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Elke Specker v. Michael Kazma, an individual; Mako Shark Diving, LLC, a California limited liability company; Yellow Charter Boat, Inc., a California corporation; In Personem Cetus Specula, In Rem, Defendants United States District Court, S.D. California 2016 WL 3924106 (Decided July 21, 2016)

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**THE LOCALITY AND RELATIONSHIP TEST BETWEEN AN INCIDENT AND
MARITIME ACTIVITY FOR AN ADMIRALTY OR MARITIME CASE RELATED TO
CONTRACTS AND TORTS MUST BE MET TO HAVE ORIGINAL FEDERAL
JURISDICTION**

Elke Specker v. Michael Kazma, an individual; Mako Shark Diving, LLC, a California limited liability company; Yellow Charter Boat, Inc., a California corporation; In Personem Cetus Specula, In Rem, Defendants

United States District Court, S.D. California
2016 WL 3924106
(Decided July 21, 2016)

The District Court denied the defendants’ motions to dismiss for lack of subject matter jurisdiction, finding that the incident met the requirements of a locality and relationship test for maritime jurisdiction, and held that one defendant engaged in traditional maritime activity is all that is required in order to subject all defendants to maritime jurisdiction.

Plaintiff Elke Specker, who suffered a shark bite, brought a negligence action against defendants Michael Kazma; Mako Shark Diving, LLC (“Mako”); Yellow Charter Boat, Inc. (“Yellow Charter”); and Cetus Specula.³¹ Kazma, the instructor; Mako, the instructor’s company; and Yellow Charter, the company from whom Kazma charter the vessel; were named as in personam defendants while the vessel Cetus Specula was named as an in rem defendant.³²

On June 13, 2015, Specker joined a shark diving expedition led by Kazma, on board the Cetus Specula.³³ Kazma hand-fed sharks while Specker filmed the expedition.³⁴ Specker claims that Kazma was intoxicated during the expedition, causing him to negligently lead the divers to an unsafe area of the water.³⁵ Specker claims that Kazma held the shark bait in a way as to lead a shark directly toward Specker.³⁶ As a result of the subsequent shark attack, Specker suffered serious injuries and disfigurement.³⁷ Specker did not claim that her injuries were the direct result of negligence of any of the in personam defendants.³⁸ She claimed that the Cetus Specula’s negligence was the direct cause of her injuries by (1) having an instructor who was intoxicated; (2) creating an unsafe condition; (3) operating the vessel in an unsafe condition; and (4) not properly hiring and training the vessel’s staff.³⁹

Specker commenced this action on November 16, 2015.⁴⁰ On January 5, 2016, Yellow Charter and Cetus Specula filed an answer.⁴¹ Kazma filed an answer on January 8, 2016. Kazma and Mako Shar Diving, LLC (collectively, Kazma) filed a motion to dismiss for lack of subject

³¹ *Specker v. Kazma*, 2016 WL 3924106, at 1 (S.D. Ca. 2016).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.* at 1-2.

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).⁴² Yellow Charter and Cetus Specula also filed a motion to dismiss under 12(b)(1), with Yellow Charter including a motion to dismiss under Rule 12(b)(6) for failure to state a claim.⁴³ Under Rule 12(b)(6), the motion must be made before the service of a responsive pleading.⁴⁴ However, Yellow Charter had already filed its answer.⁴⁵

Under Rule 12(b)(1), the plaintiff has the burden of proving that jurisdiction exists on a motion to dismiss for lack of subject matter jurisdiction.⁴⁶ Federal courts have original jurisdiction to hear admiralty and maritime cases related to contracts and torts.⁴⁷ A plaintiff must meet the requirement of (1) a locality test; and (2) a relationship test to show a connection between the incident and maritime activity.⁴⁸ This relationship test includes (a) “whether the incident has a potentially disruptive impact on maritime commerce,” and (b) “whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.”⁴⁹

The locality test requires that the activity happen “in the place where the injury occurs.”⁵⁰ In this case, Specker was bitten by a shark while in the water off the coast of California. Therefore, the locality test was satisfied.⁵¹

To satisfy the relationship test, the incident must be considered at an “intermediate” level of generality.⁵² In this case, the court viewed the incident as “an injury suffered by a scuba diver in navigable waters after diving off a commercial vessel.”⁵³

The first step of the relationship test regards “potential effects” and “whether the general features of the incident were likely to disrupt commercial activity.”⁵⁴ When a scuba diver is injured in navigable waters, one potential effect is the diversion of another vessel to help the diver.⁵⁵ Another potential effect is the loss of a crewmember who must tend to the diver, leaving the crewmember unavailable for other duties.⁵⁶ This “potential effect” rule applies to recreational vessels.⁵⁷ The court in this case found that the “potential effects” step was satisfied since tending to Specker’s injury had a potential impact on maritime commerce.⁵⁸

The second step of the relationship test requires “the tortfeasor’s activity [to] be ‘so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply.’”⁵⁹ The activity must be considered generally, but not so

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 6.

⁴⁵ *Id.*

⁴⁶ *Id.* at 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)).

⁵⁰ *Id.* (quoting *Taqghadomi v. U.S.*, 401 F.3d 1080, 1084 (9th Cir. 2005)).

⁵¹ *Id.*

⁵² *Id.* at 3. (quoting *Grubart*, 513 at 538).

⁵³ *Id.* at 3.

⁵⁴ *Id.* (quoting *Grubart* 513 U.S. at 538).

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.* See, e.g., *In re Mission Bay Jet Sports, LLC*, 570 F. 3d 1124, 1129-30 (9th Cir. 2009).

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* (quoting *Gruver v. Lesman Fisheries Inc.*, 489 F.3d 978, 983 (9th Cir. 2007)).

generally to exclude the maritime context.⁶⁰ Kazma argues that Specker's activity should be considered as "swimming with fish," but the court found that this only considers the activity immediately surrounding the shark attack.⁶¹ If the activity was considered as just that of swimming with fish, it would not satisfy a relationship to a traditional maritime activity.⁶² To satisfy the substantial relationship test, "all that is required is that one of the alleged tortfeasors be engaged in a traditional maritime activity, and that such activity is claimed to have been a proximate cause of the incident."⁶³

Specker claimed that Kazma was negligent since he was intoxicated while feeding the sharks.⁶⁴ She claimed that the Cetus Specula was negligent by allowing Kazma to be intoxicated, "creating an unsafe condition, failing to operate safely, and failing to properly hire, train and supervise its crew."⁶⁵ Specker did not have a factual claim against Yellow Charter for its negligence.⁶⁶ However, the Cetus Specula, which transported Specker to the scene of the incident, was involved in traditional maritime activity.⁶⁷ Only one defendant engaged in traditional maritime activity is required in order to subject all defendants to maritime jurisdiction.⁶⁸ Specker's activity and injury was dependent on the relationship among the four defendants, as "she could not have participated in the activity if any four named parties were absent."⁶⁹

The court denied Kazma's and Mako's motion to dismiss under Rule 12(b)(1), denied Cetus Specula's and Yellow Charter's motion to dismiss under Rule 12(b)(1), and denied Yellow Charter's motion to dismiss under Rule 12(b)(6).⁷⁰

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⁶⁰ *Id.* See *Gruver*, 489 F.3d at 986.

⁶¹ *Id.* at 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* at 6.