, the court ignored the potentially disruptive impact on maritime commerce by classifying the potential effects (slipping tie or passengers overcome while navigating on the lake) as speculation and, instead, relied on the narrower and more specific facts at hand in contravention of the Supreme Court's holdings in Grubart and Sisson. Cf. Great Lakes, 3 F.3d at 228 ("remote possibility of impact on maritime commerce [is] . . . enough to support admiralty jurisdiction").

In this case, the description of the incident at an intermediate level of generality is carbon monoxide poisoning on a vessel anchored to an island in a navigable river. It is not necessary to delve into the propriety of the holding in H2O Houseboats because the general

features of this case differ from those in H2O Houseboats. The vessel in this case was anchored to an island in the middle of river, rather than to the shoreline of a lake. In order to rescue the incapacitated crew, the rescue team had to travel by boat across the navigable waterway to the island. Such an inevitable rescue has the potential to impede maritime traffic, which might have to be diverted or halted in order to facilitate rescue efforts. Moreover, although the vessel was being used for pleasure at the time of the accident, it was nevertheless a commercial vessel because it was purchased and used as a demonstration boat to engage in the commerce of selling boats. See Foremost, 457 U.S. at 680 (Powell, J., dissenting) (arguing that no admiralty jurisdiction existed because, among other things, two boats that had collided were pleasure boats and "[n]either of these boats had ever been used in any commercial activity" and, therefore, there was "no connection with any historic federal admiralty interest"). The general features of this case would have the potential to disrupt maritime activity. As a result, the first prong of the connection test has been met.

b. Substantial relationship to maritime activity

The second prong of the connection test addresses whether "the character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 534. The question is whether "a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity

traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." Id. at 539. Moreover, "as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will 'involve' such traditional maritime activity and will meet the second nexus prong." Id. at 541. The second prong of the connection test is easily met in this case because the boat was moored to an island in the middle of a navigable river. As in Sisson, "[c]learly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity' given the broad perspective demanded by the second aspect of the [connection] test." Sisson, 497 U.S. at 365. The fact that the vessel in Sisson was docked at a marina, rather than anchored on an island, is of no consequence because "[i]n cases after Executive Jet, the Court stressed the need for a maritime connection, but found one in the navigation or berthing of pleasure boats." Grubart, 513 U.S. at 543. In addition, the Supreme Court has declined to define traditional maritime activity narrowly as the act of navigation only. Sisson, 497 U.S. at 366.

Because both the location and connection tests have been met, I find that admiralty jurisdiction exists over the tort claims alleged in this lawsuit. With that finding,"[a]bsent a relevant statute, the general maritime law, as developed by the judiciary, applies." East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986); see also Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996) ("general maritime law [is] a

species of judge-made federal common law").

B. Limitation of Vessel Owner's Liability Act

Plaintiff SkipperLiner has filed a motion for partial summary judgment, arguing that its liability is limited to the fair market value, allegedly $141,889, of the subject vessel under the Limitations of Vessel Owner's Liability Act, 46 U.S.C. App. § 183(a). The Limited Liability Act, as it is also known, provides that the liability of a shipowner incurred as a result of a maritime accident "without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. App. § 183(a).

As a preliminary matter, it is necessary to address subject matter jurisdiction under the Limited Liability Act itself. In David Wright Charter Service, Inc. v. Wright, 925 F.2d 783, 785 (4th Cir. 1991), the court held that a claim would not exist under the Limited Liability Act unless the underlying cause of action arose from federal maritime jurisdiction. In other words, the Fourth Circuit read that the Limited Liability Act not as a source of federal jurisdiction, but rather as a procedure that can be invoked once such jurisdiction has been established. See also Sisson, 497 U.S. at 359 n.1 ("We need not decide which party is correct [whether § 183(a) provides an independent source of federal jurisdiction] . . . because [28 U.S.C.] § 1331(1) is sufficient to confer jurisdiction."); In re Complaint of

Holly Marine Towing, Inc., 270 F.3d 1086, 1087 (7th Cir. 2001) (46 U.S.C. App. § 183(a) "establishes a procedure for obtaining and enforcing the limitation" of shipowner's liability) (emphasis added). Therefore, because admiralty jurisdiction has been met under 28 U.S.C. § 1331(1), I need not examine whether § 183(a) confers independent jurisdiction.

1. Section 183 owner

It is undisputed that the Sea Ray 310 Sundancer, the subject vessel, was purchased by plaintiff SkipperLiner, was legally titled in plaintiff's name and had not been resold to any party. Nevertheless, defendant Sea Ray argues that plaintiff SkipperLiner is not the "owner" within the meaning of § 183(a) because SkipperLiner purchased the boat as a demo for claimant Noel Jordan, who exercised total control over it. Therefore, according to defendant Sea Ray, Noel Jordan is an equitable owner under § 183(a). In addition, defendant Sea Ray notes that claimants Noel Jordan and Barbara Jordan are the only two SkipperLiner executives who have exclusive use of their own demo boats, while other executives have shared use of a demo boat. Like other SkipperLiner executives using a demo boat, claimant Noel Jordan was responsible for all fuel costs.

The word "owner" in the Limited Liability Act is accorded a liberal, common sense interpretation in order to effectuate the intent of the act. See Flink v. Paladini, 279 U.S. 59 (1929) (section 183 was designed to encourage investment in shipping by exempting

investor from loss greater than fund he is willing to invest in enterprise); Dick v. United States, 671 F.2d 724, 727 (2d Cir. 1982).

In support of its contention that claimant Noel Jordan is the true owner of the subject vessel, defendant Sea Ray points to American Car & Foundry Co. v. Brassert, 289 U.S. 261 (1933). I am unpersuaded that the holding in Brassert is applicable here because the facts differ substantially from the facts in this case. In Brassert, a boat manufacturer sold a boat to a buyer and conditioned the transfer of title on full payment to be made within 90 days. Id. at 262. The buyer was required to insure the boat fully, pay all taxes, comply with all laws and hold the manufacturer harmless from all liability relating to the use or operation of the boat. Id. at 263. The accident occurred before any default on the part of the buyer. Id. The court in Brassert held that the "[manufacturer] had no control over the vessel's operation. [The manufacturer] did not man or operate [the vessel], and had no right to do so. For all purposes of use in navigation, the vessel belonged to [the buyer]." Id. at 264. Cf. Hammersley v. Branigar Org., Inc., 762 F. Supp. 950, 956 (S.D. Ga. 1991) (even though boat titled in wife's name only, whether husband was also owner was question of fact because there was docking and storage agreement between marina and couple; couple filled in both names in the space marked "owners"; husband skippered vessel about 75% of the time; and couple paid for their slip at marina with joint funds); In re Complaint of Nobles, 842 F. Supp. 1430, 1437 (N.D. Fla. 1993) (although title ownership in husband's name

only, limited liability may apply to wife if other factors so indicate on discovery).

In this case, the facts do not show that claimant Noel Jordan personally paid the insurance, taxes or titling fees on the boat or that plaintiff SkipperLiner retained legal title in order to secure payment from Jordan. To the contrary, claimant Noel Jordan was allowed to use the boat in his capacity as SkipperLiner's president and chief executive officer. The use of a demo boat was a perk offered to various executive officers of the corporation, not only to Noel Jordan. The only cost incurred by claimant Noel Jordan regarding the demo boat was that he was required to pay for the fuel consumed during his personal use, as was required of all other executives using a demo boat. The fact that Noel Jordan had exclusive use of his demo boat, while other executives had shared use, merely indicates that he was entitled to a more substantial perk as president.

Because Noel Jordan used the vessel in his capacity as president of plaintiff SkipperLiner and there are no facts suggesting that ownership may have extended to him personally, I find that plaintiff SkipperLiner is the sole owner of the subject vessel for purposes of § 183(a).

2. Liability predicated on ownership

Claimant Barbara Jordan and defendant Centek argue that plaintiff SkipperLiner's liability is not predicated on ownership, but rather on its status as a retailer that rigged the

vessel negligently. Therefore, they argue, plaintiff SkipperLiner is not protected by § 183(a) because it was acting as a retailer, not an owner, when it rigged the vessel. Section 183(a) states:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Claimant Barbara Jordan argues that the phrase "liability of the owner" in § 183(a) refers to liability contingent on ownership status, rather than liability contingent on retailer status (the capacity in which SkipperLiner rigged the boat). The purpose of the Limited Liability Act is to encourage shipbuilding and investment by limiting a shipowner's liability to the amount of his or her interest in the ship. See Joyce v. Joyce, 975 F.2d 379, 383-84 (7th Cir. 1992). "Congress intended the principal beneficiaries of the Act to be innocent shipowners and investors who were sued for damages caused through no fault or neglect of their own." Id. at 384. Because of the Act's purpose, claimant Barbara Jordan and defendant Centek argue, plaintiff SkipperLiner should not be able to avoid responsibility for its negligent rigging as a retailer by the fortuitous circumstance that it also happened to be the owner of the boat. In other words, they argue that if the boat had been owned by

another party and plaintiff SkipperLiner had rigged it negligently, then SkipperLiner would not be able to limit its liability under the Act. Therefore, the same result should obtain in a case such as this in which the allegedly negligent events occurred by virtue of SkipperLiner's status as retailer and rigger.

Although there is some surface appeal to this argument, the plain language of the statute does not support the reading advocated by claimant Barbara Jordan and defendant Centek. The Act states that the "liability of the owner" is limited; it does not further narrow the definition to the "liability of the owner acting in an owner's capacity only," which the drafters could have done if that is what they had intended. Moreover, as stated in the preceding section, the term "owner" is to be construed broadly. Such a narrow reading contravenes federal precedent interpreting that term broadly. See Dick, 671 F.2d at 727. In addition, even in those cases in which § 183 ownership status had been construed to extend beyond the title owner, the equitable owner supplemented, rather than supplanted, the title owner's status as owner. See, e.g., Hammersley., 762 F. Supp. at 956; Complaint of Nobles, 842 F. Supp. at 1437.

3. Without privity or knowledge

The Limited Liability Act provides that the liability of a shipowner incurred as a result of a maritime accident "without the privity or knowledge of such owner . . . shall not . . .

exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. App. § 183(a) (emphasis added). Neither privity nor knowledge is defined in the Act, but both are "understood to be an owner's 'personal participation . . . in the fault or negligence which caused or contributed to the loss or injury.'" Great Lakes, 3 F.3d at 231 (quoting Coryell v. Phipps, 317 U.S. 406, 411 (1943)). "All that is needed to deny limitation is that the shipowner, 'by prior action or inaction set[s] into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of the casualty . . . .'" In re Oil Spill by The Amoco Cadiz, 954 F.2d 1279, 1303 (7th Cir. 1992) (quoting Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1158 (2d Cir. 1978)). Plaintiff SkipperLiner bears the burden of proving that it lacked privity or knowledge. See The Amoco Cadiz, 954 F.2d at 1303 (citing Coryell, 317 U.S. at 409 (burden of proof regarding privity or knowledge is on those who seek benefit of Limited Liability Act)).

In a typical limitation proceeding, the admiralty court follows a two-step procedure for determining whether the vessel owner is entitled to limited liability. First, the court determines what acts of negligence or conditions of unseaworthiness caused the accident. In this case, it is undisputed that the accident was caused by carbon monoxide poisoning, the source of which was an unplugged drain hole in the generator's muffler. Second, the court determines whether the shipowner had knowledge or privity of those same acts of

negligence or conditions of unseaworthiness. Hercules Carriers, Inc. v. Claimant State of Florida, Dept. of Transp., 768 F.2d 1558, 1563-64 (11th Cir. 1985) (quoting Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10 (5th Cir. 1976)).

For purposes of determining a corporate shipowner's "privity or knowledge," the court divides employees into two groups: (1) corporate managers vested with discretionary authority and (2) other ministerial agents or employees. Great Lakes, 3 F.3d at 231. "If a managerial employee is possessed of 'privity or knowledge,' i.e., if he or she personally participates in the activity that caused the alleged loss, the corporation is precluded from the benefit of the Limitation Act." Id. In Joyce, the Court of Appeals for the Seventh Circuit held that "'privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection'" and that the "'[n]egligent failure to discover constitutes privity and knowledge within the meaning of the statute.'" Joyce, 975 F.2d at 384 (quoting China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 787 (5th Cir. 1965) and McNeil v. Lehigh Valley R.R., 387 F.2d 623, 624 (2d Cir. 1967), respectively). Moreover, the court of appeals has noted that the "recent trend has been to enlarge the scope of activities within the 'privity or knowledge' of the shipowner, including . . . requiring shipowners to exercise an ever-increasing degree of supervision and inspection." The Amoco Cadiz, 954 F.2d at 1303.

In this case, two of plaintiff SkipperLiner's employees performed the physical rigging of the boat: Troy Holzer, a senior service technician, and Randy Kessel, a service technician. Because these two employees are ministerial, their alleged negligence in rigging the boat cannot be imputed to plaintiff SkipperLiner, the corporate owner of the vessel. Nevertheless, William Ray, who was Holzer's and Kessel's supervisor and the service department manager, did not provide either technician with the manufacturer's rigging checklists because the boat was a demo. In fact, it was standard practice at SkipperLiner not to provide rigging checklists for demo boats. As the service department manager, Ray supervises the service technicians. Claimant Noel Jordan relies on Ray to supervise the rigging process. Therefore, I find that Ray is a corporate manager vested with discretionary authority. See In re Complaint of Hellenic, Inc. v. Bridgeline Gas Distribution LLC, 252 F.3d 391, 395 (5th Cir. 2001) ("privity or knowledge is imputed to the corporation when the employee is an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred") (internal quotation omitted). As the service department manager, Ray participated in the events by not providing either technician with a rigging checklist in a job in which the rigging duties had been divided between two technicians. Ray's action (assigning two technicians to rig the boat) and inaction (not providing either technician with a rigging checklist) set into motion a chain of circumstances that might have been a contributing cause

of the accident. See The Amoco Cadiz, 954 F.2d at 1303. Because of his discretionary authority, Ray's privity or knowledge is imputed to the corporate entity, plaintiff SkipperLiner.

In addition, reasonable diligence in the rigging process might well have uncovered the fact that the generator was leaking carbon monoxide into the passenger cabin. Privity or knowledge "includes not only actual knowledge, but also constructive knowledge—what the shipowner could discover through reasonable diligence." Joyce, 975 F.2d at 384 (citing Avera v. Florida Towing Corp., 322 F.2d 155, 166 (5th Cir. 1963)). In this case, reasonable diligence would have included (1) inspecting and testing the generator system while it was running and (2) having a corporate policy of using rigging checklists on every boat rigged, including demo boats, especially when the rigging duties have been divided between two workers. In and of itself, plaintiff SkipperLiner's undisputed practice of not using rigging checklists on demo boats imputes privity or knowledge to the corporate entity because such a practice is participation by the corporation itself.

Because SkipperLiner has not met its burden of showing that it lacked privity or knowledge, I find that it cannot limit its liability under § 183(a) of the Limitation of Vessel Owner's Liability Act. Therefore, plaintiff SkipperLiner's motion to limit its liability will be denied.

## D. Choice of Law

Under general maritime law, the substantive law used to determine remedies can be different from the substantive law that determines liability. Therefore, I will address the choice of law as to remedies and liabilities in turn.

### 1. Substantive remedies law

The exercise of admiralty jurisdiction "'does not result in automatic displacement of state law.'" Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) (quoting Grubart, 513 U.S. at 545). In Calhoun, the Supreme Court held that extending state wrongful death and survival remedies is compatible with substantive maritime policies. Id.; see also Western Fuel Co. v. Garcia, 257 U.S. 233 (1921) (extending state wrongful death statute); Just v. Chambers, 312 U.S. 383 (1941) (extending state survival statute). In Calhoun, the court held that where a non-seaman is killed or injured in territorial waters of the United States and no federal statute provides appropriate relief, a party may assert a claim for relief under state law for survival or wrongful death. Calhoun, 516 U.S. at 202. (As discussed infra, Christopher Jordan, Bradford Frohmader and Shawn Carney were not "seamen" when the accident occurred.) In other words, state law may supplement the measure of damages provided under general maritime law. Id. at 206. In order to supplement general maritime law with state remedies, the court must first determine which state's remedies will apply

under a choice-of-law analysis.

The appropriate choice-of-law rules are controlled by a federal court's basis for jurisdiction. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998). In a typical diversity case, this court would apply Wisconsin choice-of-law rules to determine which state's substantive law applies. See generally, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); see also Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993) (even though plaintiffs invoked diversity jurisdiction, substantive admiralty law preempts state law). However, because this court's jurisdiction is grounded in admiralty, federal choice-of law rules determine which state's laws will apply to the damages claims. See Lauritzen v. Larsen, 345 U.S. 571 (1953) (involving choice between United States and Denmark); see also Calhoun v. Yamaha Motor Corp., 216 F.3d 338 (3d Cir. 2000) (on appeal from district court after remand from Supreme Court). In Lauritzen, the Court identified seven factors for courts to weigh in deciding substantive choice of law: place of the wrongful act; law of the flag; domicile of the injured; allegiance or domicile of the shipowner; place of contract; inaccessibility of a foreign forum; and the law of the forum. Id. at 583-91. In Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 309 (1970), another international tort dispute, the Supreme Court held that the seven-factor list enunciated in Lauritzen is neither exhaustive nor mechanical and added an eighth factor, the shipowner's base of operations. Only four of the eight Lauritzen-Rhoditis factors are arguably applicable in determining which state's remedy

laws will apply to this case: (1) place of the wrongful act; (2) domicile of the injured; (3) law of the forum; and (4) shipowner's base of operations.

a. Place of the wrongful act

The Supreme Court has recognized that the "solution most commonly accepted as to torts in our municipal and in international law is to apply the law of the place where the acts giving rise to the liability occurred, the lex loci delicti commissi." Lauritzen, 345 U.S. at 583. The parties dispute where the "acts giving rise to the liability" occurred. Some argue that it is where the three young men were killed and injured (Minnesota). Others argue that it is where the allegedly negligent acts that led to their death or injury occurred, including where the boat was rigged (Wisconsin), where the boat was built (Tennessee), where the muffler was designed and manufactured (presumably Georgia) or where the carbon monoxide detector was disconnected (either Wisconsin or Minnesota). Interestingly, defendants Sea Ray and Centek and plaintiff SkipperLiner (the parties who oppose applying Minnesota law) argue for the application of Wisconsin law only because that is where the allegedly negligent acts took place, even though allegedly negligent acts also occurred possibly in three other states (Minnesota, Tennessee and, presumably, Georgia).

In this case, the doctrine of lex loci delicti as a rule of locality would indicate the application of Minnesota law. See Lauritzen, 345 U.S. at 583; see also Restatement (First)

of Conflict of Laws § 377 (1934) ("place of wrong" defined as "the state where the last event necessary to make an actor liable for an alleged tort takes place"); Land v. Yamaha Motor Corp., 272 F.3d 514, 517 (7th Cir. 2001) ("place of injury, or lex loci delicti"). The event that triggered liability is the accident on Coney Island, not the allegedly negligent acts that took place earlier in different states. Those allegedly negligent events could not (and did not) give rise to liability because, at the time at which they allegedly took place, no injury or death had occurred. The last event necessary to give rise to liability occurred in Minnesota; therefore, this is the place of the wrongful act.

Some of the parties argue that even if the place of the wrongful act is Minnesota, the fact that the accident occurred there is nothing more than a fortuitous occurrence. As a result of this fortuity, defendant Sea Ray and others argue, the place of the wrongful act (Minnesota) takes on a lesser degree of importance. See Calhoun, 216 F.3d at 346. In Calhoun, the Court of Appeals for the Third Circuit applied the Lauritzen factors to a domestic tort action. Id. at 345-46. A 12-year-old girl had been killed in a jet ski accident in the territorial waters off the coast of Puerto Rico. Id. at 340. As Pennsylvania residents, the parents of the deceased girl's parents filed suit in the Eastern District of Pennsylvania. Id. at 341. One question was whether the law of Pennsylvania (domicile of the deceased girl and her parents) or Puerto Rico (situs of the injury) governed the measure of damages. Id. at 346-47. The court held that when "a party voluntarily and intentionally travels to

another state, the location of the injury is not fortuitous." Id. at 347. Moreover, once a court classifies the accident as non-fortuitous in nature, "the place of the injury assumes much more importance, and in some instances may be determinative." Id. (quoting LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1072 (3d Cir. 1996).

It is undisputed that the young men went to Coney Island purposely for an overnight outing. Nevertheless, defendant Sea Ray argues that there is nothing in the record to establish that Bradford Frohmader knew that Coney Island was located in Minnesota and that his alleged lack of knowledge makes Minnesota "all the more fortuitous." (Defendant Sea Ray, or any other party for that matter, did not allege this same lack of knowledge with respect to the other two men, Christopher Jordan and Shawn Carney. On the same note, there is nothing in the record to establish the converse, that is, that any of the three young men did not know that Coney Island was located in Minnesota. In any event, it is undisputed that the three young men went to Coney Island voluntarily and intentionally.)

The concept of a fortuitous place of injury referred to in Calhoun arose in the context of a plane crash. See Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1967); see also In re Air Crash Disaster near Chicago, 644 F.2d 594, 615 (7th Cir. 1981). In Scott, a plane taking off from Boston's Logan Airport bound for Atlanta (with a layover in Philadelphia) crashed in Boston Harbor. Scott, 399 F.2d at 18-19. The court determined that the location of the injury was purely fortuitous because the airplane could have crashed

anywhere, for example, in Boston Harbor, the Hudson River or Long Island Sound. Id. at 28; see also Calhoun, 216 F.3d at 347. In this case, the accident could not have occurred anywhere; it could have occurred only on Coney Island, where the young men traveled intentionally for an overnight outing in the boat. Even assuming that none of the three knew that Coney Island was in Minnesota, this assumption does not render their being in Minnesota fortuitous. Adopting defendant Sea Ray's logic would dilute the meaning of fortuity as well as the use of the remedies law of the state in which the injury or death occurred by requiring actual knowledge of one's location at the moment of injury. For example, it is quite plausible that in Calhoun the 12-year-old girl killed did not know that the waters in which she was jet skiing off the coast of Puerto Rico were territorial waters belonging to Puerto Rico because she was within three miles of its coastline. It is possible that a 12-year-old would not even know that Puerto Rico is in the United States. The court did not address these possibilities because they are irrelevant. Such a lack of knowledge would not make the child's location in Puerto Rico fortuitous because she had intentionally and voluntarily traveled to Puerto Rico with her parents.

Because the place of the wrongful act is Minnesota and the location of the accident was non-fortuitous in nature, this factor "assumes much more importance, and in some instances may be determinative." See Calhoun, 218 F.3d at 347. Therefore, the place of the wrongful act weighs heavily in favor of applying Minnesota law.

b. Domicile of the injured

The three deceased and injured men were residents of Wisconsin. All eight claimants are residents of Wisconsin. This factor weighs in favor of applying Wisconsin law.

c. Law of the forum

"The purpose of conflict-of-laws doctrine is to assure that a case will be treated in the same way under appropriate law regardless of fortuitous circumstances which determine the forum." Lauritzen, 345 U.S. at 591. Claimants argue that it is a "fortuitous circumstance" that the vessel was transferred back to plaintiff SkipperLiner's place of business (located in La Crosse, Wisconsin) several weeks after the incident, according to the parties' briefs, and, as a result, plaintiff SkipperLiner was required to file in the district court where the "vessel has been attached or arrested." Fed. R. Civ. P. Supp. R. F(9). Until its transfer, the boat had been moored in Lawrence Lake Marina in Minnesota. For many of the same reasons that it is not fortuitous to travel intentionally to Coney Island for an overnight outing, it is not a fortuitous circumstance for a shipowner to transport its boat back to its place of business several weeks after an accident.

Claimants assert that they are in this court involuntarily because plaintiff SkipperLiner filed its limitation of liability complaint here. It is undisputed that at the time plaintiff SkipperLiner filed its limitation of liability complaint, the vessel was docked in La

Crosse, Wisconsin, which is located in the Western District of Wisconsin. Therefore, plaintiff SkipperLiner was required to file in this district. See Fed. R. Civ. P. Supp. R. F(9). As a consequence of plaintiff SkipperLiner's filing, claimants were required to file their claims and an answer in this court if they were to contest the exoneration or limitation of liability. See Fed. R. Civ. P. Supp. R. F(5).

The procedural stance of this case differs from the typical maritime torts case. In general, the claimant/plaintiff files a complaint in state court and then the shipowner files a petition for limitation of liability in the district court in which the vessel is located. See In re Complaint of McCarthy Bros. Co., 83 F.3d 821, 826 (7th Cir. 1996); see also Langnes v. Green, 282 U.S. 531, 540 (1931) (state has power to entertain shipowner's limitation claim and afford relief under limitation act). When the federal court exercises its exclusive admiralty jurisdiction, it must necessarily enjoin the proceedings in state court. McCarthy Bros., 83 F.3d at 826. This federal injunction is in direct conflict with the "savings to suitors" clause, 28 U.S.C. § 1331(1), which excepts from the district courts' exclusive jurisdiction over admiralty matters the rights of the claimants to seek "all other remedies to which they are otherwise entitled." Id. "When the shipowner fails to meet certain prerequisites for the limitation action, the claimant's original choice of state forum will return to the forefront." Id. at 827; see also Great Lakes, 3 F.3d 225 at 231 n.9 ("Once limitation is denied, claimants should be permitted to elect whether to remain in the

limitation proceeding or to revive their original claims in their original fora.")

In this case, plaintiff SkipperLiner filed its petition (or "complaint" as it is known under Fed. R. Civ. P. Supp. R. F) in this court before any claims had been filed against it. The complaint stated that "[t]here are no claims presently pending against Plaintiff in any Court of which Plaintiff has received notice. However, it is anticipated that personal injury or death claims will be filed in the near future." Plt.'s Cpt., dkt. #2, ¶ 6. This court entered an order directing notice to issue to all parties claiming damages and enjoining all other causes of actions in this matter. Order entered Dec. 8, 2000, dkt. #5. As a result of the order requested by plaintiff SkipperLiner, claimants were able to file their claims only in this court. As a result, they were drawn involuntarily into this forum (as opposed to being able to file suit in another forum, such as the Minnesota state court). See Lauritzen, 345 U.S. at 591-92 ("Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not."); see also Quintero v. Klaveness Ship Lines, 914 F.2d 717, 723 (5th Cir. 1990) (law of forum not a factor when party in that forum involuntarily); Kukias v. Chandris Lines, Inc., 839 F.2d 860, 863 (1st Cir. 1988) (same); Nunez-Lozano v. Rederi, 634 F.2d 135, 137 (5th Cir. 1980) (same).

Because claimants were drawn into this forum involuntarily, the law of the forum is not a factor that will be weighed in determining the applicable choice of law.

d. Shipowner's base of operations

The shipowner, plaintiff SkipperLiner, is located in La Crosse, Wisconsin. This factor weighs in favor of Wisconsin law.

e. Weighing the Lauritzen-Rhoditis factors

Of the four relevant Lauritzen-Rhoditis factors, one weighs heavily in favor of Minnesota law (place of the wrongful act), two weigh in favor of Wisconsin law (domicile of the injured and shipowner's base of operations) and one is a non-factor. Because one factor weighs heavily and the other two factors simply weigh in, the scale appears to be in equipoise. Nevertheless, in examining the Lauritzen factors, the Court of Appeals for the Fifth Circuit held that a court does not "merely add up the scores for and against, for the test is neither arithmetic nor mechanistic." De Oliveira v. Delta Marine Drilling Co., 707 F.2d 843, 845 (5th Cir. 1983); see also Rhoditis, 398 U.S. at 308 ("The Lauritzen test, however, is not a mechanical one."). Viewing the factors non-mechanically, I find that the shipowner's base of operation is a factor better suited to the realm of international torts rather than domestic tort actions, such as this case. When the Supreme Court added the shipowner's base of operations as a factor, it did so "in light of the national interest served by the assertion of the Jones Act" and because this factor has been deemed especially important where the vessel flies a flag of convenience. Rhoditis, 398 U.S. at 309. In fact,

in Hurd v. United States, 134 F. Supp. 2d 745, 750 (D.S.C. 2001), the district court applied only two of the eight factors to a domestic tort action, the place of wrongful act and the domicile of the injured,. See also Calhoun, 216 F.3d at 346-51 (shipowner's base of operation not considered). The shipowner's base of operations adds little, if any, weight to the analysis. Therefore, I turn to the competing state interests regarding the remaining factors to be weighed: the place of the wrongful act (Minnesota) versus the domicile of the injured parties (Wisconsin).

It is clear that Minnesota has an interest in prescribing the rules governing torts occurring non-fortuitously within its borders and, likewise, that Wisconsin has an interest in all parties domiciled within its borders, which includes all the claimants in this case. Moreover, Minnesota has a strong interest in maintaining the safety of its waterways to preserve the economic benefit it derives from tourism and other commercial enterprises, although the same can be said of Wisconsin because the Mississippi River borders both states. In fact, both Minnesota and Wisconsin rescue teams responded to the incident. Therefore, the competing state interests appear to remain somewhat in balance. Nonetheless, according to Calhoun, the place of the wrongful act is given greater weight if it is non-fortuitous in nature.

In Calhoun, the court determined that "the Lauritzen factors, viewed as a whole, represented a departure from the application—in admiralty cases—of the lex loci delicti rule

and a move toward analyzing which state had the most significant relationship to the incident and the dominant interest in having its law applied." Calhoun, 216 F.3d at 346. The law of the place of injury is to be supplanted only when another state has a more significant relationship to the incident than the place of injury. See Restatement (Second) of Conflict of Laws § 175; see also Lauritzen, 345 U.S. at 928 ("[t]he solution most commonly accepted as to torts . . . is to apply the law of the place where the acts giving rise to the liability occurred."); Just v. Chambers, 312 U.S. 383, 391 (1941) (in admiralty, "broad recognition"of state authority "to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction"); Air Crash Disaster, 644 F.2d at 615-17 ("The old rule in many jurisdictions, developed from torts other than air crashes, was that where there was nothing fortuitous about the fact that the injury occurred in a given state, great weight would be given to the law of the place of the injury."). In addition, applying the law of the place of the injury results in greater certainty, predictability and uniformity of result. See Restatement (Second) of Conflict of Laws § 6(e); Calhoun, 516 U.S. at 207 (characteristic features of general maritime law are harmony and uniformity in interstate relations). Although Wisconsin has an interest that is nearly as significant as Minnesota's, it does not have a more significant interest. Therefore, I find that Minnesota law supplements the remedies provided by general maritime law.

2. Substantive liability law

The Supreme Court explicitly left open "the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies." Calhoun, 516 U.S. at 215 n.14 ("We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law had held sway."). Therefore, it must be determined which liability standards (federal or state) apply to each of the claims in this case.

a. Wrongful death claims

Before 1970, wrongful death actions were governed by The Harrisburg, 119 U.S. 199 (1886). In The Harrisburg, the Court held that because there was no statutory cause of action for wrongful death in admiralty cases, it would be inappropriate for the federal courts to create such a cause of action from federal common law. Id. at 213. After The Harrisburg, the Supreme Court held in a trilogy of opinions that when exercising admiralty jurisdiction, the federal courts were required to apply state law completely with respect to both procedural and substantive issues in wrongful death actions. See Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Hess v. United States, 361 U.S. 314 (1960); The Tungus v. Skovgaard, 358 U.S. 588 (1959). For example, the Court held that "in an action for wrongful death in state territorial waters, the conduct said to give rise to liability is to be

measured not under admiralty's standards of action, but under the substantive standards of the state law." Hess, 361 U.S. at 319. Because no federal statute provided a cause of action for wrongful death in territorial waters, The Harrisburg, Goett, Hess and The Tungus held collectively that state law, not general maritime law, applies to the liability of wrongful death claims.

In 1970, the Supreme Court overruled its holding in The Harrisburg explicitly and created a federal cause of action under general maritime law for wrongful death to provide a remedy for survivors of seamen killed in territorial waters. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970). However, the Court did not expressly overrule Goett, Hess or The Tungus, the cases holding that state law applied to liability in this situation. Id. at 378 ("We have found the primary source of confusion is not to be found in The Tungus, but in The Harrisburg . . ."). The Court of Appeals for the Third Circuit examined this dichotomy and held that although the broad propositions (the role of state regulations in admiralty) of cases such as The Tungus remains good law, the more specific holding that state law applies to liability was overruled effectively by Morange. Calhoun, 216 F.3d at 350. Therefore, the court held, federal maritime law, not state law, applies to wrongful death claims. In Calhoun, the court was driven to its conclusion by the longstanding and prevailing policy of advancing uniformity in federal admiralty law. Id.; see also Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (in admiralty law, uniformity and harmony are

goals). The net effect in Calhoun was that federal maritime law governed the substantive liability of the wrongful death claim, while state law governed the compensatory and punitive damages.

The careful reasoning in Calhoun is persuasive. In order to advance uniformity and harmony in admiralty law, I conclude that federal maritime law governs the liability of the wrongful death claims at issue in this case.

b. Personal injury and strict liability claims

Unlike wrongful death and survivor statutes, general maritime law always has been held to apply to personal injury claims. See Just, 312 U.S. at 383; Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). Maritime law also has been held to apply to negligence, strict liability and products liability claims. East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865 (1986) (noting Ninth and Third Circuits have embraced Restatement (Second) of Torts § 402A as part of general maritime law). Because the case law is well settled as to personal injury, strict liability and products liability claims, these claims are governed by general maritime law.

c. Supplementing general maritime law

"With admiralty jurisdiction comes the application of substantive admiralty law." East River, 476 U.S. at 864 (citing Executive Jet, 409 U.S. at 255). "Absent a relevant statute, the general maritime law, as developed by the judiciary, applies." Id.; see also Calhoun, 516 U.S. at 206 ("general maritime law [is] a species of judge-made federal common law"). Although a court sitting in admiralty jurisdiction must apply federal maritime rules that directly address the issues at hand, it should resort to state law when no federal rule covers a particular situation. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320-21 (1955); Just, 312 U.S. at 387-88 ("there are numerous instances in which the general maritime law has been modified or supplemented by state action"); see also Suma Fruit Int'l v. Albany Ins. Co.,122 F.3d 34 (9th Cir. 1997) (state law controls only in absence of federal statute, judicially fashioned admiralty rule and need for uniformity in admiralty practice).

When the state law conflicts with the uniformity of a substantive general maritime law or threatens it, then the state law must give way. See Pope, 346 U.S. at 409 (admiralty's comparative negligence rule barred application of state contributory negligence rule); Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (federal maritime rule validating oral contracts precluded application of state Statute of Frauds); Garrett v. Moore-McCormack Co., 317 U.S. 239, 248-49 (1942) (federal maritime rule allocating burden of proof

displaced conflicting state rule); Amtrak, 121 F.3d at 1426-27 (Alabama wrongful death statute is only one in all 50 states that provides for punitive damages on showing of mere negligence and must give way to more uniform maritime law). Indeed, the Supreme Court has warned that states "may not deprive a person of any substantial admiralty rights as defined . . . by interpretative decisions of this Court." Pope, 346 U.S. at 410. "Where substantive admiralty principles are placed at risk by the potential application of state law, there is 'no leeway for variation or supplementation by state law.'" Amtrak, 121 F.3d at 1426 (quoting Calhoun, 516 U.S. at 210). State law may not be applied by a federal court if it would defeat or narrow any substantial admiralty rights of recovery, either as created by federal legislation or as defined by interpretive decisions of the federal courts. See Pope, 346 U.S. at 410; Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-246 (1942); Bagrowski v. American Export Isbrandtsen Lines, Inc., 440 F.2d 502, 506 (7th Cir. 1971).

Therefore, to the extent that Minnesota substantive liability law neither conflicts with nor defeats general maritime law, it may supplement the scope of liability prescribed by general maritime law.

D. Claimant Noel Jordan's Alleged Liability

Defendants Sea Ray and Centek have filed counterclaims against claimant Noel Jordan for contribution. Claimant Noel Jordan filed a motion for summary judgment,

alleging that no prima facie case has been made out against him. Only defendant Sea Ray opposes Noel Jordan's motion, contending that (1) he is strictly liable under the seaworthiness doctrine; (2) he is negligent for lack of reasonable care; and (3) he negligently entrusted the vessel to the three young men. Defendant Sea Ray contends that claimant Noel Jordan owed a legal duty to provide the men with a seaworthy vessel.

1. Doctrine of unseaworthiness

"It is settled that the general maritime law imposes duties to avoid unseaworthiness and negligence." Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001) (citing Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-550 (1960) (unseaworthiness) and Leathers v. Blessing, 105 U.S. 626, 630 (1882) (negligence)).

Before 1944, unseaworthiness "was an obscure and relatively little used" general maritime liability standard, largely because "a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." Miles v. Apex Marine Corp., 498 U.S. 19, 25 (1990); see also Moragne, 398 U.S. at 398-99. In 1944, the Supreme Court expanded a shipowner's liability to injured seamen by imposing a non-delegable duty "to furnish a vessel and appurtenances reasonably fit for their intended use." Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); see also Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). "The duty imposed was absolute; failure to supply a safe ship resulted in liability 'irrespective of

fault and irrespective of the intervening negligence of crew members.'" Calhoun, 516 U.S. at 208 (quoting Miles, 498 U.S. at 25). Therefore, the doctrine of unseaworthiness became a "species of liability without fault." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946). In addition, in Sieracki, the Court extended to longshore workers performing seamen's work the duty to provide a seaworthy ship, once owed only to seamen. Id. at 102. "Congress effectively overruled this extension in its 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq." Calhoun, 516 U.S. at 208. However, the doctrine of unseaworthiness is limited to seamen and does not extend to passengers. See Calhoun, 516 U.S. at 206 ("we have declined to extend the duty further"); Kermarec, 358 U.S. at 629; Craig v. M/V Peacock, 760 F.2d 953, 955 (9th Cir. 1985) (only duty owed to non-seamen is that of exercising due care under circumstances).

Therefore, the threshold question is whether Christopher Jordan, Bradford Frohmader and Shawn Carney were seamen. In Chandris, Inc. v. Latsis, 515 U.S. 347, 355 (1995), the Supreme Court noted that "[t]raditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 354 (1991) (quoting Sieracki, 328 U.S. at 104 (Stone, C.J., dissenting)). Similarly, the Supreme Court suggested that "'every one is entitled to the

privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage'" Norton v. Warner Co., 321 U.S. 565, 572 (1944) (quoting The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916)).

"To establish the 'tort' of unseaworthiness it must be shown that the work performed by the person claiming liability under the doctrine was 'in the ship's service' and that the warranty of seaworthiness thereby extends to him." Armour v. Gradler, 448 F. Supp. 741, 744 (W.D. Pa. 1978) (quoting Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); see also Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970). "The 'status' or relation which determines whether one is 'in the ship's service' can arise only where the individual seeking to invoke liability for unseaworthiness is engaged in "the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage.'" Armour, 448 F. Supp. at 744 (quoting United New York and New Jersey Sandy Hook Pilot's Ass'n. v. Halecki, 358 U.S. 613, 617 (1959)).

Christopher Jordan, Bradford Frohmader and Shawn Carney were not aboard the vessel to perform the traditional duties of seamen; rather, they intended to go on an overnight, recreational outing. Defendant Sea Ray points to In re Read's Petition, 224 F. Supp. 241 (S.D. Fla. 1963) (cited by the court in Armour, 448 F. Supp. at 745), in support of its contention that the young men in this case were seamen. In Read's Petition, the court

held that a person who had joined the crew voluntarily in order to participate in a pleasure yacht race, even though he had not been hired or paid, was nevertheless considered a seaman under the common law theory of a master-servant relationship. Id. at 246. In Read's Petition, the court concluded that the claimant was not "a guest invited aboard just for the ride. He was neither a friend nor acquaintance of the [boat owners] but had represented to one of them that he had sufficient sailing experience to be a member of a crew—and he came aboard for the very purpose of aiding in the navigation of a vessel." Id. at 246. In this case, the three young men were not on board for the purpose of helping to navigate the boat, but in order to go on an overnight outing on Coney Island. See Armour, 448 F. Supp. at 745 (no seaman status when plaintiff went fishing on defendant's boat because all assistance was voluntary and "not under orders in the sense of a traditional master/crew arrangement"). In addition, "where the injured party is a guest or co-adventurer, the policy and the historical function of the seaworthiness doctrine will not support unseaworthiness liability." Id. at 745.

Because Christopher Jordan, Bradford Frohmader and Shawn Carney were not seamen, there was no legal duty for claimant Noel Jordan to provide a seaworthy vessel under the doctrine of unseaworthiness in general maritime law. Moreover, the duty to provide a seaworthy vessel is the shipowner's duty and claimant Noel Jordan is not the owner of the subject vessel. Therefore, I will grant claimant Noel Jordan's motion for

summary judgment on this issue.

2. Negligence

Defendant Sea Ray argues, rightly so, that the "owner of a ship in navigable waters owes a duty to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." Kermarec, 358 U.S. at 632. To reiterate, plaintiff SkipperLiner is the owner of the subject vessel, not claimant Noel Jordan. Defendant Sea Ray points to St. Hilaire Moye v. Henderson, 364 F. Supp. 1286 (E.D. Ark. 1973), to support its argument that the duty of reasonable care extends to operators and others in possession or control of the vessel. Thus, defendant Sea Ray asserts that even if claimant Noel Jordan is not the owner, he was the operator of the subject vessel and the duty extends to him. Defendant Sea Ray misconstrues the ephemeral nature of an operator. When Noel Jordan turned the boat over to both Bradford Frohmader (who took the helm) and Christopher Jordan, he was no longer the operator of the vessel; they were.

Although these arguments are not applicable to claimant Noel Jordan (because he is not the shipowner), they are applicable to the shipowner, plaintiff SkipperLiner. Claimant Noel Jordan's allegedly negligent acts are vicariously attributable to plaintiff SkipperLiner

because he is an employee, the president, of plaintiff SkipperLiner. See Muratore v. M/S Scotia Prince, 845 F.2d 347 (1st Cir. 1988).

Because claimant Noel Jordan is not the owner and, additionally, was not the operator of the vessel on the night in question, he had no legal duty to those on board. Therefore, I will grant claimant Noel Jordan's motion for summary judgment on this issue.

3. Negligent entrustment

A person can be held liable for negligent entrustment "only if he knows or has reason to know that the person being entrusted is incapable of operating the vessel safely." Joyce v. Joyce, 975 F.2d 379, 385 (7th Cir. 1992). Defendant Sea Ray alleges that claimant Noel Jordan negligently entrusted the vessel in two ways because he knew that (1) the young men would be drinking alcohol that evening; and (2) the young men were incompetent to operate the vessel.

The doctrine of negligent entrustment provides that it is negligent to permit a third person to use something or to engage in an activity that is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. Restatement (Second) of Torts § 308 (1965). To prevail on this theory, defendant Sea Ray must show that claimant Noel Jordan knew or should have known that

his son, Christopher, and Bradford Frohmader would likely use the vessel in a dangerous manner. Defendant Sea Ray argues that a finder of fact could conclude that Noel Jordan negligently entrusted the vessel when he knew that the young men would be drinking alcohol that evening or when he knew or should have known that they were incompetent to operate the vessel. Claimant Noel Jordan asserts that although he testified that he knew the young men were going to the island to "party," he did not testify that he knew that they would be drinking alcohol. Claimant Noel Jordan also testified that he did not disconnect the carbon monoxide detector, but it is undisputed that the carbon monoxide detector had been disconnected at some point. This may suggest that the young men disconnected the detector.

It is arguable that claimant Noel Jordan knew or should have known that the young men would consume alcohol (as might be inferred through Jordan's actual knowledge that they would be "partying") or that they were incompetent to use the vessel properly (as suggested by their allegedly disconnecting the carbon monoxide detector), and that these were factors that contributed to their carbon monoxide poisoning. A jury might draw these inferences and find that claimant Noel Jordan negligently entrusted the men with the vessel. Although this evidence is slight, a court deciding a summary judgment motion should not weigh evidence. See Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980). I cannot rule as a matter of law that defendant Sea Ray is not entitled to proceed on

its negligent entrustment theory against claimant Noel Jordan. Therefore, claimant Noel Jordan's motion for summary judgment will be denied on this issue.

E. Defendant Centek's Alleged Liability

Defendant Centek, manufacturer of the generator's muffler installed in the subject vessel, filed a motion for summary judgment, contending that (1) there has been no showing that the muffler was defective and unreasonably dangerous to the user; (2) the muffler was altered substantially when incorporated into the boat; and (3) the negligence of others was a superseding cause that relieves Centek of liability. Plaintiff SkipperLiner argues that as the manufacturer of the component muffler built exclusively for Sea Ray boats, defendant Centek owed a duty to warn potential users of the existence and location of the second drain hole that had been added to the muffler. It is undisputed that defendant Sea Ray received the muffler from defendant Centek with both drain plugs installed, removed one of the drain plugs after water-testing the boat (as part of its de-rigging process) and did not reinstall one drain plug before shipping the boat to plaintiff SkipperLiner.

General maritime law applies to products liability claims. See East River, 476 U.S. at 865. Moreover, in East River, the Supreme Court cited approvingly a holding by the Court of Appeals for the Third Circuit embracing § 402A of the Restatement (Second) of Torts (1965). Id. (citing Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp., 726

F.2d 121, 123 (3d Cir. 1984) (collecting cases)); see also Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1136 (9th Cir. 1977); McKee v. Brunswick Corp., 354 F.2d 577, 584 (7th Cir. 1965).

Section 402A of the Restatement (Second) of Torts states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Defendant Centek is a "seller . . . engaged in the business of selling" wet mufflers that are used in marine environments. See Restatement § 402A comment f. In order to recover from defendant Centek, plaintiff SkipperLiner (and others) must show that the muffler was defective and unreasonably dangerous for its "normal" use. See Restatement § 402A comment h (product not defective if "safe for normal handling and consumption"). "In admiralty cases, the 'normal' use of a product includes all reasonably foreseeable uses, including foreseeable misuse." Vickers v. Chiles Drilling Co., 822 F.2d 535, 538 (5th Cir. 1987) (collecting cases). Defendant Centek had the obligation to foresee that a rigger who

was unfamiliar with the new two-hole design, might observe only one plugged hole and assume erroneously that the entire muffler was plugged. Moreover, defendant Centek could not make the muffler safe for plaintiff SkipperLiner by telling only defendant Sea Ray that the new two-hole design had been implemented. See id. at 538 n.5 (citing Pan-Alaska, 565 F.2d at 1136). Even though defendant Sea Ray was aware that the muffler required two plugs for its two holes (and thus the muffler was not unreasonably dangerous to Sea Ray), it was still unreasonably dangerous to other foreseeable users, such as plaintiff SkipperLiner. Id.

In addition, the muffler was unreasonably dangerous for normal use because of its design. Id. at 538 (in admiralty, product may be unreasonably dangerous because of defective design). In order to "decide whether a product is defectively designed and unreasonably dangerous, [the court] may consider how easily the manufacturer could have designed a safer alternative product." Id. at 539. It is undisputed that a wet marine muffler requires a drain hole and corresponding plug. In this case, the muffler's design was changed from one hole to two holes in order to facilitate access to at least one drain hole in the various Sea Ray models of boats. The potential flip-side of easier drain-hole accessibility in some models is that the other drain hole would be inaccessible in other models.

It is undisputed that defendant Centek shipped the muffler to defendant Sea Ray with both drain holes plugged. Therefore, defendant Centek argues, when the plugs were

removed by defendant Sea Ray, the muffler had been substantially and materially altered. Although any misuse or fault by the user or consumer could reduce the recovery or contribution, see Restatement § 402A comment n; see also Pan-Alaska, 565 F.2d at 1138 (comparative fault concepts can be applied to strict products liability), removing the muffler's removable drain plug did not substantially alter the design of the system. In removing the plug, which was designed to be removed, defendant Sea Ray did not change the shape or function of the muffler. The design of the muffler was the same on the night of the carbon monoxide poisoning as it was when it left defendant Centek's facilities.

Because the muffler retained the same design from the time defendant Centeck manufactured the muffler until the time plaintiff SkipperLiner acquired it, defendant Centek owes a duty to plaintiff SkipperLiner regarding any design defect. Therefore, defendant Centek's motion for summary judgment will be denied.

F. Motion to Strike Expert Testimony

Defendant Sea Ray filed a motion to strike portions of the testimony of Thomas Crane, plaintiff SkipperLiner's expert, as untimely under Fed. R. Civ. P. 16(b). Defendant Sea Ray argues that Crane is a proponent expert and, for that reason, plaintiff SkipperLiner was required to identify him no later than September 14, 2001, as set out in the preliminary pretrial conference order and as mutually modified by the parties. Plaintiff SkipperLiner

asserts that the original complaint was the limitation action and that Crane was hired to respond only after claimants and defendant Sea Ray alleged in their third-party complaints that plaintiff had rigged the subject vessel negligently. Therefore, plaintiff SkipperLiner argues, Crane is a respondent expert, who did not need to be identified until October 26, 2001, as set out in the preliminary pretrial conference order and as mutually modified by the parties. The parties do not dispute the respective deadlines or the fact that plaintiff SkipperLiner identified Crane as an expert on October 26, 2001. Rather, the disagreement centers on whether portions of Crane's testimony are proponent in nature and, as a result, untimely. I am unpersuaded by defendant Sea Ray's argument for several reasons.

First, defendant Sea Ray concedes that "[t]o the extent Mr. Crane opines that SkipperLiner properly rigged the boat, SkipperLiner is correct: those are responsive expert opinions. However, more so than not, Mr. Crane's opinions actively criticize Sea Ray rather tha[n] provide support for an argument that SkipperLiner did its job correctly. Those are the opinions of Mr. Crane that should be stricken as untimely." Dft.'s Reply to Mot. to Strike, dkt. #216, at 4. Plaintiff SkipperLiner argues that the purpose of Crane's testimony was to apportion liability to other parties and thereby help plaintiff defend itself and, as a result, the testimony is responsive and timely. Plaintiff asserts that Crane defends it against the allegation that its negligence (in rigging the boat) led to the injuries and deaths by expressing his expert opinion that if there had been no hole in the bulkhead, no harmful

levels of carbon monoxide would have collected inside the cabin even though the muffler drain hole was unplugged. Although defendant Sea Ray concedes that portions of the Crane's report are responsive, it does not cite specifically to those portions that it believes are allegedly proponent in nature. Rather, defendant Sea Ray makes generalizations regarding Crane's testimony (focusing on the muffler's two-hole design and the hole in the bulkhead), apparently expecting the court to cull through the six-page, single-spaced report and make word-by-word determinations sua sponte. This expectation is unreasonable.

Second, defendant Sea Ray's own expert, E. Charles Game, has refuted Crane's position by stating that "it has not been established to a reasonable degree of scientific probability that the alleged uncaulked hole in the bulkhead was a cause of the deaths and injuries." Dft.'s Reply to Mot. to Strike, dkt. #216, Ex. 2, at 1. Game expands on his contrary expert opinion regarding the hole in the bulkhead for five, single-spaced paragraphs in a section entitled, "Even with the 3/4 inch hole in the engine room bulkhead, the subject vessel complied with applicable standards." Id. at 9-10. Further, Game counters Crane's opinions regarding the muffler's two-hole design in detail by devoting five large, single-spaced paragraphs to the subject. Id. at 4-5. In addition, Game states in his second preliminary report that he has reviewed Crane's "proponent expert disclosure report" before making his own report. Id. at 12. Therefore, it appears from the reports of defendant Sea Ray's own expert that Crane's opinions have not gone uncontroverted. In fact, Crane's

opinions regarding the muffler's two-hole design and the hole in the bulkhead have been addressed head-on by Game.

Third, the parties have been warned that extending the expert disclosure deadlines repeatedly would not affect the trial date. Order entered October 24, 2001, dkt. #105. It appears that defendant Sea Ray's real dispute lies not in the testimony of Crane, but in the fact that its expert, Game, had been deposed after Crane. As a result, defendant Sea Ray argues, it has been prejudiced. Plaintiff SkipperLiner notes that scheduling depositions in this case has been difficult because of the number of parties. Moreover, plaintiff SkipperLiner argues that Crane was originally scheduled to be deposed prior to Game, but Crane was called to testify in another trial and his deposition had to be rescheduled. Nevertheless, defendant Sea Ray contends that this court's scheduling order coupled with the Federal Rules of Civil Procedure gives it the legal authority to depose Crane after its expert, Game, had been deposed. Defendant Sea Ray does not cite a specific rule to support this argument, and I am aware of none. "Rule 16 itself indicates that pretrial conferences are held in order to produce agreement among the parties and the trial judge as to the scope of the issues in the particular case and the admission of uncontested items of evidence. The order which follows such conferences is intended to be tailored to the particular case and to reflect agreements made by the parties." Sadowski v. Bombardier Ltd., 539 F.2d 615, 621 (7th Cir. 1976) (citing Peter Eckrich & Sons, Inc. v. Selected Meat Co., 512 F.2d 1158,

1164 (7th Cir. 1975)). The trial in this case is scheduled to begin on February 25, 2002; allowing defendant Sea Ray to depose Crane again would force the delay of the trial. I am not willing to move the trial date to allow defendant Sea Ray to take a second deposition of Crane.

Because defendant Sea Ray will have an opportunity at trial to address its concerns regarding Crane's opinions, I will deny its motion to strike the expert testimony of Thomas Crane.

ORDER

IT IS ORDERED that

1. Plaintiff SkipperLiner Industries, Inc.'s motion for partial summary judgment is GRANTED as to its motion for admiralty jurisdiction and is DENIED as to its motion to limit its liability.

2. Claimant Barbara Jordan's motion for partial summary judgment is GRANTED as to her motions for admiralty jurisdiction and to disallow plaintiff SkipperLiner's limitation of liability;

3. Claimants Maureen DuMond's and John L. Frohmader's motion for partial summary judgment is GRANTED as to their motions for admiralty jurisdiction and to disallow plaintiff SkipperLiner's limitation of liability;

4. Claimants DuMond's and Frohmader's motion for partial summary judgment is GRANTED as to their motion for Minnesota law to apply to remedies;

5. Claimant Noel Jordan's motion for summary judgment is GRANTED as to the issues of unseaworthiness and negligence and is DENIED as to the issue of negligent entrustment;

6. Defendant Centek Industries, Inc.'s motion for summary judgment is DENIED; and

7. Defendant Sea Ray's motion to strike the testimony of plaintiff SkipperLiner's expert, Thomas Crane, is DENIED.

Entered this 31st day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge