IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TWIN RIVERS TOWING COMPANY and CONSOLIDATION COAL COMPANY as owners or owners pro hac vice of six coal barges,	)	
Plaintiffs,	)	
-VS-	)	
	)	Civil Action No. 01-1752
CECELIA HUSARCHIK, RANDOLPH L. SMITLEY, JAMIE A. THISTLETHWAITE and TEDDY W. TURNER,	)	
Claimants.	)	

AMBROSE, Chief District Judge.

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND

ORDER OF COURT

I. INTRODUCTION

On the evening of May 24, 2000, a pleasure boat operated by Claimant Jamie Thistlethwaite allided violently with a flotilla of barges moored along a wall on the Monongahela River in Southwest Pennsylvania. As a result of the allision,[1] four of the five persons in the pleasure boat were injured and subsequently brought suit against the owners of the barges, Consolidation Coal Company and Twin Rivers

[1] "Allision" is the term used in admiralty law to describe a collision between a moving ship and a stationary object or vessel, as compared to a "collision" which involves two or more moving vessels. Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co., 180 F.3d 518, 520 n.1 (3d Cir. 1999).

Towing Company, and/or Mr. Thistlethwaite. See Turner v. Consolidation Coal *et al.*, CA 01-1033; Husarchik v. Consolidation Coal *et al.*, CA 01-1813; and Smitley v. Thistlethwaite, CA 02-765. Twin Rivers Towing Company and Consolidation Coal Company filed a complaint pursuant to 46 U.S.C. § 183(a),[2] seeking exoneration from or limitation of liability. See In re Twin Rivers Towing, CA 01-1752. The four individuals injured in the allision then filed claims for damages in the limitation of liability action.

This Court conducted a non-jury trial of the consolidated cases on June 30, July 1, and July 2, 2003. By agreement of the parties, the trial addressed only the issue of liability. After the close of trial and preparation of the trial transcripts, the parties submitted proposed Findings of Fact and Conclusions of Law in October, 2003, along with memoranda of law in support of their respective positions.

This Court has subject matter jurisdiction pursuant to the Court's federal admiralty and maritime jurisdiction granted by 28 U.S.C. § 1333(1) inasmuch as the allision occurred on the Monongahela River within this judicial district; see also Fed.R.Civ.P. 9(h).

The district court for the Eastern District of Pennsylvania has succinctly described the process in a limitation of liability proceeding. See In re Lenzi, CA 89-4571, 1991 U.S. Dist. LEXIS 3653 (E.D. Pa. March 22, 1991). The court stated:

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[2] "The liability of the owner of any vessel, whether American or foreign, . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. § 183(a).

> In a limitation proceeding, the claimants proceed with their case first and carry the initial burden of proving that some fault on the part of the vessel as to which exoneration or limitation is sought was a proximate cause of the casualty. If claimants fail to carry their burden of proof, the [complainant] is entitled to a decree of exoneration from liability. Thus, in order to determine whether [the complainant] is to be exonerated, the Court must make detailed factual findings with respect to all acts of fault or negligence by any party which are alleged to have caused or contributed to the loss. Only if claimants are able to sustain their burden of proving that some fault on the part of the vessel as to which exoneration or limitation is sought [was] a proximate cause of the loss, does the burden then shift to the [complainant] to show that there was no neglect, privy, design or knowledge on the part of the vessel owner in order to limit the owner's liability to the value of the vessel.

Lenzi, 1991 U.S. Dist. Lexis 3653, *9-*10, internal citations omitted.

Having carefully reviewed the evidence and testimony presented at trial, the parties' arguments, and supplemental research as necessary, I have arrived at the following Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52(a).

II. FINDINGS OF FACT

A. Identification of the Parties and Others

1. Complainants are Consolidation Coal Company ("Consolidation") and Twin Rivers Towing Company ("Twin Rivers Towing"). Pre-Trial Stipulation of Undisputed Facts by All Parties, "Undisputed Facts," Docket No. 65, ¶ 1.

2. As part of its business as a coal producer, Consolidation owns tow boats and coal barges used to facilitate transportation of coal to customers. Undisputed Facts, ¶ 1.

3. Twin Rivers Towing, a sister company of Consolidation, operates Consolidation's towboats and barges. Undisputed Facts, ¶ 1.

4. Claimants are Jamie A. Thistlethwaite ("Thistlethwaite"), Ted Turner ("Turner"), Randolph Smitley ("Smitley") and Cecelia Husarchik ("Husarchik"). Undisputed Facts, ¶ 2.

5. Mark Santucci ("Santucci") owned the 17-foot Silverline pleasure boat powered by a 150 horsepower outboard engine, Registration PA 58668AC, involved in this case; Santucci is not a party. Undisputed Facts, ¶¶ 4 and 6.

6. At the time of the allision, Brian Loring was captain of the Motor Vessel *Arkwright,* a towboat owned by Complainants. Testimony of Brian Loring, "Loring," Transcript of Non-Jury Trial for July 1, 2003, Docket No. 70, "Tr. 2," at 225.

7. Ronald Evancho is the waterways conservation officer for the Pennsylvania Boat and Fish Commission who investigated the allision. Testimony of Ronald J. Evancho, "Evancho," Tr. 2 at 131.

8. James Allen is a retired U.S. Coast Guard Officer and marine safety consultant who testified as an expert at trial on behalf of Claimants. Testimony of James W. Allen, "Allen," Transcript of Non-Jury Trial for June 30, 2003, Docket No. 69, "Tr. 1," at 174, 181.

9. Douglas Halsey is a retired U.S. Coast Guard Officer who testified as an expert witness on behalf of Complainants. Testimony of Douglas Halsey, "Halsey," Transcript of Non-Jury Trial for July 2, 2003, Docket No. 71, "Tr. 3," at 33.

10.. Michael A. Zemaitis, Ph.D., is an associate professor of pharmaceutical

studies at the University of Pittsburgh, Pittsburgh, Pennsylvania, who testified at trial via videotape deposition and provided an expert report regarding intoxication. Videotape testimony of Michael Zemaitis, "Zemaitis Depo.," Complainants' Trial Exh. 111.

11. Harold Murray Kline is Chief of the Fire Department at Rice's Landing, Pennsylvania, and one of the first people to arrive at the scene of the accident. Videotape testimony of Harold Murray Kline, "Kline Depo.," Complainants' Trial Exh. 110.

12. Jason Maddich is an emergency medical technician who assisted at the scene of the accident. Testimony of Jason Maddich, "Maddich," Tr. 2 at 115-16.

B. <u>The Scene of the Accident and Complainants' Actions on May 24, 2000</u>

13. The maritime accident in this case occurred on May 24, 2000, near the mouth of a small tributary of the Monongahela River known as "Pumpkin Run," located in Greene County, Pennsylvania. Undisputed Facts, ¶¶ 4-5.

14. Pumpkin Run enters the Monongahela River at approximately the 68-mile marker on the left descending bank, near a small rural community known as Rice's Landing. Undisputed Facts, ¶¶ 4-5.

15. Pumpkin Run enters the Monongahela through an opening in a wall which was formerly part of a U.S. Amy Corps of Engineers lock; the wall is referred to as the "Old Lock Six Wall." Undisputed Facts, ¶ 5.

16. In 1960, the Pennsylvania Fish and Boat Commission constructed a public fishing area and boat launch ramp at the point where Pumpkin Run enters the

Monongahela. Kline Depo. at 10:04 a.m.

17. A public parking lot is adjacent to the boat launch ramp and parallel to the Monongahela River. Santucci, Tr. 1 at 24.

18. The parking lot is illuminated by three evenly spaced streetlights; the base of each streetlight is about three feet from a fence separating the parking lot from the top of the Old Lock Six Wall; from the fence to the edge of the wall is another 18 inches. Kline Depo. at 10:40 a.m.; Complainants' Trial Exh. 4F (photo of parking lot, fence and streetlights).

19. The three streetlights are intended to light the parking lot and are positioned so that the strongest illumination is directed away from the river and wall and toward the parking lot. Kline Depo. at 10:14 a.m.; 10.38 a.m.

20. The streetlights are on photoelectric cells and there is no reason to believe that the lights did not automatically go on that day. Kline Depo. at 10:15 a.m.; 10:20 a.m.; Maddich, Tr. 2 at 125.

21. In addition to the streetlights, several houses are located behind the parking lot on a steep slope rising from the river. Kline Depo. at 10:16 a.m.

22. The nearest houses are approximately 15 feet above the level of the parking lot and Old Lock Six Wall. Kline Depo. at 10:16 a.m.

23. The top of the Old Lock Six Wall is approximately 10 feet above the water. Kline Depo. at 10:17 a.m.

24. Twin Rivers Towing and/or Consolidation are the owners or owners *pro hac vice* of two towboats used for transporting barges loaded with coal on the

Monongahela and other rivers in the Pittsburgh area, specifically two boats known as the *M/V Mathies* and the *M/V Arkwright*. Loring, Tr. 2 at 231.

25. On May 24, 2000, the *Mathies*, captained by Ron Nova ("Nova"), was headed upstream on the Monongahela, with a flotilla of nine barges, each loaded with 1,000 tons of coal. Loring, Tr. 2 at 231.

26. During its trip upstream, the *Mathies* lost power in one of its two towboat engines. Loring, Tr. 2 at 233.

27. On that day, the Monongahela River was experiencing high water conditions which make management of a towboat and its flotilla more difficult. Loring, Tr. 2 at 232.

28. Since a towboat may not be able to adequately manage a large flotilla of heavily loaded coal barges using only one engine, Nova was facing "a real serious condition." Loring, Tr. 2 at 233.

29. Nova contacted the *Arkwright* which was also on the Monongahela River at the time, and requested its assistance. Loring, Tr. 2 at 233.

30. The *Mathies* was located at approximately the 75-mile marker when it contacted Loring, captain of the *Arkwright*, which was heading downstream at approximately the 68-mile marker. Loring, Tr. 2 at 255-256.

31. Loring is a long-time employee of Consolidation with fifteen years' experience on the rivers of Western Pennsylvania, including the Monongahela; he has been a towboat captain for seven or eight years. Loring, Tr. 2 at 225.

32. At the time he received the request for assistance from Nova, Loring was

towing another flotilla of six barges, each containing 1,500 tons of coal. Loring, Tr. 2 at 229-30.

33. At approximately 9:05 p.m., Loring and his crew tied off the *Arkwright's* barges at the Old Lock Six Wall, using mooring stanchions placed every 10 to 20 feet apart along the top of the wall. Loring, Tr. 2 at 235; Allen, Tr. 2 at 50.

34. Loring was aware that there is a lot of pleasure boat traffic in the vicinity of Old Lock Six Wall. Deposition of Brian Loring, read into the record, "Loring Depo.," Tr. 1 at 161.

35. Loring was aware that there were manned mooring facilities maintained by Complainants in the vicinity where he could have tied off his barges, e.g., Dillworth Landing, or facilities where the *Mathies* could have moored its barges near Mile 75. Loring, Tr. 2 at 256, 258.

36. Loring placed the coal barges in a configuration of two barges side-by-side in groups of three, with three barges tied off to the Old Lock Six Wall. Claimants' Trial Exh. 28 (Loring drawing); Complainants' Trial Exh. 1 (Pa Fish and Boat Commission Boat Accident Investigator's Report by Ronald Evancho), "Evancho Report."

37. In that configuration, the total width of the flotilla was approximately 70 feet (two barges of 35 feet wide each) and the total length was approximately 600 feet (three barges of 200 feet long each). Evancho Report.

38. At the point where the *Arkwright* was moored, the Monongahela River is approximately 750 feet wide; the channel used by commercial vessels is approximately 300 feet wide with about 225 feet of river on either side of the

channel. Halsey, Tr. 3 at 57-58.

39. There are no navigational warnings (e.g., buoys) on the river itself or on the relevant navigational charts prepared by the U.S. Coast Guard or the Pennsylvania Fish and Boat Commission indicating that the Monongahela River near the Old Lock Six Wall is "hazardous" as that term is defined by the Coast Guard, nor is there any prohibition with respect to any watercraft mooring at that point. Halsey, Tr. 3 at 63-64, 71; Allen, Tr. 2 at 98-99.

40. Allen conceded that the waterway at that point is not "narrow" as the term is construed under maritime law. Allen, Tr. 2 at 58.

41. There is conflicting evidence as to where the downstream end of the barges was located with respect to the nearest streetlight in the parking lot.

42. Loring testified that he moored the barges about 108 to 120 feet below Pumpkin Run; consequently, the downstream end of the barges was directly across from the nearest streetlight in the parking lot, "give or take ten or 15 feet." Loring, Tr. 2 at 237; 239.

43. Maddich testified that the downstream end of the barges was near a ladder set into the wall close to the point where the parking lot pavement ends and a grassy area begins; he remembered this because he climbed down the ladder to get to the barge deck. Maddich, Tr. 2 at 118-19; Complainants' Trial Exh. 4F and 4D (photographs of accident location taken in late June 2003).

44. Maddich testified that the ladder he used to reach the barge deck was about 75 or 100 yards (i.e., at least 225 feet) away from the nearest streetlight.

Maddich, Tr. 2 at 119.

45. Kline testified that the last streetlight was 10 to 12 feet from the end of the parking lot and that the end of the barge was approximately 25 to 30 feet into a grassy area downstream from the parking lot. Kline Depo. at 10:37-38 a.m.

46. Kline also testified that the Fire Department was operating in the grassy area, i.e., while transferring people from the barge and boat to medical helicopters, the Department set up its flood lights in that area to illuminate the work. Kline Depo. at 10:12-14 a.m.

47. Kline, a life-long resident of Rice's Landing, is both disinterested and the witness most familiar with the Old Lock Six Wall area; I therefore accept his testimony that the downstream end of the barge was at least 35 feet from the nearest streetlight.

48. The *Arkwright* was usually equipped with five to seven kerosene lanterns used to mark the outside corners of the flotilla of barges. Loring Depo., Tr. 1 at 161; 164.

49. Loring did not know if lanterns were aboard the *Arkwright* on the day of the allision because he did not look for them. Loring, Tr. 2 at 247.

50. No lanterns or other forms of illumination were placed anywhere on the moored barges and no one was posted as a lookout. Loring Depo., Tr. 1 at 162.

51. Loring believed that lanterns on the barges would have been of relatively little use because they would have "blended in" with the streetlights and lights from nearby houses in Rice's Landing. Loring, Tr. 2 at 249.

52. I find, to the contrary, that a light on the outside corner of barges would have been 15 to 20 feet lower than the level of a streetlight, approximately 35 feet downstream from the nearest light on Old Lock Six Wall, and at least 70 feet out into the river. While from a long distance, the barge lights might have blended in with the streetlights and house lights, they would have been readily distinguishable from those light sources the closer a recreational boat came to Pumpkin Run, particularly if it were operating close to the Old Lock Six Wall.

53. Consolidated does not have a company policy for lighting moored barges; Loring goes by regulations promulgated by the U.S. Coast Guard. Loring, Tr. 2 at 228-29.

54. It would have taken 15 minutes or less for Loring to place lanterns on the outside corners of the barges. Halsey, Tr. 3 at 119.

55. The *Arkwright* departed the Old Lock Six Wall at approximately 9:25 p.m and proceeded to assist the *Mathies*. Loring, Tr. 2 at 235.

56. When Loring left the barges, the atmosphere was clear. Loring, Tr. 2 at 246.

57. The barges at the point farthest downstream were red or a "rusted metal color" and did not have reflectors on them. Deposition of Donnie Lowe, Pilot of the *M/V Arkwright*, read into the record, Tr. 1 at 162-163.

58. Although there were white-painted fixtures on the deck of the downstream barge, these were not visible from the Santucci boat because they were lost in a shadow. Santucci, Tr. 1 at 90.

59. The head of a person sitting in a pleasure boat would have been two to four feet above the water. Halsey, Tr. 3 at 95.

60. Based on a series of five photographs taken at the scene, the deck of the barge would have been slightly higher (6 to 12 inches) than the head of a person standing in the pleasure boat and about two feet above the head of a person seated in the boat. Claimants' Trial Exh. 9.

61. The downstream end of the barges was "raked," that is, the side of the barge was not entirely at right angles to the surface of the river. Instead the side of the barge went straight down at right angles to the river for about two feet, then sloped in toward the center of the barge. Santucci, Tr. 1 at 90-92.

62. The area under the rake of the barges would be in shadows cast by the light from the streetlights. Maddich, Tr. 2 at 121.

63. The light from the streetlights was sufficient to illuminate the top surface of the barge and the coal, but cast a shadow over the downstream side of the barges. Maddich, Tr. 2 at 126-27.

64. Given the position of the streetlights and the barges, the wall cast a shadow onto the barges, but the part of the barge deck farthest from the wall was not in shadow. Kline Depo. at 10:43 a.m.

65. Barges with and without tows were moored along Old Lock Six Wall both day and night; in fact, it was "so commonplace," Kline did not take notice of them. Kline Depo. at 10:05 a.m.

66. Santucci had frequently seen barges tied up along Old Lock Six Wall during

daylight hours, as well as "full tows with the towboat," at night, but had never seen unattended barges tied up there at night. Santucci, Tr. 1 at 46, 61.

67. Evancho had seen barges without towboats tied up twice before at night at Old Lock Six Wall, but did not know if they had been illuminated with lanterns. Evancho, Tr. 2 at 163.

C. <u>Events of the Day – Claimants and Santucci</u>

68. At approximately 4:00 p.m. on May 24, 2000, Thistlethwaite, Turner, Smitley, Husarchik, and Santucci boarded Santucci's pleasure boat at the Pumpkin Run boat launch ramp. Santucci, Tr. 1 at 63.

69. Santucci was familiar with the area of the Monongahela River near Rice's Landing inasmuch as he has lived in the vicinity most of his life and has launched his boat from the Pumpkin Run boat ramp several times over the two and a half years preceding the accident. Santucci, Tr. 1 at 23, 25.

70. The Pumpkin Run launch facility was "quite readily" used by pleasure craft. Santucci, Tr. 1 at 26.

71. When they boarded the boat, the Claimants took alcoholic beverages with them. Specifically, Thistlethwaite took two bottles of wine (Thistlethwaite, Tr. 1 at 121); Turner took as many as four wine coolers (Turner, Tr. 2 at 204); Smitley and Husarchik brought a bottle of vodka and two four-packs of wine coolers (Smitley, Tr. 2 at 185).

72. Although a small quantity of marijuana was found in a bag in the left panel of the boat (Evancho, Tr. 2 at 141), no evidence was admitted to support a

conclusion that any member of the boating group consumed marijuana on May 24, 2000.

73. During the afternoon, Thistlethwaite operated the boat from the driver's seat located in the right front of the boat. Santucci, Tr. 1 at 34; Complainants' Trial Exh. 22 (Santucci's deposition sketch of passengers' positions in the boat.)

74. Thistlethwaite had operated Santucci's boat at least twice that season and several times in the past. Santucci, Tr. 1 at 57; Thistlethwaite, Tr. 1 at 115.

75. During the period 4:00 p.m. until approximately 8:30 p.m., Claimants and Santucci drove up and down the Monongahela River for enjoyment. Santucci, Tr. 1 at 32, 34.

76. At approximately 8:30 p.m., the boating party docked at the Landmark Lounge ("the Landmark"), a river-side bar and restaurant which caters to pleasure-boaters. Santucci, Tr. 1 at 34.

77. The Landmark is approximately 4 miles downstream from Rice's Landing, also on the left descending bank of the Monongahela River. Santucci, Tr. 1 at 35.

78. While at the Landmark, each of the Claimants and Santucci ordered and consumed alcoholic beverages and food. Santucci, Tr. 1 at 34.

79. With the exception of the specifics immediately following and in the section below entitled "Intoxication Levels of Claimants," there is no evidence as to the amount of alcohol anyone consumed at the Landmark.

80. Thistlethwaite testified that while at the Landmark, he had "one glass of wine and possibly, a half of a mixed drink." Thistlethwaite, Tr. 1 at 130.

81. Santucci testified that Thistlethwaite drank less than a glass of wine at the Landmark and that he did not see Thistlethwaite drink alcohol while onboard his boat. Santucci, Tr. 1 at 34, 63.

82. Turner testified that he did not see Thistlethwaite drink any alcohol at the bar. Turner, Tr. 2 at 206.

83. Turner further testified that he would not have gotten into the boat after the stop at the Landmark if he knew Thistlethwaite was inebriated or in any way impaired. Turner, Tr. 2 at 211.

84. At the bar, Thistlethwaite behaved in a loud and boisterous manner, e.g., buying drinks for people he did not know and demanding additional food. Turner, Tr. 2 at 205-06.

85. Thistlethwaite's behavior was such that the proprietor of the Landmark became "a little bit perturbed," but not to the point that the party was asked to leave. Turner, Tr. 2 at 206; Thistlethwaite, Tr. 1 at 128.

86. Turner testified this was typical of Thistlethwaite's public behavior. Turner, Tr. 2 at 221.

87. There is no independent evidence that Thistlethwaite was visibly intoxicated any time during the day.

88. There is no evidence that Thistlethwaite operated the pleasure boat in an erratic, dangerous or inattentive manner at any time during the day or that any of the passengers were concerned about his operation.

D. <u>The Accident and Its Aftermath</u>

89. Approximately 30 to 45 minutes after arriving at the Landmark, i.e., between 9:00 and 9:15 p.m., Claimants and Santucci re-boarded Santucci's boat. Turner, Tr. 2 at 206; Thistlethwaite, Tr. 1 at 102.

90. At the time the group left the Landmark, the sky was dark; there was total cloud cover and no moon or stars were visible. Santucci, Tr. 1 at 70-71; Evancho, Tr. 2 at 137.

91. When the weather is warm, there is usually mist on the river, but it was not foggy that night; the emergency helicopters would not fly in foggy conditions. Kline Depo. at 10:15 a.m.; 10:22 a.m.

92. Despite the generally overcast conditions, the silhouettes of the hills on either side of the Monongehela River could be seen due to ambient light and there was some reflected light on the river itself. Santucci, Tr. 1 at 37.

93. The only lights on the boat were the required navigation light on the bow and an anchor light. Santucci, Tr. 1 at 71.

94. Although Santucci kept a spotlight on the boat, it was not used on the night of the accident. Santucci, Tr. 1 at 72; 94.

95. Pleasure boaters are not required to have spotlights when they operate although it "might be a good idea" under certain circumstances. Allen, Tr. 2 at 92.

96. Upon re-boarding at the Landmark, Thistlethwaite drove the boat as he had earlier in the day, i.e., sitting in the right front seat, looking forward. Santucci, Tr. 1 at 67; Thistlethwaite, Tr. 1 at 133.

97. Husarchik and Smitley were seated at the mid-point of the boat.

Complainants' Trial Exh. 22.

98. No one specifically asked Smitley to act as a lookout on the river. Santucci, Tr. 1 at 51.

99. As was his normal practice, Santucci stood in the stern of the boat, looking forward in order to look out for hazards, a practice he refers to as "riding defensively." Santucci, Tr. 1 at 75-76, 86.

100. From his standing position, Santucci had an unobstructed view over the windshield to the river. Santucci, Tr. 1 at 37, 43, 75.

101. Turner moved to a position in front of the windshield in order to plane out the boat and to "look out for [his] own well-being." Turner, Tr. 2 at 210.

102. From the front of the boat, Turner could see only about 10 to 15 feet in front of him due to the darkness. Turner, Tr. 2 at 208.

103. At some point during the trip, Turner moved from the bow of the boat to a seat directly behind Thistlethwaite in the stern. Santucci, Tr. 1 at 65.

104. The boat proceeded upstream, eventually reaching a speed estimated by Santucci as no more than 23 to 25 miles per hour, since it was loaded with "eight or nine hundred pound worth of passengers." Santucci, Tr. 1 at 28; 69-70.

105. Once the boat achieved full speed, it "planed out," i.e., leveled out in the water so that Thistlethwaite had an unobstructed view of the river. Thistlethwaite, Tr. 1 at 106-07.

106. For most of the return trip, the boat remained in the center of the channel, approximately 300 feet from the shore. Santucci, Tr. 1 at 42.

107. As the boat rounded the last bend in the Monongahela River before entering Pumpkin Run, Thistlethwaite kept the vessel in essentially a straight course toward the boat launch area, thereby causing its trajectory to "taper[] off from the center channel towards the access center" on the right-hand side of the boat. Santucci, Tr. 1 at 42-43; 73.

108. As the boat came alongside the Old Lock Six Wall and Santucci told Thistlethwaite "we're at the wall, that's close enough," Santucci discerned "some type of variance in color, both being . . . dark gray and black," directly in front of the boat; he immediately jumped overboard. Santucci, Tr. 1 at 47; Thistlethwaite, Tr. 1 at 110.

109. A few seconds later, the pleasure boat ran into the outermost corner of the barges moored by the *Arkwright*, i.e., at a point approximately 65-70 feet from the Old Lock Six Wall. Claimants' Trial Exh. 9.

110. Although he had been looking straight ahead toward the boat launch ramp, by the time Santucci discerned the danger, the boat was only about 35 feet (two boat-lengths) away from the end of the moored barges. Santucci, Tr. 1 at 47-48.

111. As a result of the impact, Smitley, Thistlethwaite, Turner and Husarchik were injured. Smitley, Tr. 2 at 193; Turner, Tr. 2 at 216.

112. Santucci was not injured as he had jumped from the boat prior to the impact. Santucci, Tr. 1 at 49-50.

113. After the allision, Smitley helped Santucci out of the water and Husarchik out of the boat. Smitley, Tr. 2 at 195-96.

114. Smitley then cautioned Turner, who was walking around in a "withdrawn" condition on the top of the barge, to sit down because Smitley was afraid Turner would fall down between the barges, and cautioned Santucci not to move Thistlethwaite because he was afraid his neck might be broken. Smitley, Tr. 2 at 196.

115. Smitley then helped Husarchik over the fence separating the parking lot and adjacent grassy area from the top of the Old Lock Six Wall, and they walked to the nearest accessible house to summon emergency 911 assistance. Smitley, Tr. 2 at 196-97.

116. Based on Smitley's testimony of the time involved in the individual events following the impact, I find that the elapsed time between the allision and the placing of the 911 call was not less than 8 and possibly as much as 12 minutes.

117. Kline and the Rice's Landing Fire Department arrived at the scene of the accident at approximately 9:45 p.m. Kline Depo. at 10:08; Complainants' Trial Exh. 94.

118. EMS Southwest, located in Waynesburg, Pennsylvania, received a call from the Greene County 911 dispatcher at 9:40 p.m., but Maddich did not know what time he arrived at the scene. Maddich, Tr. 2 at 115-16.

119. Kline testified that the house where the emergency medical technicians ("EMTs") met Husarchik was the house immediately to the left of a building which looks like a church with a steeple. Kline Depo. at 10:37 a.m.; Complainants' Trial Exh. 4A.

120. Smitley's testimony about the path he and Husarchik took from the boat to the nearest house to summon help and Kline's testimony about the specific house supports the conclusion that the downstream end of the flotilla was, as Kline testified, at least 35 feet from the nearest streetlight.

121. Husarchik, Smitley, Thistlethwaite and Turner were taken by life-flight helicopter to Mercy Hospital in Pittsburgh, Pennsylvania. Undisputed Facts, ¶ 16.

122. Santucci remained at the accident scene and spoke with Evancho who arrived around 11:30 p.m. Evancho Report.

123. Evancho has had full municipal police academy training and approximately six months of specialized training with the Fish and Boat Commission, advanced training from the Underwriters Laboratories, and an advance boating investigation course; he had investigated approximately 15 boating accidents before this one. Evancho, Tr. 2 at 134.

124. Evancho estimated the speed of the pleasure boat at 25 to 30 miles per hour at the time of impact based on his experience investigating maritime accidents involving small boats and his questioning on the scene of Santucci. Evancho, Tr. 2 at 139.

125. Evancho concluded that the conduct of the passengers did not contribute in any way to the incident. Evancho, Tr. 2 at 179.

126. Thistlethwaite subsequently pled guilty to reckless operation of a watercraft, to exceeding the minimum height swell speed within one hundred feet of the shoreline, failing to maintain proper lookout by all means appropriate in the

prevailing circumstances and conditions, and failing to operate at a safe speed so that he could take proper and effective action to avoid collision and stop within a distance appropriate to the prevailing circumstances and conditions. Thistlethwaite, Tr. 1 at 151-52, 155; Complainants' Trial Exhs. 14 and 15.

127. The Pennsylvania Fish and Boat Commission investigation did not result in any citation to Twin Rivers Towing or Consolidated. Allen, Tr. 2 at 67.

128. The United States Coast Guard did not investigate the accident. Complainants' Trial Exh. 96, letter from U.S. Coast Guard dated July 31, 2000, stating reasons why agency did not investigate.

129. Thistlethwaite filed a Stipulation with this Court on June 27, 2002, in which he agreed "to a finding that he was negligent in operating the pleasure vessel. . . but . . . continues to assert that the Complainants . . . were primarily and overwhelmingly negligent in the operation, ownership, and navigation" of the *Arkwright* and the six coal barges. Docket No. 29.

E. Intoxication Levels of Claimants

130. During his investigation of the accident scene, Evancho found an empty beer bottle, a broken "gallon-size" wine bottle, a gallon jug containing "some kind of orange juice type mix," and an empty wine cooler bottle in the boat. Evancho, Tr. 2 at 141-142.

131. Turner saw Smitley and Husarchik drinking on the boat; he was not sure about Thistlethwaite or Santucci. Turner, Tr. 2 at 204.

132. Turner consumed two or four wine coolers that day on the boat and

wine at the Landmark. Turner, Tr. 2 at 204.

133. No hospital records for Turner were submitted into evidence.

134. Zemaitis did not opine regarding Turner's level of intoxication.

135. Although he detected the odor of alcohol, Evancho concluded that Santucci did not appear to be intoxicated when interviewed at the scene. Evancho Report.

136. Santucci did not seek medical assistance; consequently, no medical records were admitted into the record for him.

137. Blood alcohol concentration ("BAC") levels can be determined by laboratory tests which are generally considered "scientifically accepted methods." Zemaitis Depo. at 9:42-44 a.m.

138. These laboratory tests allow a physician or trained technician to extrapolate an individual's BAC at a reasonably short time prior to the time when the blood is drawn, based on known and predictable rates of metabolism and the individual's weight, but without regard to the individual's physical conditioning. Zemaitis Depo. at 9:43 a.m.; 9:47 a.m.; Complainants' Trial Exh. 107 at 2.

139. Thistlethwaite's blood was drawn at 12:41 a.m. on May 25, 2000, at Mercy Hospital. Complainants' Trial Exh. 60.

140. At that time, his BAC was .61 milligrams per deciliter (.06%). Zemaitis Depo. at 9:42 a.m.; Complainants' Trial Exh. 60.

141. Dr. Zemaitis testified that, based upon his calculations, at the time of the accident Thistlethwaite's blood alcohol content would have been between 95 to 105

milligrams per deciliter (.95% - .10%). Zemaitis Depo. at 9:44 a.m.

142. Thistlethwaite's reported BAC, as extrapolated to the time of the accident, could not have been the result of one glass of wine and one half of a mixed drink, the amount Thistlethwaite testified he had consumed at the bar. Zemaitis Depo. at 9:45 a.m.

143. According to Zemaitis, Thistlethwaite would have been "affected by alcohol at the time of the accident;" that is, at the reported BAC, his sensory and motor function, night vision, balance, reaction time, depth perception, judgment and coordination would have been negatively affected. Zemaitis Depo. at 9:45-46 a.m.

144. If Thistlethwaite regularly consumed alcohol, his tolerance for alcohol could be greater; consequently the degree to which his functions were impaired could be less than average. Zemaitis Depo. at 10:00 a.m.

145. Evancho testified that he concluded Thistlethwaite was operating the boat under the influence of alcohol based on the toxicology report, Thistlethwaite's admission that he had consumed alcohol, and the presence of the empty alcoholic beverage containers that passengers on the boat admitted they had brought on board that day. Evancho, Tr. 2 at 150.

146. Husarchik's BAC approximately 2 hours after the accident was 62 milligrams per deciliter. Zemaitis Depo. at 9:47 a.m.; Complainants' Trial Exh. 87.

147. Based upon Zemaitis's calculations, at the time of the accident Husarchik's BAC would have been 85 to 90 milligrams per deciliter which equates to

.85% to .090%, or slightly below the legal limit. Zemaitis Depo. at 9:48 a.m.

148. The Mercy Hospital in-patient summary for Smitley indicated a diagnosis of "acute intoxication" (Complainants' Trial Exh. 74), and the STAT MedEvac Records of the EMTs who transported him to the hospital noted that Smitley had advised them that between 4 p.m. and approximately 9:00 p.m., he had taken "several Vicodin to party," i.e., to increase the intoxicating effect of alcohol. Zemaitis Depo. at 9:50-51 a.m.; Complainants' Trial Exh. 77.

149. Smitley testified at trial that the EMTs had erroneously consolidated his statement that the Claimants' intent in taking the boat trip that day was "to party" with his later statement that he had taken Vicodin for tooth pain. Smitley, Tr. 2 at 189.

150. Vicodin is a prescribed analgesic used following oral surgery. Zemaitis Depo. at 10:09 a.m.

151. Without knowing how many Vicodin tablets Smitley had taken, when they were taken, and the dosage, Zemaitis would not know if Smitley were impaired in his ability to act as a lookout on the boat as a result of his Vicodin use. Zemaitis Depo. at 10:12 a.m.

152. No laboratory tests for blood alcohol content or for controlled substances were submitted into evidence for Smitley.

153. Zemaitis' opinion that Smitley was impaired by alcohol or drug consumption "to some degree" (Zemaitis Depo. at 9:52 a.m.) is entitled to little weight inasmuch as it is based only speculative statements and not on any verifiable

laboratory tests.

154. However, Smitley testified that he was so intoxicated that he would not have been able to maintain a lookout or judge Thistlethwaite's ability to operate the boat. Smitley, Tr. 2 at 193.

F. Testimony of James W. Allen, Claimants' Expert

155. Allen served in the U.S. Coast Guard for thirty years, most of which was spent in search and rescue and maritime law enforcement. Allen, Tr. 1 at 174, 181.

156. In his Coast Guard experience, Allen investigated "several hundred" maritime casualties, most of them involving pleasure craft. Allen, Tr. 2 at 8.

157. Allen never investigated a marine casualty involving a commercial vessel; designated Investigative Officers ("IOs") who have received special training investigate commercial accidents. Allen, Tr. 2 at 40-41.

158. Since his retirement from the Coast Guard, Allen has functioned as a marine safety consultant and as a expert witness. Allen, Tr. 1 at 187.

159. Allen visited the scene of the accident in daylight and at night but did not go onto the river in any type of watercraft. Allen, Tr. 2 at 44-45.

160. With the exception of his legal conclusions, I find Allen's testimony generally credible.

161. Allen is familiar with the U.S. Coast Guard Inland Navigation Rules, also known as the "Rules of the Road," other Coast Guard regulations, and U.S. Army Corps of Engineers regulations. Allen, Tr. 1 at 185; Tr. 2 at 9.

162. Allen's opinion, within a reasonable degree of maritime certainty, was

that the area near Rice's Landing and Pumpkin Run is designated for pleasure boating and fishing; the street lights were not designed to light the lock wall and would have cast a shadow on the barges there such that they could only be seen from above; and the barges were improperly moored too close to the entrance to Pumpkin Run. Allen, Tr. 2 at 16-18.

163. Where the barges were moored at Old Lock Six Wall, they were not "sticking into the so-called channel." Allen, Tr. 1 at 201.

164. However, the barges were in the approach pattern of the boat launch ramp on Pumpkin Run and thus an obstruction to navigation. Allen Tr. 1 at 200.

165. In the area of Old Lock Six Wall, the river is navigable shore-to-shore for pleasure boats. Allen, Tr. at 199.

166. The pleasure boat was not required to stay in the channel. Allen, Tr. 1 at 202.

167. As a general rule, when pleasure boats run at night in inland waters, they prefer to remain close to the shore in order to eliminate the possibility of having a collision with another vessel. Allen, Tr. 2 at 6.

168. According to Allen, the area of the river was hazardous because "you're mixing commercial vessel traffic with pleasure craft," and with the barges moored along the wall, "it's twice the hazard it was to start with, and you have a blind spot coming out of the boat ramp which is a hazard." Allen, Tr. 2 at 60.

169. Allen's opinion, within a reasonable degree of maritime certainty, was that professional mariners should have recognized that they were in a recreational

area and that putting six barges in the navigable waterway created a hazard to navigation; consequently, the barges should have been lit. Allen, Tr. 2 at 20, 101.

170. The Rules of the Road do not explicitly require the barges to be lit. Allen, Tr. 1 at 200.

171. However, Loring should have placed lights on the barges pursuant to Rule 2 of the Rules, specifically the portion regarding "any precautions which may be required by the ordinary practice of seaman or by the special circumstances of the case." Allen, Tr. 2 at 25.

172. Rule 2 required the barges to be lit as prudent seamanship in view of the special circumstances at the time, i.e., Loring knew the boat ramp was there and that the area was recreational, not commercial. Allen, Tr. 2 at 25.

173. It is Allen's opinion that the *Mathies* was, at most, experiencing a "potential emergency" because the pilot stated that he was not aware of an emergency when the vessel lost one of its two engines. Allen, Tr. 2 at 54.

174. Allen agreed that Thistlethwaite's conduct was a partial cause of the accident. Allen, Tr. 2 at 104.

175. Allen concluded that Thistlethwaite was not boating in a reckless fashion; if the barges had not been there, he had ample room to stop his boat before getting to the entrance of Pumpkin Run. Allen, Tr. 2 at 105.

G. <u>Testimony of Douglas Halsey, Complainants' Expert</u>

176. Halsey is a retired Coast Guard officer who operates a business called Marine Safety Services. Halsey, Tr. 3 at 28.

177. Halsey was with the Coast Guard and Navy for a total of 21 years, ten years of which was specifically in a commercial vessel safety program, concentrating on commercial vessel inspection, commercial vessel accident investigation, and marine casualty investigation. Halsey, Tr. 3 at 31-32.

178. Following specialized training, Halsey was a designated IO from 1975 until 1984. Halsey, Tr. 3 at 33-34.

179. Incidents involving towboats and barges make up 99 percent of the cases in which IOs become involved. Halsey, Tr. 3 at 36.

180. IOs are not involved with accidents involving pleasure craft since the Boating and Safety Act of 1972 requires reports in those cases to be made to the state in which the accident occurred, not the Coast Guard. Halsey, Tr. 3 at 36.

181. The Coast Guard "does not want and will not accept reports of boating accidents involving pleasure craft. That's to be investigated only by the state;" an exception to this are incidents which result in "multiple deaths or a huge amount of publicity or something that may have significant impact on laws and regulations." Halsey, Tr. 3 at 37.

182. The failure of the Coast Guard to investigate this accident and the opinion of a Coast Guard officer who provided a letter opining on the cause of the accident and the liability of Complainants (Complainants' Trial Exh. 86) are therefore irrelevant.

183. As part of his investigation into the accident, Halsey undertook daylight and after-dark inspections, a shoreside inspection, and an actual trip on the river

duplicating the path taken by Santucci's boat, including the presence of six barges loaded with coal moored at the Old Lock Six Wall. Halsey, Tr. 3 at 45.

184. Halsey's trip on the river was made on a towboat, not a pleasure craft. Halsey, Tr. 3 at 46.

185. In the towboat, Halsey was standing at least seven or eight feet above the waterline. Halsey, Tr. 3 at 94.

186. As considered by the Rules of the Road, a "congested area," such as where pleasure boats are launched and commercial traffic travels in the same area, is not the same as a hazardous area. Halsey, Tr. 3 at 64-65.

187. The "ordinary prudence" demanded by Rule 2 did not require the *Arkwright* to place lanterns on the barges. Halsey, Tr. 3 at 71.

188. Complainants did not violate either Rule 2A or 2B of the Rules of the Road when they moored the barges at Old Lock Six Wall. Halsey, Tr. 3 at 72-73.

189. Halsey has never seen Rule 2 cited as the sole cause to bring action against a mariner. Halsey, Tr. 3 at 123.

190. Halsey opined that Thistlethwaite violated Rules 1, 2, 3, 4, 5, 6, 7, 8, and 19, the most important being Rules 5 and 6. Halsey, Tr. 3 at 84.

191. Halsey opined that the only part of the river where the Santucci boat could expect to proceed unimpeded by obstacles in the waterway (including the barges) was the 300-foot wide navigable channel in the center of the river. Halsey, Tr. 3 at 55-59; 107.

192. Halsey conceded that if, as the Santucci boat approached Pumpkin Run,

Thistlethwaite's vision was unobscured and he had maintained a proper lookout, he would have been able to distinguish a light on the barge from streetlights and houselights at a distance of several hundred feet. Halsey, Tr. 3 at 117-119.

193. Halsey opined that none of the actions taken or omitted by Complainants with regard to mooring the barges or the *Arkwright* going to the assistance of the *Mathies* violated the Rules of the Road, any other maritime statute, or the standard of prudent seamanship. Halsey, Tr. 3 at 71-72.

194. In general, I find Halsey's testimony credible with the exception of his overly broad conclusions regarding Thistlethwaite's violations of the Rules of the Road and his legal conclusions.

III. CONCLUSIONS OF LAW

A. Relevant Law

1. "That the Monongahela is a highway of interstate commerce and constitutes navigable waters of the United States is clear." Grays Landing Ferry Co. v. Stone, 46 F.2d 394, 395 (3d Cir. 1931).

2. Because this action arises from an allision which occurred on the navigable waters of the United States, the rights and liabilities of the parties must be determined by applicable federal statutes and/or the general maritime law. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 455 (2001).

3. "Liability for allisions, and other types of marine casualties, is based upon a finding of fault that caused or contributed to the damage that occurred." Folkstone Maritime v. CSX Corp., 64 F.3d 1037, 1046 (7th Cir. 1995), citing 2 Thomas J.

Schoenbaum, Admiralty and Maritime Law ("Schoenbaum"), § 14-2 (2d ed. 1994); People's Natural Gas Co. v. Ashland Oil, Inc., 604 F.Supp. 1517, 1523 (W.D. Pa. 1985) ("the same rules generally regulate accidents between a moving ship and a stationary or a fixed object.")

4. "Liability in admiralty collision cases generally stem [sic] from the following sources: 1) negligence in the navigation or deviation from generally accepted concepts of prudent seamanship and reasonable care; 2) violation of statutory and/or regulatory rules governing navigation and management of vessels (and other maritime structures such as bridges over navigable waters); and 3) non-compliance with well-established, recognized customs or practices in the marine industry." In re: American Milling Co., 270 F. Supp.2d 1068, 1088 (E.D. Mo. 2003); see also Lenzi, 1991 U.S. Dist. LEXIS 3653 at *10-*11, listing the same sources and citing Gilmore and Black, The Law of Admiralty ("Gilmore"), § 7-3 (2d. 1975).

5. The conduct of the pleasure craft operated by Thistlethwaite and owned by Santucci, as well as the conduct of the M/V *Arkwright* and her tow of six coal barges, was governed by the Inland Navigational Rules Act of 1980, 33 U.S.C. § § 2001-2038 ("federal Rules of the Road"). Foremost Ins. Co. v. Richardson, 457 U.S. 668, 676 (1982) ("the federal Rules of the Road . . . apply to all vessels without regard to their commercial or noncommercial nature.")

6. The Congressionally sanctioned Rules of the Road are designed to prevent collision and "anyone who undertakes operation of vessels on navigable waters is charged with knowledge of [them] and a mandatory duty to obey them." Turecamo

Maritime v. Weeks Dredge No. 516, 872 F.Supp. 1215, 1229 (S.D. N.Y. 1994).

7. The Rules of the Road "are not mere prudential regulations, but binding enactments, obligatory from the time that the necessity for precaution begins and continuing so long as the means and opportunity to avoid the danger remains." Belden v. Chase, 150 U.S. 674, 698 (1893); see also Arabian American Oil Co. v. Hellenic Lines Ltd., 633 F. Supp. 659, 665-66 (S.D. N.Y. 1986) quoting Gilmore at § 7-3, 489 ("[T]hese Rules... are strictly and literally construed and compliance is insisted upon. This is how it should be, for, though they have the force of statute, they are not couched in legal terms of art, and are not lawyers' law, but are plain and simple directions addressed to ship's officers.")

8. The Rules of the Road "and common law principles of admiralty law require prudent seamanship and the exercise of due care." Inland River Towing, Inc. v. Am. Commer. Barge Line, 143 F. Supp.2d 646, 649 (N.D. Miss. 2000).

9. The conduct of the pleasure craft, the M/V *Arkwright*, and her tow of six coal barges was also governed by maritime Rules of the Road promulgated by the Fish and Boat Commission of the Commonwealth of Pennsylvania at 58 Pa. Code § 103.1 *et seq.*

10. Pennsylvania Rules of the Road apply only to the extent that they do not conflict with applicable federal statutes. Smith v. Haggerty, 169 F. Supp.2d 376, 381 (E.D. Pa. 2001).[3]

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[3] I recognize that Smith was vacated on reconsideration for lack of subject matter jurisdiction. See Fahnestock v. Reeder, 223 F. Supp.2d 618 (E.D. Pa. 2002). However, that ultimate decision does not make the reasoning in Smith any less persuasive on the matters for which it is cited herein.

11. "Liability for allisions may be imposed even in the absence of a statutory violation, if negligence was involved." Folkstone Maritime, 64 F.3d at 1046.

12. "The test and standard for a finding of negligence is reasonable care under the circumstances, or whether, judged against the standard of good and prudent seamanship, the allision could have been prevented by the exercise of due care. . . . It is not required that an extreme degree of caution or other more exacting standard of care be used; nor does error of judgment impute fault if it is within the ordinary care standard." Folkstone Maritime, id. (internal citation omitted).

13. "As in other tort contexts, in order for liability to be imposed in a maritime allision case, the fault must be a proximate cause of the injury. Therefore, the fault committed by the operator of the instrumentality . . . must be a contributory cause of the collision. Generally, common-law proximate cause analysis is applicable, and, if a vessel was not a contributory cause of the allision, no liability will follow." Folkstone Maritime, id.

14. The parties contend that two legal presumptions come into play in this case, the "*Oregon Rule*" and the "*Pennsylvania Rule.*"

15. It is well-established in maritime law that a moving vessel under power is presumptively at fault if it strikes a stationary object. Cliffs-Neddrill Turnkey International v. M/T Rich Duke, 947 F.2d 83, 86 (3d Cir. 1991), citing *The Oregon*, 158 U.S. 186, 197 (1895).

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16. The *Oregon Rule* applies against the vessel and all parties participating in the management of the vessel at the time of the allision and shifts both the burden of proof and the burden of persuasion to the vessel. City of Chicago v. M/V Morgan, 248 F. Supp.2d 759, 773 (N.D. Ill. 2003).

17. The presumption of fault arising under the *Oregon Rule* can be overcome if the moving vessel can show, by the preponderance of the evidence,[4] that 1) the allision was the fault of the stationary object, 2) the moving vessel acted without fault, or 3) the allision was an unavoidable accident. Cliffs-Neddrill, id.; City of Chicago, id.

18. Violation of maritime-related statutes and regulations by a vessel or other object involved in a collision invokes the *Pennsylvania Rule*. In re: Nautilus Motor Tanker Co., 85 F.3d 105, 113 (3d Cir. 1996), citing *The Pennsylvania*, 86 U.S. 125, 126 (1874), *overruled in part on other grounds*, United States v. Reliable Transfer, 421 U.S. 397 (1975).

19. The *Pennsylvania Rule* provides that:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when . . . a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship of showing not merely

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[4] "The term preponderance means that upon all the evidence the facts asserted . . . are more probably true than false." Nautilus Motor Tanker Co. v. Naughton, 862 F.Supp. 1260, 1272 n.4 (D. N.J. 1994) (internal quotations and citations omitted). "On the other hand, the clear and convincing standard of proof has been defined as evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Id. (internal quotations and citations omitted).

> that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

The Pennsylvania, 86 U.S. at 136.

20. The *Pennsylvania Rule* applies to allisions as well as collisions. Orange Beach Water, Sewer & Fire Protection Auth. v. M/V Alva, 680 F.2d 1374, 1381 (11th Cir. 1982); Nautilus Motor Tanker, 85 F.3d at 113.

21. A party alleging that the *Pennsylvania Rule* applies must demonstrate by a preponderance of the evidence: (1) the existence of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation involves marine safety or navigation; and (3) the injury suffered is of the nature that the statute or regulation was intended to prevent. Nautilus Motor Tanker, 85 F.3d at 114, citing United States v. Nassau Marine, 778 F.2d 1111, 1116-17 (5th Cir. 1985) and Folkstone Maritime, 64 F.3d at 1047.

22. "The *Pennsylvania Rule* applies only to violations of statutes that delineate a clear legal duty, not regulations that require judgment and assessment of a particular circumstance," i.e., in cases where "a 'precise and clearly defined duty' is mandated by the relevant statute, not when the statute 'calls for the use of interpretation and judgment.'" Tokio Marine & Fire Ins. Co., Ltd. v. Flora MV, 235 F.3d 963, 966-67 (5th Cir. 2000), quoting In re: Interstate Towing Co., 717 F.2d 752, 756 (2d Cir. 1983).

23. "Whether a statutory violation constitutes fault under the rigorous *Pennsylvania* standard is a factual question." Cliffs-Neddrill, 947 F.2d at 87.

24. The *Pennsylvania Rule* does not establish fault or ultimate liability for damages, but rather shifts the burdens of proof and persuasion on causation to the party who violated a statute or regulation. Folkstone Maritime, 64 F.3d at 1047; Otto Candies, Inc. v. M/V Madeline D, 721 F.2d 1034, 1036 (5th Cir. 1983) (the *Pennsylvania Rule* "does not *ipso facto* impose liability" on the offender.)

25. The burden of proof imposed upon the violating party under the *Pennsylvania Rule* is "difficult, if not impossible to discharge." Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 825 (9th Cir. 1988).

26. In order to rebut the presumption of fault, the *Pennsylvania Rule* requires a party involved in an allision who has been determined to have violated a maritime statute or regulation to demonstrate by a "clear and convincing showing that [its] violation . . . could not have been a proximate cause of the collision." Cliffs-Neddrill, 947 F.2d at 86.

27. Alternatively, the burden of proof imposed by the *Pennsylvania Rule* may be satisfied "by demonstrating that the accident would have occurred despite the statutory violation." Nautilus Motor Tanker, 85 F.3d at 114.

28. Application of the *Oregon Rule* and/or the *Pennsylvania Rule* does not preclusively establish unilateral fault; that is, both presumptions may be applied to the same facts and to all parties involved. In re: TT Boat Corp., CA No. 98-494, 1999 U.S. Dist. LEXIS 5627, *29 (E.D. La. Apr. 15, 1999) ("The presumptions are not mutually exclusive; rather they act in conjunction with one another and [may] each be relevant when the court allocates fault. . . . Each party may be held responsible if

each party contributed to the cause of the allision.")

B. Thistlethwaite's Liability

29. There is no reason to apply the *Oregon Rule* in this case with regard to Thistlethwaite, a person "participating in the management of the vessel at the time of the allision" inasmuch as Thistlethwaite has acknowledged his fault in the allision.

30. Thistlethwaite, the sole operator of the pleasure craft on May 24, 2000, pled guilty to violations of 30 Pa. C.S. § 5501(a), 58 Pa. Code § 103.3(b), 58 Pa. Code § 103.4, and 58 Pa. Code § 103.5(a), all of which establish the standard of care to be observed by operators of any boat or watercraft.

31. Reckless operation of a water craft is defined and prohibited by 30 Pa. C.S.§ 5501(a), which provides in relevant part

> No person shall operate a watercraft in, upon or through the waters of this Commonwealth in a reckless manner. For the purposes of this subsection, reckless operation means operating a watercraft in a manner that consciously, willfully and wantonly disregards a substantial and unjustifiable risk to the safety of persons or property in, upon or along the waters of this Commonwealth. Reckless operation of a watercraft involves a gross deviation from the standard of care that a reasonable operator of a watercraft should observe under the circumstances.

32. The Pennsylvania Rules of the Road provide that "boats are limited to slow, minimum height swell speed when within 100 feet of the shore line; docks; launching ramps; swimmers or downed skiers; persons wading in the water; anchored, moored or drifting boats; floats, except for ski jumps and ski landing floats; or other areas so marked." 58 Pa. Code § 103.3(b). Although not specifically

stated, and not analyzed in any reported case, it is reasonable to infer that this Rule is intended, at least in part, to avoid the possibility of collision with the enumerated objects and persons.

33. Moreover, "every boat shall maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions to make full appraisal of the situation and the risk of collision." 58 Pa. Code § 103.4.

34. 58 Pa. Code § 103.5(a) provides that "every boat shall proceed at a safe speed so that it can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."[5]

35. Thistlethwaite's guilty pleas to these violations of the Pennsylvania Rules of the Road and his subsequent stipulation of negligence filed with the Court in this matter refute any argument that his conduct, if not the sole cause, was at least a contributory cause of the accident.

36. Because no federal agency, for example, the U.S. Coast Guard, investigated this incident, Thistlethwaite was not charged with violation of any federal maritime statutes.

37. However, Complainants' expert Halsey opined that Thistlethwaite violated

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[5] The statute continues "In determining a safe speed, the following factors shall be among those taken into account: (1) State of visibility. (2) Traffic density, including concentrations of other boats. (3) Weather conditions, currents and the proximity of navigational hazards. (4) Maneuverability of the boat with special reference to stopping distance and turning ability." 58 Pa. Code § 103.5(b).

federal Rules of the Road 1, 2, 3, 4, 5, 6, 7, 8, and 19.

38. I find Halsey's list of violations not only overly inclusive, but also, in some instances, illogical.

39. For instance, Rule 1 establishes the scope and applicability of the Rules of the Road in general and does not mandate specific conduct; Rule 3 establishes definitions used elsewhere in the federal Rules; and Rule 4 provides that Rule 4 and those following apply in any condition of visibility. Neither Halsey's testimony at trial, his expert report (Complainants' Trial Exh. 109), Complainants' Memorandum of Law ("Complainants' Memo," Docket No. 78), nor independent research has disclosed how these rules can be "violated."

40. Halsey opined that Thistlethwaite's violation of Rule 5 was one of the two most serious violations of the federal Rules.

41. Rule 5 provides: "Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision." 33 U.S.C. § 2005.

42. "It is axiomatic than an inefficient lookout is equivalent to none." Cliffs-Neddrill, 947 F.2d at 89, quoting Interstate Towing, 717 F.2d at 755.

43. The evidence establishes that the pleasure boat maintained a lookout in addition to Thistlethwaite, i.e., Santucci, but that the lookout was inadequate to compensate for poor visibility and the speed at which Thistlethwaite was operating the boat since Santucci did not perceive the danger until his boat was only about

35 feet away from the end of the barges.

44. Neither Thistlethwaite nor Santucci maintained an efficient lookout and thus violated Rule 5.

45. Halsey opined that Thistlethwaite's second most serious violation was a violation of Rule 6, 33 U.S.C. § 2006, which provides:

> Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In determining a safe speed the following factors shall be among those taken into account: (a) By all vessels: (i) the state of visibility; (ii) the traffic density including concentration of fishing vessels or any other vessels; (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions; (iv) at night the presence of background light such as from shore lights or from back scatter of her own lights; (v) the state of wind, sea, and current, and the proximity of navigational hazards; (vi) the draft in relation to the available depth of water.

46. Under this Rule, a boat is considered to be traveling at a safe speed when it is able to stop within one-half the distance of visibility forward from her bow. Williamson Leasing Co. v. American Commercial Lines, Inc., 616 F.Supp. 1330, 1340 (E.D. La. 1985).

47. Based on Santucci's testimony that as the pleasure boat approached the entrance to Pumpkin Run, he was not aware of a variation of gray and black (which turned out to be the end of the barge) until the boat was approximately 35 feet away from the barge, Thistlethwaite violated Rule 6 by proceeding at an excessive rate of speed, given the prevailing circumstances and conditions, i.e., an inability to

stop within approximately 17 feet.

48. Halsey opined that Thistlethwaite violated Rule 2, 33 U.S.C. § 2002, which provides in its entirety:

> (a) *Exoneration:* Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
>
> (b) *Departure from rules when necessary to avoid immediate danger:* In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

49. As discussed above, Thistlethwaite failed to "comply with these Rules" and therefore violated Rule 2(a).

50. There is no evidence to support a conclusion that Thistlethwaite departed from any Rule in order to avoid immediate danger; therefore, he did not violate Rule 2(b).

51. Operating a water craft under the influence of alcohol is prohibited by 30 Pa. C.S. § 5502(a), which provides in pertinent part:

> No person shall operate or be in actual physical control of the movement of a watercraft upon, in or through the waters of this Commonwealth: (1) while under the influence of alcohol to a degree which renders the person incapable of safe operation of a watercraft. . . or (4) while the amount of alcohol by weight in the blood of (i) an

adult is 0.10% or greater.[6]

52. The statute further provides that:

> It is *prima facie* evidence that: (i) an adult had 0.10% or more by weight of alcohol in his or her blood at the time of operating or being in actual physical control of the movement of a watercraft if the amount of alcohol by weight in the blood of the person is equal to or greater than 0.10% at the time a chemical test is performed on a sample of the person's breath, blood or urine, [but] the chemical test of the sample of the person's breath, blood or urine shall be from a sample obtained within three hours after the person drove, operated or was in actual physical control of the watercraft.

30 Pa. C.S. § 5502(A.1)(1) and (2).

53. The emergency call to the 911 dispatcher was placed somewhere between 8 and 12 minutes after the allision, based on Smitley's testimony.

54. Kline testified that the Fire Department received the emergency call from the Greene County 911 dispatcher at 9:45 p.m.

55. It is reasonable to infer that the allision occurred not later than 9:37 p.m.

56. The evidence shows that Thistlethwaite's blood was drawn for testing at 12:41 A.M. on May 25, 2000, i.e., more than three hours after he was operating the pleasure boat.

57. Therefore, the results of the test showing an extrapolated range of .95%

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[6] The comparable federal Rule is that "an individual is under the influence of alcohol . . . when: (a) The individual is operating a recreational vessel and has a Blood Alcohol Concentration (BAC) level of .08 percent or more, by weight, in their blood." 33 C.F.R. § 95.020(a). The regulations also provide, however, that where a State has adopted a BAC which is different from that set out in 33 C.F.R. § 95.020(a), the level established by the State will be used for purposes of determining whether a person operating a recreational vessel within the geographic boundaries of that State is under the influence of alcohol. 33 C.F.R. § 95.025. For purposes of this case, therefore, the then-applicable Pennsylvania standard of .10% BAC applies.

to 1.05% blood alcohol content by weight do not provide *prima facie* evidence that Thistlethwaite was operating the boat while under the influence of alcohol in violation of 30 Pa. C.S. § 5502(a).

58. Alternatively, under federal regulations, an individual operating a recreational vessel may be considered under the influence of alcohol if "the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." 33 C.F.R. § 95.020(c).

59. Santucci and Turner both testified that they did not believe Thistlethwaite was impaired based on their observations of him, and no contradictory eye-witness testimony was offered to refute their statements.

60. As noted above, Halsey opined at trial that Thistlethwaite was negligent in failing to remain in the navigable channel at all times during his approach to the entrance to Pumpkin Run.

61. When moored along the Old Lock Six Wall, the barges were moored in "navigable waters," i.e., "those waters that . . . are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. § 329.4. General Definition of Navigable Waters of the United States.

62. A vessel has an "unfettered right" to navigate the full width of a water

channel in the absence of known obstacles, that is, the vessel is not limited to the middle or dredged channels of the river. People's Natural Gas Co., 604 F.Supp. at 1528; Orange Beach, 680 F.2d at 1382-83 and cases cited therein; Pennzoil Producing, 943 F.2d at 1470-71; Pennsylvania R.R. v. S.S. Marie Leonhardt, 320 F.2d 262, 265 (3d Cir. 1963); Folkstone Maritime, 64 F.3d at 1052.

63. While this right is not "wholly unfettered,[7]" contrary to Halsey's opinion, Thistlethwaite was not negligent in choosing to approach Pumpkin Run as he did, i.e., by crossing the mid-point of the navigation channel in the middle of the river and gradually coming closer to the right-hand bank as he neared the boat launch ramp.[8] See Pennsylvania R.R., 320 F.3d at 266 (the course chosen was "a mere condition," and not a "substantial cause," of the allision.)

64. In sum, I find that Thistlethwaite, as operator of the pleasure boat, violated Pennsylvania statutes 30 Pa. C.S. § 5501(a), reckless operation of a water craft; 58 Pa. Code § 103.3(b), maintaining a slow, minimum height swell speed; 58 Pa. Code § 103.4, maintaining a proper lookout; and 58 Pa. Code § 103.5(a), proceeding at a safe speed; all of these violations contributed to the allision.

65. I further find that Thistlethwaite violated federal Rule of the Road 2, the general responsibility rule; Rule 5, the lookout rule; and Rule 6, the safe speed rule; these violations also contributed to the allision.

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[7] That is, a vessel operator "does not have the right to roam at will from bank to bank, running down whatever known hazards may lie in his path." Pennzoil Producing, 943 F.2d at 1471.

[8] That is not to say, of course, that his other actions, i.e., excessive speed in the dark, were not negligent.

66. Finally, I find that although not required by any statute or navigational rule to use a spotlight, Thistlethwaite was negligent in failing to do so as he approached the entrance to Pumpkin Run at high speed under conditions of very limited visibility.

67. I find, however, that Complainants have failed to show by clear and convincing evidence that Thistlethwaite was impaired due to alcohol at the time of the allision or that he violated any of the other federal Rules of the Road enumerated by Halsey.

C. Liability of Husarchik, Turner and Smitley

68. The *Oregon Rule* does not apply to the actions of Husarchik, Turner and Smitley because there is no evidence that they were "parties participating in the management of the vessel at the time of the allision." Compare Merrill Trust Co. v. Bradford, 507 F.2d 467 (1st Cir. 1974), affirming dismissal of suit by estate of guests killed when a private yacht capsized because evidence supported conclusion that they were experienced sailors who more likely than not participated in the navigation and handling of the yacht.

69. As stated above, both the federal and Pennsylvania Rules of the Road require vessels to "maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions to make full appraisal of the situation and the risk of collision." 33 U.S.C. § 2005; 58 Pa. Code § 103.4.

70. Despite Halsey's testimony that each passenger had a duty under Rule 5

to maintain a lookout, neither Complainants' Memorandum of Law nor independent research has disclosed precedent establishing this duty for passengers in recreational boats.

71. At least one court in this Circuit has held that passengers in a recreational boat do not have a duty to maintain a lookout. Smith v. Haggerty, *supra*, 169 F. Supp. 2d at 384 ("We hold that neither the Inland Navigation Rules, Pennsylvania law, nor general maritime principles create an obligation for small recreational motorboats to employ a separate person as lookout in addition to the boat operator.") See also Capt'n Mark v. Sea Fever Corp., 692 F.2d 163, 166 (1st Cir. 1982) (the failure to post a lookout must be evaluated in light of all the circumstances and it would be excessively "onerous and unrealistic" to require that, as a matter of law, a small vessel with a limited crew must post a lookout with no other duties).

72. The Third Circuit has held that where the vessel involved is a recreational boat, "and there is nothing to block the operator's vision ahead of the boat, we perceive no basis for holding that someone in addition must be designated as a lookout." Andrews v. United States, 801 F.2d 644, 650 (3d Cir. 1986).

73. There is no evidence to support Complainants' contention that the passengers knew or should have known that excessive weight in the back of the boat resulted in the bow being elevated to the point where Thistlethwaite's view was blocked; moreover, the evidence is that his view was not blocked after the boat planed out.

74. I find that Rule 5 of the federal Rules of the Road and 58 Pa. Code § 103.4

did not create a statutory duty for Husarchik, Turner or Smitley to maintain a lookout while the pleasure boat was being operated by Thistlethwaite.

75. Another court in this district has implied that if the passengers in a recreational boat have reason to believe that the operator is intoxicated or inattentive for some reason, a duty arises for the passengers to maintain a lookout for themselves. In re Anderson, CA Nos. 83-2045 and 83-2054, 1987 AMC 1268, 1276 (W.D. Pa. 1986), distinguishing Andrews in part because no evidence of intoxication was presented there, while in Anderson, the two people killed when their motor boat went over a dam were both indisputably intoxicated to the point where they could not have maintained a lookout.

76. Andrews also implicitly recognizes this standard in the statement: "It follows that passengers in such a vessel who are without notice that the operator is being inattentive are no more obliged to maintain a lookout for themselves than are similarly situated passengers in an automobile." Andrews, 801 F.2d at 650.

77. Pennsylvania law provides that a passenger in an automobile "does not assume a risk of harm arising from the [driver's] conduct unless he then knows of the existence of the risk and appreciates its unreasonable character," that is, the passenger "must have been subjectively aware of the facts which created the danger and he must have appreciated the danger itself and the nature, character and extent which made it unreasonable." Weaver v. Clabaugh, 388 A.2d 1094, 1096 (Pa. Super. 1978) (internal citations omitted); see also Lundquist v. United States, CA Nos. 96-35219 and 96-35220, 1997 U.S. App. LEXIS 16204, * 11-*12 (9th Cir. June 27, 1997)

and cases cited therein.

78. "Knowledge may be inferred, without actual proof, from the surrounding circumstances," and " there are some dangers which are so obvious or well known that all adults of normal intelligence will be charged with their knowledge." Weaver, id.

79. There is no evidence that Thistlethwaite operated the boat in erratically during the trip from the Landmark to the area of the Old Lock Six Wall.

80. There is no evidence to support Complainants' contention that the passengers knew or should have known from Thistlethwaite's disruptive behavior at the Landmark or any other visible signs that he was intoxicated; the only testimony on this subject was that his behavior there was typical.

81. The testimony of Turner and Santucci was consistent that they did not believe Thistlethwaite was impaired as a result of alcohol consumption.

82. Smitley admitted that when they left the Landmark, he was quite intoxicated himself, but he did not testify as to the extent to which he believed at the time Thistlethwaite may have been impaired.

83. The evidence supports a conclusion that all the passengers were drinking alcohol during the period of 4 p.m. through approximately 9 p.m.; however, there is no evidence from which to infer that any of the other passengers were sufficiently intoxicated at the time they boarded the boat at the Landmark that they consequently were unable to recognize that Thistlethwaite was impaired.

84. I also find that Complainants have failed to establish that Husarchik,

Turner, and Smitley were contributorily negligent due to their own intoxication.

85. "Contributory negligence does not involve breach of any duty owed to others but, rather, is a failure to reasonably safeguard one's own person or property. . . . However, it is elementary that any negligence, to be actionable in a claim by another, must be a proximate cause of the damages. Put another way, fault which produces liability must be contributory and proximate cause of the collision, and not merely fault in the abstract." In re J.E. Breeneman Co., 782 F.Supp. 1021, 1025-26 (E.D. Pa. 1992) (internal quotation and citation omitted).

86. Contributory negligence is an affirmative defense which Complainant is required to prove by a preponderance of the evidence. Skidmore v. Grueninger, 506 F.2d 716, 727 (5th Cir. 1975).

87. Husarchik, Turner and Smitley did not operate the boat; there is no evidence that any of them was qualified to operate the boat; they did not interfere with the operation of the boat; they were not asked by Santucci or Thistlethwaite to maintain a lookout, and Turner did not negligently abandon his duties as lookout because he did not have any such duty initially.

88. I conclude that Complainants have failed to show by the preponderance of the evidence that any passenger (including Smitley who admitted that he was intoxicated when they left the Landmark) was negligent for failing to prevent Thistlethwaite's reckless operation of the boat. See Skidmore, 506 F. 2d at 726, affirming trial court's conclusion that an intoxicated passenger in recreational boat was not contributorily negligent because her intoxication was not a proximate cause

of the allision.

D. Liability of Complainants

89. Complainants contend that Thistlethwaite's "admission of negligence and guilty plea to the various boating regulations also *precludes* a finding that the stationary vessel and its owner . . . were at fault." Complainants' Memo at 6 (emphasis added).

90. This is clearly not the law. See Pennzoil Producing Co. v. Offshore Exp., Inc., 943 F.2d 1465, 1469 (5th Cir. 1991), citing Reliable Transfer, *supra*, for the conclusion that such an argument overlooks "one of the most fundamental precepts of admiralty jurisprudence . . . that damages in admiralty cases are to be apportioned on the basis of comparative fault of the parties;" see also Tidewater Marine, Inc., v. Sanco Int'l, Inc., 113 F. Supp.2d 987, 999 (E.D. La. 2000), noting that "all parties against whom [the *Pennsylvania Rule*] is applied may be liable if their negligence proximately caused the accident."

91. Complainants contend (Memo at 30) that the only regulation which could possibly invoke the *Pennsylvania Rule* relative to the lighting of moored barges is 33 C.F.R. § 88.13, which provides in relevant part:

> (a) The following barges shall display at night and if practicable in periods of restricted visibility the lights described in paragraph (b) of this section:
>
> > (1) Every barge projecting into a buoyed or restricted channel.
> >
> > (2) Every barge so moored that it reduces the available navigable width of any channel to less than 80 meters [approximately 264 ½

feet].

(3) Barges moored in groups more than two barges wide or to a maximum width of over 25 meters [approximately 82 feet].

(4) Every barge not moored parallel to the bank or dock.

92. Allen conceded that none of the conditions set out in § 88.13(a) was applicable to the circumstances surrounding the events in this matter.

93. I find that Complainants did not violate 33 C.F.R. § 88.13 by failing to post lanterns on the barges moored along Old Lock Six Wall.

94. Claimants Turner, Smitley and Husarchik argue that Complainants violated Rule 5 of the Rules of the Road by failing to post a lookout on the moored barges. Claimants' Turner and Smitley's Memorandum of Law ("Turner-Smitley Memo"), Docket No. 77 at 6-15; Proposed Findings of Fact and Conclusions of Law of Claimant Cecilia Husarchik, Docket No. 80, at 1.

95. This argument is based on Halsey's testimony that Rule 5 applies to "all vessels at all times" under "all conditions of visibility." Turner-Smitley Memo at 8, citing Tr. 3 at 82-83.

96. Claimants rely on two cases for this argument, namely, *The Clara*, 102 U.S. 200 (1880) and Cliffs-Neddrill, *supra*.

97. Those cases are readily distinguished inasmuch as the vessels which failed to post a lookout were both at anchor in open water, not moored. See *The Clara*, 102 U.S. at 201, where the ship at fault was lying at anchor within a crowded breakwater where many vessels had sought shelter during a storm, without a watch,

when the *Clara*, properly manned and lit, was proceeding to its anchorage; and Cliffs-Neddrill, where the *Neddrill 2* was anchored in a sea-lane, had not reported its location to the agency in charge of disseminating navigational information to shippers in the area, and may have violated the statute requiring it to display certain lights indicating it was at anchor, in addition to its failure to post a lookout.

98. "The traditional distinguishing factor of a moored vessel versus an anchored vessel has been that the former is moored to a permanent object such as a dock or a pier while the anchored vessel is anchored in open water. 'A mooring is a permanent location to which a vessel ties and thus moored vessels are located in an expected place. In contrast, an anchorage is a temporary location, often occurring in the traveled way, and thus anchored vessels are not located in expected places.' The safety requirements for an anchored vessel, thus, are generally higher, for its presence is in unexpected places." Sunderland Marine Mutual Ins. Co. v. Weeks Marine Construct. Co., 338 F.3d 1276, 1277-78 (11th Cir. 2003), quoting Self Towing, Inc. v. Brown Marine Services, Inc., 837 F.2d 1501, 1505 (11th Cir. 1988).

99. Moreover, "the primary function of a lookout on a stationary vessel is to sight approaching ships and their navigation lights, listen and watch for warning signals well in advance of a possible allision, and communicate to other ships through radio, signalling lights or whistles." Cliffs-Neddrill, 947 F.2d at 90.

100. As it approached Pumpkin Run, the evidence is irrefutable that the Santucci boat was not using a spotlight or any other means of signaling its presence

or its intention to enter the boat launch ramp area.

101. "The *Pennsylvania Rule* was not meant to be a hard and fast rule that requires a finding of fault for statutory violations, no matter how speculative, improbable or remote." Cliffs-Neddrill, 947 F.2d at 88.

102. I find that the failure of Complainants to post a lookout on the moored barges, even if theoretically a violation of Rule 5, was at most a speculative rather than proximate cause of the allision.[9]

103. Thistlethwaite contends that the *Pennsylvania Rule* operates against the Complainants because they violated 33 C.F.R. § 207.300 (m)(2)(i), 33 U.S.C. § 409, and Rule 2. Memorandum of Law Submitted on Behalf of Claimant Jamie Thistlethwaite, "Thistlethwaite Memo," Docket No. 74, at 20-28.[10]

104. Under the Code of Federal Regulations, a floating craft may not, "except in an emergency, moor in any narrow or hazardous section of the waterway." 33 C.F.R. § 207.300(m)(2)(i).[11]

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[9] Moreover, I believe the only effect of posting a lookout on the barges would have been the "better to see how reckless was the navigation of the oncoming ship." Trinidad Corp., 845 F.2d at 827, quoting Bloomfield S.S. Co. v. Brownsville Shrimp Exch., 243 F.2d 869, 872 (5th Cir. 1957) ("A dozen lookouts posted fore, aft, and amidships, on deck, in the pilot house, or perched mast high would not have told [the stationary vessel] more than what she already knew: that an ocean-going vessel was coming straight on.")

[10] Claimants Husarchik, Turner and Smitley join in and adopt Thistlethwaite's Proposed Findings of Fact and Conclusions of Law and, I presume, his arguments as well.

[11] 33 CFR § 207.300 sets out U.S. Army Corps of Engineers regulations regarding the use, administration and navigation for the Ohio River, the Mississippi River above Cairo, Illinois, and tributaries of those rivers. The cited section provides in full "(m) Mooring – (2) Outside of locks. (i) No vessel or other craft shall regularly or permanently moor in any reach of a navigation channel. The approximate centerline of such channels are marked as the sailing line on Corps of Engineers' navigation charts. Nor shall any floating craft, except in an emergency, moor in any narrow or hazardous section of the waterway. Furthermore, all vessels or other craft are prohibited from regularly or permanently mooring in any section of navigable waterways which are congested with commercial facilities or traffic unless it is moored at facilities approved by the Secretary of the

105. The evidence shows that while the *Arkwright* was responding to the emergency experienced by the *Mathies*, it was not itself in an emergency situation that would allow it to moor with impunity in a narrow or hazardous section of the waterway.

106. However, I need not base my conclusion on this distinction because I find, as Allen conceded at trial, that the area near the Old Lock Six Wall was not marked on any navigational charts as either narrow or hazardous.

107. Therefore, mooring the barges at Old Lock Six Wall did not violate 33 C.F.R. § 207.300(m)(2)(i) because they were not in a narrow or hazardous point in the river as that condition is contemplated by the regulation.

108. Claimants contend that Complainants created an obstruction to navigation in violation of 33 U.S.C. § 409 by mooring the unlit, rusty, dark-colored barges where they were directly in the expected path of small boats approaching the entrance to the Pumpkin Run boat launch ramp from downstream and where they were only partially lit by indirect street lighting not intended to illuminate the Old Lock Six Wall and/or the adjacent waters of the river. Thistlethwaite Memo at 24-26.

109. Under 33 U.S.C. § 409, "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

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Army or his authorized representative. The limits of the congested areas shall be marked on Corps of Engineers' navigation charts. However, the District Engineer may authorize in writing exceptions to any of the above if, in his judgment, such mooring would not adversely affect navigation and anchorage." At trial, Allen conceded that the barges were not moored within the "reach" of the navigational channel.

passage of other vessels or craft."

110. Contrary to Halsey's testimony, the term "navigable channel" as used in § 409 is not limited to the shipping channels marked by buoys to which commercial vessels are confined. United States v. Osage Co., 414 F. Supp. 1097, 1102 (W.D. Pa. 1976) ("A vessel may navigate at any part of a river containing navigable waters, including an anchorage area.")

111. "A vessel need not completely obstruct the channel in order to violate § 409. Rather if an anchored vessel occupies so much of the navigable channel as to practically impede another vessel's navigation or make the effort to pass a dangerous maneuver, she has placed herself in a position which the statute forbids and must take the consequences of her unlawful act." Turecamo Maritime, 872 F. Supp. at 1230 (internal quotation omitted.)

112. The question of "whether an anchorage or mooring constitutes an obstruction to navigation is to be determined by reference to all the relevant facts and circumstances." Orange Beach, 680 F.2d at 1380; see also Sunderland Marine, 338 F.3d at 1279.

113. Among the facts and circumstances to be considered are the general difficulty of navigation in the area, the percentage of the entire shore-to-shore width of the navigable channel, the characteristics of the waterway at that location, the ability of other vessels to pass the obstruction, and the availability of alternative locations for anchorage. Orange Beach, 680 F.2d at 1378-80.

114. I find that the barges did not obstruct a significant portion of the entire

navigable waterway (approximately 70 feet of a waterway at least 750 feet wide); there was no evidence that navigation is generally difficult in the area of Old Lock Six Wall; and the area was frequently used to moor barges without prior complaints of obstructing navigation.

115. Thus, I find that by merely mooring the barges along the wall, Complainants did not create an obstruction to navigation in violation of 33 U.S.C. § 409.

116. Claimants also contend that despite the fact that the barges were not technically required by 33 C.F.R. § 88.13 to be lit, Loring should have posted lanterns on the corners of the barges pursuant to the standard of prudent conduct prescribed by Rule 2.[12] Thistlethwaite Memo at 20-24.

117. Rule 2 requires

> vessels to observe general standards of good seamanship, observance of the 'precautions which may be required by the ordinary practice of seamen.' Thus liability may be imposed for negligence even when no violation of the rules is found. Rote observance of a rule will not necessarily excuse responsibility for a collision.

Elenson v. S.S. Fortaleza, No. 90 Civ. 0437 (RWS), 1991 U.S. Dist. LEXIS 16853, *9 (S.D. N.Y., Nov. 21, 1991), quoting Thomas J. Schoenbaum, Admiralty and Maritime Law 449 (1987).

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[12] The Court finds disconcerting a statement made by Thistlethwaite that "where both vessels . . . violated Rule 2. . . . liability and damages are allocated between the vessels according to their comparative fault." Thistlethwaite Memo at 8. While this is undoubtedly true, two of the four cases cited as standing for this proposition never address Rule 2. See Parker Towing Co. v. Yazoo River Towing, Inc., 794 F.2d 591 (11th Cir.1986) where the district court found plaintiffs violated Rules 5 and 7 and defendants violated 33 C.F.R. § 88.13(a)(3); also Alamo Barge Lines, Inc. v. Rim Maritime Co., Ltd., 596 F. Supp. 1026 (E.D. La. 1984) in which plaintiff's liability was based solely on negligence and defendants' liability on statutory violations. In the other two cases (one of which was Elenson, *supra*), liability was imposed for violation of Rule 2 *in addition to* other navigational rules.

118. "Good seamanship includes, among other things, taking the best possible actions to avoid collision and taking action to mitigate the effects of the collision." Elenson, id.

119. What constitutes prudent seamanship and reasonable care is a factual determination. Cliffs-Neddrill, 947 F.2d at 91.

120. Complainants argue that a violation of Rule 2 cannot form the basis for the imposition of the presumption of fault arising under the *Pennsylvania Rule* because it is a general "catch-all" provision that does not impose a mandatory duty and is not intended to prevent a specific injury. Complainants' Memo at 28-30.

121. Exhaustive independent research has disclosed only one case in which a vessel seeking exoneration for its part in an allision was found liable solely because its agent violated Rule 2. See American Milling, 270 F. Supp.2d at 1095-96, where the captain of a barge tow, alleged by a claimant to have violated Rules 2 and 5, was found liable under only Rule 2 when he failed to consider the strength of the current and failed to navigate with due care under the circumstances existing at the time his tow allided with a bridge in St. Louis Harbor.

122. While I would not characterize Rule 2 as a "catch-all" provision, I do conclude that it is generally applied in conjunction with the failure to adhere to those Rules which set out mandatory duties and/or specific courses of action rather than establishing judicious standards of behavior for mariners (see Interstate Towing, *supra*); thus I conclude that Complainants did not violate Rule 2.

123. However, the failure to find case law supporting Complainants' position

is not surprising, given that the standard of conduct imposed under Rule 2 is that of reasonable care, meaning that the statutory duty is the same as required under common law negligence and general maritime law. Diesel Tanker Ira S. Bushey v. Tug Bruce A. McAllister, 92 CIV 5559 (SS) (THK), 1994 U.S. Dist. LEXIS 8788, *25- *26 (S.D. N.Y. June 29, 1994).

124. Thus, even though I conclude that placing the barges at Old Lock Wall Six after dark without lights did not violate any statute or Rules of the Road, it is still necessary to consider whether such an act was simply negligent. See Coumou v. United States, CA Nos. 95-30219 and 95-20697, 1997 U.S. App. LEXIS 12674, *15 (5th Cir. Feb. 26, 1997) ("The fact that the government did not violate a statute, however, does not end our inquiry. The general maritime law of negligence recognizes a duty of reasonable care under existing circumstances.")

125. Under general federal maritime law, negligence is an actionable wrong. Galentine v. Estate of Stekervetz, 273 F. Supp.2d 538, 544 (D. Del. 2003), citing Leathers v. Blessing, 105 U.S. 626 (1882).

126. "In order to prevail on a claim of maritime negligence a plaintiff must prove that there was: 1) a duty of care which obliges the person to conform to a certain standard of conduct; 2) a breach of that duty; 3) a reasonably close causal connection between the offending conduct and the resulting injury; and 4) actual loss, injury, or damages suffered by the plaintiff." Galentine, 273 F. Supp.2d at 544, citing 1 Thomas Schoenbaum, Admiralty and Maritime Law § 5-2 at 170 (3d ed. 2001); see also VA Int'l Terminals, Inc. v. M/V Katsuragi, 263 F. Supp.2d 1025, 1035 (E.D. Va.

2003), and Canal Barge Co., Inc. v. Torco Oil Co., 220 F.3d 370, 376 (5th Cir. 2000) (same).

127. The claimant must establish each element of the maritime negligence claim by the preponderance of the evidence. VA Int'l Terminals, id.

128. Rule 2 establishes a general duty for mariners to observe "any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case," thus the first prong of the negligence test is met.

129. "Breach of the duty of care can be proven by the failure to observe the degree of care, precaution, and vigilance which the circumstances demand." Galentine, 273 F. Supp.2d at 545.

130. A party may be found negligent for failing to post adequate lighting even when those lights are not required by any statute or regulation. See Arabian American Oil, 633 F. Supp. at 661 n.2 and 669-70, finding that although no international treaty or convention or Saudi Arabian statute or regulation required an oil platform located in a recognized sea lane in the Persian Gulf to maintain lights or other means to signal approaching vessels, the failure to do so was a contributing factor to a subsequent allision because the approaching vessel would have sighted the platform in time to take evasive action. See also Sutton v. Earles, 26 F.3d 903, 913 (9th Cir. 1994), concluding that the U.S. Navy had been negligent in failing to light a mooring buoy placed in an area known to be used by recreational boaters to reach a popular harbor, although no statute or regulation required the buoy to be illuminated.

131. Loring admitted that (1) it was already dark when he left the barges at

Old Lock Six Wall; (2) he knew that recreational boaters used the Pumpkin Run boat launch ramp both day and night; (3) he did not attempt to use the lanterns that were onboard to mark the corners of the barges and in fact did not even consider doing so; (4) there was no reflective material on the barges.

132. From his years of experience on the Monongahela River, Loring knew or should have known that recreational boaters are not required to use spotlights when operating after dark and that they tend to use the entire river width, to drive too fast, and to consume alcohol while boating.

133. Furthermore, Loring's conclusion that the barges were adequately lit is questionable, given that his estimate of the distance between the downstream end of the barges and the nearest streetlight (10 to 15 feet) was less than half the more likely distance estimated by Kline (35 feet).

134. Although Halsey testified that the streetlights illuminated the tops of the barges and the coal, Halsey based this conclusion on his viewpoint from the deck of a tugboat, which is presumably at least as high as the top of the barges, not from 2-5 feet above water level where Santucci and Thistlethwaite would be viewing the end of the barges. Therefore, I do not find persuasive Halsey's opinion that the streetlights provided adequate illumination.

135. Even if I were to accept Halsey's opinion that the deck and coal (at least 6 feet above water level) were at least partially illuminated from above, Halsey never ascertained that occupants of a recreational boat (just above water level) would be able to see the vertical and raked ends of the barges.

136. Although not required by statute to post lights on the barges, Loring should have recognized that doing so would have reduced the risk of an allision with a recreational boat returning to Pumpkin Run after dark; thus he breached his duty to observe the degree of care, precaution, and vigilance which the circumstances demanded.

137. Causation in maritime law, as in general tort law, requires the party alleging negligence to demonstrate both factual and proximate causation. Galentine, 273 F. Supp.2d at 548.

138. "Factual causation involves an inquiry into whether the event would have occurred in the absence of an act or omission. Proximate causation involves an inquiry into whether the damage was a reasonably foreseeable consequence." Galentine, id.

139. Had Loring, as a reasonable precaution, posted lights on the barges, Thistlethwaite or other persons on the pleasure boat might have noticed them and adjusted their141.

course back toward the middle of the river, particularly as the boat moved toward the right ascending bank on its approach to Pumpkin Run and the distinction between the barge lights and lights on the shore became more evident. "Who can say that, given the additional time, those measures [to avoid a collision] would not have been successful?" Cliffs-Neddrill, 947 F.2d at 87, quoting Boyer v. *The Merry Queen*, 202 F.2d 575, 579 (3d Cir. 1953).

140. The negligence must be a "substantial factor" in causing the injury, where

"substantial" is defined as "more than but for the negligence, the harm would not have resulted." Tidewater Marine, 113 F. Supp.2d at 999 (internal quotations omitted).

141. The failure to post lights on the barges when mooring them alongside Old Lock Six Wall, after dark, in a path known to be used by recreational boaters returning to Pumpkin Run, was a substantial factor in causing the allision.

142. To establish proximate cause, the party alleging negligence must show that the other's "blameworthy act [was] sufficiently related to the resulting harm to warrant imposing liability for that harm." Exxon Co. U.S.A. v. Sofec, Inc., 517 U.S. 830, 839 (1996).

143. A specific harm is "a foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." Canal Barge Co., 220 F.3d at 377 (internal quotation omitted).

144. The allision was a foreseeable consequence resulting from the failure to post lights on the barges when mooring them alongside Old Lock Six Wall, after dark, in a path known to be used by recreational boaters returning to Pumpkin Run.

145. The fourth element requires no discussion inasmuch as all Claimants have established that they suffered physical injuries as a result of the allision.

146. Thus, I conclude that the failure to light the barges was negligent, given the facts and circumstances of this case.

147. Complainants argue, however, that any negligence on their part was superseded by the "admittedly negligent" conduct of Claimants. Complainants' Proposed Findings of Fact and Conclusions of Law, Docket No. 79, at ¶ 26.

148. Under the superseding cause doctrine, a party may be exonerated from liability where its negligence "substantially contributed" to another party's injury "but the injury was actually brought about by a cause of independent origin that was not foreseeable." Tidewater Marine, 113 F. Supp.2d at 998, citing Exxon, 517 U.S. at 837; see also Schoenbaum, *supra*, at § 5-3, 165-66.

149. "For the subsequent negligence of a third party to absolve the initial wrongdoer of liability for all of the damages suffered by the injured party, the subsequent negligence of the third party must be so extraordinary that a reasonably prudent person could not have foreseen its occurrence." Tidewater Marine, 113 F. Supp.2d at 999.

150. Loring admitted that he knew recreational boaters operated vessels too fast and too near the shore, thus, the fact that someone, i.e., Thistlethwaite, would do so while the barges were moored at the Old Lock Six Wall was readily foreseeable.

151. Other than the conclusory statement above, Complainants offer no legal analysis or support for their position that Thistlethwaite's negligence and statutory violations were the superseding cause of the allision, therefore, pursuant to my previous analysis, I find that Complainants' negligence in failing to post lanterns on the barges was a contributory factor in the allision.

IV. ALLOCATION OF LIABILITY

1. In maritime allision cases, fault is judged under a comparative negligence standard. Reliable Transfer, 421 U.S. at 411; see also McDermott, Inc. v. AmClyde, 511 U.S. 202, 207 (1994) (Reliable Transfer established "a rule requiring that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made.")

2. In the Third Circuit, "principles of apportionment of damages based on comparative negligence apply in admiralty." In re Complaint of Tug Beverly, Inc., CA 92-0099, 1993 U.S. Dist. LEXIS 16553, *42-43 (E.D. Pa. Oct. 26, 1993), quoting M & O Marine, Inc. v. Marquette Co., 730 F.2d 133, 136 (3d Cir. 1984).

3. With regard to the allision which occurred on May 24, 2000, Husarchik, Turner and Smitley, jointly and severally, were not negligent nor in violation of the federal or Pennsylvania "lookout rule" for having failed to maintain a lookout, nor contributorily negligent for deciding to ride with Thistlethwaite or failing to take action to prevent his operation of the pleasure boat.

4. Complainants did not violate any statutory regulations, federal Rules of the Road, or Pennsylvania maritime Rules of the Road.

5. However, Complainants were negligent in failing to post lanterns on barges moored after dark in the direct path of recreational boats returning to the Pumpkin Run boat launch ramp.

6. Thistlethwaite is liable for violations of 30 Pa. C.S. § 5501(a), 58 Pa. Code § 103.3(b), 58 Pa. Code § 103.4, and 58 Pa. Code § 103.5(a); violation of federal Rules of the Road Rules 2, 5, and 6; and negligence in failing to use a spotlight on his

approach to Pumpkin Run.

7. A court has "considerable discretion in determining the relative degrees of each party's fault in contributing to the allision." Arabian American Oil, 633 F. Supp. at 670.

8. I conclude that Thistlethwaite's negligence was the overwhelming cause of the accident and the injuries to himself and to Husarchik, Turner and Smitley. Even if the barges had been lit, thus increasing the probability that Thistlethwaite or another occupant of the boat would have seen them sooner, Thistlethwaite's negligence, violations of numerous Pennsylvania state boating regulations, and of federal Rules of the Road far outweigh the negligence of Complainants. See Woodford v. Carolina Power & Light Co., 798 F. Supp. 307, 312 (E.D. N.C. 1992).

9. In light of these findings, the liability for injuries or damages as a result of the allision which occurred on May 24, 2000, between the recreational boat operated by Thistlethwaite and the barges owned by Complainants shall be apportioned as follows:

Jamie A. Thistlethwaite: eighty-five percent (85%);

Twin Rivers Towing and Consolidation Coal Company: fifteen percent (15%);

Cecilia Husarchik, Ted Turner and Randolph Smitley: zero percent (0%).

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TWIN RIVERS TOWING COMPANY and CONSOLIDATION COAL COMPANY as owners or owners pro hac vice of six coal barges,	)	
Plaintiffs,	)	
-VS-	)	
	)	Civil Action No. 01-1752
CECELIA HUSARCHIK, RANDOLPH L. SMITLEY, JAMIE A. THISTLETHWAITE and TEDDY W. TURNER,	)	
Claimants.	)	

AMBROSE, Chief District Judge.

ORDER OF COURT

And now this **21st** day of January 2004, it is ordered that judgment is entered in favor of Ted Turner, Cecilia Husarchik and Randolph Smitley and against Twin Rivers Towing and Consolidation Coal Company for fifteen percent (15%) of their damages and against James Thistlehwaite for eighty five percent (85%) of their damages.

Judgment is also entered in favor of James Thistlehwaite and against Twin

Rivers Towing and Consolidation Coal Company for fifteen percent (15%) of his damages.

BY THE COURT:

Donetta W. Ambrose,
Chief U.S. District Judge