YUSKO V. NCL (BAHAMAS), LTD.: ELEVENTH CIRCUIT HOLDS SHIPOWNERS MAY BE VICARIOUSLY LIABLE FOR EMPLOYEE'S NEGLIGENCE WITHOUT NOTICE OF RISK-CREATING CONDITIONS

ALEX GRESSETT*

In *Yusko v. NCL (Bahamas), Ltd.*,[1] the United States Court of Appeals for the Eleventh Circuit addressed whether a shipowner is required to have notice of risk-creating conditions to be liable under general maritime law for the negligent acts of its employees.[2] The plaintiff, cruise ship passenger Joann Yusko ("Yusko"), filed a negligence suit against the shipowner, NCL (Bahamas), Ltd. ("NCL"), for injuries she sustained when a crewmember dropped her during a dance competition on board the ship.[3] The United States District Court for the Southern District of Florida granted summary judgment in favor of NCL because Yusko failed to show that NCL had "actual or constructive notice of a risk-creating condition on the ship."[4] On appeal, the Eleventh Circuit reversed, holding that the district court applied the wrong standard in assessing Yusko's claim because the notice requirement applies only to negligence claims proceeding under a direct liability theory.[5] The court clarified that when a passenger sues a shipowner for maritime negligence based on vicarious liability, the passenger is not required to show that the shipowner had notice of a risk-creating condition.[6]

In late 2017, sixty-four-year-old Joann Yusko embarked on a ten-day cruise aboard the *Norwegian Gem*—a cruise ship owned by NCL.[7] One evening during Yusko's cruise, the cruise ship employees organized an informal dance competition called "Dancing with the Stars."[8] The crewmembers acted as the "stars" and were paired with participating passengers, where they were judged based on "how entertaining they were."[9] Yusko volunteered to participate in the event and was paired with crewmember Michael Kaskie ("Kaskie"), who was also a professional

* Junior Editor, *Cumberland Law Review*; Candidate for Juris Doctor, May 2023, Cumberland School of Law; B.S. Marketing, May 2020, University of Alabama.

[1] Yusko v. NCL (Bahamas), Ltd., 4 F.4th 1164 (11th Cir. 2021).

[2] *Id.* at 1166.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1166–67.

[6] *Id*. at 1166.

[7] *Yusko*, 4 F.4th at 1166.

[8] *Id.*

[9] *Id.*

dancer.[10] Soon after they started their dance, Yusko fell backwards during a move where Kaskie "spun Yusko while holding her arms" and hit her head on the deck.[11] After her fall, "Yusko received treatment onboard the ship and completed the cruise."[12] Yusko was later diagnosed with a traumatic brain injury stemming from her fall.[13]

Subsequently, Yusko filed a complaint in federal district court alleging that NCL should be held vicariously liable for her injury.[14] Yusko specifically alleged two theories of negligence: "(1) [NCL's] own failure to exercise reasonable care under the circumstances and (2) Kaskie's failure to act reasonably and in a manner that would keep Yusko safe."[15] The United States District Court for the Southern District of Florida, relying on the Eleventh Circuit's decision in *Keefe v. Bahama Cruise Line, Inc.*,[16] granted summary judgment in favor of NCL because Yusko failed to show that NCL was on notice of the "risk-creating condition" (i.e., Kaskie's dancing) that caused her injury.[17]

On appeal, Yusko's main contention was that the district court erred in evaluating her claim under the *Keefe* standard.[18] She argued that the notice requirement set forth in *Keefe* is limited to maritime negligence claims where the passenger alleges the shipowner is *directly* liable for the passenger's injuries, such as "the negligent maintenance of its premises."[19] Thus, since her claim was based on a theory of vicarious liability, she argued she did not have to establish the notice element that *Keefe* requires.[20]

Reviewing the district court decision *de novo*, the Eleventh Circuit ultimately agreed with Yusko, and explained that "[*Keefe*'s] notice requirement does not—and was never meant to—apply to maritime negligence claims proceeding under a theory of vicarious liability."[21]

In its opinion, the court first established that general maritime law governs Yusko's claim, and since Congress has not addressed tort liability

---

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Yusko*, 4 F.4th at 1166.
[14] *Id.*
[15] *Id.* Under common law, to establish a prima facie cause of action for negligence the plaintiff must show: "(1) the tortfeasor had a duty to protect the plaintiff from a particular injury, (2) the tortfeasor breached that duty, (3) the breach actually and proximately caused the plaintiff's injury, and (4) the plaintiff suffered actual harm." *Id.* at 1167–68 (citing Chaparro v. Carnival Corp., 693 F.3d 1333, 1336 (11th Cir. 2012)).
[16] Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989).
[17] *Yusko*, 4 F.4th at 1166.
[18] *Id.* at 1167.
[19] *Id.*
[20] *Id.*
[21] *Id.*

with respect to this specific type of recreational activity, the court was "therefore obliged to exercise [its] broad discretion in admiralty and maritime to develop [the] law regarding this issue."[22] The court went on to discuss several of its previous decisions, starting with *Keefe*, where it originated the notice requirement for maritime negligence claims.[23] In *Keefe*, a passenger was dancing on a cruise ship and sustained injuries from slipping on a wet surface.[24] As a result, the passenger sued the shipowner for negligent maintenance of its premises—a theory of direct liability.[25] The Eleventh Circuit in *Keefe* developed the notice requirement as a way to properly assess whether the shipowner had breached the standard of care it owed to its passengers.[26] The court explained that "as a prerequisite to imposing liability . . . the carrier [must] have had actual or constructive notice of the risk-creating condition, at least where, as here, the menace is one commonly encountered on land and not clearly linked to nautical adventure."[27] Simply put, *Keefe* established a notice requirement for negligence claims against shipowners.[28]

Following *Keefe*, the Eleventh Circuit applied the notice requirement a second time in *Everett v. Carnival Cruise Lines*.[29] In *Everett*, a cruise ship passenger "fell over a metal threshold for a fire door" and sued the shipowner for negligence under a theory of direct liability.[30] The court relied on the *Keefe* standard when it held that the passenger must establish that the shipowner had notice of the risk-creating condition for the negligence claim to be successful.[31] The court remanded the case for a new trial due to the district court's failure to apply this standard.[32] In addition to *Keefe* and *Everett*, the court cited several other maritime negligence cases in which it applied the notice requirement, noting that all of those cases were based on theories of direct liability.[33]

---

[22] *Id.* (second alteration in original) (quoting Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1232 (11th Cir. 2014)) (internal quotation marks omitted).
[23] *Yusko*, 4 F.4th at 1168.
[24] *Id.* (citing *Keefe*, 867 F.2d at 1320).
[25] *Id.* (citing *Keefe*, 867 F.2d at 1320).
[26] *Id.*; *see Keefe*, 867 F.2d at 1321–22.
[27] *Yusko*, 4 F.4th at 1168 (alteration in original) (quoting *Keefe*, 867 F.2d at 1322).
[28] *See id.*
[29] *Id.* (citing Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990)).
[30] *Id.*; *see Everett*, 912 F.2d at 1357.
[31] *Yusko*, 4 F.4th at 1168 (citing *Everett*, 912 F.2d at 1358).
[32] *Id.* (citing *Everett*, 912 F.2d at 1359).
[33] *Id.* 1168–69; *see* Chaparro v. Carnival Corp., 693 F.3d 1333, 1335–36 (11th Cir. 2012) (repeating the notice requirement where a passenger sued the shipowner for negligently failing to warn her about dangers on the island); K.T. v. Royal Caribbean Cruises, Ltd., 931 F.3d 1041, 1046 (11th Cir. 2019) (applying the notice requirement where a shipowner was sued for "negligently failing to monitor the ship's public areas").

Relying on this precedent, NCL argued that the district court correctly applied the notice requirement to Yusko's claim "because the notice requirement applies regardless of whether a negligence claim is based on a shipowner's direct negligence or its vicarious liability for an employee's negligence."[34] The court ultimately rejected NCL's argument because it "erroneously conflate[d] the very different concepts of direct and vicarious liability."[35] The court explained that the notice requirement serves the purpose of "defin[ing] the scope of a shipowner's duty to exercise ordinary reasonable care to passengers. . . . . [F]or negligent acts committed by the shipowners *themselves* . . . ."[36] The court distinguished the present case from cases like *Keefe* and *Everett* where the plaintiffs alleged wrongdoing on part of the shipowners *themselves*, not an employee.[37] When a shipowner breaches its duty of care and a passenger becomes injured, such as in *Keefe*, the shipowner is directly liable under maritime law.[38] However, in vicarious liability cases such as *Yusko*, the court noted that the notice requirement is inapplicable because the shipowner's duty is completely irrelevant.[39] Rather, the court reasoned that the shipowner may be held vicariously liable for the actions of its employees regardless if it had notice, acted, or failed to act in any way.[40] The court again clarified that "[w]hen the tortfeasor is an employee, the principle of vicarious liability allows an otherwise non-faulty employer to be held liable for the negligent acts of [that] employee acting within the scope of employment."[41] Thus, all that matters in terms of vicarious liability claims is whether an employer-employee relationship exists.[42] Where this relationship does exist, the employer may be held liable for torts committed by their employee during the course of his employment, "even if [the employer] has not violated any duty at all."[43] Therefore, the court concluded that NCL's conduct was completely irrelevant in assessing Yusko's negligence claim under a vicarious liability theory.[44]

Lastly, the court addressed NCL's argument that if the court did not apply the "notice requirement into [its] vicarious liability caselaw, the notice

---

[34] *Yusko*, 4 F.4th at 1168–69.
[35] *Id.* at 1169.
[36] *Id.* (emphasis added).
[37] *Id.*
[38] *Id.*
[39] *Id.* "But the scope of a shipowner's duty has nothing to do with vicarious liability, which is not based on the shipowner's conduct." *Yusko*, 4 F.4th at 1169.
[40] *See id.*
[41] *Id.* (second alteration in original) (citation omitted).
[42] *Id.*
[43] *Id.*
[44] *Id.* "[I]t makes very little sense to rely on caselaw about the scope of a shipowner's duty where, as here, the shipowner's duty is irrelevant." *Yusko*, 4. F.4th at 1169.

requirement in [its] direct liability caselaw [would] be superfluous."[45] NCL pointed out that both Yusko and the passenger in *Keefe* were similarly injured while dancing on a cruise ship, and questioned the logic of how one claim could fail under a direct liability theory yet the other succeed under a vicarious liability theory.[46] The court explained that the "plaintiff is the master of his or her complaint" and has the choice of which legal theory to pursue.[47] The court admitted that it may be "easier for a passenger to proceed under a theory of vicarious liability[,]" but noted that "there will be just as many occasions where passengers are limited to a theory of direct liability" due to the circumstances surrounding their injury.[48] The court concluded by expressing confidence "that the notice requirement will have a robust field of operation despite our decision not to extend it to vicarious liability."[49] In sum, the Eleventh Circuit found that the district court erred in requiring Yusko to establish as part of her claim that NCL had notice of a risk-creating condition.[50] For this reason, the court reversed and remanded the district court's grant of summary judgment in favor of NCL.[51]

The Eleventh Circuit's decision in *Yusko* is significant because for the first time it expressly limited the *Keefe* notice requirement to maritime negligence claims brought under a theory of direct liability. Relying on common law principles, the court ultimately refused to extend the notice requirement to such claims proceeding under a vicarious liability theory due to the differences between direct and vicarious liability principles with respect to an employer's duty. Going forward, the court's decision in *Yusko* will likely make it easier for plaintiffs to bring maritime negligence claims under a vicarious liability theory due to the lower burden of proof required for plaintiffs to succeed on these claims.

---

[45] *Id.* at 1170.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Yusko*, 4 F.4th at 1170.
[51] *Id.* at 1170–71.