UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

DANIEL J. REGAN, ET AL	:	**CIVIL ACTION NO. 5:06 CV 1257**
	:	
versus	:	**DISTRICT JUDGE HICKS**
	:	
	:	**MAGISTRATE JUDGE HORNSBY**
STARCRAFT MARINE LLC,	:	
JOHN C. VANDERGRIFF, ET AL	:	**JURY DEMAND**

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PROPOSED JURY INSTRUCTIONS

MEMBERS OF THE JURY:

PLAINTIFFS' PROPOSED JURY CHARGE NO. 1

RESPONSIBILITY OF JURORS

It now becomes my duty to tell you the law that applies to this case, and it is your duty, as I mentioned at the beginning of the trial, to follow that law as I shall now state it to you.

Before I tell you the law, however, let me make some general comments about your responsibility as jurors. You have been chosen from the community to make a collective determination of the facts in this case. What the community expects of you, and what I expect of you, is the same thing that you would expect if you were a party to this suit: . . . an impartial deliberation and conclusion based upon all the evidence presented in this case and on nothing else.

This means you must deliberate on this case without regard to sympathy, prejudice, or passion for or against any party to this suit. This means the case should be considered and decided as an action between persons of equal standing in the community. All persons stand equally before the law and are to be dealt with as equals in a court of justice. A corporation or an insurance company is entitled to the same fair trial at your hands as a private individual. All persons stand equal before the law, and are to be dealt with as equals in our courts.

Above all, the community wants you to achieve justice, and your success in that endeavor depends upon the willingness of each of you to seek the truth as to the facts from the same evidence presented to all of you and to arrive at a verdict by applying the same rules of law as I give them to you.[1]

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.[2]

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[1] Jury Charge adopted for use in *Boutin v. Newfield Exploration Co., et al*, C.A. No. 6:07-CV-0567, U.S. District Court, Western District of Louisiana, Lafayette Division (Judge Rebecca Doherty).
[2] Fifth Circuit Pattern Jury Instruction 2.11

PLAINTIFFS' REQUESTED JURY CHARGE NO. 5

ELEMENTS OF THE CLAIM AND BURDEN OF PROOF

In a lawsuit for damages, the plaintiffs must prove by a preponderance of the evidence: (1) that the defendants had a legal duty or responsibility to act according to a certain standard of care set by the law under the circumstances; (2) that the defendants failed to act according to the standard of care set by the law under the circumstances; (3) that the conduct of the defendants was an actual cause of injury or damage to the plaintiff; (4) that the conduct of the defendants is the kind of activity that the legal duty or standard is designed to protect against, and therefore makes the defendants liable for any injury or damage that comes to others; and (5) that the plaintiffs actually sustained injury or damage. In this case, the plaintiffs must prove every essential part of their claim by a preponderance of the evidence.

A preponderance of the evidence simply means evidence that persuades you that the plaintiffs' claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the plaintiffs' claim by a preponderance of the evidence, you should find for the defendants as to that claim.[12] On the other hand, if you find that plaintiffs have established by a preponderance of the evidence each element of plaintiffs' claim, then you should find for the plaintiffs as to that claim.

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[12] Fifth Circuit Pattern Jury Instruction 2.20

PLAINTIFF'S REQUESTED JURY CHARGE NO. 7

I will now explain the law of strict products liability. A company "engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[13]

[13] *Restatement of Torts 3d*, - Products liability, § 1

STARCRAFT'S REQUESTED JURY CHARGE NO. 2

STRICT LIABILITY

This is a case in which the plaintiffs are proceeding under a concept known as strict liability. Strict liability does not mean absolute liability. Plaintiffs claim damages for personal injuries alleged to have been caused by a defective condition or conditions in the 2004 Starcraft pontoon boat manufactured and sold by Starcraft. In order to recover, plaintiffs must prove that the pontoon boat was defective and that the alleged defect was the proximate cause of plaintiff's accident. *East River Steamship Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986);

Plaintiffs object in that this is covered in Plaintiffs' Proposed Jury Charge #1, paragraph 3, Plaintiffs' Proposed Jury Charge# 7 and is further explained in charges # 8-19 all of which are direct quotes from the Restatement of Torts 3rd.

Starcraft responds that the plaintiffs' charges do not clearly explain the meaning of strict liability. Starcraft does not agree that strict liability is discussed in Plaintiffs' Proposed Jury Charge #1, Paragraph 3. Starcraft's position is that this Requested Jury Charge will assist the jury in understanding the concept of strict liability.

Plaintiffs reply that the meaning of strict liability is explained in Plaintiffs' Reqeusted Jury Charges Number 9-11.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 8

I have used the word "defective." I will define that term for you. A product may be defective in three different ways. "A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."

Restatement of Torts 3d, § 2

Starcraft objects to this jury charge. Plaintiffs have not alleged a cause of action based on manufacturing defect. None of the experts retained by the plaintiffs have stated that the boat did not depart from its intended design. In addition, plaintiffs have not alleged a cause of action based on design defect. None of the plaintiffs' experts have set forth a reasonable alternative design. Starcraft, therefore, requests that this jury charge be revised to read as follows:

"I have used the word "defective." A product can be defective in three different ways. In this case, the plaintiffs are alleging that the boat is defective because of inadequate instructions or warnings."

Plaintiffs' Response: Plaintiffs' have alleged manufacturing and design defects (see Complaint Doc #1, p. 3 of 5, Pretrial Order Doc# 248, pp. 7-9. Plaintiffs can establish manufacturing defects in that the rails were lower in height than specifications called for. Plaintiffs can establish defects in design as well as reasonable alternative designs. See Plaintiffs' Opposition to Motion in Limine on Alternative Designs Doc #261.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 10

I used the term "defect in design." I will define that term for you. "A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain or distribution, and the omission of the alternative design renders the product not reasonably safe."

Restatement of Torts 3d, § 2(b)

Starcraft objects to the inclusion of this jury charge. Plaintiffs have not set for the elements of a design defect. None of the experts have set forth proof of a reasonable alternative design. A motion in *limine* is also pending on this issue. As no alternative design issue was raised timely by the plaintiffs, it must be excluded.

Plaintiffs' Response: See Plaintiffs' comments on Plaintiffs' requested charges No. 8 and No. 9.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 11

I have used the term "defective because of inadequate instructions or warnings." I will define that term for you. "A product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision or reasonable instructions by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe."

Restatement of Torts 3d, § 2(c)

STARCRAFT'S REQUESTED JURY CHARGE NO. 4

FAILURE TO HEED WARNING

A product, no matter how well it was designed or manufactured, will subject the manufacturer to liability if it presents a potential for injury and is not accompanied by warnings of risks incident to its intended or foreseeable use or by adequate instructions for its use. But when a potentially injurious product is accompanied by an adequate warning, the law does not view it as defective. A manufacturer is entitled to assume that any such warnings will be heeded, and that instructions for use will be followed.

It is for you to determine whether such warnings or directions for use in the instant case were adequate. If you find this to be the case, and if you determine from the evidence that this plaintiff would not have sustained the injury that is alleged to have been suffered had the warning been heeded or the directions followed, you cannot find the defendant liable.

If you find that there was a lack of warnings on this boat, this is not a cause of the accident if you find that the plaintiff would have read the warnings.

Instructions on Products Liability § 7.19; *Safeco Ins. Co. v. Baker*, 515 So. 2d 655 (La. App. 1987); *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987) (superseded by LPA on definition of "normal use").

Plaintiffs' object to this charge as not representing the maritime products liability rule which is set out verbatim from Restatement of Torts 3rd. See Plaintiffs' Requested Charge #11. Plaintiffs also believe that this charge is one- sided in its language.

Starcraft responds that Plaintiffs' Requested Charge #11 does not state that the jury is to decide the adequacy of the warning. This was ruled on at the March pretrial conference.

Plaintiffs reply that Starcraft's response that "Plaintiffs' Requested Jury Charge Number 11 does not state that the jury is to decide that the adequacy of the warning" can be cured by adding to Plaintiffs Charge 11 the following: "It is up to you, the jury, to determine whether the product is defective because of inadequate instructions or warnings, as I have explained to you."

Starcraft's response: Plaintiffs Jury Charge 11 does not adequately define how a warning is inadequate and when a manufacturer can be found liable for inadequate warnings.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 12

"In connection with liability for defective design for inadequate instructions or warnings:

(a) a product's noncompliance with applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation;

(b) product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law, a finding of product defect."

Restatement of Torts 3d, § 4(b)

Starcraft objects to the inclusion of this charge. The plaintiffs have not alleged that the boat violated "an applicable product safety statute or administrative regulation." The plaintiffs have only alleged that the boat did not comply with a voluntary standard developed by the ABYC. The ABYC is a Council made up of members. There is no statutory or regulatory authority for the ABYC. It is merely a voluntary organization. The comments to the RST3d § 4 state as follows: "a. Product safety statutes or administrative regulations. The safety statutes and administrative regulations referred to in this Section are those, promulgated by federal and state and local legislatures and agencies, intended to promote safety in the design and marketing of products. The phrase 'safety statute or administrative regulation' is intended to be inclusive of all final governmental edicts and directives, issued pursuant to such statutes or regulations, that establish binding safety

standards for the design and marketing of products." The ABYC standards are not binding standards established by a federal, state or local legislature or agency. This section of the Restatement, therefore, is inapplicable and the jury charge should be withdrawn.

Plaintiffs' Response: Plaintiffs believe that this charge is appropriate because of this vessel's violation of ABYC standards which set out the industry's safety standards and, in the words of Starcraft's expert Augusto Villalon in his expert report, is the "gold standard" when it comes to recreational boating safety standards.

Starcraft responds that being the "gold standard" does not equal being a product safety statute or administrative regulation. Since the ABYC is neither a statute nor regulation, this jury charge is inapplicable.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 14

Removed by agreement.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 17

"A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor becoming a continuation of the predecessor."

Restatement of Torts 3d, § 12.

Starcraft submits that this proposed jury charge is not applicable. There is no issue involving successor liability. In the pretrial order, at stipulated fact 2, Starcraft states that it "is responsible for the design, manufacture and warnings of the subject boat."

Plaintiffs' Response: Starcraft has since merged with Smokercraft. This issue may be resolved by additional stipulation.

Starcraft and plaintiffs are in the process of perfecting a stipulation which should alleviate the need for this instruction.

STARCRAFT'S REQUESTED JURY CHARGE NO.6

SUPERSEDING OR INTERVENING CAUSE

The negligence of another actor or actors can serve as an intervening, superseding cause of the accident to shield Starcraft from liability to plaintiffs if the act or omission was so extraordinary as not to have been reasonably foreseeable. In this case, Starcraft contends that the individual or combined negligence of plaintiffs, Vandergriff and the United States was so extraordinary as to be unforseeable to Starcraft or anyone similarly situated. If you find this to be the case, you must find in favor of Starcraft even if you have already found that the product contained one or more defects, at least one of which was a proximate cause of the accident.

Baker v. Outboard Marine Corp., 595 F.2d 176 (3rd. Cir. 1979).

Plaintiffs' Object. Plaintiffs believe that this proposed charge is argumentative, one sided and that the facts of this case do not justify the giving of an "intervening and superceding cause" charge. Plaintiffs believe, in addition, that even if warranted by the facts, this proposed charge is not an accurate or complete statement of the rule regarding superceding or intervening causes. See Plaintiffs' charge # 23. In the event that the court finds that an intervening/superseding instruction is warranted (which Plaintiffs do not believe is the case) a more accurate and balanced statement of the law is as follows: "Starcraft Marine LLC alleges that the acts of John Vandergriff and/or Daniel Regan constitute a superseding cause, which Vandergriff and Regan deny. I instruct you that an intervening act amounts to a superseding cause where the subsequent actor's negligence was neither "normal" nor "reasonably foreseeable." In other words, 1) the intervening act must bring about a harm that is different in kind from that which would otherwise have

resulted from Starcraft's alleged negligence; and 2) the intervening act must not be a normal result of the defendant's alleged original negligence." The Law of Maritime Personal Injuries § 16:66 (5th ed.), forms, Robert Force and Martin J. Norris.

Starcraft responds that Plaintiffs' Charge No. 23 does not address a superseding or intervening cause. Starcraft believes that the case law cited should be used rather than plaintiffs' proposed definition from a secondary source.

Plaintiffs reply: Plaintiffs believe their proposed charge is balanced and accurately states the law. Plaintiffs believe defendant's charge is neither.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 21

NEGLIGENCE

Negligence is measured by what the reasonable person or reasonable company would do or not do. In answering the question of whether Starcraft Marine was negligent, you may ask whether Starcraft Marine took actions or did things which a reasonable company would not have done and/or whether Starcraft Marine failed to take actions or do things which a reasonable company would have done. In addition, in answering the question of whether Vandergriff was negligent, you may ask whether Vandergriff took actions or did things which a reasonable person would not have done and/or whether Vandergriff failed to take actions or do things which a reasonable person would have done. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); Thomas J. Schoenbaum, *Admiralty and Maritime Law, 4 Ed.*, § 5-2.

STARCRAFT'S REQUESTED JURY CHARGE NO.3

ACCIDENT

"Negligence is not presumed from the mere happening of an accident." Nor does the mere happening of an accident by itself indicate that a product is defective. *Fidelity & Casualty Co. v. Funel*, 383 F.2d 42 (5th Cir. 1967); *Sanders v. Bain*, 722 So. 2d 386 (2d Cir. 1998).

PLAINTIFF'S REQUESTED JURY CHARGE NO. 23

MULTIPLE CAUSES

The law recognizes that there can be multiple causes of an accident. *Pino v. Gauthier*, 63 3 So.2d 638, 650-51 (La.App. 1st Cir. 1993).

I instruct you that where there are multiple causes of an accident, you may find that the defendants' conduct was a substantial factor in causing the accident if you find:

(1) when the plaintiff's harm would not have occurred absent the specific defendant's conduct";

(2) If the defendants' conduct was one of multiple causes and "each of the multiple causes played so important a role in producing the result that responsibility should be imposed upon each item of conduct, even if it cannot be said definitively that the harm would not have occurred 'but for' each individual cause"; or

(3) If the "actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm."

Perkins v. Energy Corp., 782 So.2d 606, 611-12 (La. 3/23/2001).

Starcraft objects to this proposed jury charge. This jury charge sets out the "substantial factor" test. The jury should only apply one of the tests –"but for" or "substantial factor." *Perkins v. Energy Corp.*, 782 So.2d 606, 611-12 (La. 2001).

Plaintiffs' Response: Plaintiffs believe that causation requires both "but for" and "substantial factor".

Starcraft responds that only one of the tests should apply and be instructed on – either "but for" or "substantial factor."

Plaintiffs' Reply: A fair reading of *Perkins* allows the jury to utilize any or all of the tests.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 26

COMPARATIVE FAULT

"Failure to take every precaution against every foreseeable risk or to use extraordinary skill, caution and foresight does not constitute negligence.... [The plaintiff] is required only to use reasonable precautions, and [his] conduct in this regard is not negligent if, by a common-sense test, it is in accord with that of reasonably prudent persons faced with similar conditions and circumstances."

Dupas v. City of New Orleans, 354 So.2d 1311, 1313 (La. 1978), quoting *Smolinski v. Taulli*, 276 So.2d 286, 290 (La. 1973).

Starcraft recommends that the following jury instruction be used for comparative fault instead of this proposed instruction:

The law provides that Starcraft is liable, regardless of fault, for injury which results from a defect in the product which existed at the time it was placed on the market.

If you find this to be the case in this action, and if you also find from the evidence that the plaintiff by his negligence in part contributed to the injury, then it is your duty to determine what proportion of the resulting damage was a result of the plaintiff's own negligence. The plaintiff's damages will be reduced to the extent of that sum which represents the proportionate degree of plaintiff's fault

Jury Instructions on Products Liability § 9.03; *Vickers v. Chiles Drilling Co.*, 882 F.2d 158 (5th Cir. 1989); *Falgoust v. Richardson Industries, Inc.*, 552 So. 2d 1348 (La. App. 1989).

Plaintiffs' reply: Plaintiffs believe its requested charge and that of Starcraft should be read together.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 30

COMPENSATORY DAMAGES

You may award compensatory damages only for injuries that the plaintiff proves were proximately caused by the defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:[16]

Plaintiff's Requested Special Charge:

1) physical injury, disability and disfigurement;

2) lost earnings, past and future;

3) loss of earning capacity;

4) medical expenses, past and future;

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[16] Fifth Circuit Pattern Jury Instruction 15.

) physical pain and suffering, past and future;

6) mental anguish and distress, past and future, including loss of enjoyment of life

7) loss of enjoyment of life; and

8) loss of consortium of Francis E. Regan.

Starcraft would like to add the following language to the end of the third paragraph: "Any damages awarded must not be based on speculation."

Plaintiffs' Response: This is covered in the second paragraphs' reference to not engaging in arbitrary guesswork.

Starcraft objects to the including the loss of consortium claim for Francis Regan. Missouri law should apply to Mr. Frances Elwood Regan, Jr.'s claim for damages. He is a Missouri resident. All of his damages have occurred in the State of Missouri. Missouri law does not recognize parental loss of consortium damages. *Powell v. American Motor Corp.*, 834 S.W. 2d 184 (Mo. 1992). Mr. Frances Elwood Regan, Jr. should not, therefore, be entitled to damages in this action.

Also, the Fifth Circuit has determined that loss of society and loss of consortium are synonymous. *Walker v. Armogene Braus,* 861 F. Supp. 527 (E.D. La. 1994). If the Court allows these charges, they should be combined.

Starcraft also responds that *In re Denet Towing Serv., Inc.* is not applicable. That case is distinguishable as it involves a seaman. Regan is not a seaman. Under *Walker*, a

plaintiff is not entitled to recover loss of society or loss of consortium damages in a case involving a non-seafarer. See also, *Doyle v. Graske*, 579 F.3d 898 (8th Cir. 2009).

Plaintiff's Response To Starcraft's Objection Re Loss of Society Claim

In *American Export Lines, Inc. v. Alvez*, 100 S. Ct. 1673, 1674 (1980) the Supreme Court extended the general maritime law right to recover loss of society damages to injury cases. In *Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990), the Supreme Court held that a survivor of a true seaman could not recover loss of society damages in general maritime death cases. Some lower courts interpreted *Miles* narrowly finding that only true seamen were denied the right to recover loss of society damages and that all other maritime plaintiffs, like the father of Daniel Regan, could. recover for this item of damage. See e.g. *Schumacher v. Cooper,* 850 F. Supp. 438, 453-454 (D.South Carolina, 1994) (swimmer's general maritime negligence claim against boat operator); *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199, 200-202 (W.D. Mich. 1994) (maritime products liability claim); *In Re Denet Towing Service, Inc.*, 1999 WL 329698 (E.D. La. 1999) (seaman's loss of society claim against non-employer third party under general maritime law). Despite harsh scholarly criticism of *Miles* [see e.g. Robert Force, *The Curse of Miles v. Apex Marine Corp., The Mischief of Seeking "Uniformity" and Legislative Intent in Maritime Personal Injury Cases*, 55 La. L. Rev. 745 (1993); Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com 249 (1993)], other lower courts interpreted *Miles* broadly to deny loss of society damages no all maritime plaintiffs including non-seamen. See e.g. *Walker v. Armogne Braus*, 861 F. Supp. 527 (E.D. La. 1994). An extensive review of the split in jurisprudence on the issue of post *Miles*

recoverability of loss of society damages and the related issue of punitive damages post-*Miles* can be found at Robert Force, *The Legacy of Miles v. Apex Marine Corp.*, 30 TLNMLJ 35 (2006). In a 2008 decision involving the related issue of post-*Miles* punitive damages, the Supreme Court chose the narrow interpretation of *Miles* and specifically cited with approval its previous decision of *Alvez, supra* in which it recognized a non-seaman's right to recover loss of society damages in a general maritime law injury case like the one *sub judice*. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2630, footnote 21 (2008). Plaintiffs acknowledge the contrary holding in *Doyle v Graske*, 579 F. 3d 898 (8th Cir. 2009) but suggest that the ruling and reasoning of the Court in *Doyle* is wrong primarily because it ignores *Baker's* approval of *Alvez*, supra, and also fails to recognize or utilize *Baker's* fundamental change in the test for determining when federal statutory law preempts the application of a general maritime rule. John W. deGravelles, *Supreme Court Charts Course For Maritime Punitive Damages*, 22 U.S.F.Mar. L.J. 123 (2010), 146-149. Plaintiffs are prepared to do more extensive briefing on this issue should the Court desire same.

PLAINTIFF'S REQUESTED JURY CHARGE NO. 33

INJURY/PAIN/DISABILITY/DISFIGUREMENT/ LOSS OF CAPACITY FOR ENJOYMENT OF LIFE

"A tort which gives rise to mental anguish or emotional upset on the part of the injured party creates a claim for damages which is separate and distinct from any claim for physical pain and suffering."

Harris v. Pineset, 499 So.2d 499, 506 (La. App. 2nd Cir. 1986).

PLAINTIFF'S REQUESTED JURY CHARGE NO. 34

INJURY/PAIN/DISABILITY/DISFIGUREMENT/
LOSS OF CAPACITY FOR ENJOYMENT OF LIFE

Fright, fear or mental anguish while the ordeal of a physical injury is in progress is compensable apart from the actual physical injury with attendant pain and suffering sustained by the plaintiff because of an injury.

Dawson v. Stuart, 437 So.2d 974, 976 (La. App. 4th Cir. 1983).