

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1606

MICHELE SKINNER AND KATHRYN SKINNER

VERSUS

AGGRESSOR FLEET, LIMITED, AGGRESSOR FLEET FRANCHISING, INC.,
AGGRESSORS INTERNATIONAL, LTD., GALAPAGOS AGGRESSOR,
GALAMAZONAS S.A., WAYNE HASSON, CHRIS SANTIAGO,
CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND THE
SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION (LUXEMBOURG)

consolidated with

PATRICIA ANNE SKINNER

VERSUS

AGGRESSOR FLEET, LIMITED, AGGRESSOR FLEET FRANCHISING, INC.,
AGGRESSORS INTERNATIONAL, LTD., GALAPAGOS AGGRESSOR,
GALAMAZONAS S.A., WAYNE HASSON, CHRIS SANTIAGO,
CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND THE
SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION (LUXEMBOURG)

consolidated with

PAULINE PENG SKINNER, INDIVIDUALLY AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF ROBERT F.L. SKINNER, AND AS
REPRESENTATIVE, GUARDIAN AND NATURAL TUTRIX OF HER
MINOR DAUGHTER, MEREDITH F.K. SKINNER

VERSUS

AGGRESSOR FLEET, LIMITED, AGGRESSOR FLEET FRANCHISING, INC.,
AGGRESSORS INTERNATIONAL, LTD., GALAPAGOS AGGRESSOR,
GALAMAZONAS S.A., WAYNE HASSON, CHRIS SANTIAGO,
CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND THE
SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION (LUXEMBOURG)

CONSOLIDATED WITH

NUMBER 2010 CA 1607

PATRICIA ANNE SKINNER

VERSUS

AGGRESSOR FLEET, LIMITED, AGGRESSOR FLEET FRANCHISING, INC.,
AGGRESSORS INTERNATIONAL, LTD., GALAPAGOS AGGRESSOR,
GALAMAZONAS S.A., WAYNE HASSON, CHRIS SANTIAGO,
CERTAIN UNDERWRITERS AT LLOYDS, LONDON AND THE

SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY
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Judgment Rendered: March 25, 2011

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Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary, Louisiana
Trial Court Number 115,837 c/w 115,874 and 115,839

Honorable Charles L. Porter, Judge

* * * * *

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* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

Plaintiff, Patricia Skinner (Patricia), appeals a judgment granting a peremptory exception of no right of action and a motion for summary judgment dismissing her wrongful death claim against Aggressor Fleet Limited, Aggressor Fleet Franchising, Inc., Galapagos Aggressor, Galamazonas, and The Catlin Syndicate (collectively referred to as defendants), without prejudice. Defendants answered the appeal, seeking to have this court order the claims dismissed with prejudice. We amend the judgment to reflect that the dismissal shall be with prejudice, and as amended, we affirm.

BACKGROUND

Many of the facts forming the basis for the exceptions and motion for summary judgment are not in dispute. Patricia and Robert Skinner were married in Ontario in 1979, and of that marriage, one child, Kathryn, was born. Patricia and Robert entered into a separation agreement in December of 1999 and divorced in July of 2000.

Thereafter, Robert married Pauline Peng Skinner. While he was married to Pauline, in August of 2005, Robert went on a diving cruise off the Galapagos Islands on the M/V Galapagos Aggressor II. During the dive, Robert experienced chest pains and died on September 18, 2005.

Following Robert's death, three lawsuits were filed against defendants in the 16th Judicial District Court for the Parish of St. Mary seeking wrongful death and survival damages. In her lawsuit, Patricia alleged that Robert's death was caused by, among other things, defendants' failure to provide timely and adequate medical treatment to Robert after he experienced chest pains during the diving expedition. She asserted wrongful death and survival causes of action under Louisiana law. The second lawsuit was filed by Michele and Kathryn Skinner, Robert's adult daughters, and the third was filed by Pauline Skinner, individually and as the

personal representative of Robert's estate and on behalf of their minor child, Meredith.

All of the parties in the lawsuits agreed that the Death on the High Seas Act (DOHSA), 46 U.S.C.A. § 30301 *et seq.*,¹ provides the exclusive remedy to all parties for all claims. DOSHA creates a wrongful death action for deaths occurring on the high seas more than 3 miles from the shores of the United States, which may be brought by the "personal representative of the decedent" for the exclusive benefit of "the decedent's spouse, parent, child, or dependent relative." 46 U.S.C.A. § 30302.

Defendants filed exceptions of no right of action and no cause of action and a motion for summary judgment. Therein, they claimed that none of the plaintiffs had a survival cause of action because DOSHA provides the exclusive remedy in wrongful death actions for deaths occurring on the high seas and preempts state law survival actions. They further urged that Patricia has no claims against them under DOSHA because she is not the personal representative of the decedent's estate and she is not a member of the class of beneficiaries to whom DOSHA extends a remedy.

In support of the exceptions and motion, defendants offered a certificate of an Ontario court appointing Pauline as the trustee of the Estate of Robert F. Skinner. Because Pauline was appointed as the trustee of the decedent's estate, defendants urged, she is the decedent's personal representative and the only person who may bring a wrongful death lawsuit under DOSHA; thus, Patricia lacks standing to assert a cause of action for wrongful death under DOSHA. Defendants also claimed that Patricia, the divorced spouse of the decedent, is not the decedent's relative and therefore cannot be considered a DOSHA beneficiary.

In opposition to the motion and exceptions, plaintiff claimed that she is a

¹ Previously, DOSHA was found at 46 U.S.C.A. § 761 *et seq.*

dependent relative of Robert and therefore a DOSHA beneficiary. She asserted that she was dependent on Robert because of a 1999 separation agreement in which Robert agreed to pay her \$125,000.00 per year in spousal support during her lifetime. Furthermore, Patricia argued, she is Robert's "relative" by affinity within the meaning of DOSHA by virtue of their former marriage as well as by their common blood relative and natural daughter, Kathryn. Although conceding that she is not the administrator of Robert's estate, Patricia argued that she has standing to assert a claim under DOSHA under a jurisprudential exception authorizing a DOSHA beneficiary to intervene in a lawsuit brought by a personal representative with whom the beneficiary has a conflict of interest.

On September 17, 2009, Patricia filed a motion to allow her claims to serve as a petition of intervention into the lawsuit filed by Pauline. The DOSHA action filed by Pauline was settled, and on December 21, 2009, that lawsuit was dismissed with prejudice.

Upon thoroughly analyzing federal law, the trial court found that Patricia did not have a state law survival claim because DOSHA clearly provides the exclusive recovery for deaths on the high seas and preempts state survival actions. Secondly, the court held that Patricia, the ex-wife of Robert, is not a dependent relative as contemplated by DOSHA. The trial court rendered judgment sustaining the exception of no right of action and granting the motion for summary judgment, but ordered that the lawsuit be dismissed without prejudice.

Patricia appealed the dismissal of her wrongful death claim under DOSHA. Defendants answered the appeal, challenging the trial court's failure to order that the dismissal be with prejudice.

DISCUSSION

Generally, an action can be only be brought by a person having a real and actual interest that he asserts. La. C.C.P. art. 681. The peremptory exception

raising the objection of no right of action tests whether the plaintiff who seeks relief is the person in whose favor the law extends a remedy. **Howard v. Administrators of Tulane Educational Fund**, 2007-2224, p. 16 (La. 7/1/08), 986 So.2d 47, 59. The objection assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. **Taylor v. Babin**, 2008-2063, p. 5 (La. App. 1st Cir. 5/8/09), 13 So.3d 633, 637, writ denied, 2009-1285 (La. 9/25/09), 18 So.3d 76.

In 1920, Congress enacted DOSHA to provide an action for deaths occurring on the high seas. It is well settled that under DOSHA, only the personal representative of the decedent may bring suit for wrongful death. **Alcabasa v. Korean Air Lines Co., Ltd.**, 62 F.3d 404, 407 (D.C. Cir. 1995); **Benoit v. Fireman's Fund Ins. Co.**, 355 So.2d 892, 895-896 (La. 1978) and cases cited therein. However, this well-established rule is subject to a jurisprudential exception recognizing that where a conflict of interest exists between a DOSHA beneficiary and the decedent's personal representative, the beneficiary may intervene in the lawsuit instituted by the personal representative and assert an independent claim for wrongful death on his own behalf. See Alcabasa, 62 F.3d at 408; **Benoit**, 355 So.2d at 896.

In this appeal, Patricia does not dispute that Pauline is the decedent's personal representative and the appropriate plaintiff to bring the DOSHA wrongful death action; however, she claims that because of the "obvious" conflict of interest between herself and Pauline, she should have been allowed to intervene in Pauline's lawsuit to assert her own independent wrongful death claim. For this argument to have any merit, it must first be found that Patricia is in fact a DOSHA beneficiary to whom the law grants a wrongful death remedy.

Patricia urges that she is her ex-husband's "dependant relative" as that term

is utilized in DOSHA. She claims to be dependent on the decedent because of a separation agreement giving her an annual income for the remainder of her life. The real issue in this appeal is not whether Patricia is dependent on her ex-husband, but whether she is a “relative” of her former husband so as to qualify as a DOSHA beneficiary. Analyzing the federal jurisprudence, we conclude she is not.

It is well settled that for deaths occurring on the high seas, DOSHA represents Congress’ considered judgment on issues covered by the law, such as beneficiaries, and on such issues, courts are not free to rewrite the rules that Congress has affirmatively and specifically enacted. **Dooley v. Korean Air Lines Co., Ltd.**, 524 U.S. 116, 122, 118 S.Ct. 1890, 1894, 141 L.Ed. 2d 102 (1998); **Mobil Oil Corporation v. Higginbotham**, 436 U.S. 618, 624-25, 98 S.Ct. 2010, 2014-2015, 56 L.Ed.2d 581 (1978). Because Congress has specifically enumerated the individuals who qualify as beneficiaries under DOSHA, courts may not alter or expand that class of beneficiaries. **Dooley**, 524 U.S. at 123, 118 S.Ct. at 1895.

Plaintiff has not cited a single federal case extending DOSHA beneficiary status to an ex-wife. However, there are cases squarely holding that an ex-spouse and a putative wife are not relatives of a decedent for the purposes of DOSHA’s beneficiary listing. See **Petition of ABC Charters, Inc.**, 558 F.Supp. 364, 366-367 (W.D. Wash. 1983) (applying DOSHA’s beneficiary listing in a general maritime wrongful death action, held that a dependent divorced wife was not a “dependent relative”); **Lawson v. United States**, 192 F.2d 479, 481 (2nd Cir. 1951), cert. denied, 343 U.S. 904, 72 S.Ct. 635, 96 L.Ed. 1323 (1952) (holding that a putative wife was not a “relative” of the decedent for DOSHA purposes as that term is ordinarily understood).

In support of her claim that she is a “relative” of her ex-husband, Patricia relies on federal jurisprudence defining the term “relative” in DOSHA to include persons related to the decedent by affinity as well as by blood. For example, in

Petition of United States, 418 F.2d 264, 270-271 (1st Cir. 1969) a federal appellate court, holding that the term “relative” as used in DOSHA comprehends persons related to the decedent by affinity as well as consanguinity, accorded DOSHA beneficiary status to a step-child of the deceased. Accord **Boswell v. Bludworth Bond Shipyard, Inc.**, 854 F.Supp. 461, 463-464 (S.D. Tex. 1994)(stating that a worker’s marriage to a child’s mother created a relationship of affinity between the child and the worker which would permit recovery under DOSHA).

In this case, Patricia insists that she is related to her ex-husband by affinity through their common blood relative and daughter, Kathryn. We disagree. The term “affinity” encompasses relationships by marriage—the relation that one spouse has to the blood relatives of another spouse or a familial relation resulting from a marriage. *Black’s Law Dictionary* 63 (8th Ed. 2004). Patricia, the decedent’s ex-wife, is not related to him by marriage or blood, and therefore, she is not a “relative” as that term is commonly understood and contemplated by DOSHA. See **Robertson v. Aetna Casualty & Surety Insurance Co.**, 629 So.2d 445, 446 (La. App. 3rd Cir. 1993) (holding that a divorced wife is not a “relative” of her ex-husband under a policy of insurance as she is not related by blood or marriage to her former spouse).

Because we have found that Patricia is not a DOSHA beneficiary, she had no right to intervene in the DOSHA lawsuit filed by the decedent’s personal representative, and the trial court properly sustained the exception of no right of action. Because the basis for the objection could not be removed by amendment of the petition, the trial court should have ordered that the dismissal be with prejudice. La. C.C.P. art. 934. Therefore, we amend the judgment to reflect that the dismissal shall be with prejudice.

CONCLUSION

For the foregoing reasons, we amend the judgment to reflect that the dismissal shall be with prejudice and, as amended, the judgment sustaining the peremptory exception of no right of action is affirmed. All costs of this appeal are assessed to appellant, Patricia Skinner.

AMENDED AND AS AMENDED AFFIRMED.