

May _____, 2012

Susan A. Steiner, Attorney
United States Coast Guard
Legal Service Command
300 East Main Street, Suite 400
Norfolk, VA 23510

RE: Town of Chilmark Property Damage Claim;
Date of Incident: July 12, 2010;
U.S.C.G. File No. 11-32-LC-0245

Dear Ms. Steiner:

Pursuant to 28 U.S.C. § 2401(b) and § 2675(a), the Town of Chilmark (the "Town") requests reconsideration of the United States Coast Guard's ("USCG") denial of the Town's claim under the Federal Tort Claims Act ("FTCA") submitted on February 16, 2011. See 28 CFR 14.9(b) and 33 CFR 25.127. A copy of the Town's timely claim form is attached hereto as Exhibit "A", and the USCG's denial, dated March 8, 2012, is attached hereto as Exhibit "B" (the "Denial Letter").

A. Background.

Paragraph 2 of the Denial Letter states as follows:

"The information indicates that the fire began on the drive-on pier, quickly spreading to a nearby structure, access piers and moored boats."

The USCG's basis for denying the Town's claim is not correct - the fire did not originate in an area controlled by the Town. Further, the Town's review of the available evidence, suggests that the most likely explanation is that a malfunction of the electrical line leading to the Menemsha Coast Guard Station (the "USCG Boathouse") caused the southwest corner of the boardwalk/pier supporting the USCG Boathouse to catch fire (rather than an electrical line running under the so-called drive-on dock). Since the USCG is responsible for the electrical line supplying power to its boathouse, the Town is entitled to a reasonable measure of compensation for its property loss claim.

The factual and legal reasons supporting the Town's request for reconsideration are as follows:

B. Factual Grounds for Reconsideration.

1. In order to assist you with assessing the physical evidence and witness statements compiled during the investigation, we refer you to the photos and maps identifying the locations of the major structures identified in the Investigation Report. Enclosure 18 (pages 1 & 2) are aerial photos superimposed on a portion of the Town's Assessor's Map 27.1, a copy of which is appended hereto as Exhibit "C". We have labeled the following structures depicted on Exhibit "C":

a.) the boardwalk/pier; b.) the USCG Boathouse; c.) the drive-on dock or pier; and d.) the USCG piers.

2. Eyewitness reports summarized in the Investigation Report support the conclusion that the fire started on the boardwalk/pier leading to the USCG Boathouse rather than on the drive-on pier leading to the Town dock, and therefore was ignited by a malfunction in the USCG's electrical line.

3. Paragraph 2 (with 18 subparagraphs) on pages 2-4 of the Investigation Report summarize the oral and written statements of the sole member of the USCG who was present in the USCG Boathouse when the fire broke out. At approximately 2:30 p.m. on July 12, 2010, this Coast Guard member was using the exercise equipment in the weight room located in the northwest corner of the USCG Boathouse when he smelled smoke.

Investigation Report ¶ 2(g) & (i), page 3. He saw smoke through a west facing window, but saw no flames. Id. at 2(i). He ran out of a of north facing door onto the USCG pier, turned to the west, and he saw white and black smoke but, again, no flames. 2(j). The witness then ran back into the USCG Boathouse in order to find a telephone and, while inside, noticed flames outside of windows facing both to the west and to the east. Id. at 2(l).

At this point, the witness decided to exit the USCG Boathouse and, as he was leaving through the south facing door, he described:

"[A]n arc of flames starting under the passenger side [of a USCG pickup] located on the west side of the boathouse pier The arc shaped fire was about ten feet from the south door of the boathouse. . . . [and] cover[ed] two to three deck boards and about one to two feet above the decking. [He] continued to run out the south door of the boathouse and jumped over the arc of flames."

Id. at 2(m).

4. This USCG witness did not observe any flames on the Town drive-on pier, but rather undeniably only saw fire on the USCG pier and dock in close proximity to the USCG Boathouse - indicating the location where the fire started.

5. Other witnesses whose observations were detailed in the Investigation Report support this conclusion. In paragraphs 22 (a-d)), on pages 10-11, the Investigation Report details the observations of another key witness on this question. The witness is familiar with the area as he is the owner of vessel moored in Menemsha. The witness was walking along Harbor Hill Road at the time the fire started, which is just to the east of and at a higher elevation than the USCG Boathouse. After smoke drew the witness's attention to the area of the USCG Boathouse, his statement is memorialized as follows:

"As he looked closer, he could see fire in front (south) of the boathouse.

"[He] described the fire to be ten by five feet in size and the flames were five to six feet tall off the deck in front (south) of the USCG Boathouse. At this time the USCG Boathouse was not on fire and the fire was approximately five feet away from the front (south) of the USCG Boathouse."

6. Absent from this witness's statement is any observation that the drive-on pier was on fire at the time he first observed flames in front of the USCG Boathouse. This witness's statement is crucial because there are no other witnesses whose statements were summarized or reproduced in the Investigation Report who appear to have had an unobstructed view, from a higher plane, of the entire USCG Boathouse area. This witness was able to identify the precise location where the fire originated before spreading to the USCG Boathouse itself and surrounding structures, including the drive-on pier.

7. The statement of a third key witness is summarized in par. 37(a) on page 16 of the Investigation Report, which supports the first noted witness's observations. This second witness was operating the Chilmark Harbor Master's boat at the time the fire broke out, and was located about seventy feet from the southeast corner of the USCG Boathouse. The witness stated that he:

"could see the flames under the dock and coming up through the decking in front (south) of the USCG Boathouse. The flames were approximately eight feet in front (south) of USCG Boathouse coming through the deck boards. The

flames on the dock started at the front (south) door of the USCG Boathouse at this time."

8. It is not disputed that "a constant breeze was noted during the day blowing from southwest to northeast. This light wind was a contributing factor to the fire spread." O&C Report, page 5. Various sections of the Investigation Report (e.g, Enclosure 17, page 1) note that the fire damaged the drive-on pier, but the authors further conclude that the damage to the drive-on pier was the likely result of the wind pattern: the "[f]ire extended seaward [from the USCG Boathouse] down the pier, known as the "drive on dock"" Id.

9. The area of the drive-on pier most severely damaged by the fire is located some distance to the north of the USCG boardwalk/pier and Boathouse. In fact, the Town and residents continued to use the drive-on pier for access to docking spaces adjacent to the Town dock, by foot, until approximately December of 2010, when the Town's contractor removed the damaged section in connection with repairs and replacement to the Town's docking system. The location of the most significant damage to the drive-on pier further demonstrates that the fire likely originated on USCG property from arcing or shorting of the electrical line servicing the USCG Boathouse.

10. The Town has further concerns that the USCG relied on the incomplete summaries of the various witness statements

contained in the Investigation Report rather than on full statements furnished to the investigators. For example, former Selectman Frank M. Fenner, is an eyewitness who had an opportunity to make detailed observations as the fire began to spread.¹ Mr. Fenner is the owner of, and was working at, the Galley Restaurant when the fire began, which is located approximately 150-200 yards to the south of the USCG Boathouse on Boathouse Road.

11. In the early stages of the fire, Mr. Fenner was transported from the base of the harbor, along the eastern side of the USCG Boathouse, to his personal boat, which was tied to the north of the USGS Boathouse along the Town dock. Mr. Fenner proceeded to maneuver his boat out of the harbor and back in toward the fire, traveling along the channel side. From that vantage point, Mr. Fenner had an unobstructed view of the entire length of the drive-on pier, as well as the boardwalk-pier supporting the USCG Boathouse. He reports that he did not see any flames under the drive-on pier, and that the main flames were in the front of the USCG Boathouse, similar to the reports of other witnesses who were in close in proximity to, or had a clear view of, the area (as noted in the previous paragraphs).

¹ It appears that Mr. Fenner's statement is summarized in par. 30 of the Investigative Report (pages 13-14), but the Town has concerns that his complete testimony was not incorporated into the final report.

Mr. Fenner's observations buttress the Town's contention that the electrical line under the drive-on pier did not ignite the fire.

C. Legal Grounds for Reconsideration.

It is reasonable for the USCG to review the totality of the evidence in the light most favorable to the Town, which is the standard a judge would use either at summary judgment or on a motion for directed verdict. Viewed from that perspective, the Town's claim cannot be dismissed as without a legal basis. See, e.g., Duford v. Sears, Roebuck and Co., 833 F.2d 407, 411 (1st Cir. 1987) ("To sustain a directed verdict for [defendants in a tort claim] . . . [the court] must determine that the evidence produced at trial, viewed in the light most favorable to the plaintiff, would not have permitted a rational jury to reach any conclusion other than that the defendants were not liable.").

It is established law in Massachusetts - which is the substantive law governing the Town's claim² - that it is the province of a fact-finder to determine causation when competing theories of liability are presented. In Zezuski v. Jenny Manufacturing Company, 363 Mass. 324 (1973), for example, the plaintiff's gasoline station was damaged in an explosion and

² "In claims brought under Section 1346(b) of the FTCA, a court must apply the law of the place where the negligent act occurred." Soto v. United States, 11 F.3d 15, 17 (1st Cir. 1993).

fire occurring shortly after the defendant began to deliver gasoline to the station's storage tanks. Id. at 325-26. The plaintiff adduced evidence that the delivery truck's hose lacked a safety valve, but there was also testimony that two boys may have thrown a lighted match into the tank. See id. at 326.

The jury found in the plaintiff's favor, awarding him damages, but the trial judge set aside the verdict. Id. at 324. On appeal, the Supreme Judicial Court ("SJC") reversed, holding:

"There was sufficient evidence from which the jury could have concluded that the defendants' negligence caused the plaintiff's damage. The lack of evidence as to the precise factor causing the explosion and fire did not preclude the jury from reaching verdicts for the plaintiff. It is true that the mere coexistence of the defendants' negligence and the plaintiff's injury does not entitle the plaintiff to recovery. The jury are not allowed to speculate on the causal relationship between the negligence and the injury, The question of causation, however, is generally a question of fact for the jury to be proved by a preponderance of the evidence."

Id. at 328-29 (citations omitted).³

³ The First Circuit applies this Massachusetts rule in FTCA cases where the damage occurred within the Commonwealth, and has cited the Zezuski case favorably. See, e.g., Swift v. United States, 866 F.2d 507, 510-11 (1st Cir. 1989), where the Court held:

"Application of the legal cause standard to the circumstances of a particular case is a function ordinarily performed by, and peculiarly within the competence of, the fact finder. The SJC has consistently held questions of causation to be for the fact-finder. And, this court has manifested a similar persuasion What we have said as to proximate

D. Conclusion.

Here, the competing possible causes of the fire would require a fact-finder to decide the most plausible source of ignition and, if necessary, to apportion responsibility to the various parties. The physical evidence, when viewed in the context of the most compelling eyewitness accounts, establishes that it is more likely than not that the fire originated on the southwestern side of the USCG controlled boardwalk-pier leading to the Boathouse and that the arcing and shorting of its electrical supply line was the cause. There is no evidence to suggest that the fire started elsewhere. Given that there is credible evidence suggesting that the drive-on pier caught fire after the Boathouse became consumed in flames - and given the lack of eyewitness evidence establishing that a lit cigarette was deposited on the boardwalk-pier prior to the onset of the fire - the Town has presented a valid claim for compensation.

We urge you to reconsider the USCG's original denial, and to award fair and reasonable compensation to the Town for its losses. Please do not hesitate to call with any questions or to request additional information or documentation.

cause is equally true as to negligence."

Very truly yours,

Ronald H. Rappaport
Chilmark Town Counsel

RHR/jmh

cc: Timothy Carroll, Executive Secretary
Captain Verne B. Gifford, USCG Sector SE New England
Attachments

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