

Admiralty Practicum

Volume 2007
Issue 2007 *Spring 2007*

Article 12

Cranford v. United States United States Court of Appeals for the 11th Circuit 466 F.3d 955 (Filed October 5, 2006)

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**ALLISION BETWEEN A PLEASURE BOAT AND A SUBMERGED WRECK AND THE
BASES OF LIABILITY FOR THE ENSUING INJURIES AND DEATH RESULTING
FROM THE ALLISION**

United States Coast Guard's marking of the submerged wreck fell within the discretionary function exception of the Federal Tort Claims Act and government's subsequent failure to remove the submerged wreck also falls within the exception.

Cranford v. United States
United States Court of Appeal for the 11th Circuit
466 F.3d 955
(Filed October 5, 2006)

On August 9, 2003, a seventeen-foot motor boat hit a wreck in Mobile Bay, which was between 6 and 18 inches below the surface, and about 100 yards north of Fort Morgan Beach. The motor boat, operated by Ronald Melech and carrying Eddie Cranford and Howard Melech, was traveling eastward parallel to the shore at about 30 miles an hour at the time of impact. The crash threw Cranford and Ronald Melech from the boat; Howard Melech, who was injured, helped Cranford, also injured, back into the boat. Ronald Melech's body did not surface until the next day.

Cranford, Howard Melech, and Diane Melech, wife of the deceased Ronald Melech, filed separate actions against the government in federal court, which were later consolidated for purposes of discovery. The allegations were twofold: the negligence of the United States government in marking the submerged wreck; the negligence of the United States government in failing to remove the submerged wreck.

The plaintiffs further alleged that the district court had jurisdiction over their claims under the Federal Tort Claims Act. The Federal Tort Claims Act is a statute that limits federal sovereign immunity and allows recovery in federal court for tort damages caused by federal employees. In bringing about this statute, Congress was recognizing the "manifold injustice that springs from the delimiting effect of the rule." 35 Am. Jur. 2d *Federal Tort Claims Act* § 1, at 296 (1967).

The government, defendant, moved to dismiss the plaintiffs' complaints on the basis that there was a lack of subject matter jurisdiction. The United States District Court for the Southern District of Alabama granted the demurrer by relying on the "discretionary function exception" of the Federal Torts Claims Act. 28 U.S.C. § 2680 (a).

On appeal, the United States Court of Appeals for the Eleventh Circuit focused on the issues of: (1) the appropriate legal standard for the discretionary function exception; (2) whether the marking of the Fort Morgan wreck falls within the exception; and (3) whether the refusal to remove the wreck falls within the exception.

The discretionary function exception of the Federal Torts Claim Act (FTCA), or 28 U.S.C. § 2680 (a), grants government employees immunity from liability in certain tort actions. The exception states that the FTCA, which facilitates granting liability to government employees, will not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The plaintiffs' first contention, that the government was negligent in the Coastguard's marking of the submerged wreck, is defeated when it becomes clear that the pertinent regulations and statutes do not *require* marking any structure or sunken vessel. Rather, the relevant statute that gives authority to the Coast Guard to mark such wrecks or structures provides, "The Secretary *may* mark . . . any sunken vessel or other obstruction existing on the navigable waters . . . of the United States *in such manner and for so long as, in his judgment, the needs of maritime navigation require.*" 14 U.S.C. § 86 (emphasis added).

The plaintiffs contend that the government's failure to remove the submerged wreck falls within the discretionary function exception. The plaintiffs refer to the Wreck Act, which states:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or *to sink, or permit or cause to be sunk, vessels or other craft in navigable channels* And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be *the duty of the owner, lessee, or operator of such sunken craft to immediately mark it* with a buoy or beacon during the day and, unless otherwise granted a waiver by the Commandant of the Coast Guard, a light at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner, lessee, or operator so to do shall be unlawful. 33 U.S.C.A. § 409 (Emphasis added).

Alone, this section requires the government to remove the submerged wreck and failure to do so renders the government liable for illegal conduct. An earlier section of the statute, however, section 403, grants the government the authority to create obstructions, such as breakwaters. 33 U.S.C.A. § 403. Section 403 shields the government from liability in this circumstance and nullifies plaintiffs' reliance on section 409 of the Wreck Act.

The United States Court of Appeals, Eleventh Circuit, held that the Coast Guard's marking of the submerged wreck did fall within the discretionary function exception of the Federal Tort Claims Act and that the government's failure to remove the submerged wreck also falls within the exception. The order of the United States District Court for the Southern District of Alabama is affirmed and the boaters' appeal is denied.

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