LEON L. GIORGIO, JR.	*	**NO. 2003-CA-1832**
VERSUS	*	**COURT OF APPEAL**
ALLIANCE OPERATING CORPORATION, GULFSTREAM RESOURCES, INC., BURLINGTON RESOURCES, ET AL., CHEVRON USA, INC., SUPERIOR OILFIELD SERVICES, INC., STATE OF LOUISIANA, THROUGH ITS DEPARTMENT OF NATURAL RESOURCES, LLOYDS UNDERWRITERS AT LLOYDS, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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TOBIAS, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent.

I find that *Shofstahl v. Board of Commissioners of the Orleans Levee District*, 2002-0018 (La. App. 4 Cir. 1/15/03), 841 So.2d 1, *writ denied* 2003-1387 (La. 9/26/03), 854 So.2d 368, (which the majority finds is factually distinguishable), is identical to the facts to the case at bar. *Shofstahl* and general maritime law bar recovery by the plaintiffs against the State of Louisiana, Department of Natural Resources.

In *Shofstahl*, the plaintiffs were proceeding at night in navigable waters when they hit an unlit pier that appeared on navigational

charts. Recognizing that the claim fell within the admiralty laws and not state law, we stated:

> Given that this boating accident occurred on navigable waters, the plaintiffs correctly first sought recovery under admiralty law. Thus, the governing law we use to determine whether summary judgment is appropriate will be that of general maritime law. Plaintiffs also correctly note that state law can be used to supplement the general maritime law, but this point will be discussed later.
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> The plaintiffs alleged negligence on the part of the defendants by the fact of the pier's existence on navigable waters. The defendants countered and responded by producing the permit for the pier granted by the U.S. Army Corps of Engineers in 1956.
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> Under general maritime tort law, this action shifted the burden of proof to the plaintiffs to show a duty or legal requirement on the defendants to affix a navigation light on the boat pier. To attempt to satisfy this burden, the plaintiffs alluded to a statement in the permit from the Army Corps which stated that lighting would be required if the U.S. Coast Guard prescribed it. After seven years of litigation, plaintiffs produced no evidence that the U.S. Coast Guard ever required a light on this pier.
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> We agree with the trial court, that without an incumbent duty on the part of the defendants to have lit the pier, the general maritime tort law does not hold the owners of a pier liable.

In *American Commercial Barge v. Alter Barge Line, Inc.*, 2002 WL 31246543 (E.D.La.10/4/2002), the court reflecting on maritime tort law stated:

> When a **moving vessel collides with a fixed object,** there is a **presumption** that the **moving vessel** is **at fault.** *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895).
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> * * *

> The presumption may be overcome, however, if the moving vessel demonstrates that the collision, ... was caused by an act of God, the negligence of a third party, or the fault of the stationary object. *See* *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895); *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 794-95 (5th Cir.1977).

Upon reviewing the record, we find that plaintiffs did not come forth with evidence to prove a duty existed on behalf of the defendants to light the pier. Moreover, because the defendants had a permit, for which the U.S. Coast Guard did not require a light, and because the pier was marked on the official marine navigation chart published by the federal government, we find the plaintiffs did not prove that the pier constituted an unreasonable risk--to use the language of Louisiana tort law--even though maritime law applies.

The plaintiffs alleged that the trial court erred by not referencing more legal standards in this case. The trial court was succinct in its reasons for judgment, stating that it found no duty incumbent upon the defendants to light the pier. Even though the plaintiffs are correct in that more standards could have been applied, they are not in the plaintiffs' favor and would not change the outcome.

For example, the language of the federal navigational statute of 1980 (33 U.S.C. § 2006-2038) recognizes that mariners may encounter navigational hazards in conditions of poor visibility, and states:

> 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, ...
> (v) the state of wind, sea, and current, and the proximity of navigational hazards; ...
> See 33 U.S.C. § 2006.

Clearly a pier is an obstruction to navigation, but it is one that is routinely allowed, and this one was officially permitted by the federal government and noted on the appropriate navigational charts.

The legal duty under general maritime law to avoid an obstruction to navigation is on the operator and look-out (33 U.S.C. § 2005) of the vessel--the plaintiffs here. 33 U.S.C. § 2008.

Plaintiffs cite no statute or case law that the owner of a pier which is duly permitted by the federal government, and the precise location of which is depicted on the official marine navigation chart published by the federal government, has a legal duty to display a navigation light on the pier in circumstances where neither the federal permitting authority nor the federal regulatory/ enforcement authority requires the light. …

All of these facts lead us to the next point, which is ultimately what was the cause of this maritime accident. The United States Supreme Court has held the requirement of legal or "proximate" causation and the related "superseding cause" doctrine apply in admiralty notwithstanding the adoption of the comparative fault principle in state law tort litigation. In *Exxon v. Sofec*, 517 U.S. 830, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996), Justice Thomas wrote for the Court:

> The legal question that we took this case to address is whether a

> plaintiff in admiralty that is the superseding and thus the sole proximate cause of its own injury can recover part of its damages from tortfeasors or contracting partners whose blameworthy actions or breaches were causes in fact of the plaintiff's injury. As we have held above, the answer is that it may not.

517 U.S. at 840, 116 S.Ct. 1813.

In the present case, plaintiffs' actions are the superseding and the sole proximate cause of their injuries. While the defendants' unlit pier may be a cause in fact of the plaintiffs' injuries, cause in fact liability is not sufficient to justify a recovery using negligence principles of general maritime law. We recognize that this is different from most state tort law systems, where percentages of fault are allocated (whether they be proximate causes or causes in fact) and recovery is permitted according to the percentage of fault times the damages. Nevertheless, due to the situs and maritime nature of this accident, substantive general maritime law applies.

We embraced the "intervening" concept in *Sutton v. Duplessis*, 584 So.2d 362 (La.App. 4 Cir.1991) where we held:

> **Negligence is actionable only where it is both a cause in fact and a legal cause of the injury.** Legal cause requires a proximate relation between the actions of a defendant and the harm which occurs, and such relation must be substantial in character. *Sinitiere v. Lavergne*, 391 So.2d 821 (La.1980) ...
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> A proximate cause is generally defined as any cause which, in natural

> and continuous sequence, **unbroken by any efficient, intervening cause,** produces the result complained of and without which the result would not have occurred. [Citations omitted.] When an accident results from two acts of negligence, **one more remote and one an intervening cause,** the presence of the **intervening cause prevents a finding of liability on the one responsible for the more remote cause.** [Citations omitted.]
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> In this case, we find that the negligence of the Orleans Parish School Board was **an intervening cause** which superseded any negligence on the part of Mrs. Sutton, and was the **sole legal cause** of Peter's injury.

Sutton, 584 So.2d at 365 [Emphasis added.]

Here, the plaintiffs' navigational negligence was the sole proximate cause of the allision and/or the superseding cause. A fixed object does not cause an accident simply by "being there." See *American River Trans Company v. Arosita Shipping Company*, 148 F.3d 446, 1998 AMC 2794 (5th Cir.1998).

The plaintiffs' third assignment of error is that the trial court did not apply a state legal standard of conduct by which to judge this alleged tort. The trial court was correct in applying substantive maritime tort law. This accident occurred over navigable waters in a boat. The act of boating is the most classical of all maritime activities. The fact that a boat strikes a boat pier does not involve state policy considerations so significant as to justify altering general maritime law. *Adams v. Chevron, U.S.A., Inc.*, 589 So.2d 1219 (La.App. 4 Cir.1991). Moreover, federal general maritime law preempts state law, and state law should supplement general maritime law only under special circumstances. This is not one of those circumstances.

> Plaintiffs cite *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.1992) to argue that state tort law should govern this case. The United States Supreme Court has explained, "Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973); *see; Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). Thus, "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir.1990).
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> We distinguish *Green*, because that accident involved a helicopter crash over navigable waters, something that was not classical maritime activity. Under the facts here, there is no need to supplement federal law, there is a clearly applicable rule in the general maritime law. *Green, supra* at 638. An application of state law to these facts would interfere with the uniform working of the maritime legal system. Moreover, to make a finding that lights should have been required on the pier, would usurp power granted by the federal government to the U.S. Coast Guard.

Id. at pp. 6-11, 841 So.2d 4-7. [Footnote omitted; emphasis in original.]

The majority's reliance on *Anderson v. Tenneco Oil Co.*, 2001-0295 (La. App. 4 Cir. 5/24/02), 826 So.2d 1143, and *Melerine v. State*, 2000-0162 (La. App. 4 Cir. 11/14/00), 773 So. 2d 831, is misplaced. In both cases, the plaintiffs suffered damages after striking the remenant of oil drilling activities. Each remenant had been abandoned by the oil industry and the

state became the owner of the remenant; the state had knowledge of the existence of the remenant. ***No evidence existed in either case that the remenant appeared on any nautical chart.*** The state was held responsible under a theory of garde and or ownership.

In the case at bar, unlike the situations in *Anderson* and *Melerine,* the National Oceanic and Atmospheric Administration charts of Breton Sound show the obstruction which the *Jo-Le* struck. Giorgio had charts aboard the *Jo-Le,* one of which depicted the obstruction. He failed to exercise the necessary care. In my view, *Shofstahl* controls the facts of this case, not *Anderson* or *Melerine,* by virtue of official charts in the possession of the vessel operator that noted the obstruction.

The majority places special emphasis upon the testimony of Gary Ross, a representative of the Louisiana Department of Conservation, who opined that once the site was orphaned and neither Alliance nor Superior exercised further control of the structure, "it was the State's responsibility to determine whether it [the structure] needed to be removed." By making the foregoing statement, the majority opens up the question of whether the state has abused its discretion in not removing the structure. This raises the issue of the "public duty doctrine" embodied in La. R.S. 9:2798.1, which states:

> A. As used in this Section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers,

> officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.
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> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
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> C. The provisions of Subsection B of this Section are not applicable:
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> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
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> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.
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> D. The legislature finds and states that the purpose of this Section is not to reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

Certainly the state had the right to determine when and if the structure should be removed, but the plaintiffs have presented no evidence to establish a breach of a duty, *especially in view of the fact that the structure was noted on official navigational charts.* One cannot say that the state acted unreasonably in the case at bar. I find that La. R.S. 9:2798.1 provides further grounds to support a reversal of the trial court's decision.

Finally, I find that the majority's reliance upon La. R.S. 30:101.1, *et seq.*, the Louisiana Underwater Obstruction Removal Program, to impose

liability upon the state is misplaced. By the clear language of the statute, an "underwater obstruction" is "any obstacle, whether natural or manmade, which impedes normal navigation and commercial fishing on the navigable waters of the state." La. R.S. 30:101.3(6). By implication, the statute applies to obstructions that are not visible to the eye. The structure in the case at bar was *not* underwater and was visible to the eye. But even assuming that the statute applies to visible structures, one must examine La. R.S. 30:101.8, which specifically states that the secretary and assistant secretary [of the Department of Natural Resources] shall not be liable for any damages arising from an act or omission if the act or omission is part of a good faith effort to carry out the purposes of …" La. R.S. 101.1, *et seq. Cf.,* La. R.S. 9:2798.1. The record before us fails to disclose any evidence that the state did anything that was not a good faith effort to comply with the law, given the limitation of finances of the state, the funds available to the program, and the designation of the structure on official navigation charts.

I conclude, therefore, that general maritime law applied to this accident. Further, the precise location of the obstruction appeared on official nautical charts which Giorgio failed to observe and exercise appropriate caution. See 33 U.S.C. §§ 2001, *et seq.* No duty existed for the state to light the obstruction. The state is not liable under La. R.S.

9:2798.1 or La. R.S. 30:101.8 because as a matter of common sense and law the appearance of the obstruction on an official nautical chart was sufficient to warn those traveling upon navigable water of the obstruction. For these reasons, *inter alia*, we are required by law to reverse and not affirm as the majority so holds.