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"Death on the High Seas Act: What Is It and When Does It Apply and How to Overcome Obstacles Created Because of the Act"

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A. The Basics.

The Death on the High Seas Act (DOHSA) is a federal statute which is found at 46 U.S.C. §§ 30301-30308. You may see references in cases to another section, 46 U.S.C. §§ 761 et seq. because DOHSA was renumbered in 2006.

DOHSA is only one piece of the larger puzzle of the law of wrongful death in maritime law. Whenever there is a wrongful death either on navigable water or caused by a negligent or tortuous act which was committed on navigable water, any one of a number of laws can apply. The list of usual suspects are:

1. Death on the High Seas Act (DOHSA): 46 U.S.C. §§ 30301 et seq.;

2. The Jones Act: 46 U.S.C. § 30104 which applies to "seamen;"

3. The General Maritime Law: wrongful death cause of action, also referred to as a cause of action under *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339, 1970 AMC 967 (1970);

4. State wrongful death statutes: which generally can be applicable in a maritime action either in state territorial waters or on land if maritime jurisdiction applies, for example, through the Admiralty Extension Act, 46 U.S.C. § 30101;

5. Longshore and Harbor Workers' Compensation Act (LHWCA): 33 U.S.C. §§ 901-950;

6. Suits in Admiralty Act (SIAA): 46 U.S.C. § 30901 et seq. Actions against the United States in admiralty jurisdiction. This includes, for example, actions against the Coast Guard or against the United States for causing deaths through negligent rescue or injury caused by a vessel owned by the United States. Cases and commentators indicate that the SIAA contains an implied discretionary function exemption to sovereign immunity for purposes of the Act. See, e.g., "The Suits in Admiralty Act and the Implied Discretionary Function" by D.S. Ingraham; 1982 Duke Law Journal 146;

7. The Public Vessels Act: 46 U.S.C. § 31101 et seq. Also suits against the United States. This applies only in cases where the plaintiff was injured while employed by the government or onboard a government owned or government operated vessel.

B. Maritime jurisdiction and pleading requirements.

In order for DOHSA to apply at all, maritime jurisdiction must apply. Maritime jurisdiction applies where there is a "vessel", "in navigable waters", and a "significant relationship to traditional maritime activity." See, e.g., *Executive Jet Aviation Inc. v. City of*

Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). In *Executive Jet*, the aircraft crashed after takeoff and ingestion of birds into the jet engines. The Supreme Court held that admiralty jurisdiction did not extend to an airplane crash into navigable waters (the Great Lakes) where the plane flew predominantly over land. Thus, there are the additional prongs of the test for maritime jurisdiction: (1) locality, that is, whether it occurred on navigable waters; (2) nexus, that is, whether the wrongful act bares a significant relationship to a traditional maritime activity; and (3) potential impact of the type of incident on commercial maritime activity. See also, *Sisson v. Ruby*, ___ U.S. ___ (1990) where the court found admiralty jurisdiction in an action involving a fire on a noncommercial vessel at a marina on a navigable water way.

The definition of "vessel" was recently explored by the U. S. Supreme Court in a case decided on January 15, 2013, *Lozman v. City of Riviera Beach, Florida*, ___ U.S. ___ (2013). In *Lozman*, the Court held that Lozman's floating home or office, a house-like plywood structure with an empty bilge space underneath the main floor to keep it afloat, was not a "vessel" as that term is defined in 1 U.S.C. § 3. The latter section provides: "the word 'vessel' includes every description of a water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Court found that nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no steering mechanism and it had an unraked hull and rectangular bottom and lacked self propulsion. The court said that "consequently, a structure does not fall within the scope of the statutory phrase unless **a reasonable observer looking to the home's physical characteristics and activities would consider it designed to a practical degree for carrying people or things over water.**" (Emphasis added). Thus, admiralty jurisdiction did not apply to the regulation and eventual destruction of that floating home.

Pleading admiralty jurisdiction and the application of DOHSA is required. See, e.g., *Delgado v. Reef Resort Ltd.*, 364 F.3d 642, 2004 AMC 1109 (5th Cir. 2004).

Further, federal courts under *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) may require that you plead specifically whether the decedent died as a result of the injuries sustained as a result of the tortfeasor's actions or from causes unrelated to the accident. See, e.g., Order Granting Motion to Dismiss in *Scouten v. NCL (Bahamas) Ltd.*, case no. 1:08-CV-21485-FAM (S.D. Fla. August 20, 2008) (copy attached hereto).

C. History of Maritime Wrongful Death, Part 1; Congress then the Supreme Court create recoveries.

1. 1886: No Remedy for Wrongful Death in the General Maritime Law, says Supreme Court.

In *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), the United States Supreme Court announced that the maritime law contains no remedy for the survivors of persons killed on the high seas or on navigable waters. After that decision, some courts began to apply state wrongful death statutes both on the high seas and in state territorial waters. This adoption

of some remedy for death followed the law in England; In 1846, Lord Campbell's Act, the Fatal Accidents Act, was passed in England. Nine & 10 Vict., c. 93.

After *The Harrisburg* and following Lord Campbell's Act, states enacted wrongful death statutes. Some of these statutes were held by courts to apply to deaths occurring both in state territorial waters and on the high seas. In fact, the U. S. Supreme Court in *The Hamilton*, 207 U.S. 398 (1907) allowed recognition by courts of such state statutes. The problem of course was that some of these statutes did not apply outside the territorial boundaries of the state.

2. <u>1920: Congress enacts the Death on the High Seas Act.</u>

Congress passed DOHSA in 1920 to fill the void of the absence of any federal remedy for death on the high seas and to effect uniformity in the maritime law across state jurisdictions. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 398, 401. DOHSA, 46 U.S.C. § 30302 provides:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependant relative.

§ 30303 makes clear that the recovery is limited to pecuniary to "pecuniary" damages. That section provides:

> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action has brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.

DOHSA also provides that contributory negligence is not a bar to recovery and the comparative negligence is a defense. 46 U.S.C. § 30304. DOHSA then provides for a survival action where the plaintiff dies during the pendency of the action but due to the wrongful act, neglect, or default described in § 30302. In that case, the personal representative may be substituted as the plaintiff in the action may proceed before the recovery to which the plaintiff would have been entitled. 46 U.S.C. § 30305.

DOHSA is most commonly referred to as a statute which fills a void in the maritime law. In other words, it is referred to as remedial. However, DOHSA even in its current form with its specific three nautical mile limitation restricts the rights of the survivors of people who have died or where negligence occurs more than three miles from the shore and less than the state territorial waters. After all, the U.S. Supreme Court in *The Hamilton* in 1907 allowed state remedies to apply. If not for DOHSA and its preemptive affects, the decedent's family in a maritime death

would recover under the state wrongful death statutes if the state territorial waters do extend beyond three miles. However, DOHSA preempts those state statutes and reduces recovery down to pecuniary damages which means that DOHSA provides no damages for loss of companionship or other "non-economic" damages.

In Florida, for example, the state territorial waters have been held to extend to 12 nautical miles from shore under the Florida Constitution. See, *Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213 (Fla. 3d DCA 2003). (Also citing to Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988), a federal proclamation which declares that the territorial sea of the Unites States is 12 nautical miles from shore.)

Thus, it can be argued that DOHSA is a restriction of common law and other remedies. If so, DOHSA should be narrowly construed.

3. 1970: Now there is a remedy for wrongful death in the General Maritime Law, says the Supreme Court.

In 1970, the U. S. Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, (1970), reversed itself (from *The Harrisburg*) and held that there is in fact a General Maritime Law cause of action for wrongful death. The Court held that under the General Maritime Law there is a wrongful death remedy "for death caused by violation of maritime duties." *Moragne*, 398 U.S. at 380.

In *Moragne,* the decedent was a longshoreman and he died in state territorial waters. The Court said that the General Maritime Law cause of action for wrongful death was intended to effect uniformity for wrongful death actions where DOHSA and the Jones Act (both enacted in 1920) did not apply. The Supreme Court in *Moragne* said that DOHSA and the Jones Act had rendered *The Harrisburg* decision an "unjustifiable anomaly in the present maritime law" because DOHSA diminishes greatly the types of damages allowable under state wrongful death remedies which can be incorporated and utilized in an action for death within three nautical miles. Damages for wrongful death under the Jones Act, like DOHSA, are limited to pecuniary losses. Under the Jones Act however, conscious pain and suffering of the decedent before death may be recovered. Under DOHSA, there is no recovery for pre-death pain and suffering.

4. 1986 and beyond: DOHSA preempts all remedies if DOHSA applies.

In 1986, the Supreme Court held that DOHSA preempts not only state wrongful death remedies but also *Moragne* (General Maritime Law) wrongful death action for negligence or unseaworthiness where the death occurs on the high seas. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). *Tallentire* involved another crash of a helicopter on the high seas killing occupants onboard. The decedents in *Tallantire* had been working on an oil platform off of the coast of Louisiana. There, the Plaintiffs had argued the plain language of section 7 of DOHSA which seems to provide that a state law remedy can apply.

The Court of Appeals in *Tallantire* held that the Plaintiff could recover non pecuniary benefits under the Louisiana wrongful death statute by virtue of § 7 of DOHSA. Sec. 7 provides

that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected" by the Act. The Court concluded, on the basis of § 7's legislative history, that the section was intended to preserve the applicability of state wrongful death statutes on the high seas, and that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas, and in fact had intended its statute to have that effect.

The U.S. Supreme Court reversed the Circuit Court in *Tallantire* and said: "The language of § 7 of DOHSA and its legislative history, as well as the congressional purposes underlying DOHSA, mandate that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause ensuring that state courts have the right to entertain causes of action and provide wrongful death remedies both for accidents occurring on state territorial waters and, under DOHSA, for accidents occurring on the high seas." This seems like a tortured reading of the plain language of the statute, but the law now is that Section 7 of DOHSA does not allow incorporation of state wrongful death remedies if DOHSA applies. Section 7 merely allows the action to be brought in state or federal court.

Certainly, the reach of DOHSA preempts state wrongful death remedies. *Hughes v. Unitech Aircraft Service, Inc.*, 662 So.2d 999 (Fla. 4th DCA 1995); and preempts the *Moragne* wrongful death action for negligence or unseaworthiness under the general maritime law; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Ford v. Booten*, 681 F.2d 712 (11th Cir.1982) ("when the incident takes place outside the three mile limit, DOHSA and DOHSA alone controls").

Where DOHSA and the Jones Act apply, that is in a seaman's case, the two remedies may be pled in the alternative. See, *Heath v. American Sail Training Association*, 644 F.Supp. 1459, 1467 (D.R.I. 1986) and *In Re Dearborn Marine Service*, 499 F.2d 263 (5th Cir.1974).

DOHSA also preempts any state survival actions. Thus, there can be no recovery for pre-death pain and suffering under DOHSA. *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 S.Ct. 1890, 141 L.Ed.2d 102, 1998. See also, *Jacobs v. Northern King Shipping Co.*, 180 F.3d 713 (5th Cir. 1999).

D. Causes of action which are covered by DOHSA.

DOHSA is extremely broad in its application. Almost any cause of action which it falls under the maritime jurisdiction and the territorial limits of DOHSA are governed by the damage recovery under DOHSA. For example, actions which are governed by DOHSA includes actions based upon negligence under the statute itself. See, § 30302 supra. See also, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174, 1986 AMC 2113 (1986); *Kuntz v. Windjammer "Barefoot" Cruise, Ltd.*, 573 F.Supp. 1277 (W.D.Pa.1983), affirmed 738 F.2d 423 (3d Cir.1984); *Echols v. Hubbard Enterprises* 1986 W.L. 11611, 1986 AMC 2002 (M.D. Fla. 1986). DOHSA also applies to causes of action for misrepresentation and negligent misrepresentation. See, *Smith v. Carnival Corporation*, 584 F.Supp.2d 1343 (S.D. Fla. 2008) (application of DOHSA where "plaintiff's misrepresentation claim alleges that [the cruise line] made statements concerning the safety of [the excursion operators] snorkel excursion that [the

cruise line] knew or should have known the statements were false, and that the decedent and others relied on those statements.") DOHSA also can apply to actions based upon actions brought by seamen for unseaworthiness. See, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399-401; and *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 1982 AMC 2409 (5th Cir.1982). Actions for intentional conduct and for stricter products liability also can be governed by DOHSA. See, *Curry v. Chevron, USA*, 779 F.2d. 272 (5th Cir.1985) and *Lipworth v. Kawasaki Motors Corp.*, 592 So.2d 1151 (Fla. 4th DCA 1992). See also, *Doles v. Koden International, Inc.*, 779 So.2d 609 (Fla. 5th DCA 2001). In *Koden*, the 5th DCA held that "admiralty law encompasses actions for personal injury and wrongful death caused by defective products" citing *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir.1994).

E. Status of decedents which are covered by DOHSA: passengers, seamen, and visitors on vessels.

DOHSA applies to passengers on vessels. See, e.g., *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 1982 AMC 2409 (5th Cir.1982). See also, *Lipworth v. Kawasaki Motors Corp.*, 592 So.2d 1151 (Fla. 4th DCA 1992) (application of DOHSA to passenger on a jet ski); *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir.1994) (application of DOHSA to cruise line passenger); and *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F.Supp.2d 1309 (S.D. Fla. 2012) (application of DOHSA to cruise line passenger).

DOHSA also can apply to actions for a seaman for unseaworthiness. See, e.g., *Doles v. Koden International, Inc.*, 779 So.2d 609 (Fla. 5th DCA 2001). In *Koden*, the 5th DCA cited to the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990) and explained that unseaworthiness imposes an absolute duty on the ship owner. "Failure to supply a safe ship resulted in liability irrespective of fault and irrespective of the intervening negligence of crew members." *Doles*, 779 So.2d at 612 citing *Miles*, 498 U.S. at 25. Accordingly, "the unseaworthiness doctrine thus became a species of liability without faulting." *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 94 (1946) and *Miles*, 498 U.S. at 25-26.

F. Causes of action under DOHSA of nondecedents joined with actions by survivors of decedents.

Any one catastrophe can give rise to a death as well as to injuries whether physical or emotional to those who are not killed. The maritime law allows actions by the nondecedents to be joined by the action by the survivors of decedents without any restriction by DOHSA. For example, DOHSA according to the Supreme Court "did not address the availability of other causes of action." *Dooley v. Korean Air Lines Company, Ltd.*, 524 U.S. 116, 122-23 (1998) as cited in *Smith v. Carnival Corporation*, 584 F.Supp.2d 1343 (S.D. Fla. 2008).

The Southern District of Florida has held that an action for negligent infliction of emotional distress was not precluded by DOHSA. In *Smith v. Carnival Corporation*, 584 F.Supp.2d 1343 (S.D. Fla. 2008), the Court was faced with a Second Amended Complaint which stated that the daughters of the decedent "were present at the drowning of their mother and saw

their mother die as a direct and proximate result of the [conduct] of [the cruise line] and [the excursion operator] as described herein." 584 F.Supp.2d at 1349. This was the claim not of the decedents estate because of the death itself but for the others who witnessed the death. However, in determining whether the plaintiff stated a cause of action, the court held that "admiralty law allows recovery only for those passing the zone of danger test." *Smith*, 584 F.Supp.2d at 1349. After discussing the zone of danger test, the court dismissed the second amended complaint for negligent infliction of emotional distress under U.S. general maritime law because the plaintiffs had "not alleged any facts indicating that [the decedent's] daughters were in the zone of danger." *Smith*, 584 F.Supp.2d at 1350.

The Southern District of Florida reached a somewhat different result in regard to a claim for intentional infliction of emotional distress after a death on the high seas. In *Markham v. Carnival Corporation*, case number 1:12-CV-23270-CMA (S.D. Fla. Order dated December 3, 2012) (copy attached hereto), the Court held that plaintiffs may state an intentional infliction of emotional distress claim in the maritime context citing *McAllister v. Royal Caribbean Cruises, Ltd.*, No. Civ. A. 02-CV-2393, 2003 WL 23192102, at 4 (E.D. Pa. September 30, 2003); and *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir.2002). The Court relied on Florida law to determine whether the allegations of the intentional infliction of emotional distress claim were sufficient. See, *Garcia v. Carnival Corporation*, 838 F.Supp.2d 1334, 1339 (S.D. Fla. 2012). In *Markham*, the plaintiff alleged that the cruise line allowed unlimited amount of liquor on one of its excursions to Cozumel, Mexico. A cruise line passenger, apparently inebriated, came back to the ship, fell over the railing of the ship, and hit the surface of the ocean and died on impact. To make matters much worse, the cruise made "no immediate response despite the fact that this incident occurred in daylight and the ship was directly off of Cozumel, Mexico in relatively calm seas." Then, in another aggravation of the situation, a cruise line representative contacted the decedent's mother and told her that the decedent, her only son, had committed suicide. To make matter even worse, if that is possible, the cruise line "then caused the same misinformation to be disseminated to the local media."

The plaintiff in *Markham* brought a two count complaint, one for intentional infliction of emotional distress and another for negligence, and seeking punitive damages. The Court in its order denying Defendant's motion to dismiss said that "Florida common law demands an 'extremely high standard' of outrageousness to sustain an IIED claim" but "Florida courts have nonetheless shown a particular solicitude for the emotional vulnerability of survivors regarding improper behavior toward the dead body of a loved one" citing *Williams v. City of Minneola*, 575 So.2d 683, 691 (Fla. 5th DCA 1991). The Southern District of Florida in *Markham* also declined to strike the claim for punitive damage. The Court held that even under DOHSA "punitive damages are available in those rare situations of intentional wrong doing" citing *In Re Amtrak Sunset Ltd. Train Crash In Bayou Canot, ALA. on September 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997).

G. Location of the wrongful act governs.

DOHSA should be named the "Negligence on the High Seas Act" given the interpretations of its applicability if the negligence is on the high seas but the death is not. The death does not have to occur on the high seas; Only the wrongful act which precipitated the death has to occur there. In fact, it does not have to happen on the high seas at all but only beyond 3 nautical miles from the shores of the United States, no matter where it happens. For example, if the decedent dies in the territorial waters of another country, that is considered the "high seas" for purposes of the statute. However, if the death and the wrongful act occur on foreign land but admiralty jurisdiction applies to the Extension of Admiralty Act, DOHSA does not apply.

"Death on the High Seas" or "Death on Land." DOHSA applies even where the injury producing death occurred on the high seas, even where the actual death occurs onshore. See, e.g., *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1987 AMC 2024 (9th Cir.1987); *Moyer v. Klosters Rederi*, 645 F.Supp. 620, 1987 AMC 1404 (S.D. Fla. 1986); *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F.Supp.2d 1309 (S.D. Fla. 2002). In the recent case of *Lasky*, for example, the plaintiff was a passenger on a cruise ship. When the ship was in the waters of Cozumel, Mexico, the plaintiff was onboard the ship when he fell and hit his head. At first, the passenger could not even stand. When the cruise ship personnel arrived and lifted the passenger into a wheelchair, they failed to examine him or take into account the "type, extent, and nature" of the passengers injuries. The ship's medical personnel fitted the passenger with a neck brace and told him to return the following morning for a follow up. When the passenger got off the cruise ship two days later, he experienced intensifying pain and went to the emergency room in Fort Lauderdale, Florida. There, x-rays and a CT scan revealed he had a fractured neck. His condition deteriorated and he died approximately one month later. The plaintiff's family sued the cruise line alleging that their employees were improperly trained in the handling of passengers who are injured. The defendant moved for summary judgment on the applicability of DOHSA. The court held that DOHSA applied and said:

> Moreover, a cause of action under DOHSA accrues at the time and place where an alleged wrongful act or omission was consummated in an actual injury, not at the point where previous or subsequent negligence allegedly occurred. *Balachander v. NCL*, 800 F.Supp.2d 1196, 1201 (S.D. Fla. 2001) (citing *Moyer v. Rederi*, 645 F.Supp. 620, 627 (S.D. Fla. 1986). Put another way, the right to recover for death depends upon the law of the place of the act or omission that caused it and not upon the place where the death occurred. *Moyer*, 645 F.Supp. at 627 (quoting *Vancouver S.S. Co., Ltd. v. Rice*, 288 U.S. 445, 447 (1933).

Lasky, 850 F.Supp.2d at 1312.

H. DOHSA applies to death in foreign waters whether on the high seas or not.

Because foreign waters, even if close to shore, are beyond three nautical miles under the statute, DOHSA applies to wrongful acts and deaths occurring in foreign waters. As one Court recently said: "The 11th Circuit has consistently interpreted DOHSA as applying to maritime incidents occurring within the territorial waters of foreign states. *Sanchez v. Loffland Brothers Co.*, 626 F.2d 1228 (5th Cir. 1980); *Moyer v. Klosters Rederi*, 645 F.Supp. at 623-24." *Ridley v. NCL (Bahamas) Ltd.*, 824 F.Supp.2d 1355 (S.D. Fla. 2010). See also, *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529-30 (9th Cir.1994) (applying DOHSA to a death which occurred within Mexico's territorial waters); *Motts v. M/V Green Wave*, 210 F.3d 565, 569-70 (5th Cir. 2000); *Cormier v. Williams/Sedco/Horn Constructors*, 460 F.Supp. 1010 (E.D. La. 1978) (applying DOHSA to accident occurring in navigable river in Peru); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277 (W.D. Pa. 1983) (applying DOHSA to claim resulting from scuba death in Bahamas).

I. DOHSA does not apply to death on land, foreign or otherwise, however.

DOHSA, however, does have its limits. It does not apply to an admiralty death which occurs on foreign soil. See, *Fojtasek v. NCL (Bahamas), Ltd.*, 613 F.Supp.2d 1351 (S.D. Fla. 2009). In *Fojtasek*, a cruise passenger purchased a cruise line marketed zip line excursion in Honduras. The excursion was purchased by the passenger onboard the ship. Thus, through the Admiralty Extension Act, cited above, the case was in admiralty and admiralty law applied.

According to the Plaintiff in *Fojtasek*, ship personnel made misrepresentations of material fact in regard to the safety of the zip line ride and the verification of the safety by the cruise line. According to the complaint, the safety of the ride was never verified. A rusted cable snapped sending the cruise passenger Fojtasek to the jungle floor and to her death. The Defendant cruise line in *Fojtasek* moved for summary judgment on the applicability of DOHSA alleging that the negligence took place onboard the vessel. The court, citing *Moyer v. Klosters Rederi*, 645 F.Supp. 620, 627 (S.D. Fla. 1986), said "a cause of action under DOHSA accrues at the time and place where an alleged wrongful act or omission was consummated in an actual injury, not at the point where previous or subsequent negligence allegedly occurred." The court also cited *Motts v. M/V Green Wave*, 210 F.3d 565, 571 (5th Cir. 2000) for the proposition that "this Circuit's precedent looks to the location of the accident in determining whether DOHSA applies."

J. History of Maritime Wrongful Death, Part 2; Death in state territorial waters.

1. 1974: Non economic damages are recoverable after all, says Supreme Court, but not when DOHSA or Jones Act apply.

We have now seen the reach of DOHSA outside of the 3 mile limit. We learned that DOHSA provides no non-economic or non-pecuniary damages to whatever class of plaintiff.

Now what happens within state territorial waters? The history lesson continues. In 1970, the U.S. Supreme Court in *Moragne* decided that there was a cause of action for wrongful death under the general maritime law. That would seem to apply within state territorial waters because it does not apply outside the three mile limit where DOHSA does apply.

Four years later, in *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, 1973 AMC 2572 (1974), the Supreme Court decided that in a death involving a longshoreman in state territorial waters, a dependant relative of the decedent could not only recover the usual items of pecuniary damages ("loss of support, loss of services, loss of nurture, and funeral expenses"), but she could also recover for non-pecuniary damages such as loss of society and loss of "love, affection, care, attention, companionship, comfort, and protection." *Gaudet*, 414 U.S. at 585. See also, Complaint of *Cambria S.S. Co.*, 505 F.2d 517, 1974 AMC 2411 (6th Cir.1974).

Four years after *Gaudet*, the U. S. Supreme Court held that there are no *Gaudet* damages (non-economic damages) under DOHSA. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581, 1978 AMC 1059 (1978). *Higginbotham* involved the wrongful death of helicopter passengers over the high seas. The court ruled that *Gaudet* could not be applied beyond the territorial waters where DOHSA applied, that is on the high seas.

Then, in 1990, the court further limited *Gaudet* damages in *Miles v. Apex marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275, 1991 AMC 1 (1990). In *Miles*, a Jones Act seaman died aboard a ship docked in state waters. The Court held that the Jones Act applied because the plaintiff was a Jones Act seaman. *Gaudet* damages, according to the Court, did not apply in Jones Act actions no matter where the death or the negligence occurred.

2. 1996: State wrongful death remedies can supplement wrongful death actions when neither DOHSA nor the Jones Act apply, says Supreme Court.

After *Moragne* (creating a General Maritime Law wrongful death action) and *Gaudet* (creating non-economic, non-pecuniary damages in certain circumstances, certainly within state territorial waters for a longshoreman), what are the damages for a non-seaman, non-longshoreman in state territorial waters? The U.S. Supreme Court in 1996 answered that question in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). In *Calhoun*, the Supreme Court held that if such a plaintiff, a nonseafarer, that is neither a seaman nor a longshoreman, is killed within state territorial waters, the remedies applicable under the *Moragne* cause of action can be supplemented by state law remedies including state wrongful death and survival remedies. In one Florida case applying *Calhoun*, damages were awarded under the Florida Wrongful Death Act for a worker "who was working nearby for another employer, was killed while attempting to rescue a member of the crew (who also died) from the hold of the defendant's vessel while it was moored at Government Cut in Miami-Dade County, Florida." The court cited to *Calhoun* and other cases and affirmed a judgment for the wrongful death damages and punitive damages. *Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373 (Fla.3d DCA 2000).

In summary, *Gaudet* seems to create non-economic damages only in territorial waters and only to longshoremen. For the non sea farer who dies in state territorial waters, i.e., where

neither DOHSA nor the Jones Act apply, the General Maritime Law allows supplementation of remedies by the applicable state wrongful death statute, under *Calhoun*.

K. Commercial aviation accidents.

General maritime law arguably has applied all along to any aircraft which crashed in state territorial waters. See, e.g., *Flying Boat, Inc. v. Alberto*, 723 S.2d 86 (Fla. 4th DCA 1998). In *Alberto*, a sea plane crashed in Key West Harbor in an area of commercial shipping traffic. In *Alberto*, the court held that the Florida Wrongful Death Act did not apply to limit damages to the pilot and copilot who died in the crash. Instead, the court held that maritime law applied and preempted state law even though the General Maritime Law (common law) applied under *Moragne*.

On July 17, 1996, TWA flight 800 departed JFK International Airport for Paris, France. Shortly after takeoff, the plane exploded in midair and crashed. All 230 persons onboard perished. According to the NTSB, the crash occurred eight nautical miles south of the shore of Long Island, New York. *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200 (2d Cir. 2000). Ordinarily, DOHSA would apply to such a disaster. However, Congress stepped in led by Republican Arlen Specter. In 2002, what is now 46 U.S.C § 30307 "commercial aviation accidents" was added to DOHSA. That section provides that "if the death resulted from a commercial aviation accident occurring on the high seas beyond **12** nautical miles from the shore of the United States, **additional compensation is recoverable for non-pecuniary damages**, but punitive damages are not recoverable." (Emphasis added). The Act, in the third subsection, specifies that **within 12 nautical miles "this chapter does not apply**." (Emphasis added). In other words, for commercial aviation accidents within 12 nautical miles--not the 3 nautical miles of the other sections of DOHSA—the Plaintiff can recover non pecuniary damages under *Moragne* (General Maritime Law cause of action for wrongful death), *Gaudet* (non pecuniary damages in state territorial waters for death of a non seaman), and *Calhoun* (supplement with state wrongful death remedies where death in territorial waters of a non seaman, non longshoreman). In most states, this would of course include loss of companionship and all of the non-pecuniary damages. Outside of the 12 nautical miles, for any "commercial aviation accident," DOHSA specifically does not apply. That is the *Moragne* cause of action would apply and, perhaps, *Gaudet* damages would apply or state damages actions would apply depending upon the definition of state territorial limits for a particular state.

In one case interpreting Sec. 30307, the commercial aviation accident section of DOHSA, *Eberli v. Cirrus Design Corp.,* 615 F.Supp.2d 1369 (S.D. Fla. 2009), the Court held that the term "commercial aviation accident" was ambiguous but did not apply to the ferrying of an aircraft from the seller to the buyer. During the ferry operation, an accident occurred and the aircraft crashed and the pilot was killed. The aircraft had only recently received a certificate of airworthiness which provided that it was not be used to carry passengers or property for compensation or hire.

L. Pecuniary damages under DOHSA.

Pecuniary damages should include loss of support. "This is the reasonable expectation of the pecuniary benefits that would have resulted from the continued life of the deceased, usually measured by loss of future income." *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974). Most courts use a four step procedure to calculate future lost earnings under *Culver v. Slater Boat Co.*, 722 F.2d 114, 117 (5th Cir. 1983). In the words of one author of a multi volume maritime treatise:

> First, the loss of work life resulting from the injury or death is determined. Second, the lost income stream is calculated by estimating what the victim would have earned (including fringe benefits). To make this judgment, which is necessarily speculative, proof may be introduced not only regarding the victims current wages, but also positive factors: what he might have received for individual merit and gains in productivity, as well as negative factors: that employment and wages are declining in the industry. Third, the total damages should be determined by subtracting the plaintiff's post accident earning power from his normal earning power (both figures should be after tax) and multiplying by his work life expectancy. The resulting figure is a question of fact to be determined by the jury (or the court in a bench trial), and a wide range of individual variables can be considered in arriving at a final figure. Fourth, the future income loss must be discounted by a discount rate established by the "market interest rate," the rate of interest earned on the best and safest investments.

Schoembaum, Thomas J. (2011) *Admiralty and Maritime Law, Fifth Edition*, West, Section 5-16.

Pecuniary damages also include loss of services of the deceased. Loss of services includes the household services performed by the deceased, and the award is usually measured by the cost of paying someone to perform such tasks. *Verdin v. C&B Boat, Co., Inc.*, 860 F.2d 150 (5th Cir.1988); *Neal v. Barisich, Inc.*, 707 F.Supp. 862 (E.D. La. 1989); *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.1978).

Pecuniary damages also include loss of nurture, guidance, care, and instruction. Loss of nurture of minor children is held to be pecuniary loss and thus recoverable under DOHSA. *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir.1983), *Verdin* 860 F.2d at 150; *Barger*, 514 F.Supp. at 1199.

Pleading requirements for such losses can be specific. See, *Gavigan v. Celebrity Cruises, Inc.*, 843 F.Supp.2d 1254 (S.D. Fla. 2011). In *Gavigan*, the decedent left eight adult children. The personal representative sought to recover the loss of fatherly nurture and guidance for those eight adult children. The Court and the Order at that citation granted motion to dismiss with leave to amend. The specific pleading requirements were described by the Court:

> Plaintiff merely alleged that all eight of the adult children sustained a "loss of fatherly nurture and guidance" and "will suffer a financial loss as a result of the inability" to receive that guidance…these conclusory allegations are insufficient to raise the right to relief above the speculative level. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. Plaintiff alleges no facts describing the aspect of the "fatherly nurture and guidance" that any of the adult children would have received if not for the death of their father. There are also no facts connecting that lack of guidance to a subsequent financial loss. Plaintiff must supply the missing facts to survive a motion to dismiss.

DOHSA also allows the pecuniary loss of inheritance. *Nygaard*, 701 F.2d at 77. *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir.1985). Funeral expenses, if they are paid by dependants, are recoverable. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

It would seem that a careful analysis of the loss to the survivors of "nurture, guidance, care, and instruction" for children could be extremely significant, especially if the children are minors. The measure is what a replacement would cost. To measure what a replacement or replacements would cost, the finder of fact has to take into account the number of hours per day that the decedent parent spent with the child, that the decedent parent was on call 24/7, that time was spent with his or her son or daughter at night and on weekends, and that the services were those of a counselor, teacher, guide, tutor, and companion, and then calculated what it would take to retain a person or persons for these positions during these hours, this can be a significant number. The types of testimony which could support such arguments include vocational rehabilitation professionals, economists, and family members who can testify about the specific tasks performed by the now missing parent.

M. Commentary: DOHSA and the Jones Act are anachronistic.

DOHSA and the death recovery under the Jones Act out of step with General Maritime Law recoveries for wrongful death and with the wrongful death remedies of most states. The General Maritime Law and most state wrongful death remedies provide for recovery not only of the economic contributions but also for the pre death pain and suffering of the decedent and for the loss of companionship, guidance, and consortium of the "survivors". Congress should amend DOHSA for vessel accidents in much the same way as the commercial aviation section of DOHSA was amended after the TWA disaster. It should also amend the Jones Act to provide for the loss of companionship, guidance, and consortium of the "survivors".

Congress considered these changes in July and August of 2010, months after the Deep Water Horizon oil platform exploded in the Gulf of Mexico and killed 11 seamen. The movement in Congress to change this antiquated law failed. We should not fail again.

John H. (Jack) Hickey is a Past President of the Dade County Bar Association and a current member of the Board of Governors of The Florida Bar. Hickey is a graduate of Florida State University (*magna cum laude*, Phi Beta Kappa) and Duke Law School. He is Board Certified as a Civil Trial Lawyer by The Florida Bar and by the National Board of Trial Advocacy and specializes in personal injury, wrongful death, admiralty and maritime, premises liability, and product liability. Hickey Law Firm, P.A. has offices at 1401 Brickell Avenue, Suite 510, Miami, Florida 33131. Website: www.hickeylawfirm.com.

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number:
08-21485-CIV-MORENO

RICHARD D. SCOUTEN, as Survivor and Personal Representative of the Estate of JOAN ALICE POSTLE, decedent,

Plaintiff,

vs.

NCL (BAHAMAS) LTD. d/b/a NCL and/or NCL AMERICA, INC.,

Defendants.
_____/

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE came before the Court upon the Defendants' Motion to Dismiss Plaintiff's Complaint and to Strike Plaintiff's Demand for Jury Trial **(D.E. No. 8)**, filed on **June 23, 2008**.

THE COURT has considered the motion, response, reply to the response and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is **GRANTED**. The Complaint is **DISMISSED** without prejudice. Plaintiff may file an Amended Complaint by **September 5, 2008**.

The Plaintiff's claim that the decedent died "either as a result of the injuries she sustained aboard the Defendants' floating dock, or, in the alternative, from causes unrelated to the accident" is too speculative to maintain a cause of action for wrongful death. See Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) ("[F]actual allegations must be enough to raise a right to relief above the speculative level."). Moreover, the Complaint does not satisfy the pleading requirements set forth

in Federal Rule of Civil Procedure 11.

In addition, there is no diversity of citizenship that would provide diversity jurisdiction in this case. An admiralty action does not provide an independent basis for a jury trial in this district unless the plaintiff sues under a statute that expressly provides for it. See Green v. Ross, 338 F. Supp. 365, 367 (S.D. Fla. 1972); Neenan v. Carnival Corp., Case No. 99-2658-CIV-LENARD, 2001 WL 91542 (S.D. Fla. Jan. 29, 2001). In his Response to the Motion to Dismiss, the Plaintiff contends that there could be diversity jurisdiction based on the fact that the Defendants might not be Florida residents. Apparently, the Plaintiff forgets that he affirmatively pled that the Defendants were citizens of Florida in his Complaint. The Court rules that the Defendants are citizens of Florida for purposes of this lawsuit based on the Plaintiff's own representations to the Court, which are uncontroverted by the Defendants. Therefore the Plaintiff's request for a jury trial is **STRICKEN** without leave to refile.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of August, 2008.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23270-CV-ALTONAGA/Simonton

MICHELLE MARKHAM, *et al.*,

Plaintiffs,

vs.

CARNIVAL CORP., d/b/a
CARNIVAL CRUISE LINES, INC.,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Defendant Carnival Corporation d/b/a Carnival Cruise Lines, Inc.'s ("Carnival['s]" or "Defendant['s]") Motion to Dismiss the Complaint and Alternative Motion to Strike ("Motion") [ECF No. 4], filed October 3, 2012. Carnival seeks to dismiss Plaintiffs, Michelle Markham ("M. Markham"), Joyce Markham ("J. Markham"), and Chanel Markham's ("C. Markham['s]") (collectively, "Plaintiffs[']") Complaint [ECF No. 1] under Federal Rule of Civil Procedure 12(b)(6), or, alternatively, to strike portions of the Complaint under Federal Rule of Civil Procedure 12(f). Plaintiffs filed their Response in Opposition ("Response") [ECF No. 10] on October 22, 2012, to which Carnival replied ("Reply") [ECF No. 18] on November 8, 2012. The Court has carefully considered the parties' written submissions and applicable law.

I. BACKGROUND[1]

In September 2011, Clint Markham ("Decedent") and his wife, M. Markham, went on a cruise (the "Cruise") aboard the Carnival Conquest to celebrate Decedent's fortieth birthday.

[1] The allegations set forth in the Complaint are taken as true.

(*See* Compl. ¶¶ 7–8). On September 23, 2011, while on the Cruise, M. Markham and Decedent purchased an excursion from Carnival called "Isla Pasion by Twister," which included an unlimited amount of alcoholic beverages. (*Id.* ¶ 10). Before, during and after the excursion, Decedent drank copious amounts of alcohol. Indeed, Carnival "negligently served alcoholic beverages to [Decedent] to excess so his judgment and faculties were substantially impaired." (*Id.* ¶ 12).

After returning to the Carnival Conquest following the excursion, "[b]ecause [Carnival] had conditioned [Decedent] to party hard, he wanted to continue drinking and partying" (*id.* ¶ 18), despite having already drunk "heavily" that day (*id.* ¶ 17). So, while "[i]ntoxicated and belligerent," Decedent went to an upper deck of the ship and interacted with some friends. (*Id.* ¶ 18). Decedent was on the deck in his inebriated state for "at least ten to twenty minutes," yet during that time there was "no intervention by any security personnel nor were any security personnel visible on the deck." (*Id.* ¶ 22). Decedent then "climbed up on the railing of the ship," and after sitting on the "railing for a few moments," he "fell face forward down into the sea. He appeared motionless after he hit the water." (*Id.* ¶ 18). After Decedent went overboard, "there was no immediate response from the ship," and "[d]espite this incident occurring in daylight while the ship was directly off the port of Cozumel, Mexico in relatively calm seas, [Decedent] was not rescued and his body was never recovered." (*Id.* ¶ 24).

Before the Carnival Conquest returned to port, a representative of Carnival contacted J. Markham, Decedent's mother, and told her that Decedent, her only son, had committed suicide. (*See id.* ¶ 25). Carnival "then caused the same misinformation to be disseminated to the local media." (*Id.* ¶ 26). News media reacted to this information by converging on J. Markham and M. Markham's homes, seeking information as to why Decedent had committed suicide. (*See id.*

¶¶ 26–27).

As a result of these events, Plaintiffs allege two claims against Carnival: intentional infliction of emotional distress ("IIED") (Count One), and negligence (Count Two). (*See id.* ¶¶ 28–40). Plaintiffs also seek punitive damages in relation to both counts. (*See id.* ¶¶ 32, 40). Regarding Count One, Plaintiffs allege there "was and is[] no way to construe any of the witness statements to conclude that [Decedent] 'committed suicide.'" (*Id.* ¶ 31). Thus, informing the media and Decedent's mother that he had committed suicide, "without any basis in fact for knowing that to be true[,] is outrageous and exceeds the bounds of all civilized behavior." (*Id.* ¶ 30). As a result of Carnival's conduct, "Plaintiffs have suffered severe emotional distress and anguish." (*Id.* ¶ 32).

Regarding Count Two, Plaintiffs allege Carnival owed Decedent a duty of reasonable care in the circumstances, which Carnival breached in a variety of ways, including by failing to rescue Decedent, over-serving Decedent alcoholic beverages, encouraging passengers to drink to excess, failing to warn passengers of the dangers of drinking alcohol to excess, and failing to have proper safety policies and procedures. (*See id.* ¶¶ 34–35).

II. LEGAL STANDARDS

It is well established that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S.

at 555. Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556). To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1949). When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

With regard to the motion to strike, Federal Rule of Civil Procedure 12(f) provides "[u]pon motion made by a party . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Nevertheless, "a court will not exercise its discretion under [Rule 12(f)] to strike a pleading unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Reyher v. Trans World Airlines, Inc.*, 881 F. Supp. 574, 576 (M.D. Fla. 1995) (citations omitted). Indeed, "[m]otions to strike generally are disfavored and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Merrill Lynch Bus. Fin. Servs., Inc. v. Performance Mach. Sys. U.S.A., Inc.*, No. 04–60861-CIV-MARTINEZ, 2005 WL 975773, at *11 (S.D. Fla. March 4, 2005) (internal quotation marks and citations omitted); *see also* Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1382 (3d ed. 2007) ("Rule 12(f) motions to strike . . . are not favored, often being considered purely cosmetic or 'time wasters,'" and any doubts "should be resolved in favor of the non-moving

party.") (footnote call numbers omitted).

III. ANALYSIS

Carnival raises four arguments in its Motion: (1) the IIED claim in Count One must be dismissed; (2) the negligence claim in Count Two must be dismissed; (3) if the claims are not dismissed, Plaintiffs' demands for punitive damages must be stricken; and (4) if the claims are not dismissed, the Court should strike several allegations. Each argument is addressed in turn.

A. Count One: Intentional Infliction of Emotional Distress

Carnival argues general maritime law, not Florida law, applies to Plaintiffs' IIED claim and precludes Plaintiffs from bringing an IIED claim. (*See* Reply 6 n.2). Carnival further contends, even if Florida law applies to Plaintiffs' IIED claim, Carnival's alleged conduct is not sufficiently "outrageous" to sustain an IIED claim as "[i]t was completely reasonable for Carnival to arrive at the conclusion" Decedent committed suicide. (Mot. 8; *see* Reply 6–7).

Although maritime law does not explicitly provide a cause of action for emotional distress, Plaintiffs may nevertheless state an IIED claim in a maritime context. *See McAllister v. Royal Caribbean Cruises, Ltd.*, No. Civ.A. 02-CV-2393, 2003 WL 23192102, at *4 (E.D. Pa. Sept. 30, 2003) (applying Pennsylvania law to determine the sufficiency of the plaintiffs' IIED claim under maritime law); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002) (relying on the Restatement (Second) of Torts to determine the sufficiency of the plaintiff's IIED claim under maritime law). The Court applies Florida law to determine whether the allegations concerning Plaintiffs' IIED claim are sufficient. *See Garcia v. Carnival Corp.*, 838 F. Supp. 2d 1334, 1339 (S.D. Fla. 2012) (applying Florida law to the IIED claim of a cruise ship passenger). An IIED claim under Florida law consists of the following elements: "(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous; that is, as to go beyond all

bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe." *Id.* (internal alteration omitted) (citations omitted).

Whether the conduct alleged is sufficiently outrageous to support an IIED claim is a matter of law for the Court to decide, not a question of fact. *See Medina v. United Christian Evangelistic Ass'n*, No. 08-22111-CIV, 2009 WL 653857, at *4 (S.D. Fla. March 10, 2009) (citations omitted); *Grady v. Trans World Computer Tech. Grp.*, 787 So. 2d 116, 119 (Fla. 2d DCA 2001) (citing *Ponton v. Scarfone*, 468 So. 2d 1009 (Fla. 2d DCA 1985)). Florida common law demands an "extremely high standard" of outrageousness to sustain an IIED claim. *Merrick v. Radisson Hotels Int'l, Inc.*, No. 06–cv–01591–T–24TGW (SCB), 2007 WL 1576361, at *4 (M.D. Fla. May 30, 2007) (citation omitted). Yet, Florida courts have nonetheless shown "a particular solicitude for the emotional vulnerability of survivors regarding improper behavior toward the dead body of a loved one." *Williams v. City of Minneola*, 575 So. 2d 683, 691 (Fla. 5th DCA 1991).

In *Williams*, the court held an IIED claim may lie where pictures of a family member's dead body are displayed outside the presence of the family members. *Id.* at 690. Although Plaintiffs' allegations here involve improper statements regarding the cause of a loved one's death as opposed to improper treatment of Decedent's body, the rationale discussed in *Williams* is instructive. In particular, upon the loss of a loved one, "[t]he potential for severe emotional distress is enormously increased" because "the bereaved are already suffering psychic trauma." *Id.* at 691. Consequently, in this "unique" area, "behavior which in other circumstances might be merely insulting, frivolous, or careless becomes indecent, outrageous and intolerable." *Id.*

The record must therefore be further developed to determine whether Carnival's actions

amount to the type of conduct regarded as atrocious and utterly intolerable in a civilized community. *See Estate of Duckett ex rel. Calvert v. Cable News Network LLLP*, No. 5:06-cv-444-Oc-10GRJ, 2008 WL 2959753, at *5 (M.D. Fla. July 31, 2008) (declining to dismiss an IIED claim in order to allow the parties to further develop the record as to whether the defendants' conduct in badgering and verbally assaulting the plaintiff regarding her child's death was sufficiently outrageous). Once the record is further developed, the Court can then determine whether the evidence could, for example, "support a finding that anybody from [Carnival] went out of their way to torment or mistreat the Plaintiff[s] in a manner that our society could view as utterly deplorable." *Wallis*, 306 F.3d at 842 (affirming the district court's grant of summary judgment for a cruise line on the plaintiff's IIED claim because no evidence could support such a finding). Because "at this stage of the proceedings, it cannot be said that [Plaintiffs] can prove no set of facts that would entitle [them] to relief," *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1319 (M.D. Fla. 2002), the Court will not dismiss Count One.

B. Count Two: Negligence

To properly plead a negligence claim, a plaintiff must allege four elements: "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted). In a maritime context, "a shipowner owes the duty of exercising *reasonable care* towards those lawfully aboard the vessel who are not members of the crew." *Id.* (emphasis in original) (quoting *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 (1959)).

Plaintiffs' negligence claim is predicated upon a laundry list of Carnival's alleged breaches of its duty of reasonable care. (*See* Compl. ¶¶ 35(a)–(n)). Carnival asserts that while it owed a duty to use reasonable care under certain circumstances, "taking all the allegations as true and addressing each alleged breach of a duty of care, Plaintiffs failed to state a claim in negligence upon which relief could be granted." (Reply 3; *see* Mot 4–7). One of the alleged breaches that Carnival takes issue with is that it failed to conduct a rescue operation in a safe, timely, and prudent manner. (*See* Mot. 4). In particular, Carnival asserts Plaintiffs allege Decedent "appeared motionless after he hit the water" and thus "failing to rescue could not have been the proximate cause of decedent's death. (*Id.*).

Plaintiffs assert Carnival's arguments are again more properly suited to a motion for summary judgment than a motion to dismiss, and contend taking the allegations as true, "the failure to launch a rescue operation in time may have proximately caused [Decedent's] death" and the Complaint alleges sufficient facts to "raise a reasonable expectation that discovery will reveal evidence of a required element." (Resp. 4–5 (internal quotation marks and citations omitted)). The Court agrees. Plaintiffs allege when Decedent "fell into the sea, there was no immediate response from the ship. No alarm was sounded immediately. No crew members immediately responded. Several passengers called 911 on the ship telephone but could not get through to the bridge. . . . There are reports that no rescue boat was lowered for more than twenty minutes after [Decedent] fell into the sea." (Compl. ¶ 24). Read in a light most favorable to Plaintiffs, allegations that Decedent "blacked out and passed out and fell into the sea" (*id.* ¶ 21), and "appeared motionless after he hit the water" (*id.* ¶ 18), may lead to the conclusion that any rescue operation must have been mounted very quickly to be successful. However, such allegations do not foreclose the plausible conclusion that Carnival's failure to launch a prompt

rescue proximately caused Decedent's death. At this early stage in the proceeding, Plaintiffs have sufficiently alleged a negligence claim by alleging that Carnival owed a duty of reasonable care, which it breach by failing to launch a prompt rescue, and that breach proximately caused Decedent's death.

Although certain of Carnival's alleged breaches of its duty of reasonable care may not adequately state a negligence claim, the Court will not strike the alleged breaches in line-item fashion as Carnival is asking it to do. *See McLaren v. Celebrity Cruises, Inc.*, No. 11-23924, 2012 WL 1792632, at *5 (S.D. Fla. May 16, 2012) (quoting *Holguin v. Celebrity Cruises, Inc.*, No. 10-20215-CIV, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010)). Because Plaintiffs allege a facially plausible claim for negligence, the Court does not address the remaining alleged breaches of Carnival's duty of care.

C. Punitive Damages

Carnival asserts punitive damages are unavailable because the Complaint is governed by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. section 761, *et seq.* (*See* Mot. 9). According to Carnival, DOHSA provides the sole cause of action for a decedent's personal representatives as the death was a result of alleged negligence on the high sees, and punitive damages are unavailable under DOHSA. (*See id.* (citing 26 U.S.C. §§ 761, 762)). Plaintiffs concede DOHSA bars punitive damages for their negligence claim. (*See* Resp. 10); *see also Stires*, 243 F. Supp. 2d at 1322 ("Punitive damages are not available for negligence claims in admiralty cases.") (citations omitted).

Regarding their IIED claim, however, Plaintiffs argue punitive damages may be awarded. (*See* Resp. 10 (citations omitted)). Carnival nevertheless contends *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541 (E.D. Va. 2007), forecloses any potential award of punitive damages for

Plaintiff's IIED claim. (*See* Reply 7). In *Rux*, the plaintiffs were family members of sailors who died as a result of the October 2000 terrorist attack on the U.S.S. Cole in Yemen. *See* 495 F. Supp. 2d at 545–57. The plaintiffs brought wrongful death claims against the Republic of Sudan for its involvement in the attack, as well as emotional distress claims for the plaintiffs' "own emotional distress experienced upon learning of the attack against the Cole." *Id.* at 563. The court ruled DOHSA preempted the plaintiffs' emotional distress claims because DOHSA only allows pecuniary damages. *See id.*

Importantly, the plaintiffs in *Rux* were claiming emotional distress damages "flowing from the defendants' actions that caused the deaths on the high seas." *Ostrowiecki v. Aggressor Fleet, Ltd.*, No. Civ. A. 07-6598, 07-6931, 2008 WL 3874609, at *5 (E.D. La. 2008) (differentiating between the plaintiffs' emotional distress claims before it and the plaintiffs' emotional distress claims in *Rux*). Here, conversely, Plaintiffs' IIED claims do not seek "to recover for a death on the high seas, but [instead] for emotional injuries suffered as a result of independent, separable acts of" Carnival. *Id.* at *6. As a result, DOHSA "does not apply to those alleged injuries suffered by [Plaintiffs] and, therefore, will not preempt their claims." *Id.*

Moreover, the Eleventh Circuit has held that under DOHSA, punitive damages are available "in those very rare situations of intentional wrongdoing." *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997) ("Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as . . . punitive damages, except in exceptional circumstances," including "in those very rare situations of intentional wrongdoing."). Additionally, "punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate or so

wanton and reckless as to demonstrate a conscious disregard of the rights of others." *Muratore v. M/S Scotia Prince,* 845 F.2d 347, 354 (1st Cir. 1988) (citations omitted). Carnival has not provided any analysis as to why the Court must conclude the allegations supporting the IIED claim may not be considered within this narrow class of intentional wrongdoing that would allow an award of punitive damages. For these reasons, the Court allows Plaintiffs to seek punitive damages under the IIED claim.

D. Alternative Motion to Strike

Carnival argues the Court should strike allegations concerning breaches of Carnival's duty of care that the Court determines do not exist as a matter of law as well as the "irrelevant and highly inflammatory" allegations in paragraphs thirteen, sixteen and seventeen of the Complaint. (Mot. 9–10). As previously explained, the Court will not strike the alleged breaches in line-item fashion. Further, although Carnival asserts the allegations in paragraphs thirteen, sixteen and seventeen are "obviously . . . highly inappropriate, absolutely conclusory and unsupported, and merely seek to prejudice Carnival" (*id.* 10), Carnival does not assert exactly how it is prejudiced by these allegations. The Court declines to speculate on such matters, and will not strike the identified paragraphs. *See Fundi v. Citizens Bank of Rhode Island*, No. CA 07-078 ML, 2007 WL 2407106, at *4 (D.R.I. Aug. 22, 2007) (denying a motion to strike when the defendant "failed to demonstrate any prejudice flowing from the [contested allegation]" and "cited no authority for the proposition that such [allegation] must be stricken.").

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 4]** is **DENIED**.

DONE AND ORDERED at Miami, Florida, this 3rd day of December, 2012.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record