UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 23763
Issued to: William H. BUISSET, Jr.

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2358

William H. BUISSET, Jr.

This appeal has been taken in accordance with Title 46 U.S.C,. 239(g) and 46 CFR 5.30-1.

By order dated 29 October 1982, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia suspended Appellant's license for six months on twelve months' probation, upon finding him guilty of misconduct and negligence. The specifications found proved under the charge of misconduct allege that while serving as Operator on board the United States M/V SHARON B. under authority of the license above captioned, on or about 24 July, while said vessel was pushing the barge JEANNE MARIE in the Tangier Sound, Appellant wrongfully failed to maintain a proper lookout and wrongfully failed to take action to avoid a collision with the 19 foot motorboat, Registration No. MD-9267-P. The specification found proved under the charge of negligence alleges that while serving as aforementioned, on the same date, while said vessel was pushing the barge JEANNE MARIE in the Tangier Sound, Appellant failed to navigate the vessel with due caution, thereby causing a collision with the 19 foot motorboat, Registration No. MD-9267-P.

The hearing was held at Baltimore, Maryland on 25 August 1982

and at Norfolk, Virginia on 30 August and 29 October 1982.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of six witnesses and seven documents.

In defense, Appeal offered in evidence the testimony of four witnesses and four documents.

At the end of the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant suspending all licenses issued to Appellant for a period of six months on twelve months' probation.

The Decision and the Order were rendered separately and both were served on 29 October 1982. Appeal was timely filed on 8 November 1982 and perfected on 11 February 1983.

FINDING OF FACT

On 24 July 1982, Appellant was serving as Operator on board the United States M/V SHARON B. and acting under authority of his license while the vessel was pushing the barge JEANNE MARIE in Tangier Sound.

The barge JEANNE MARIE had approximately twelve feet of freeboard at the bow. This partially obstructed Appellant's view from the tug's wheelhouse so that he could not see beyond the head of the tow for a distance of approximately 100 yards. Appellant selected his course by proceeding from one buoy to another.

As the flotilla proceeded south in Tangier Sound, it approached an area containing numerous small pleasure craft engaged in recreational fishing. The channel in that area was approximately 2,000 yards wide. The main concentration of small craft was within a 500 yard-wide area on the eastern edge of the channel near a buoy. Seas were calm, and visibility was very good.

Appellant was on a southerly course toward the buoy on the east side of the channel. As he approached the congregation of small boats near the buoy, he slowed the flotilla and commenced sounding the siren. He also ordered his deckhand to stand "lookout" on the bow of the barge, with specific instructions to direct the small boats out of the way. The deckhand, who had been working as a deckhand for twenty days, went aboard the barge and proceeded to walk back and forth on the stern quarter alerting the occupants of the boats to stay clear. Appellant gave the deckhand no further instructions and continued to navigate the flotilla through the group of small boats.

At approximately 1315, more than 10 minutes after the deckhand went aboard the barge, the barge collided with a 19-foot anchored motorboat. Appellant could not see the boat over the barge and was unaware that it lay directly ahead and in is path. After the collision, Appellant stopped the flotilla within approximately 100 feet. The boat's five occupants were rescued with no fatalities.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Adm*in*istrative Law Judge. Appellant asserts that the Administrative Law Judge erred in:

1. applying the Pennsylvania Rule, which improperly shifted the burden of proof to Appellant;

2. finding Appellant guilty of negligence for the same action for which he was found guilty of misconduct and, therefore, punishing him twice for the same violation;

3. failing to apply the in *extremis* doctrine in Appellant's favor.

APPEARANCE: Vandeventer, Black, Meredith and Martin, by Carter T. Gunn

OPINION

I

Appellant asserts that the Administrative Law Judge erred by applying the Pennsylvania Rule to the specification of negligence, which improperly shifted the burden of proof to Appellant. I agree that the Pennsylvania Rule was not applied correctly.

The Pennsylvania Rule is a rule of causation. If a vessel collides with another following a violation of the statutory Navigation Rules, the causal connection between the violation and the collision is presumed without further proof. The Pennsylvania, 86 U.S. 125 (1873); Appeal Decision No. 866(MAPP). The Pennsylvania Rules does not create a presumption of negligence following a collision alone. The causal connection is necessary to establish liability for negligence in a civil proceeding for damages. However, in suspension and revocation proceedings, a violation of the Rules is, itself, negligence as well as a misconduct. It is not necessary to show that the negligence caused damage. See 46 CFR 5.05-20(a)(2). Thus, application of the Pennsylvania Rule added nothing to this case.

The negligence specification alleged negligence based on the existence of a collision alone. As such, the specification is inadequate to "enable the person charged to identify the offense so that he will be in a position to prepare his defense," as required by 46 CFR 5.05-17(b). A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. See Appeal Decision Nos. 2277 (BANASHAKEM 2174 (TINGLEY). The negligence specification here does not do so. The collision that it alleges does not raise a presumption of Appellant's negligence, such as exists in connection with an allusion or grounding. Hence the specification is inadequate.

The Administrative Law Judge, however, used the Pennsylvania Rule to connect the negligence and misconduct specifications. As a result, he found the negligence specification proved, based on the Navigation Rules violations alleged in the misconduct specification, and the presumption of the Pennsylvania Rule that the violations of the Navigation rules were a cause of the collision.

I do not approve of salvaging a defective specification by borrowing from other specifications. The Administrative Law Judge erred in using the Pennsylvania Rule to do so. Nevertheless, there is no prejudice in this case. All of the offenses charged were clearly pleaded and the Administrative Law Judge was aware that the specifications under the negligence and misconduct charges were based on the same actions. Therefore, the error can be corrected by dismissing the negligence charge and its specifications.

II

Appellant asserts that he "was found guilty of misconduct and negligence, and presumably punished [twice] for the same action." I agree that there is duplication in the specifications found proved, but I do not agree that two sanctions were imposed for one fault.

As noted in section I above, the Administrative Law Judge found the negligence charge proved based on the Rules violations specified as misconduct. It is clear from his discussion that he considered the incident as one whole and imposed a single sanction accordingly. Therefore, dismissal of the negligence charge does not require adjustment of the sanction.

III

Appellant argues for the first time on appeal that the Administrative Law Judge should have applied the *in extremis* doctr*in*e in evaluating the propriety of the lookout posted by Appellant. I disagree.

The principle of error in *extremis* is well stated in a case cited by Appellant: "Errors in judgment committed by a vessel put in sudden peril through no fault of her own are to be leniently judge." *Union Oil Co. v.The Tug MARY MALLOY*, 414 F.2d 669(5th Cir.1969). that the peril must come about "through no fault of her own" means that a vessel which is herself to blame for the existence of the emergency cannot use it as an excuse for her own erroneous action. *The* principle applies only where the danger has been caused solely by the fault of the other vessel. The

ELIZABETH JONES, 112 U.S. 514 (1884).

The mean*in*g of "sudden peril" was clarified in a case where the in *extremis* doctrine was found inapplicable:

> Only when an emergency suddenly arises does the in extremis doctrine apply....Here the situation...had long been foreseeable as a possibility and ...it must be assumed that the Nashbulk's master had ample opportunity for the exercise of considered judgment in taking timely steps to cope with it.

National Bulk Carriers v. U.S., 183 F.2d 405, 408; 1950 A.M.C. 1293 (2nd Cir. 1950).

In consider*in*g Appellant's assertion that the principle of error in *extremis* applies, it must be kept *in* mind that the error under consideration is Appellant's failure to correct the deckhand's location as lookout. The in *extremis* doctr*in*e applies to measures taken to directly avoid collision, such as engine orders and steering orders, not to preventive measures such as the posting of a lookout. The latter do not operate on the short time scale implied by the term "in *extremis*." When a vessel is *in extremis*, it is too late for a lookout to be of help. Conversely, if a lookout is the solution to the problem, the vessel is not *in extremis*. In the case at hand, the deckhand was on the stern of the barge for several m*in*utes before the collision. Appellant had plenty of time to make a reasoned judgment about where the lookout should be posted.

As noted above, the in *extremis* doctr*in*e applies only to a vessel whose emergency came about through no fault of her own. I cannot agree that the flotilla was without fault. Appellant voluntarily navigated into the group of small boats, without regard to his obligations under the Steering and Sailing Rules. While the flotilla may have had the right-of-way respect to some of the small boats, he was obligated to alter course or keep out of the way of other under Ruler 13, 14, 15, and 18. He was also required to keep clear of boats that were anchored. Appeal Decisions Nos. 461 (MUMPETON),1091 (SMITH). Appellant, however, did not attempt

to fulfill these obligations. His instructions to the deckhand were, not to serve as lookout, but to get everyone out of the way.

The mariner who fails to follow the Navigation Rules, even though they seem impractical, does so at his own risk. Appellant's decision to disregard the Rules and steer straight on through the small boats cannot be called blameless so as to make the in *extremis* doctrine available to him.

CONCLUSION

There was substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge with respect to the charge and specifications of misconduct. The hearing was conducted in accordance with the requirements of applicable regulations.

The charge and specification of negligence should be dismissed.

ORDER

The charge of negligence and the specification thereunder are DISMISSED. the finding that the charge of misconduct and two specifications thereunder were proved is AFFIRMED. The order of the Administrative Law Judge at Norfolk, Virginia dated 29 October 1982 is AFFIRMED.

B. L. STABILE
VICE COMMANDANT

Signed at Washington, D.C., this 8th day of June 1984.

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