

FEB 10 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAAMAN SHEPARD,

Plaintiff - Appellant,

v.

FOREMOST INSURANCE COMPANY
INC.,

Defendant - Appellee.

No. 09-35291

D.C. No. 2:08-cv-00434-RAJ

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted February 3, 2010
Seattle, Washington

Before: ALARCÓN, W. FLETCHER and RAWLINSON, Circuit Judges.

Naaman Shepard (Shepard) appeals the district court's judgment following a bench trial that the marine insurance policy issued by Foremost Insurance Company (Foremost) did not cover his loss.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. The Washington proximate cause rule, *see Wright v. Safeco Ins. Co. of Am.*, 124 Wash. App. 263, 273-74 (Wash. Ct. App. 2004), and the federal proximate cause rule, *see Commodities Reserve Co. v. St. Paul Fire & Marine Ins. Co.*, 879 F.2d 640, 643 (9th Cir. 1989), are substantially similar. Therefore, any error in applying the Washington law was harmless. *See Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1134-35 (9th Cir. 2003) (applying harmless error to a choice of law decision).

2. The policy exclusion for “lack of reasonable care or due diligence in the maintenance of your watercraft” is unambiguous and must be enforced. *See Conrad v. Ace Prop. & Cas. Ins. Co.*, 532 F.3d 1000, 1005 (9th Cir. 2008).

3. The district court did not clearly err in finding that the efficient proximate cause of the loss was a lack of reasonable and proper maintenance because trial testimony supports the finding. *See Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995).

4. Shepard’s reliance on *Founders’ Ins. Co. v. Rogers*, 305 F.2d 944 (9th Cir. 1962) is inapt. *Rogers* was decided under English law and a policy provision

providing that the vessel owner discharged his responsibility under the policy by delegating the maintenance responsibility to the master. *See id.* at 945.

AFFIRMED.