

TULANE MARITIME LAW JOURNAL ONLINE

VOLUME 43

JULY 2019

In re Frescati Shipping Co.: The Third Circuit Evaluates the Scope of Safe Berth Warranties and the Applicable Standard

I. INTRODUCTION	31
II. HISTORICAL BACKGROUND	32
III. COURT’S DECISION.....	34
IV. ANALYSIS	38
V. CONCLUSION	40

I. INTRODUCTION

After traveling 1900 miles, the *M/V Athos I*, a single-hulled oil tanker, was 900 feet away from safely reaching her intended berth when the tanker hit an abandoned anchor on the bottom of the Delaware River.¹ The anchor punctured the hull of the *Athos I*, causing approximately 264,000 gallons of crude oil to spill into the river.² *Athos I* was owned and managed by Frescati Shipping Co. (Frescati), who contracted with CITGO Asphalt Refining Co., CITGO Petroleum Corp., and CITGO East Coast Oil Corp. (CARCO) to deliver a shipment of crude oil from Venezuela to New Jersey. CARCO served as both the shipping customer and the wharfinger who operated the berth. As part of the contractual agreement between CARCO and Frescati, CARCO provided the *Athos I* with a safe berth warranty pursuant to specific requirements.³ In order for the warranty to remain valid and applicable, CARCO stipulated that Frescati must load the *Athos I* with a draft of thirty-seven feet or less and she must also arrive at the port in New Jersey with a draft of thirty-seven feet or less. Following the spill, Frescati paid for the cleanup effort at a cost of \$143 million, of which \$88 million was reimbursed by the United States pursuant to the Oil Pollution Act.⁴ The crucial question of how to apportion responsibility for the cleanup cost between the three parties turns on the scope of the safe berth warranty.

The procedural history of the noted case is unique as it has been involved in litigation for over a decade.⁵ The matter has been to trial

1. *In re Frescati Shipping Co.* (Frescati II), 886 F.3d 291, 295, 2018 AMC 609, 612 (3d Cir. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.* at 298, 2018 AMC at 617.

before two different district court judges and heard on appeal before two separate panels of the United States Court of Appeals for the Third Circuit. Initially, the United States District Court for the Eastern District of Pennsylvania held that CARCO was not liable for the accident in contract, tort, or otherwise.⁶ Frescati filed an appeal and the Third Circuit found that the district court failed to make appropriate findings of fact and conclusions of law.⁷ On remand, the district court examined whether Frescati met the conditions for the safe berth warranty to be applicable and held that CARCO was liable to Frescati and the United States, as Frescati's subrogee, for breach of contract of the safe berth warranty.⁸ The district court also held that CARCO was liable in tort to Frescati, concluding that CARCO had a duty, as operator of the berth, to search for obstructions in the approach to its berth, which they did not do.⁹ CARCO appealed the district court findings, and the Third Circuit convened for the second time on this matter to determine the applicability of the safe berth warranty and the duty of care of a wharfinger. The Third Circuit *held* that CARCO breached its safe berth warranty in contract but declined to extend the District Court's proposed duty of care in tort for a wharfinger. *In Re Frescati Shipping Co.*, 886 F.3d 291, 300, 2018 AMC 609, 632 (3d Cir. 2018).

II. HISTORICAL BACKGROUND

Courts across the United States vary in their interpretation of safe berth provisions. There is a split amongst the circuit courts as to whether the safe berth clause is a full warranty or merely a promise of due diligence.¹⁰ In short, when evaluating the liability of a charterer's nomination of a port, the United States Court of Appeals for the Fifth Circuit has employed a standard of due diligence, whereas the United States Court of Appeals for the Second Circuit has utilized a strict liability standard.

The Fifth Circuit rejects the view that a charterer warrants a ship's safety and established that a safe berth warranty merely imposes a duty of

6. *Id.*

7. *Id.*

8. *Id.* at 299, 2018 AMC at 618.

9. *Id.*

10. *Compare* Venore Transp. Co. v. Oswego Shipping Corp., 498 F.2d 469, 472, 1974 AMC 827, 830 (2d Cir. 1974) (holding that the safe berth warranty clause was an express warranty with strict liability), *with* Orduna, S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1157, 1991 AMC 346, 356 (5th Cir. 1990) (holding that a safe berth warranty clause imposes only a standard of due diligence upon the charterer to select a safe berth).

due diligence upon the charterer in selecting a safe berth.¹¹ For example, in *Orduna S.A. v. Zen-Noh Grain Corp.*, the court stated that there is no legitimate social or legal policy advanced by the absolute warranty.¹² The court reasoned that the master is the expert in navigation and such a policy would discourage the master from using his best judgment in determining the safety of the berth.¹³ Further, avoiding strict liability does not increase risks because under safe berth clauses the master has the freedom and discretion to not take his vessel into an unsafe port.¹⁴ The court determined that holding a charterer to a warrantor's liability results in an undue burden being placed on charterers.¹⁵ In reaching this decision, the Fifth Circuit relied on the United States Supreme Court's decision in *Atkins v. Disintegrating Co.*, which held that the charterer's representations on the port's safety did not amount to a warranty.¹⁶ In *Atkins*, the district court evaluated a claim for damages to a vessel that occurred when she entered an unsafe port.¹⁷ The Supreme Court affirmed the district court's determination that the contractual terms allowed for the master to refuse the designation of the port, and because the master is the navigator, he is the proper person to determine whether his vessel can enter safely into any particular port.¹⁸

The Second Circuit, following the English law definition as summarized in *Leeds Shipping Co. v. Societe Francais Bunge (The "Eastern City")*,¹⁹ has long held that promising a safe berth effects an "express assurance" that the berth will be safe.²⁰ For instance, in *Venore Transportation Co. v. Oswego Shipping Corp.*, the court held that the charterer was responsible for the damages sustained to the vessel as a result of weather conditions because the charterer had a "nondelegable"

11. *Orduna*, 913 F.2d at 1156, 1991 AMC at 356.

12. *Id.* at 1157, 1991 AMC at 356.

13. *Id.*

14. *Id.*

15. *Id.*; see J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 TUL. L. REV. 860, 868 (1975) ("[C]ourts are placing an undeserved burden on the charterer in holding him to a warrantor's liability.").

16. *Atkins v. Fibre Disintegrating Co.*, 85 U.S. 272, 299 (1873).

17. *Id.*

18. *Id.* at 79.

19. [1958] 2 Lloyd's Rep. 127, 131 (Eng.) ("A port is not safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.").

20. See *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521 (2d Cir. 1935) (holding that a master was not liable for damages incurred in reliance on a charter party's safe berth warranty).

express obligation to provide a completely safe berth.²¹ Further, in *Park Steamship Co. v. Cities Service Oil Co.*, the Second Circuit explained the rationale of employing strict liability to safe berth provisions: “[T]he charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer’s acceptance of the risk of its choice.”²²

Additionally, the Third Circuit, on a question of first impression for the court, was persuaded by the definition described in *The “Eastern City”* and held that the safe berth warranty is an express assurance of safety.²³ In deciding to apply the express assurance standard as developed by the Second Circuit, the Third Circuit relied on Supreme Court decisions from the late nineteenth and early twentieth centuries.²⁴ The court reasoned that because a charterer bargains and negotiates to send a ship to a particular port and then warrants that the ship will be safe at the port, there is no reason to invalidate this contractual agreement.²⁵

Lastly, arbitration tribunals recognize the circuit split but tend to follow the majority view of strict liability.²⁶ For instance, New York arbitrators held that a charterer was responsible for damages to a vessel’s hull under the safe berth warranty, even though the record was clear that neither the charterer nor the owner was aware of the danger.²⁷ The arbitration panel noted that if the panel had applied the Fifth Circuit standard of due diligence, the charterer would not be liable because they had not acted negligently in selecting the port.²⁸

III. COURT’S DECISION

In the noted case, the Third Circuit affirmed its previous holding that a charterer’s selection of a port is an express contractual assurance

21. 498 F.2d 469, 472, 1974 AMC 827, 830 (2d Cir. 1974).

22. 188 F.2d 804, 806, 1951 AMC 851, 854 (2d Cir. 1951).

23. *In re Frescati Shipping Co. (Frescati I)*, 718 F.3d 184, 202, 2013 AMC 1521, 1546 (3d Cir. 2013).

24. *See The Gazelle & Cargo*, 128 U.S. 474, 485-86 (1888) (“[I]f the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained.”); *see also Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253 (1902) (“[C]harterers failed to provide a safe dock where the ship in question could not reach it without damage.”).

25. *See Frescati I*, 718 F.3d at 202, 2013 AMC at 1544-45 (“[T]o any extent a charterer, however distant, bargains to send a ship to a particular port and warrants that it shall be safe there, we see no basis to upset this contractual arrangement.”).

26. *See The Mercandian Queen*, SMA Arb. No. 2713, at 5 (N.Y. Sept. 4, 1990).

27. *Id.*

28. *Id.*

constituting a warranty of safety.²⁹ The court explained that the warranty is applicable “without regard to the amount of diligence taken by the charterer.”³⁰ Further, the court determined that under tort law a wharfinger’s duty is more limited than that of a “shipping customer” who has provided a safe berth warranty.³¹ In the tort context, a wharfinger is bound to use reasonable diligence in determining whether the berths themselves and their approaches are in an “ordinary” condition of safety for vessels entering into and lying at the wharf.³² CARCO had dual liabilities in its dealings with Frescati. First, the Third Circuit evaluated whether CARCO breached their safe berth warranty under the terms of the charter; and second, whether as a wharfinger, CARCO was negligent in not using reasonable diligence to ensure Frescati’s safe approach and berth at the wharf.³³

The Third Circuit upheld the district court’s determination that CARCO breached its contractual duty under the safe berth warranty.³⁴ The court stated that the safe berth warranty provides, among other things, “protection against damages to a ship incurred in an unsafe port to which the warranty applies.”³⁵ As stated, a port is deemed safe “where the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship.”³⁶

First, the court evaluated the extent of the coverage of the safe berth warranty as applied to *Frescati*. The court determined that the safe berth warranty promised that a ship with a draft of less than thirty-seven feet is covered by the warranty, in the absence of bad navigation or negligent seamanship.³⁷ The court found that both the draft of the *Athos I* was less than the warranted depth and Frescati did not violate any seamanship regulations.³⁸

The court was persuaded by the district court’s finding that the draft of the *Athos I* was thirty-six feet, seven inches at the time of the accident

29. *Frescati II*, 886 F.3d 291, 306, 2018 AMC 609, 621 (3d Cir. 2018).

30. *Id.* (“[A]bsent abnormal conditions or those not avoidable by adequate navigation and seamanship.”).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 300, 2018 AMC at 629.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 303, 306, 2018 AMC at 625, 629.

and the anchor was in a “flukes-up” position, which caused the anchor to intrude within the thirty-seven-foot safe depth warranted by CARCO.³⁹ The anchor orientation is crucial to the safe berth warranty because if the accident occurred while the anchor was in a “flukes-down” position, the *Athos I* would have had a draft that exceeded the scope of the warranty.⁴⁰ The court held that the record contained sufficient evidence to support the finding that the anchor was “flukes-up” at the time of the accident.⁴¹ In reaching their conclusion, the court was not specifically concerned with how exactly the anchor changed position from “flukes-down” to “flukes-up.”⁴² Rather, the court was persuaded by the movement of the vessel at the time of the collision, the damage to her hull, and the evidence showing that the vessel was drawing at 36’ 7.”⁴³ The court reasoned that because this was a draft at which the collision would not have occurred had the anchor been “flukes-down,” there was sufficient evidence to determine that the anchor was “flukes-up.”⁴⁴ The ship was therefore within the scope of CARCO’s safe berth warranty.⁴⁵

Next, the court examined Frescati’s seamanship because a safe berth warranty only applies in the absence of bad navigation or negligent seamanship. On appeal, CARCO argued that Frescati violated two federal regulations. The first regulation requires the owner of a single-hulled tanker to provide certain written guidance to the ship’s master for purposes of estimating the tanker’s under keel clearance, to use that guidance to plan the ship’s passage, to consult with the pilot guiding the ship to her berth, and to make a log entry reflecting discussion of the under keel clearance with the pilot.⁴⁶ The second regulation mandates that the master ensure the pilot is informed of certain information, including the ship’s draft and tidal conditions.⁴⁷ The court held that Frescati satisfied the first regulation because its Vessel Operation Procedures Manual (Operation Manual), provides written guidance as to the appropriate under keel clearance.⁴⁸

39. *Id.* at 301, 2018 AMC at 623.

40. *Id.*, 2018 AMC at 629.

41. *Id.*

42. *Id.* at 302, 2018 AMC at 623.

43. *See id.* at 303, 2018 AMC at 624 (“The ballast tanks contained no extra liquid that would have affected the ship’s draft The ship left Puerto Miranda with a draft of 36’ 6”. Visual observation of the ship by experts and crewmembers immediately after the allision suggested the *Athos I* had a 36’ 7” draft before the allision.”).

44. *Id.*

45. *Id.* at 303, 2018 AMC at 625.

46. *See* 33 C.F.R. § 157.455(a)-(b) (2018).

47. *See id.* § 164.11.

48. *Frescati II*, 886 F.3d at 304, 2018 AMC at 627.

The court clarified that the regulation does not itself require a written voyage plan, such as a written copy of the master's passage plan.⁴⁹ Rather, the court concluded that the Operation Manual satisfied the planning requirement because it appropriately listed factors to consider and the river pilot testified that he discussed the draft, wind, visibility, and tides with the ship's master.⁵⁰ Additionally, the court held that Frescati did not violate the second regulation because the testimony shows that the master discussed all relevant information with the pilots and that he recorded the conversation on the signed Pilot Card.⁵¹ The court concluded this was sufficient documentation of the master-pilot conference requirement.⁵² Accordingly, the court held that because Frescati operated the *Athos I* with neither bad navigation or negligent seamanship, CARCO's safe berth warranty applied.⁵³

Furthermore, the court addressed CARCO's liability as a wharfinger. The district court found CARCO liable for negligence.⁵⁴ However, the Third Circuit expressed doubts about the district court's proposed duty of care. The district court applied a more stringent level of liability, concluding that a reasonably prudent terminal operator should periodically scan the approach to its dock for hazards as long as ships are being invited there.⁵⁵ Given the facts of the noted case, the district court reasoned that the diligence standard required CARCO to periodically use side-scan sonar to search for hazards, and since CARCO did nothing to look for obstructions, they breached their duty of care.⁵⁶ On appeal, the Third Circuit discussed that a wharfinger's liability is more limited than that of a shipping customer and in the tort context the court is hesitant to create a strict liability standard.⁵⁷ Rather, the court stated that a wharfinger is bound by "reasonable diligence" such that a vessel should be able to enter, use, and exit a wharfinger's dock without being exposed to dangers that cannot be avoided by reasonably prudent navigation and seamanship.⁵⁸ In short, the duty is to use "reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel."⁵⁹ The court disagreed

49. *Id.* at 305, 2018 AMC at 628.

50. *Id.*

51. *Id.* at 306, 2018 AMC at 629.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 307, 2018 AMC at 630.

56. *Id.*

57. *Id.* at 306, 2018 AMC at 631.

58. *Id.*

59. *Id.*

with the district court's conclusion that the precaution of a preemptive side-scan sonar search would be less burdensome than the probability of an accident multiplied by the serious harm caused by a spill of crude oil.⁶⁰ First, the court stated that they do not share the district court's confidence that a general scan would have detected the anchor with sufficient clarity to prevent the accident that occurred.⁶¹ Second, the court harbored serious doubts about whether imposing a specific duty to require side-scan sonar would be useful for wharfingers in their ordinary course of business.⁶² Ultimately, the Third Circuit determined that CARCO breached its contractual duty under the safe berth warranty. The court noted that CARCO had some duty to use reasonable diligence as a wharfinger but declined to assert whether they did or did not breach that duty under tort.⁶³

Finally, the Third Circuit also held that CARCO could only assert defenses against the United States' subrogated claims that it could have asserted against Frescati, CARCO failed to establish equitable recoupment, and CARCO waived its argument that the Oil Pollution Act limited its liability by not filing a timely defense.⁶⁴

IV. ANALYSIS

The Third Circuit's holding in the noted case is an important confirmation of the scope and standard of safe berth provisions. Although there is a circuit split as to the scope of safe berth warranties, the decision is notable because it reaffirmed the long-held view under maritime law that a safe port clause is an express assurance.⁶⁵ There are important policy considerations between imposing an undue burden on charterers, deferring to the discretion of the ship master, and upholding the basic principles of contractual law, such that the charterers freely negotiate and nominate ports for safe berth and therefore assume the risks of ensuring port safety. Lastly, while the noted case remains consistent with the underlying purpose of the law, it serves to create a further conflict with the Fifth Circuit.⁶⁶

60. *Id.* at 307, 2018 AMC at 631-32.

61. *Id.*

62. *Id.*, 2018 AMC at 631.

63. *Id.*

64. *Id.* at 308-13, 2018 AMC at 635-41.

65. See JULIAN COOKE ET AL., VOYAGE CHARTERS ¶ 5.124 (3d ed. 2007) ("[T]he law concerning safe ports had a rather secure berth in maritime law and it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner.").

66. See *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157, 1991 AMC 346, 346 (5th Cir. 1990) ("[The safe berth warranty merely] imposes upon the charterer a duty of due diligence to select a safe berth.").

The noted case remained consistent with the majority of prior jurisprudence regarding the scope of safe berth provisions in two ways. First, it relied on “deeply rooted” traditions established by Supreme Court decisions from over a century ago⁶⁷ and further reiterated by the Second Circuit, which have long held that a charterer’s nomination of a port is an “express assurance” that the berth will be as represented.⁶⁸ Second, the court correctly distinguished between the duty of a wharfinger with that of a charterer.⁶⁹ The noted case discussed how the duty of a wharfinger is to use reasonable diligence in keeping its port safe for incoming ships as compared to a charterer who is contractually obligated to provide a safe berth.⁷⁰ This is an important distinction that the Fifth Circuit declined to interpret as such.

The court’s decision in the noted case warrants a discussion of policy considerations. The Fifth Circuit in *Orduna* relied heavily on legal scholars who opined that no legal or social policy was furthered by holding the charterer liable for the safety of the berth it selects and reasoned that it was more sensible to impose fault on the master rather than a distant merchant charterer.⁷¹ In contrast, the Third Circuit relied on its prior opinion, which reasoned that because a charterer bargains for the ability to nominate a particular port and also warrants that the port will be safe, it follows that in return the charterer accepts the risk of its choice.⁷² The policy discussion turns on whether one believes the charterer is more likely to have familiarity with the port it selects or whether a master would be in a better position to determine a port’s dangers rather than the party who selected the port. One positive implication of holding the charterer liable may be to increase port safety, as the charterer will have every incentive to ensure their port nomination is the safest and best available under the circumstances. There may be concern that this type of strict

67. See *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253 (1902) (“[C]harterers failed to provide a safe dock where the ship in question could not reach it without damage.”); *The Gazelle & Cargo*, 128 U.S. 474, 485-86 (1888) (“[I]f the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained.”).

68. See *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521 (2d Cir. 1935).

69. See *Frescati II*, 886 F.3d at 306, 2018 AMC at 630 (“A wharfinger’s duty is more limited than that of a shipping customer who has provided a safe berth warranty.”).

70. See *id.*; see also *Frescati I*, 718 F.3d 184, 201, 2013 AMC 1521, 1542 (3d Cir. 2013) (citing *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962)) (“[The charterer is bound to provide] not only a place which he believes to be safe, but a place where the chartered vessel can discharge always afloat.”).

71. See *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1158, 1991 AMC 346, 354 (citing GRANT GILMORE & CHARLES L. BLACK JR., *THE LAW OF ADMIRALTY* § 4-4, at 204-06 (2d ed. 1975)).

72. See *Frescati I*, 718 F.3d at 201, 2013 AMC at 1521.

liability will discourage the master from using his best discretion in whether the port is safe, but because a master can still be liable in tort,⁷³ this concern is diminished.

The Third Circuit applied the well-established standard that a safe berth warranty is an express assurance and declined to follow the new course established by the Fifth Circuit. The court affirmed the appropriate standard for future cases within the Third Circuit and further helped to verify the hypothesis that other circuit courts are likely to apply the standard as articulated by the Supreme Court and the Second Circuit.

V. CONCLUSION

The noted case affirmed the Third Circuit's question of first impression in holding that a safe berth warranty is an express contractual assurance. This decision will now be reviewed by the Nation's highest Court. The Supreme Court has granted certiorari⁷⁴ and after three decades of a circuit split in the lower courts, the Supreme Court will clarify whether under federal maritime law, a safe berth clause in a charter contract is a guarantee of a ship's safety or a duty of due diligence. Outside of the Fifth Circuit's decision in *Orduna*, the majority of courts have held the safe berth warranty is an express assurance that provides protection against damages to a ship where the ship cannot reach the port without harm absent abnormal conditions or those not avoidable by adequate navigation and seamanship. The Fifth Circuit seemed to deviate from the well-established law under safe berth provisions. As such, the Supreme Court will need to analyze whether the Fifth Circuit's contract interpretation of the customary safe berth clause has attracted enough of a following in the maritime industry to warrant a shift from the traditional approach. However, this appears unlikely because, in the three decades since *Orduna*, the decision has never been reaffirmed by the Fifth Circuit itself. In sum, the current interpretation of safe port clauses varies between U.S. courts, but the majority of jurisdictions apply the strict liability standard.

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73. See COOKE ET AL., *supra* note 65, ¶ 5.124.

74. *Citgo Asphalt Refining Co., et al. v. Frescati Shipping Co.*, No. 18-565, 2019 WL 1756680, 2019 U.S. LEXIS 2919 (2019).

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