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First Judicial District, Kootenai County
Jim Brannon, Clerk of the Court
By: Deputy Clerk - Larsen, Denice

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRANDI JONES, natural parent of REGINALD JUSTICE NAULT, and DASHA DRAHOS (a/k/a DASHA HUNTER), biological sister of REGINALD JUSTICE NAULT, decedent, *Plaintiffs,* *v.* CAMEREN NOSWORHTY, BRODY LUNDBLAD, TRACEY LYNN, DALE ATKISSON, CHRISTOPHER NOSWORTHY, and DOE DEFENDANTS, 1-10, *Defendants.*	**CASE NO. CV-2017-3456** **MEMORANDUM DECISION AND ORDER GRANTING LYNN'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING IN PART AND DENYING IN PART NOSWORTHY'S MOTION FOR SUMMARY JUDGMENT.**
ANDREW NAULT, natural parent of REGINALD JUSTICE NAULT, Decedent, *Plaintiff,* *v.* CAMEREN NOSWORHTY, BRODY LUNDBLAD, TRACEY LYNN, DALE ATKISSON, CHRISTOPHER NOSWORTHY, and DOE DEFENDANTS, I-X, *Defendants.*	

Defendants' Motions For Summary Judgment came on for hearing before Cynthia K.C. Meyer, District Judge, on the 11th day of July, 2018. Plaintiffs Jones and Drahos were represented by Monica Flood Brennan and Leander James. Plaintiff Nault was represented by Jane Gordon. Nosworthy Defendants were represented by Julianne Hall. Defendant Lynn was represented by Daniel Stowe. Defendant Lundblad was represented by Michael Howard.

I. INTRODUCTION

On July 21, 2015, Reginald Nault (Reggie) boarded a boat with his friends, Defendants Cameren Nosworthy and Brody Lundblad, to go on a cruise down the lake. The boat was owned by Defendant Christopher Nosworthy, Cameren's father. Cameren, Brody, and Reggie obtained approximately 12 beers from an unknown source and drank beers while boating. Cameren, Brody, and Reggie stopped at a restaurant and bar, Shooters, near the south end of the lake. Defendant Lynn and the late Defendant Atkisson allegedly provided Cameren, Brody, and Reggie with a Derailer. Cameren, Brody, and Reggie left Shooters and drank the Derailer on the lake. At some point during the trip, Reggie entered the water and drowned. Following Reggie's death, the Plaintiffs Brandi Jones, Reggie's mother, and Dasha Drahos, Reggie's sister, brought a wrongful death claim against Defendants. Plaintiff Andrew Nault, Reggie's natural father, filed a similar Complaint against Defendants on June 19, 2017 in case number CV-2017-4759. Plaintiff Nault's case was later consolidated into the above case, CV-2017-3456. Dasha Drahos's wrongful death claim was dismissed pursuant to a motion for summary judgment. Defendant Lynn now brings a motion for summary judgment based on the Idaho Dram Shop Act.

Nosworthy Defendants and Lundblad now bring a motion for summary judgment based on several theories.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)(citing I.R.C.P. 56(a)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold,* 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss,* 144 Idaho 225, 228, 159 P.3d 862, 865 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). A motion for summary judgment will not be granted where there are unresolved issues of material fact. *McKinley v. Fanning,* 100 Idaho 189, 190, 595 P.2d 1084, 1086 (1979). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard,* 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(c); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)).

III. ANALYSIS

A. Maritime Jurisdiction

Plaintiff seeks the application of maritime jurisdiction pursuant to 28 U.S.C. § 1333(1).

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. 46 U.S.C.App. § 740. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," 497 U.S., at 363, 110 S.Ct., at 2896, to determine whether the incident has "a potentially disruptive impact on maritime commerce," *id.*, at 364, n. 2, 110 S.Ct., at 2896, n. 2. Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S. Ct. 1043, 1048, 130 L. Ed. 2d 1024 (1995).

Here, it is uncontroverted that the alleged torts occurred on a navigable lake; therefore, the location test is satisfied.

Thus, the Court must next characterize the type of incident (as opposed to the specific facts of the incident) in order to determine whether the incident's general features and character were of the type likely to disrupt maritime commerce. *Grubart* at 538, 1050–51. The U.S. Supreme Court in *Grubart* noted that the characterization of the incident could provide levels of generality too specific or general to be useful, applied an intermediate level of generality, then determined "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." *Id.* at, 539, 1051.

The incident's character could be described as a drowning occurring after an intoxicated minor was served alcohol while recreationally boating and who jumped or fell from an allegedly negligently operated recreational boat because of his intoxication; or more generally, a drowning in navigable waters involving a passenger on a moving boat; or more generally yet, a death. For purposes of evaluating the applicability of maritime jurisdiction, the Court applies the intermediately general characterization of the incident: a drowning in navigable waterway involving a passenger on a moving boat. Given the somewhat factually detached level of review mandated by United States Supreme Court precedent attempting to force uniformity of law between the Port of Los Angeles and any inland body of water meeting the definition of "navigable," this Court must find that such an incident belongs within a class of incidents posing more than a fanciful risk to commercial shipping. If such an incident occurred in another location, it and the ensuing search could potentially impair commercial shipping.

The Court must now determine "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart* at, 539, 1051. Use of a recreational boat which includes "navigating" from a marina to a resort boat ramp to a restaurant on the far side of the lake with periodic stops to swim is certainly a "traditional maritime activity" for Lake Coeur d'Alene. If a fire on a "pleasure yacht" docked at a marina shows a substantial relationship to traditional maritime activity, the facts of this case regarding recreational boating surely qualify. *Sisson v. Ruby*, 497 U.S. 358, 365–67, 110 S. Ct. 2892, 2897–98, 111 L. Ed. 2d 292 (1990).

For the reasons stated above, maritime jurisdiction pursuant to 28 U.S.C. § 1333(1) applies to this case.

B. Dram Shop Liability

Plaintiffs assert that federal maritime jurisdiction case law preempts Idaho's Dram Shop Act where there is a conflict. On its face, this is a correct argument. The problem with this argument is that there is not any one consistent body of federal maritime case law applicable to the facts of this case, as would be the case if there were a United States Supreme Court ruling or federal statute on point and directly conflicting with Idaho's Dram Shop Act. In addition, the line of cases cited by Plaintiff only found ship owners who turned their ships into "floating dram shops" liable. Finally, there is no conflict between the line of cases cited by Plaintiff and the Idaho Dram Shop Act under the facts of this matter.

"State courts have concurrent jurisdiction with the federal courts to try cases at admiralty, but in doing so must apply federal maritime law rather than state law." *Fisk v. Royal Caribbean*

Cruises, Ltd., 141 Idaho 290, 292, 108 P.3d 990, 992 (2005). "[S]tate law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with maritime law." *Id.* at 294, 994.

The genesis of the published maritime dram shop cases Plaintiff cites is *Reyes v. Vantage S. S. Co.*, 558 F.2d 238 (5th Cir. 1977), *on reh'g*, 609 F.2d 140 (5th Cir. 1980), where a ship owner was found liable to an injured third party for selling alcohol to crew members and turning the ship into a "floating dram shop." Notably, the portion of the opinion dealing with the ship owner's negligence for dram shop law cites no authority for its rule; it just seems to have created a rule:

> It is the opinion of this Court that the practice revealed by this record of operating a floating dram shop makes a ship unseaworthy, and if not that, at least clearly negligent. Certainly the sea holds enough perils for a sailor, even a sober one. But for his employer to supply the beer without adequate control and then complain that Reyes was negligent for being drunk on board ship is indeed ironic.

Reyes at 244–45. On rehearing, the Court quoted its prior opinion on the matter as authority for the rule it created. *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 146 (5th Cir. 1980).

Reyes failed to conduct a *Wilburn* analysis, and this Court believes that *Reyes* was wrongly decided for that reason. In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 75 S. Ct. 368, 370, 99 L. Ed. 337 (1955), the United States Supreme Court was faced with the question of whether the Court should create a judicial maritime rule or apply Texas law. The Court noted that "[i]n the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States." *Wilburn* at 313, 370 (footnotes omitted). The Court ultimately concluded that under the facts of that case, the problem was best left to legislatures, and where the United States Congress had failed to enact a national law, the

problem was best left to state legislatures. *Id.* at 321, 374. There is no evidence of any such thoughtful analysis conducted by the *Reyes* court, and the *Reyes* Court fashioned a maritime rule by judicial fiat and applied it over existing state law.

The next in the line of cases cited by Plaintiffs is *Thier v. Lykes Bros.*, 900 F. Supp. 864 (S.D. Tex. 1995), where the Court found the defendant ship owners "were negligent in operating a floating dram shop with insufficient supervision to prevent Mr. Borzi from becoming intoxicated while on the vessel, and this negligence was a proximate and producing cause of Plaintiff's damages." *Thier* at 878, citing *Reyes*. The Court further found that the Defendant ship owners "were negligent in failing to monitor alcohol consumption onboard, fostering a party atmosphere, and failing to prohibit drunk officers from driving and this negligence was a legal and factual cause of Plaintiff's injuries." *Id.* at 879. Notably, the ship owner did not provide the alcohol; its liability was based on a duty to maintain an orderly ship by virtue of its status as the ship's owner.

The last in the line of maritime dram shop cases Plaintiff cites *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 2d 832 (S.D. Tex. 1999), where the Court applied maritime jurisdiction over a state law prohibiting dram shop liability where a riverboat casino patron got drunk, drove, and killed the plaintiff's family member. The Court found that maritime dram shop jurisdiction applied and that the ship owner providing the alcohol was liable to the party injured by the drunken patron.

Thus, this line of cases is based on *Reyes*, which failed to apply the analysis of *Wilburn* when creating a maritime rule and applying it over state law[1]. Moreover, this line of cases stands for no more than the proposition that the owner of a ship can be held liable under maritime rules when the owner allows his boat to become a "floating dram shop." Implicit in that liability is the duty of a ship owner to maintain order and safety on his ship. Such a duty would not extend to Lynn, who did not own the boat.

Other courts have analyzed federal preemption of state dram shop laws and found that there is no federal preemption because there is no uniform body of federal case law to preempt the state law on point. For example:

> In wrestling with this decision, we are guided by the fundamental tenet of preemption doctrine that federal law will not preempt state law "absent a clear statement of congressional intent to occupy an entire field" or unless applying state law would conflict with or otherwise frustrate a federal regulatory scheme. *Barske v. Rockwell Int'l Corp.*, 514 N.W.2d 917, 925 (Iowa 1994). Plainly there is no federal maritime statute comparable to Iowa Code section 123.92 governing the rights and liabilities of dram shops or third parties victimized by their patrons. And as the federal trial court in *Meyer* observed, neither is there a consistent or uniform body of maritime common law imposing tort liability on sellers of alcohol for injuries resulting from their sales. *Meyer*, 1994 WL 832006, at *4.

Horak v. Argosy Gaming Co., 648 N.W.2d 137, 146–47 (Iowa 2002).

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[1] Plaintiff also cites two unpublished cases: *Doe v. Royal Caribbean Cruises, Ltd*, No. 11-23323-CIV, 2011 WL 6727959 (S.D. Fla. Dec. 21, 2011); and *Doe v. NCL (Bahamas) Ltd.*, No. 11-22230-CIV, 2012 WL 5512347 (S.D. Fla. Nov. 14, 2012). These cases are similar to those discussed above in that they only found liability against the boat's owner. These cases are somewhat different from the cases above in that they were both cruise ships with bars serving alcohol, but this is also distinct from the facts of this matter, and these cases are no more applicable to this case than those discussed above. In addition, these two cases do not resolve the conflicting rulings regarding the application of maritime dram shop law over state laws.

The Defendant argues that there is no existing maritime rule regarding what is essentially dram shop liability, that application of maritime law is inappropriate here, and that, under *Wilburn*, this Court must apply state law. In support of its argument, the Defendant cites a decision of a United States District Court in California in which that court held that, although the court had admiralty jurisdiction over the passenger's tort action pursuant to general maritime law, no federal maritime dram shop rule existed and that, as a consequence, California's dram shop statute provided the substantive law governing the plaintiff's admiralty claim. *See Meyer v. Carnival Cruise Lines, Inc.*, 1994 WL 832006, at *4 (N.D.Cal. Dec.29, 1994) (citing *Wilburn*, 348 U.S. at 313, 75 S.Ct. 368). That court, thus, declined to fashion a federal maritime dram shop rule that would impose tort liability on sellers of alcohol for injuries resulting from their sales. *Id.* The Plaintiff, however, cites a decision of a United States District Court in Texas in which that court held that admiralty jurisdiction existed over a casino riverboat owner when a passenger who became intoxicated while drinking alcoholic beverage at the casino riverboat killed three persons while operating his automobile after departing the riverboat. *Young v. Players Lake Charles, L.L.C.*, 47 F.Supp.2d 832 (S.D.Tex.1999). The *Players* court determined that a defendant can be held liable under general maritime law for providing alcohol without adequate supervision, stating that because "there is an existing maritime rule governing the issue of dram shop liability," "there is no need to perform a *Wilburn* analysis to determine whether the Court must apply state dram shop law." *Id.* at 837. Thus, the briefs and arguments submitted by the parties demonstrate the unsettled nature of this area of federal law. Furthermore, in presenting this issue to the Court, the parties were not able to identify authority in the Seventh Circuit that would resolve this dispute, and the Court has been unable to find such.

Kludt v. Majestic Star Casino, LLC, 200 F. Supp. 2d 973, 979 (N.D. Ind. 2001).

It appears that federal trial courts have disagreed on whether there is a maritime dram shop law. *Compare Bay Casino, LLC v. M/V Royal Empress*, 199 F.R.D. 464, 467 (E.D.N.Y.1999)(finding that federal maritime law may be applied to a dram shop liability cause of action), *Young v. Players Lake Charles, L.L.C.*, 47 F.Supp.2d 832, 837 (S.D.Tex. 1999)("there is an existing maritime rule governing the issue of dram shop liability"), *with Meyer v. Carnival Cruise Lines, Inc.*, No. C–93–2383 MHP, 1994 WL 832006, at *4 (N.D.Cal. Dec. 29, 1994)(finding no authority supporting federal maritime dram shop law and applying the state's dram shop law), *Horak v. Argosy Gaming Co.*, 648 N.W.2d

> 137, 147 (Iowa 2002)(finding no federal maritime statute or maritime dram shop law preempting the state dram shop law), *Kludt v. Majestic Star Casino, LLC*, 200 F.Supp.2d 973 (N.D.Ind.2001)(applying state dram shop law to supplement general maritime law).

Vollmar v. O.C. Seacrets, Inc., 831 F. Supp. 2d 862, 870 (D. Md. 2011).

Other courts have applied state law because there was no specific conflict between state dram shop law and federal maritime dram shop law under the facts of the case. For example, in *Christiansen v. Christiansen*, 152 P.3d 1144 (Alaska 2007), the state dram shop act provided immunity for social hosts, but not for licensed alcohol sellers. The case involved an unlicensed social host on a boat who would be protected from liability by the Alaska statute. The plaintiff in *Christiansen* cited the same line of cases cited by Plaintiff here: *Young*, *Reyes*, and *Thier*. The Court stated:

> [T]hese cases fail to support Almeria's claim. None of them deals with a vessel owner who acted merely as a social host, and none purports to recognize or create a general rule of maritime law that would abrogate the traditional social-host immunity rule as it existed at common law.
>
> Given the lack of analogous precedent in maritime law, the superior court found no 'controlling federal rule' imposing liability on an unlicensed social host. We agree. In the absence of a controlling federal rule, we conclude that Almeria has not demonstrated that a characteristic feature of maritime law would be materially prejudiced by applying AS 04.21.020 in this case.

Christiansen v. Christiansen, 152 P.3d 1144, 1147 (Alaska 2007).

This Court finds that there is no uniform body of federal maritime dram shop law which would preempt Idaho's Dram Shop Act. The maritime law is unsettled in this area, and the Court would have to choose from the conflicting federal rulings on the issue if any of the rules directly addressed the factual circumstances here, which they do not.

> Federal law may preempt state law in one of two ways. First, if Congress has shown the intent to occupy a given field, any state incursion into that field is preempted by federal law. Second, even if the field is not preempted, if state law conflicts with federal law, it is preempted to the extent of the conflict.

Christian v. Mason, 148 Idaho 149, 152, 219 P.3d 473, 476 (2009)(internal citations omitted).

In addition, the cases Plaintiff cites do not apply to the facts of this case and preempt Idaho's Dram Shop Act because there is no conflict. The cases Plaintiff cites provide only for dram shop liability against boat owners. There is no allegation that the owner of the boat at issue, Chris Nosworthy, provided alcohol. While a conflict between I.C. § 23-808 and federal maritime law is theoretically possible under some combination of facts, the Court will not concoct a hypothetical conflict from facts not at issue in this matter. As applied to the facts of this matter, there is no conflict between federal maritime dram shop laws and Idaho's Dram Shop Act.

Idaho's Dram Shop Act applies to these facts, and it shields from liability "any person who sold or otherwise furnished alcohol" who did not receive notice "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." I.C. § 23-808.

Plaintiffs cite *Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 273, 371 P.3d 322, 327 (2016), and argue that Defendants cannot assert the 180-day deadline for giving notice in Idaho's Dram Shop Act because they have unclean hands because they were not honest about the alcohol. Although the Court is inclined to agree with Plaintiffs regarding the equities of Defendants benefiting from lying about alcohol and then asserting the notice provision of I.C. § 23-808(5), the unclean hands doctrine is inapplicable to these facts because the notice provision of I.C. § 23-808(5) is not an equitable remedy, but a statutory bar to relief, and the equitable

doctrine of unclean hands doctrine applies only against a person who is pursuing an equitable remedy. See *Ada Cty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 371, 179 P.3d 323, 334 (2008). Here, Defendants are asserting an unambiguous statutory bar.

Because liability pursuant to Idaho's Dram Shop Act is precluded by Plaintiffs not giving timely notice, it is unnecessary to evaluate Lynn's argument that wrongful death actions are precluded by Idaho's Dram Shop Act and *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300, (1999).

C. Federal Courts Have Applied State Wrongful Death Laws Absent Federal Preemption

Plaintiff clearly filed both an Idaho state law wrongful death claim pursuant to I.C. § 67-7032 and under federal maritime law. Regardless of whether federal maritime law consistently recognizes a wrongful death claim named as such, the Amended Complaint gives ample notice of a maritime claim for breach of duties set forth in the general allegations. For example: "The conduct of Defendants herein created the existence of conditions involving an unreasonable risk of serious bodily [injury] on a vessel in the navigable waters of the United States of America." Amended Complaint, ¶ 2.28.

Several U.S. Circuit Courts of Appeals have recognized a maritime survival action, but the U.S. Supreme Court has declined to rule on the issue of whether such an action exists as a creature of federal maritime law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34, 111 S. Ct. 317, 326–27, 112 L. Ed. 2d 275 (1990). Often when the Courts of Appeals have found a maritime survival action, it has done so by applying state tort survival statutes. The U.S. Supreme Court

has applied state wrongful death statutes to cases involving deaths on navigable waters within states.

> [W]hen a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it. . . .
>
> This criterion is manifestly not limited to cases of wrongful death. It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See Minnesota Rate Cases, 230 U.S. 352, 402-410, 33 S.Ct. 729, 741—744, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18. We see no reason why, under this test, the Florida rule in providing for the survival of a cause of action against a deceased tortfeasor for injuries occurring on navigable waters within the limits of the State should not be applied.

Just v. Chambers, 312 U.S. 383, 388–91, 61 S. Ct. 687, 691–93, 85 L. Ed. 903 (1941).

> Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202, 116 S. Ct. 619, 621–22, 133 L. Ed. 2d 578 (1996). Therefore, consistent with the approach of the U.S. Supreme Court in maritime wrongful death cases, this Court will apply the state law of the forum.

D. Remedies

Nosworthys argue "[u]nder general maritime law in a wrongful death cause of action, non-pecuniary damages are no longer recoverable in the wake of *Miles v. Apex Marine Corp*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990)." That is an overbroad reading of *Miles*.

Miles involved two claims: a claim for negligence for the death of a seaman under the Jones Act, and a claim for the deceased seaman's future earnings under general maritime principles for "unseaworthiness." The rule cited by Nosworthys involved whether the seaman's mother could recover his future wages under general maritime principles. The Court ruled she could not. However, in making that determination, the Court resorted to the Jones Act, which applies only to seamen. 46 U.S.C. § 30104. Reggie Nault was not a seaman. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995). As the Court explained in *Miles*:

> **Because this case involves the death of a seaman, we must look to the Jones Act.**
>
> The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 U.S.C. § 59. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, see *St. Louis, I.M. & S.R. Co., supra,* 237 U.S., at 658, 35 S.Ct., at 706, and it is the rule under the Jones Act. See *Van Beeck, supra,* 300 U.S., at 347, 57 S.Ct., at 454–455. **Congress has limited the survival right for *seamen's* injuries resulting from negligence.** As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability. We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for ***seamen's*** injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

Miles, at 36, 328 (emphasis added). This is essentially a finding that Congress has already spoken to the issue of what a seaman's personal representative can recover, and the Court would not create a remedy contravening that congressional intent. However, that concern is not at play here because Reggie Nault was not a seaman, and Congress has not acted to limit the recovery for every death occurring in navigable waters.

Nosworthy also cites to *Newhouse v. United States*, 844 F. Supp. 1389 (D. Nev. 1994), which applied *Miles*'s rule to non-seamen. Some other courts have done the same. This Court does not find those cases persuasive, and they are not authoritative on this Court[2]. The Court is more persuaded by a contrary line of cases finding that *Miles*'s rule was statutorily based and limited to seamen. See *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), where the 9th Circuit Court of Appeals found that the parents of boaters who were killed when a recreational boat collided with a Navy mooring buoy in state territorial waters were entitled to recover non-pecuniary damages, including for loss of society. The Court stated "the fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles*, 498 U.S. at 32–33, 111 S.Ct. at 325–26, and that statute does not limit recoveries for the deaths of non-seamen." *Sutton v. Earles*, 26 F.3d 903, 917 (9th Cir. 1994).

Thus, it does not appear to the Court that various federal courts have created a uniform rule applicable to the facts of this case. Where there is no uniform rule of maritime law, this Court will follow the approach of *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202, 116 S. Ct. 619, 621–22, 133 L. Ed. 2d 578 (1996), which states:

> Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases.

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[2] "[S]tate courts are not bound by circuit court precedent even on matters of federal law." *State v. McNeely*, 162 Idaho 413, 416, 398 P.3d 146, 149 (2017). "Such decisions are authoritative only if the reasoning is persuasive." *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 142 Idaho 235, 240, 127 P.3d 138, 143 (2005).

However, Chris Nosworthy is correct that his liability, if any, is limited to the value of the boat. This is because there is a federal statute directly on point, and this preempts any Idaho law on the subject. 46 U.S.C. § 30505 states in relevant part:

> **(a) In general.**--Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.
>
> **(b) Claims subject to limitation.**--Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Section 30506 is only applicable to seagoing vessels, and therefore not applicable here.

Plaintiff argues that 46 U.S.C. § 30505 is intended to apply only to vessels carrying freight. It appears to this Court that the whole of maritime law is intended primarily to protect commercial shipping, and its ends are not necessarily well-matched to purely recreational outings in inland navigable waters, but maritime law has been expanded to apply in those situations with the intended goal of uniformity. Here, the statute at issue has clearly been expanded to cover recreational boating: "[e]xcept as otherwise provided, this chapter (except section 30503) applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 46 U.S.C. § 30502. This limitation of liability is not confined to commercial vessels, and applies even to jet skis. *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990). 46 U.S.C. § 30505 limits Chris Nosworthy's liability, if any, to the value of the boat.

Additionally, 46 U.S.C. § 30505 conflicts with the vicarious liability provision of I.C. § 67-7032, and preempts it to the extent of the conflict. The conflict is the limitation of liability contained in 46 U.S.C. § 30505, which limits damages to the value of the boat, whereas I.C. § 67-7032 makes the boat owner fully liable. Additionally, I.C. § 67-7032(3) states: "[n]othing contained herein shall deprive the owner of any vessel of any of the rights, limitations or exemptions from liability afforded such owner under any federal statutes."

E. Idaho's Dram Shop Act is Constitutional

Plaintiff argues that Idaho's Dram Shop Act is unconstitutional because it violates Art. 3, § 19 of the Idaho Constitution, as well as the equal protection and due process clauses of the Idaho and United States Constitutions.

Art. 3, § 19 of the Idaho Constitution prohibits "local and special laws" on a variety of issues. Idaho's Dram Shop Act is neither a local nor special law because it applies generally to all members of the classes it creates, and it is not arbitrary, capricious, or unreasonable.

> This Court has clearly set forth three characteristics of special laws. First, "[a] special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality." *ISEEO IV,* 140 Idaho at 591, 97 P.3d at 458. It is important to note that "[a] law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable." *Id.* Second, we have found that when the Legislature pursues a "legitimate interest in protecting citizens of the state" in enacting a law, then it is not special. *Id.* Lastly, courts must determine "whether the [statute's] classification is arbitrary, capricious, or unreasonable." *Arel,* 146 Idaho at 35, 189 P.3d at 1155.

Citizens Against Range Expansion v. Idaho Fish And Game Dep't, 153 Idaho 630, 636, 289 P.3d 32, 38 (2012).

Plaintiff argues "By enacting the statute, the legislature attempted to 'limit' the common law dram shop cause of action with respect to a sub-class of claimants bringing negligence claims. The legislature encroached upon a fundamental right protected by Art. 3, § 19 of the Idaho Constitution." Plaintiff never identifies which fundamental right is allegedly encroached upon, and the Court does not know or understand Plaintiff's argument.

It appears to the Court that the Idaho had a legitimate and rational basis for enacting Idaho's Dram Shop Act: it wanted to limit liability upon purveyors of alcohol, discourage irresponsible drinking, and implicitly leave liability for injuries caused by inebriated persons upon the person who allowed themselves to become inebriated: the inebriate himself. The exceptions to this rule are limited to those who lack capacity at the time they were served or who are not otherwise allowed to drink alcohol: obviously intoxicated persons and minors.

Plaintiff argues: "I.C. § 23-808(5) segregates out a class of plaintiffs among personal injury plaintiffs suing in negligence (who all have a two-year statute of limitations) and unconstitutionally limits their claims by a 180-day statute of limitations."

The Court has evaluated similar claims regarding the Idaho Dram Shop Act in the context of equal protection, and stated:

> This Court has also previously recognized that "[n]ot every legislative classification which treats different classes of people differently can be said to be 'discriminatory,' much less 'obviously' 'invidiously discriminatory.' " *State v. Beam,* 115 Idaho 208, 212, 766 P.2d 678, 682 (1988). "For a classification to be 'obviously' 'invidiously discriminatory,' it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Id.* I.C. § 23–808 limits dram shop liability to those persons who are innocently injured as a result of the negligent provision of alcohol. Preventing intoxicated persons from recovering from the negligent providers of alcohol

> furthers this purpose and is not calculated to excite animosity or ill will. The classification at issue here is neither invidiously discriminatory nor does it involve a fundamental right.

Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999). Therefore, the Court applied rational basis scrutiny.

The situation here is the same. The notice provision does not distinguish between individuals or groups odiously or in an attempt to excite animosity or ill will. Rather, it appears that the Legislature wanted to discourage irresponsible drinking by leaving the liability with the drinker instead of shifting it onto purveyors of alcohol. It created two narrow exceptions to this general rule, which were further narrowed by the time limit of I.C. § 23-808(5).

> On rational basis review, courts do not judge the wisdom or fairness of the legislation being challenged. *See Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211, 221 (1993). The United States Supreme Court has held that "[o]n rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' " *Federal Communications Comm'n,* 508 U.S. at 314–15, 113 S.Ct. at 2101–02, 124 L.Ed.2d at 222. This Court also recognized in *Meisner* that "[u]nder the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." 131 Idaho at 262, 954 P.2d at 680 (citing *Bint v. Creative Forest Prod.*, 108 Idaho 116, 120, 697 P.2d 818, 822 (1985)).

Id. at 396–97, 308–09.

Limiting liability primarily to the inebriated person whose actions were the immediate cause of the injury both limits dram shop and social host liability and discourages irresponsible consumption of alcohol. The Court therefore finds that disparate treatment of personal injury

plaintiffs under I.C. § 23–808(5)[3] vs. I.C. § 5-219(4) is rationally related to legitimate governmental purposes. Accordingly, this Court holds that I.C. § 23–808 does not violate the Equal Protection Clauses of the Idaho or United States Constitutions, or Art. 3, § 19 of the Idaho Constitution.

Although Plaintiff states that I.C. § 23-808(5) violates the Due Process Clauses of the Idaho and Federal Constitutions, Plaintiff never articulates any reasoning to support that conclusion. Plaintiffs have not met their burden of proof for this claim, and the Court does not find that I.C. § 23-808(5) violates the Due Process clauses of the Idaho and Federal Constitutions.

Plaintiff next argues that the Idaho Dram Shop Act is ambiguous because "[t]here is an irreconcilable conflict between I.C. § 23-808(5) and I.C. §§ 23-808(1) and (3)" and therefore the statute must be stricken. Plaintiff provides no authority for the prospect that an allegedly ambiguous civil statute limiting liability must be stricken. Regardless, the Court finds no conflict and no ambiguity.

The Idaho Legislature found that except in specific instances, furnishing alcohol to a person was not the proximate cause of injuries inflicted by the person who was provided with alcohol. I.C. § 23-808(1). The Legislature stated therefore, it intended to limit dram shop and social host liability. *Id.* It accomplished this goal by using language broader than necessary to accomplish that intent, but certainly broad enough to accomplish its stated intent: "any person who sold or otherwise furnished alcoholic beverages." I.C. § 23-808(3). The Legislature then

[3] Plaintiffs also argue that there is no rational basis for requiring notice via certified mail vs. regular mail, and this is discriminatory. These facts are not at issue here because the Plaintiffs provided no notice. The Court will not issue an advisory opinion for a hypothetical state of facts not at issue.

further limited dram shop and social host liability by providing a notice provision without any discovery exception. I.C. § 23-808(5). If the legislature intended for the Dram Shop Act to apply only to social hosts, it easily could have merely repeated the words "dram shop or social host" instead of using the different, longer, and more expansive phrase "any person who sold or otherwise furnished alcoholic beverages." It is also entirely possible that the legislature did not intend to incentivize dishonesty by enacting I.C. § 23-808(5), but it is not the Court's job to second-guess the Legislature's wisdom in crafting legislation; it is the Court's job to apply unambiguous law as written. I.C. § 73-113(1). If the language of a civil statute of this nature was ambiguous, the Court would engage in statutory construction to discern legislative intent rather than strike the statute as unconstitutional. I.C. § 73-113(2).

F. Nosworthy's Arguments About Duty

Nosworthy Defendants argue that Cameren Nosworthy did not owe Reggie Nault a duty because: 1) there is no affirmative duty to prevent Reggie from jumping off the boat absent a special relationship; and 2) no duty existed because Reggie's act of jumping from the moving boat was not foreseeable.

First, Brody Lundblad's deposition testimony at 48:19 – 52:19 makes it incredibly obvious that Reggie Nault might jump from the moving boat. Per Brody's testimony, Reggie told Cameren and Brody that he was going to jump as the boat was moving, Reggie had jumped from boats on previous occasions when traveling very fast, Reggie made these statements about 10 minutes after finishing the derailer, and Reggie was not wearing a life jacket. Cameren's deposition testimony at 43:1 – 11 was largely consistent with Brody's and also said that Reggie stated he was going to jump. The declaration of Lexie Bond noted that the Snapchat video had

the speedometer filter on, and stated "It seemed that the boys knew that Reggie was going to enter the water because they were purposefully video-taping and had selected the speed." It was foreseeable that Reggie Nault might jump from the boat considering that he said he was going to jump from the boat after drinking and both Brody and Cameren told him not to jump. Reasonable minds could not differ on this issue under these facts. There may be issues of comparative negligence at play[4], but it was foreseeable that Reggie might jump from the boat and that he could drown when doing so.

Second, the Court rejects Nosworthy's characterization of the duty as limited to preventing Reggie from jumping. "[E]very person has a duty to exercise ordinary care to prevent unreasonable, *foreseeable* risks of harm to others." *Johnson v. McPhee*, 147 Idaho 455, 467, 210 P.3d 563, 575 (Ct. App. 2009) (internal quotations omitted, emphasis in original). The Court expects that, for example, Plaintiffs will argue at trial that Cameron was driving too fast under the circumstances (knowing that Reggie was drinking and making statements about jumping from the moving boat while not wearing a life jacket) and breached his duty to use ordinary care in doing so.

> Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury. . . . The degree of care to be exercised must be commensurate with the danger or hazard connected with the activity.

Whitt v. Jarnagin, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966).

[4] See *Bevan v. Vassar Farms, Inc.*, 117 Idaho 1038, 1040–41, 793 P.2d 711, 713–14 (1990) (attributing deceased's negligence to his parents in a wrongful death action).

G. Negligence Per Se

> In order to replace a common law duty of care with a duty of care from a statute or regulation, the following elements must be met: (1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury.

O'Guin v. Bingham Cty., 142 Idaho 49, 52, 122 P.3d 308, 311 (2005).

The first three elements of this test are met here regarding I.C. § 67-7034(1). However, there is a genuine issue of material fact precluding summary judgment regarding Plaintiff's negligence per se claim pursuant to I.C. § 67-7034(1): there is evidence that Cameren Nosworthy was drinking on the day of the incident, but there is a genuine issue of material fact as to his blood alcohol level. There is also a genuine issue of material fact regarding whether Cameren's drinking, to the extent his blood alcohol level makes the statute applicable to him, was the proximate cause of the accident. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7016. However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7019. However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7027(2). However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. It appears to the Court that Defendants Cameren and Brody attempted to give aid, but there are questions of fact and law as to what level of aid would meet the duty created by this statute. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7027(3). There is no genuine issue of material fact that Defendants Cameren and Brody did not give notice immediately by the quickest means of communication. Instead, they called Brody's girlfriend, who then instructed them to call the police. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 18-5413(1). There is no genuine issue of material fact that Defendants Cameren and Brody gave false information to the police regarding an offense or offenses related to their consumption of alcohol. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 18-705. There is no genuine issue of material fact that Defendants Cameren and Brody gave false reports to the police related to their consumption of alcohol. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Summary judgment on this claim is denied.

H. Spoliation

As stated above, maritime jurisdiction applies to the facts of this case. None of the parties have cited maritime cases where the court has applied spoliation. As such, the Court has researched the issue and has been unable to find a maritime case where spoliation was applied as a cause of action. Rather, the cases the Court has located[5] have treated spoliation as an evidentiary sanction. "Spoliation is a rule of evidence, and the decision to impose sanctions for violations is one administered at the discretion of the trial court and governed by federal law." *Turner v. United States*, 736 F.3d 274, 281 (4th Cir. 2013) (internal quotations and citation omitted).

> A party seeking sanctions based on the spoliation of evidence must establish, inter alia, that the alleged spoliator had a duty to preserve material evidence. This duty arises "not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001). Generally, it is the filing of a lawsuit that triggers the duty to preserve evidence. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D.Md.2010). Moreover, spoliation does not result merely from the "negligent loss or destruction of evidence." *Vodusek*, 71 F.3d at 156. Rather, the alleged destroyer must have known that the evidence was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction. *See id.* Although the conduct must be intentional, the party seeking sanctions need not prove bad faith. *Id.*

[5] See *Turner v. United States*, 736 F.3d 274, 281 (4th Cir. 2013); *Sharp v. Hylas Yachts, LLC*, 872 F.3d 31, 42 (1st Cir. 2017); *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 260 (4th Cir. 2011); *Wheelings v. Seatrade Groningen, BV*, 516 F. Supp. 2d 488, 505 (E.D. Pa. 2007); *Fuesting v. LaFayette Par. Bayou Vermillian Dist.*, No. CIV.A. 02-2511, 2007 WL 2028160, at *1 (W.D. La. July 11, 2007); *In re Bridge Constr. Servs. of Fla., Inc.*, 185 F. Supp. 3d 459, 472 (S.D.N.Y. 2016); *Marbulk Shipping, Inc. v. Martin-Marietta Materials, Inc.*, 223 F.R.D. 640, 646 (S.D. Ala. 2004).

Id. at 282. Thus, it appears under general maritime law that spoliation is an evidentiary remedy only available when a party destroys evidence, generally after a lawsuit has been filed. Spoliation does not appear to be a cause of action under general maritime law.

In the maritime cases the Court found where there were spoliation claims as causes of action, the cases were in federal court where there was also diversity jurisdiction, and the courts therefore applied state law regarding spoliation pursuant to the *Erie* doctrine. "Lakewood's spoliation counterclaim, brought in diversity, is controlled by the laws of the State of Washington." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 367 (9th Cir. 1992). Also see *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 480 (N.D. Cal. 1987); *Kolanovic v. Gida*, 77 F. Supp. 2d 595, 596, n.1 (D.N.J. 1999), *Bravo v. Foremost Ins. Grp.*, No. C94-20467 RPA, 1994 WL 570643, at *1 (N.D. Cal. Oct. 11, 1994).

This Court is not a federal court, so diversity jurisdiction and the *Erie* doctrine do not apply. It appears to the Court that under maritime law, spoliation of evidence is an evidentiary sanction; not a tort. Because maritime law applies to the facts of this case, Defendants are entitled to summary judgment on Plaintiff's spoliation claim as a matter of law.

IV. CONCLUSION AND ORDER

For the reasons stated above, the Plaintiffs' Idaho Dram Shop Act claims are dismissed as a matter of law. Maritime rules preempt Idaho state laws to the extent there are United States Supreme Court rulings or federal statutes on point, and those rulings and statutes conflict with Idaho law. In circumstances where there is no maritime law consensus or federal statute directly on point, this Court will apply Idaho law.

Idaho's Dram Shop Act is constitutional, and does not violate equal protection or due process rights.

Remedies beyond pecuniary damages are available in a maritime wrongful death suit. However, Chris Nosworthy's liability, if any, is limited to the value of the boat.

There are genuine issues of material fact regarding Plaintiff's negligence per se claims which preclude summary judgment.

It was foreseeable that Reggie might jump from the boat and that he could drown when doing so.

Plaintiffs' spoliation claim is dismissed as a matter of maritime law.

Dated August 9th, 2018.

Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

Signed: 8/9/2018 01:51 PM

I certify that on this _____ day of _____, 2018, I caused a true and correct copy of this document to be served, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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