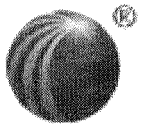

**ALI ELMADARI and DIANE ELMADARI, Plaintiffs, v. BELL STEAMSHIP COMPANY, Defendant.**

**Civil No. 5-96-183 (JRT/RLE)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FIFTH DIVISION**

*1998 U.S. Dist. LEXIS 23295; 1999 AMC 2924*

**September 30, 1998, Decided**
**September 30, 1998, Filed**

**DISPOSITION:** [*1] Plaintiffs' first objection was overruled and second objection was granted. Magistrate Judge's report and recommendation was granted in part and rejected in part. Defendant's motion for summary judgment was granted in part and denied in part. Counts II and IV of the Amended Complaint were dismissed, with prejudice.

**COUNSEL:** James J. Courtney, III, LAW OFFICE, Duluth, MN, for plaintiffs.

Tim A. Strom, HANFT, FRIDE, O'BRIEN, HARRIES, SWELBAR & BURNS, Duluth, MN, for defendant.

Thomas W. Emery and Peter Worden, Jr. GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, Detroit, MI, for defendant.

**JUDGES:** JOHN R. TUNHEIM, United States District Judge.

**OPINION BY:** JOHN R. TUNHEIM

**OPINION**

**MEMORANDUM OPINION AND ORDER ON REPORT AND RECOMMENDATION**

Plaintiff Ali Elmadari ("Elmadari") and his wife, Diane Elmadari, brought this action against defendant Bell Steamship Company alleging personal injuries and loss of consortium resulting from an accident that occurred aboard defendant's ship. This matter is before the Court on plaintiffs' objection to the Report and Recommendation of the Magistrate Judge [*2] dated July 13, 1998. The Magistrate Judge recommended that defendant's motion for summary judgment be granted and that Counts I, II, and IV of plaintiffs' complaint be dismissed with prejudice.

The Court has reviewed *de novo* plaintiffs' objection to the Report and Recommendation pursuant to *28 U.S.C. § 636(b)(1)(C)* and D. Minn. LR 72.1(c)(2). For the reasons set forth in the Report and Recommendation, the Court agrees with the Magistrate Judge that defendant's vessel was seaworthy.

Few facts appear to be in dispute. Elmadari was an employee working and living aboard defendant's ship at the time the accident occurred. He shared quarters with another of the ship's employees, John Burress ("Burress"). The night before the accident occurred Burress rigged a piece of personal exercise equipment to the door of their quarters. The equipment slid under the door, was attached to the door by tightening a wing-nut, and protruded above the floor. Early the next morning Elmadari awoke and proceeded across their quarters,

tripping over the exercise device and injuring his back.

Plaintiffs' first claim for damages arises under general maritime law under the doctrine [*3] of unseaworthiness. The unseaworthiness doctrine holds that a shipowner owes a duty to provide "a vessel and appurtenances reasonably fit for their intended use." *Mitchell v. Trawler Racer, 362 U.S. 539, 550, 4 L. Ed. 2d 941, 80 S. Ct. 926 (1960)*. The shipowner's duty is not grounded in negligence, but rather is an absolute duty independent from the duty to exercise reasonable care. *Id. at 549*. The shipowner is liable for damages resulting from an unseaworthy vessel regardless of whether it had actual or constructive knowledge of the defect, and regardless of whether the defect was temporary or permanent. *Id. at 549-50*.

The shipowner's liability is not limitless, however. In *Morales v. City of Galveston, 370 U.S. 165, 170, 8 L. Ed. 2d 412, 82 S. Ct. 1226 (1962)*, the Supreme Court held that for liability to arise the vessel must be in some way unfit for service. *Morales* enumerated several defects which could give rise to unfitness, including defective gear, appurtenances in disrepair, unfit crew and improper loading or stowage. *Id. at 170*. As *Morales* suggests, unfitness can result not only [*4] from the presence of a faulty piece of ship's equipment, but also from the absence of something appurtenant to the ship which, if present, would have eliminated the hazard. *Id.* at n.9. (discussing whether unfitness resulted from the absence of a forced ventilation system to diffuse fumes from contaminated grain which injured several people on board the ship). Unfitness does not result, however, when the thing causing the injury is an agent brought on board from outside that is not related to the ship itself, its appurtenances, or its crew. *Id. at 171* (finding no unfitness when the injury was caused by the "introduction of a noxious agent from outside," namely, contaminated grain stowed for shipment).

The exercise equipment that precipitated Elmadari's injury, like the contaminated grain in *Morales*, was an agent introduced from the outside. Plaintiffs cleverly argue that when Burress attached the equipment to the door, the door and the equipment in combination became an unfit appurtenance to the ship. The Court finds this argument unpersuasive. The equipment did not suddenly become a part of the door simply because a wing-nut held it there, any more than the grain in [*5] *Morales* became a part of the cargo hold where it was stowed. The shipowner did not supply the exercise equipment to be used in the crew's required routine, but rather was a personal item that Burress brought on board for his own enjoyment. The device was therefore not a part of the ship's equipment.

Plaintiffs cite *Mitchell* for the proposition that things placed on board by crew for their personal use can become appurtenances causing a ship to be unseaworthy. *Mitchell* does not support this proposition. [1] That case addressed only the issue of whether constructive notice to the shipowner is a necessary element of liability, and not the scope of the ship itself or of its appurtenances. *362 U.S. at 542, 549-50*. Plaintiffs additionally cite *Di Salvo v. Cunard S.S. Co., 171 F. Supp. 813, 823 (S.D.N.Y. 1959)*, for the proposition that an appurtenance, such as the door, in combination with an outside agent, such as the exercise equipment, can create a condition of unseaworthiness. On close reading of the facts, however, *DiSalvo* merely suggests that when two pieces of otherwise safe ship equipment are used incorrectly in combination, unseaworthiness [*6] may result. Moreover, to the extent that *DiSalvo* does support the proposition for which plaintiffs cite it, that proposition contradicts the later Supreme Court case of *Morales v. City of Galveston* and is therefore no longer good law. For these reasons, the exercise equipment it is not properly viewed as either appurtenant to the ship or as a part of its equipment. Because plaintiffs do not point to parts of the ship, its appurtenances, its crew, or its unloading or stowage procedures that are either defective or improperly absent, they do not state a claim for damages under the doctrine of unseaworthiness.

1 The plaintiff in *Mitchell* slipped on a ladder which had become covered in slime when crew unloaded fish spawn from the ship. According to their employment contract, the crew were permitted to sell and keep the proceeds of any fish spawn brought on board the fishing vessel. Plaintiffs consequently analogize the spawn in that case to the exercise equipment in the present case as an outside agent brought on board for the crew's personal use. The difficulty with plaintiffs' argument is that *Mitchell* does not address whether the spawn was loaded separately for the benefit of the crew, or whether it was loaded as a matter of course as part of the fishing process. *362 U.S. at 539, 540* and n.1. Unfitness in *Mitchell* could thus be found as a result of

defective unloading procedures related to the ship's business, and therefore, we cannot assume that the facts of *Mitchell* are analogous to the case at bar.

[*7] Plaintiffs' second claim for damages arises under the Jones Act, *46 U.S.C. § 688*. The Jones Act creates a cause of action in negligence for seamen who are injured in the course of their employment. *Id.* The Act incorporates the Federal Employer's Liability Act ("FELA"), *45 U.S.C. §§ 51-60*, which holds employers vicariously liable for the negligent acts of their employees. Congress originally enacted the Jones Act as a form of "welfare legislation that created new rights in seamen for damages arising from maritime torts." *Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790, 93 L. Ed. 1692, 69 S. Ct. 1317 (1949)*. As such, courts do not read the Act restrictively, but rather hold that it is "entitled to a liberal construction to accomplish its beneficent purposes." *Id.*

Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment states two distinct theories of liability under the Jones Act -- that defendant is vicariously liable for the negligent acts of Burress, its employee, and alternatively, that defendant is directly liable in negligence for failure to properly inspect the premises and [*8] make them safe. The Magistrate Judge recommended granting defendant's motion with regard to both theories. Because plaintiffs did not object to the Magistrate Judge's recommendation with respect to liability for direct negligence, the Court will address only the issue of defendant's liability under the doctrine of respondeat superior for Burress's alleged negligence.

The central question at issue under this theory is whether Burress was acting in the scope of his employment when he placed the exercise equipment under the door. Vicarious liability does not arise under the Jones Act if the negligent employee was acting outside the scope of his employment. *See, e.g., Trost v. American Hawaiian Steamship Co., 324 F.2d 225, 227 (2nd Cir. 1963)*. What defines the "scope of employment" in such cases is a debatable issue. Defendant correctly notes that courts define scope of employment more broadly with respect to the injured employee than with respect to the employee who allegedly was negligent. *See Trost, 324 F.2d at 227* (noting that the scope of the injured party's employment is synonymous with during "service of the ship," but arguing that the scope of [*9] employment of the alleged wrong-doer is narrower). [2]

2 *Trost* makes clear, and the parties do not dispute, that plaintiff Elmadari was acting within the scope of his employment for Jones Act purposes at the time the accident occurred.

Noting this distinction, however, does not resolve the issue of how "scope of employment" is defined in this context. In *Sheaf v. Minneapolis, St. P. & S.S.M.R. Co.*, the Eighth Circuit held that in cases brought under the FELA against railroads the test for scope of employment is whether the employee's purpose in acting was to further the employer's business. *162 F.2d 110, 115 (8th Cir. 1947)* (finding that a railroad employee's voluntary act of aggression did not fall within his scope of employment). *Sheaf* forcefully distinguished railroad employees from seamen, however, noting that "the obligation of a shipowner to his seamen is substantially greater than that of an ordinary employer to his employees," and that "in [maritime] cases the duties of the [*10] employer to its employees are different, giving rise to a broader and more liberal construction of the statutes applicable." *Id. at 114*. This language suggests that the rigid common law rule requiring the particular negligent acts to be committed "in furtherance" of the employer's business does not apply to maritime cases. The relevant case law provides little guidance on the definition of "scope of employment" in respondeat superior cases involving seamen whose acts are merely negligent, rather than intentional. [3] A broad reading of the statute, however, would define an act as within the scope of employment not only if it is specifically motivated by a purpose to further the employer's business, but also if it is a necessary incident to the employee's duties. *Cf. Baker v. Baltimore & Ohio R.R. Co., 502 F.2d 638, 641-42 (6th Cir. 1974)* (holding that, in FELA cases, it is not necessary that the act be committed in furtherance of the employer's business, and defining scope of employment as "not only actual service, but also those things necessarily incident thereto").

3 The Report and Recommendation cites several cases using a "furtherance" criterion. These cases are distinguishable as involving intentional acts rather than true negligence. Defendant cites *Trost* as an example of a true negligence case, however, *Trost* is unhelpful because it did not specifically set forth the test for scope of employment and because the negligent act at issue took place

several miles from the ship at a cafe. Defendant's citation to *Walker v. Sinclair Refining Co., 331 F. Supp. 408 (E.D. Pa. 1941)*, is likewise inappropriate. In *Walker* the district court sat as factfinder and did not determine the issues as a matter of law.

[*11] The allegedly negligent act in the case at bar took place on defendant's premises at a time when Burress's duties required him to be there, namely, while the ship was underway. As a ship cannot operate without crew living aboard it, the round-the-clock presence of Burress and the other crewmen during the ship's passage directly furthered defendant's purposes. Because a ship's crew necessarily must eat, sleep, shower, get dressed and perform the other tasks of daily living aboard the ship, these acts indirectly benefit the shipowner. Exercise, if a part of a crewman's daily routine, may also indirectly benefit a shipowner, since it improves the health, morale, and productivity of the crew to make life aboard the ship livable. *Cf. Murphey v. United States, 179 F.2d 743 (9th Cir. 1950)* (finding that because a soldier's excursion into town for entertainment increased morale it was in the scope of his employment, and analogizing those facts to the situation of seamen who take shore leave as a necessary diversion from monotony). Defendant's chief engineer testified in his deposition that as many as ten percent of the crew members on the ship brought personal exercise equipment [*12] on board. Burress, therefore, was not alone in making exercise a part of his life aboard the ship. These facts are sufficient to support a finding that using the exercise equipment was a necessary incident to Burress's service aboard defendant's ship. For these reasons, and in light of the aforementioned cases requiring a liberal construction of the Jones Act, the Court cannot find as a matter of law that when Burress set up the exercise device this act was performed outside the scope of his employment. The Court therefore disagrees with the Magistrate Judge's finding that summary judgment is appropriate with regard to plaintiffs' claim under the Jones Act.

Plaintiffs did not object to the Magistrate Judge's recommendation to dismiss their derivative claim for loss of consortium. For the reasons stated in the Report and Recommendation, the Court finds that plaintiffs are not entitled to recovery under maritime law or under the Jones Act for this claim.

**ORDER**

Based on the foregoing, and all of the records, files and proceedings herein, the Court **OVERRULES** the plaintiffs' first objection [Docket No. 38] and **GRANTS** the plaintiffs' second objection [Docket No. 38], [*13] and therefore, **GRANTS in part** and **REJECTS in part** the Magistrate Judge's Report and Recommendation [Docket No. 37] as set forth above. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion for summary judgment [Docket No. 28] is **GRANTED in part** and **DENIED in part**.

2. Counts II and IV of the Amended Complaint (Second and Derivative Causes of Action) are dismissed, with prejudice.

Dated: September 30, 1998.

JOHN R. TUNHEIM

United States District Judge