

NO. A09-2223

---

State of Minnesota  
**In Court of Appeals**

---

Indiana Harbor Steamship Co., LLC, a foreign limited liability company; Central Marine Logistics, Inc., a foreign corporation; ArcelorMittal USA Inc., a foreign corporation; and ArcelorMittal Minorca Mine, Inc., a foreign corporation,

*Appellants,*

vs.

Daniel L. Willis,

*Respondent,*

vs.

Duluth, Missabe and Iron Range Railway Company,

*Respondent.*

---

**RESPONDENT DULUTH, MISSABE & IRON RANGE RAILWAY  
COMPANY'S RESPONSE BRIEF**

---

ECKMAN, STRANDNESS & EGAN

Steven Eckman (#25586)

318 Barry Avenue South

P.O. Box 597

Wayzata, MN 55391

(952) 594-3600

RICKE & SWEENEY, P.A.

Diane P. Gerth (#180786)

Alfonse J. Cocchiarella (#157910)

Suite 600 Degree of Honor Building

325 Cedar Street

St. Paul, MN 55101

(651) 223-8000

*Attorney for Respondent Daniel Willis*

*Attorneys for Respondent Duluth, Missabe and  
Iron Range Railway Company ("DM&IR")*

*[Additional Counsel listed on following page]*

RAY ROBINSON CARLE &  
DAVIES PLL  
Robert T. Coniam (OH #0034623)  
Sandra M. Kelly (OH #0037008)  
Suite 1650  
1717 East Ninth Street  
Cleveland, OH 44114  
(216) 861-4533

JOHNSON, KILLEN & SEILER  
Joseph Ferguson (#0134806)  
800 Wells Fargo Center  
230 West Superior Street  
Duluth, MN 55802  
(218) 722-6331

*Attorneys for Appellants Indiana Harbor  
Steamship Co., LLC, a foreign limited  
liability company; Central Marine Logistics,  
Inc., a foreign corporation; ArcelorMittal  
USA Inc., a foreign corporation; and  
ArcelorMittal Minorca Mine, Inc.,  
a foreign corporation*

**Table of Contents**

Table of Contents .....	i
Table of Authorities .....	ii
Statement of Facts .....	1
Argument.....	10
1. A Spoliation Instruction that Informed the Jury of the Loss of Evidence Was Not an Abuse of Discretion When the Party In Control of the Evidence Attempted to Use Its Absence to Establish Liability .....	10
2. The Jury’s Apportionment of Negligence is Fully Supported by the Evidence at Trial and Should Not be Set Aside.....	17
3. The Trial Court Was Correct in Instructing the Jury to Decide DM&IR’s Negligence Under Minnesota Law .....	22
4. DM&IR Joins in the Appellants’ Position On the Jury’s Determination of Past Wage Loss .....	24
5. DM&IR Takes No Position on Whether a New Trial is Required on the Jury’s Damage Award .....	24
6A. The Indemnification Provisions of the Transportation Contract Govern the Appellants’ Contribution Claim, Not an Inapplicable Common Law Warranty .....	24
6B. The Unrefuted Testimony Supports the Finding that the Delivery of Limestone to the Dock Was a Unitary Enterprise.....	29

6C.	When Minorca Mine Utilized a Vessel Owned and Operated By Indiana Harbor and Central Marine to Deliver its Limestone to the Dock, Those Entities Were Acting as Agents of Minorca .....	33
7.	DM&IR Takes No Position On Whether ArcelorMittal Minorca Mine was a Jones Act Employer.....	37
8.	DM&IR Takes No Position On the Court's Holding on Collateral Source Set-Offs .....	37
9.	DM&IR Joins Appellants' Arguments On the Applicable Post-Judgment Interest Rate .....	37
	Conclusion .....	37
	Certificate of Compliance .....	39
	Index to Addendum .....	40

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## Table of Authorities

### Cases

<u>Brewitz v. City of Saint Paul</u> , 256 Minn. 525, 99 N.W.2d 456 (Minn. 1959) .....	18
<u>Cazad v. Chesapeake and Ohio Railway Co.</u> , 622 F.2d 72 (4th Cir. 1980) .....	23
<u>Clifford v. Geritom Med., Inc.</u> , 681 N.W.2d 680 (Minn. 2004) .....	17
<u>County of Ramsey v. Stevens</u> , 283 N.W.2d 918 (Minn. 1979) .....	13
<u>Dillon v. Nissan Motor Co. Ltd.</u> , 986 F.2d 264 (8th Cir. 1993) .....	13, 14
<u>Duluth Herald &amp; News Tribune v. Plymouth Optical Co.</u> , 286 Minn. 495, 176 N.W.2d 552 (1970) .....	34, 35
<u>Faust v. McFarland</u> , 698 N.W.2d 24 (Minn. App. 2005), rev. denied (Minn. August 16, 2005) .....	14
<u>Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.</u> , 456 N.W.2d 434 (Minn. 1990) .....	12, 13
<u>Foley v. Allard</u> , 427 N.W.2d 647 (Minn. 1988) .....	34
<u>Ford v. Chicago, M. St. P. &amp; P.R. Co.</u> , 294 N.W.2d 844 (Minn. 1980) .....	25, 26, 27
<u>Hagedorn v. Aid Assoc. for Lutherans</u> , 297 Minn. 253, 211 N.W.2d 154 (1973) .....	34
<u>Himes v. Woodings-Verona Tool Works, Inc.</u> , 565 N.W.2d 469 (Minn. App. 1997) .....	13
<u>Huhta v. Thermo-King Corp.</u> , 2004 Minn. App. LEXIS 722 (June 29, 2004) .....	14
<u>In re TPT Transp.</u> , 191 F. Supp. 2d 717 (M.D. La. 2001).....	28
<u>Kmetz v. Johnson</u> , 261 Minn. 395, 113 N.W.2d 96 (1962) .....	13

<u>Knigh t v. Alaska Trawl Fisheries, Inc. v. Northstar Terminal,</u> 154 F.3d 1042 (9th Cir. 1998) .....	27, 28
<u>Patton v. Newmar Corp.,</u> 538 N.W.2d 116 (Minn. 1995) .....	13, 14
<u>Ploog v. Ogilvie,</u> 309 N.W.2d 49 (Minn. 1981) .....	25, 26, 27
<u>Pouliot v. Fitzsimmons,</u> 582 N.W.2d 221 (Minn. 1998) .....	18
<u>Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.,</u> 350 U.S. 124 (1956) .....	27, 28
<u>Sinkler v. Missouri Pacific R. Co.,</u> 356 U.S 326 (1958) .....	32, 33
<u>State by Lord v. Pearson,</u> 619 Minn. 477, 110 N.W.2d 206 (Minn. 1961) .....	17
<u>Wajda v. Kingsbury,</u> 652 N.W.2d 856 (Minn. App. 2002) .....	13
 <b><u>Law Review Article</u></b>	
<u>Fuiaxis, Indemnification or Comparative Fault:</u> <u>Should a Tortfeasor's Right to Receive "Ryan Indemnity"</u> <u>in Maritime Law Sink or Swim in the Presence of</u> <u>Comparative Fault,</u> 67 Fordham L. Rev. 1609, 1635 (1999) .....	29

## FACTS

### **1. Respondent Daniel Willis's Injury.**

Respondent Daniel Willis worked as seaman on the ore vessel Joseph L. Block during the Great Lakes shipping season of 2004. On Friday afternoon, August 27, 2004, the Block arrived at DM&IR's ore dock No. 6 in Duluth to unload twenty-eight thousand tons of limestone bound for the ArcelorMittal Minorca Mine. (Trial Ex. 115B) Limestone is delivered to the dock for transport to iron ore mines to be used in the production of taconite pellets. It is unloaded from ore boats such as the Block by way of a conveyor system on the boat that delivers the product into a hopper located in the center of the dock. From that hopper, another conveyor system on the ground distributes the limestone into a storage area, where it sits until being loaded on to DM&IR trains for transport to the mine.

As the Block approached the dock between 1:00 and 2:00 p.m., it passed in the harbor the Cason J. Callaway, another ore vessel that had just left Dock No. 6 after unloading its load of limestone bound for one of the other mines served by DM&IR. (R. 383, 1336, Trial Ex. 115A) As the Block backed into the unloading facility, Captain Raymond Sheldon saw that in the center of the dock, on the south side of the unloading hopper, there was wet limestone residue on the surface, presumably caused by the recent unloading of limestone from the Callaway. (R. 1340) It is not uncommon for the limestone unloading operation to leave residue behind in the area of the unloading hopper.

As the Block came to a stop at the dock, Willis went down to the surface of the dock to begin the tie-up operation for the vessel. He and another crewmember set the lines on the shore end of the backed-in vessel after which he walked along the dock to the other end of the 728-foot vessel (R. 390) to tie down the front lines. While normally there are three lines running off the front of the backed-in ship, on this occasion there were only two. The motorized winch used to tighten one of the front lines (line No.2) was broken, making line No.2 unusable and leaving only two lines in the front of the vessel. (R. 341) One of the crewmembers tied the nos. 1 and 3 lines at the front of the vessel.

When he arrived at the rear of the ship to re-board, Willis was told by Second Mate Bruce Delavan to return to the center of the vessel near the hopper area where he would be required to tie line No.4, a line located in the middle of the vessel. (R. 338, 396) It was unusual to tie line No.4; the normal practice was to tie three lines at the front and three lines in the rear to hold the vessel in place during loading or unloading. (R. 338, 396, 1343) Willis nonetheless followed his orders and went to the midship area to tie up line No.4. Because of the configuration of the Block, line No.4 came to be located fairly close to the unloading hopper and the area of limestone residue left by the Callaway. (R. 396, 398) It was in the process of tying up line No.4 that Willis slipped and fell in the limestone residue left behind by the Callaway. (R. 403-405) Willis testified that he felt round taconite pellets under his hand when he fell. (R. 767), but another crewmember on the Block testified that the dock was clean. (R. 1251)

Willis testified at trial that he hurt his knee in this fall, but felt that he could return to work and re-boarded the ship to work in the vessel's hold. (R. 406) After a period of time working in the hold of the ship assisting in the unloading operations, he communicated to the crew chief that his knee was hurting too much to continue working. (R. 407) By this time, Captain Sheldon had left the ship and Second Mate Delavan was in charge. Willis asked to be taken to the hospital, so a taxicab was called to take him to St. Mary's Hospital in Duluth. (R. 408) Because Willis did not have any cash on him (R. 409), a crewmember paid the taxi driver out of his own pocket. (R. 409-410, 1376-77)

At the emergency room, x-rays were taken and Willis was given an immobilizer for his leg to prevent his knee from suffering any further injury. The injury was diagnosed as a knee injury with "likely internal derangement." (Trial Ex. 7) The staff at St. Mary's determined that Willis needed to see either an orthopedic specialist at St. Mary's the following Monday or return to his home in Escanaba, Michigan to see his physician there. (R. 413) Because Willis was so far from home, the physician's assistant who treated him and a social worker at the hospital made arrangements with Northwest Airlines for a reduced fare back to his home. They also drafted a letter outlining that Willis was in need of medical transportation home. (Trial Ex. 8)

Throughout the time he was at the hospital, both hospital staff and Willis tried to contact Captain Sheldon and left several messages on the ship for him. (R. 411) The hospital arranged for Willis to stay at a nearby hotel for the night before

returning to Escanaba the next morning. (R. 414) The hospital van brought him to the hotel (R. 414), but Willis, still without funds, had to telephone a friend back in Escanaba to obtain a credit card number to pay for the hotel room. (R. 419)

About 9:00 p.m. that Friday evening, Captain Sheldon appeared at Willis' hotel room. (R. 1323-24) Willis gave him the letter from the hospital outlining the need for medical transportation home. (R. 1323) The captain told Willis that he was not authorized to spend the money on the airfare, gave Willis a check for his earnings due to date (about \$225), and left him at the hotel. (R. 418, 1325-26) After cashing the check, Willis made arrangements to take a Greyhound bus back to Escanaba, which was all he could afford. (R. 422) The bus left Duluth the next morning and it took between 15 and 19 hours for Willis to make his way home to Escanaba. (R. 424, 425) During the entire bus trip, Willis continued to wear the immobilizer he had been given at the hospital. (R. 724)

On August 30, Willis saw his physician, (R. 428), who agreed with the diagnosis of a knee sprain. (R. 428) Willis continued to wear the immobilizer on his leg. On September 8, because of increasing pain in his leg, he presented to Dr. Whitmer. Immediately recognizing that Mr. Willis may have deep vein thrombosis, Dr. Whitmer ordered an ultrasound that revealed deep vein thrombosis (DVT) in Willis's left leg. (R. 431) He was hospitalized and began a long course of treatment for DVT. (R. 432)

Despite several surgeries and ongoing treatment, the DVT continues to plague Willis, and at trial there was considerable testimony about his limitations

because of this chronic condition. Both Willis's treating vascular surgeon, Dr. Thomas Wakefield, and the independent medical examiner retained by DM&IR testified at trial that immobility following a knee trauma could cause deep vein thrombosis. (Dr. Wakefield deposition read at trial, p. 39, R. 1742) Even the independent medical examiner hired by the Vessel Defendants agreed that the immobilizer could "play a role" in developing DVT. (R. 1613)

At trial, the manager of the dock at the time, Dave Torgersen, testified that he was never told about the fall that Willis suffered. (R. 1862) There was testimony at trial from Thomas Wiater of Central Marine Logistics that the Monday following Willis's Friday slip and fall, he faxed to DM&IR a copy of the accident report filled out shortly after the incident. (R.1435) Dock manager Torgersen testified that he had never received this fax transmission, and that he first learned about the incident during the litigation process. (R. 1861) Torgersen also testified that had he learned of the incident, an inspection of the area would have been undertaken immediately and the condition of the dock would have been photographed and documented. (R. 1861) But because he did not learn of the slip and fall that day, no inspection took place.

**2. Procedures In Place At Dock No. 6.**

At trial, employees of Dock No. 6 at the time of the incident testified about the practices of the dock designed to keep the surface area of the dock clear of the debris that could be left behind after loading or unloading of ore boats. The dock utilized a number of pieces of equipment, including sweepers, bobcats, and other

small tractors to sweep off the taconite pellets and limestone residue, the two commodities that were handled at the facility. (R. 920-21, 985-86, 1821) Additionally, during summer months, the dock used a pontoon boat equipped with a fire hose that allowed the dock personnel to wash down the surface and eliminate taconite pellets and limestone residue. (R. 484-85) DM&IR employees testified that it was common practice to clean the dock after each ship came in and that efforts were made to keep the dock clear of residue. (R. 484, 490, 915-16, 1864)

None of the dock employees had any independent recollection of the events of the day that Willis was injured. (R. 496) Because they had no notice of the slip and fall, there was no reason for any individual to remember that day. However, the records from the dock activities for that day indicate that the ore vessel Cason J. Callaway had arrived at the dock at 2:15 a.m. early that Friday morning and had left shortly before 1:00 p.m. on Friday, August 27, 2007. (Trial Ex. 115A) At 2:00 p.m., only a short period of time after the Callaway left, the Block arrived at the dock. (Trial Ex. 115B) The dock personnel testified that there simply was not enough time to go down and clean the surface area of the dock in between the two vessels. (R. 493, 950) It would have been unsafe to be operating equipment in the area where the 728-foot Block was docking. (R. 950)

Dock employees and Willis also testified the vessels almost never tie up midship in the area of the hopper. (R. 338, 1852, 1954) Most vessels utilized the fore and aft lines and did not put lines out in the area where the actual unloading of the limestone took place. There was no reason for any of the dock employees

to expect that someone would be on the surface of the dock in the area of the unloading process, as the boom on the limestone vessels swung out and unloaded the material without any need for crewmembers to go onto the dock in the hopper area. The presence of Willis in the area of the hopper was highly unusual and not a normal part of the tying up process for the ore boats that loaded and unloaded cargo at dock No. 6.

3. **The Roles Of The Vessel Defendants And The Contract Governing Limestone Delivery.**

The limestone that was being unloaded from the Block on August 27, 2004, was owned by and destined for delivery to the iron ore mine owned by Appellant ArcelorMittal Minorca Mine in Virginia, Minnesota. The limestone was to be used in the production of taconite pellets from the mine, which would then be transported to the dock for loading onto a ship such as the Block for delivery to steel foundries in Indiana. Under a Transportation Contract between DM&IR and the predecessor to the Minorca mine, DM&IR supplies off-loading, unloading, storage facilities, and transportation via rail between the Minorca mine and vessels at DM&IR's ore docks in Two Harbors and Duluth. (R. 220-21, Trial Ex. 65) The ore docks are not public docks, and only those entities that have contractual relationships with DM&IR are allowed to berth their ships at the facilities. Because Minorca Mine, the entity for whom the limestone was delivered, is a signatory to the contract, its agents are allowed to dock at the facility to unload limestone and load taconite pellets.

ArcelorMittal Minorca Mine is a subsidiary of Appellant ArcelorMittal USA (AMUSA). (R. 191) Vessels such as the Block are used in the transport of limestone and taconite and are controlled by AMUSA by way of a Time Charter Agreement, essentially a lease to AMUSA from the ship's owner, Appellant Indiana Harbor Steamship Co. (R. 206, 223, Trial Ex. 64) The Time Charter Agreement provides for AMUSA's exclusive use of the ship. (R. 227) Appellants Indiana Harbor and AMUSA utilize the services of Appellant Central Marine Logistics to manage the vessel's crew. (R. 228)

The coordination of the Block's scheduling, the delivery of limestone to Minorca Mine and the transport of taconite pellets to AMUSA's foundries in Indiana are all coordinated by one individual, Daniel Cornillie. (R. 198, 258-259) Cornillie testified at trial by way of deposition about the interconnectedness of the mine, its parent company, the owner of the vessel, and the company that managed the vessel.<sup>1</sup> (R. 198-199) In his testimony, Cornillie described how he alone worked to ensure that the foundries owned by Appellant AMUSA were continuously supplied with the taconite pellets manufactured by Appellant Minorca Mine and how the mine was continuously supplied with the limestone necessary to produce the pellets. (R. 198-199, 215, 260-261) Both of these commodities were transported to the foundries by ships owned by Appellant Indiana Harbor and managed by Appellant Central Marine. (R. 218) The

---

<sup>1</sup> At trial these entities, all Appellants here, were referred to as the "Vessel Defendants" and were represented by the same counsel. There were no cross or counterclaims among these parties.

interconnectedness of the appellants was highlighted by the testimony of Cornillie that he was not entirely sure exactly which of the entities was his employer. (R. 200) Cornillie also testified that what the vessels do under the direction of AMUSA is all for the benefit of the Minorca mine. (R. 208) All of the products on the vessels go to feed the Minorca mine. The limestone material that was on the Block was owned by Minorca. (R. 267)

It was the interconnectedness of the four Vessel Defendants at trial that resulted in the trial court's determination that they were acting as a "unitary enterprise" and that their liability ought to be submitted to the jury as one.

## ARGUMENT

### **1. A Spoliation Instruction That Informed The Jury Of The Loss Of Evidence Was Not An Abuse Of Discretion When The Party In Control Of The Evidence Attempted To Use Its Absence To Establish Liability.**

At trial, the court gave a limited spoliation instruction to the jury about DM&IR's inability to inspect the dock after Willis's fall. The instruction was designed to cure the prejudice to DM&IR as a result of the Vessel Defendants' failure to inform DM&IR of the accident and document the condition of the dock.

It is uncontroverted that after Willis's fall, DM&IR was not immediately told of the accident. Although there was testimony that a copy of an accident report was faxed to DM&IR, the dock manager, David Torgersen, stated he never received it. In any event, the document the Vessel Defendants claim was sent to DM&IR was not sent until the Monday following this Friday afternoon incident - almost three full days later. Other than this facsimile, no notice was received by DM&IR about the fall until service of the Third Party Complaint some thirty months later. Consequently, DM&IR was effectively denied the opportunity to investigate the circumstances under which the fall took place and document the condition of the dock. (R. 1861) The failure of Willis and his employer to timely notify DM&IR allowed the evidence of the physical condition of the dock to dissipate over the next few days as other vessels came into and out of the dock. (R. 1883) This failure on the part of the Vessel Defendants precluded DM&IR from obtaining evidence that might have supported, among other things, an open and obvious defense.

The testimony and evidence at trial about the condition of the dock – evidence DM&IR could not counter – resulted in prejudice that the limited spoliation instruction helped cure. At trial, Willis testified that the white limestone residue obscured the presence of taconite pellets underneath the milky water – pellets that he says caused him to fall. (R. 404) DM&IR denies that there would have been any taconite pellets present at the time of this accident because of its dock cleaning policies and practices. Even if DM&IR had been notified immediately after the Block left, there would have been value to an inspection because the Block's boom generally created its mess on the shore (north) side of the hopper, while the Callaway's mess was on the lake (south) side the hopper. (R. 1446-47) However, because the Vessel Defendants did not tell DM&IR of the accident until at least three days later, the evidence of what was actually present on the dock that day was allowed to fade away as a result of normal dock operations. This was in no way the fault of the DM&IR, yet it was forced to live with the results and face factual allegations at trial it had no meaningful way to rebut.

The lack of evidence about the condition of the dock became more prejudicial at trial, where photographs showing a very messy dock were introduced and shown to the jury without adequate foundation. (Trial Exhibits 87H, 87L, 87Q and 87W) During discovery, the Vessel Defendants had produced photographs of the dock area during an unloading of the Block. In these photos, the dock is shown littered with heavy limestone residue. No information as to

when the photos were taken, by whom, or the circumstances of how the residue came to be on the dock was proffered at trial. Nonetheless, counsel for Willis attempted to use these photographs of unknown provenance to show the jury how messy the dock could become, claiming prejudice if he could not use them. (R. 369) Despite lacking foundation, these photographs were admitted and shown to the jury with testimony about how they depicted a dirty, messy dock.

Confronted with photographs showing a condition that could have been created intentionally by unknown actors, DM&IR objected to the use of the photos. DM&IR had been denied the opportunity to preserve evidence, yet at trial it had to deal with foundationless photos supposedly showing the condition of the dock years before on the date of the accident.

Faced with this prejudice, DM&IR requested that the court give to the jury a limited spoliation instruction. The instruction to the jury read:

#### SPOLIATION

If evidence that could reasonably be expected to have been produced, but is not produced due to the actions or inactions of a party that prejudice another party, and the party whose actions allowed the evidence to have been altered fails to give a reasonable explanation, you may decide that the evidence would have been unfavorable to that party.

Respondent's Addendum at RA-3. Vessel Defendants opposed this instruction and argue that giving it was so erroneous as to require a new trial.

Spoliation is "a failure to preserve property for another's use as evidence in pending or future litigation." *Federated Mut. Ins. Co. v. Litchfield Precision*

*Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990). Spoliation of evidence has been held to constitute an obstruction of justice deserving of sanctions. *Id.*, 456 N.W.2d at 436. Courts have inherent powers to sanction parties for the destruction of evidence that is critical to a party's claim. *Id.* Sanctions are appropriate even when the party destroying the evidence has not violated a court order and even when there has been no finding of bad faith. *Patton v. Newmar Corp.*, 538 N.W.2d 116, ¶118 (Minn. 1995), citing *County of Ramsey v. Stevens*, 283 N.W.2d 918, 925 (Minn. 1979). Sanctions are based upon the "prejudice to the opposing party." *Patton*, 538 N.W.2d at 119; *Dillon v. Nissan Motor Co. Ltd.*, 986 F.2d 264 (8th Cir. 1993).

Even if the evidence is destroyed through inadvertence or negligence, sanctions may be imposed. *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. App. 1997). Sanctions may be imposed for a failure to produce evidence in the possession or under the control of a party to litigation. See, e.g., *Federated Mut. Ins.*, 456 N.W.2d at 436; *Kmetz v. Johnson*, 261 Minn. 395, 401, 113 N.W.2d 96, 100 (1962). While normally imposed for the destruction of evidence under one's control and possession, *Wajda v. Kingsbury*, 652 N.W.2d 856, 861 (Minn. App. 2002), sanctions should also be considered when the party knowingly allows evidence to dissipate. Here, the Vessel Defendants' silence and failure to immediately notify DM&IR of the condition of the dock even after Willis had fallen clearly allowed that evidence to be lost. Again, this is true even though the loss of evidence may be the result of

inadvertence or negligence. *Huhta v. Thermo-King Corp.*, 2004 Minn. App. LEXIS 722 (June 29, 2004). (Reproduced at RA-6) Minnesota law does not require a finding that the spoliation or destruction of evidence be intentional. *Wadja*, 652 N.W.2d at 862 (“The law in Minnesota is that spoliation of evidence need not be intentional to warrant sanctions”). See also, *Faust v. McFarland*, 698 N.W.2d 24, 31 (Minn. App. 2005), *rev. denied* (Minn. August 16, 2005) (“Minnesota law does not differentiate between intentional and unintentional spoliation”).

Once spoliation has been established, trial courts utilize standards adopted by the Minnesota Supreme Court in *Patton* to fashion the appropriate remedy. The *Patton* court adopted standards set forth by the Eighth Circuit in *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993) in which the court “Identified a reasonable and workable standard by which to test the impact of the spoliation – the prejudice to the opposing party.” 538 N.W.2d at 119. In examining the degree of evidentiary prejudice to the opposing party, the trial court is directed to “examine the nature of the lost evidence in the context of the claims asserted and the potential for remediation of the prejudice.” *Id.* Where a party has been deprived the opportunity to examine evidence central to one of its claims or defenses, Minnesota appellate courts have routinely allowed the imposition of sanctions.

In this matter, the condition of the dock at the time of the fall is central to both Willis in proving his case and to DM&IR in proving it did not act in a

negligent manner. The limited discovery that DM&IR was able to conduct has revealed circumstantial evidence that the dock would have been cleaned before the Callaway arrived and taconite pellets would not have been present. DM&IR dock employees testified that although they do not remember the specific day of the Willis's fall, it was common practice to clean the dock after vessels unloaded their product and/or before a vessel arrived. (R. 484, 490, 915-16, 1864) In fact, one of the Block's crewmembers, Third Mate Michael Grzesiek, testified that he would be surprised if there had been taconite pellets under the dock that day because "the rest of the dock was nice and clean." (R. 2151) Pellets from a previous vessel would more than likely have been cleared by the time the Callaway arrived early on Friday, but DM&IR could not produce any inspection documentation because it had never been told of the accident.<sup>2</sup>

DM&IR was prejudiced twice by the actions of the Vessel Defendants in their failure to allow an inspection of the dock. First DM&IR was denied the opportunity to pursue an open and obvious defense to the claims made against it.

---

<sup>2</sup> In Appellants' brief, there are references to the presence of taconite pellets having been on the dock 12 hours before plaintiff's fall. (Brief pp. 6, 11) The "12 hour" allegation has no factual support in the record. It comes from testimony of dock personnel who were asked hypothetical questions about how long pellets would have been on the dock, "If there were, in fact, taconite pellets spilled off the Callaway. . ." (Tr. 938) and "So if, in fact, there were taconite pellets underneath this spillage. . ." (Trial 1844) Such testimony about how long the supposed pellets would have been there does not establish that taconite pellets were actually present on the dock, especially in light of testimony that the dock would have been cleaned on a regular basis before the Callaway arrived. Dock employee Gary Sundberg testified "Because the fender would have been washed before a boat came in, so there shouldn't be any pellets there." (R. 511)

Testimony at trial was consistent in establishing that the spill itself was open and obvious to anyone who looked at it. But DM&IR's request for dismissal because the spill was open and obvious was denied at trial because of the testimony of Willis that hidden under the puddle of limestone residue were marble-like taconite pellets. (R. 1553) An inspection of the area immediately would have provided crucial evidence that may have allowed DM&IR to prove up its open and obvious defense. But because it was never informed of the fall, such evidence was never gathered and DM&IR was prejudiced.

Second, DM&IR was further prejudiced when the photographs depicting a messy dock were shown to the jury with testimony that implied that the dock was in that same condition on the day of the accident. In utilizing the offensive photographs at trial, the Vessel Defendants and Willis were taking advantage of circumstances that the Vessel Defendants caused to be created – DM&IR's inability to disprove the implication that the dock was as messy as shown in the photos. In fact, the Vessel Defendants continue to use the photographs to disadvantage DM&IR in their opening brief to this court. At p. 14, they state, "Photos of the dock . . . were proof that the spilled pellets and limestone under the hopper were present . . ." The combination of being denied the opportunity to inspect the dock and being confronted at trial with photographs with no foundation was highly prejudicial to DM&IR.

Both Willis and Appellants used the absence of documentation of the dock for an evidentiary advantage at trial. Under the facts and circumstances of this

case, the court's decision to give a limited spoliation instruction was not an abuse of discretion.

**2. The Jury's Apportionment Of Negligence Is Fully Supported By The Evidence At Trial And Should Not Be Set Aside.**

Vessel Defendants argue that the jury's apportionment of fault was "so disproportionately inconsistent" that it must set aside for a new trial. In making this argument, the Vessel Defendants are asking that the court step squarely into the role of the jury and set aside the apportionment of damages the jury made after hearing nearly two full weeks of evidence. Vessel Defendants offer no cogent reason as to why the determination of the jury should be set aside or why the trial court's denial of their motion below was wrong. All they point to is the effect of the spoliation instruction, but even without the spoliation instruction, substantial evidence supports the liability findings of the jury.

Rule 59.01(g) allows for a new trial when "the verdict, decision, or report is not justified by the evidence, or is contrary to law." The applicable test for granting a new trial on the basis that the evidence does not justify the verdict is whether the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence, or acted under some mistake. *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 687 (Minn. 2004). A new trial should not be granted upon conflicting evidence unless the verdict is so manifestly contrary to the preponderance of evidence as to warrant the inference that the jury failed to consider all of the evidence. *State by Lord v. Pearson*, 619 Minn. 477,

110 N.W.2d 206 (Minn. 1961); *Brewitz v. City of Saint Paul*, 256 Minn. 525, 99 N.W.2d 456 (Minn. 1959). In reviewing such a motion, the evidence “must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence.” *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

Vessel Defendants argue that the liability determination of the jury that places the majority of liability on the Vessel Defendants is a miscarriage of justice. However, there exists substantial evidence on the record to support the jury’s apportionment of fault.

The jury had before it significant evidence that supported its determination that DM&IR did not bear a large level of liability for the slip and fall and subsequent injuries to Mr. Willis. Testimony of dock personnel and crewmembers on the Block, as well as the documentary record, established that the Block came into Ore Dock No. 6 immediately following the departure of the Cason J. Callaway. (Trial Exs. 115A and 115B, R. 1973) Former dock supervisor David Torgersen testified that the finish time indicated on Exhibit 115A for the Callaway, showing that it finished at 12:45 p.m., meant that was the point at which the boat stopped unloading its limestone. (R. 1873) It then takes some period of time for the departing vessel to finish its operations, pull in its boom, and prepare for departure. (R. 1873) Using Exhibit 115B, documenting the arrival of the Block at 2:00 p.m. that afternoon, Torgersen testified that the notation represents the moment the vessel ties up. (R. 1873) Thus, from the 12:45 p.m. finish time

for the Callaway and the arrival time of the Block at 2:00 p.m., the Callaway crew had to perform all of its tasks to allow departure, leave the dock, while the Block had to move into position and perform the tie up operations with its lines. Generally, the boats do not come so close together (R. 494) and in reality, there was very little time between the two vessels.

Dock personnel testified that in order to properly clean the dock surface after a limestone boat, it would take at least an hour. (R. 493) Torgersen testified that a good cleaning of the dock would take about two full hours. (R. 1867) There was simply not enough time to safely clean the dock between the two boats. Even Willis's own marine safety expert testified that it would have been very unsafe to attempt to clean the area with the barge while the Block was backing in. (R. 627)

There was also testimony that the DM&IR did provide a safe way for seamen to get from one end of the dock to the other. Inside the structure of the dock is a walkway, known as the sailor's walk, that allows safe passage from one end of the dock to the other away from the hopper area and away from the dock apron. (R. 1870) Torgersen testified that the purpose of the sailor's walk is to allow people to move from one end of the vessel safely and avoid the hopper area. (R. 1870)

Moreover, there was significant testimony that tying up midship was a very rare situation, almost never happening. (R. 1854) Torgersen testified that there was no need for anyone to be in the area of midship normally. (R. 1870) The

dock employee on duty that day testified that no one notified them that the Block was going to tie up at the line that came out midship. (R. 1854) Willis testified that he had never before tied up at midship. (R. 396) The rarity of tying up in this area, combined with the dock's provision of a safe method to get from the front of the boat to the back, supports the finding of the jury that DM&IR did all that it could to provide a safe dock for the berthing of the vessels.

Nor was the testimony at trial entirely conclusive about the presence of taconite pellets on the dock. Third Mate Grzesiek testified on questioning by Willis's counsel about the possibility of there being pellets under the limestone residue. "[J]ust based on my knowledge of the dock, I would say there was not, because the rest of the dock was nice and clean. No reason to suspect that just underneath that pile would be pellets." (R. 1251)

Noticeably absent from the Vessel Defendants' analysis of the apportionment is any discussion of the series of events that took place after Willis's initial slip and fall on the dock. The jury had before it evidence of the actions of Captain Sheldon in leaving Willis to find his own way home from a hotel in Duluth, when he made no inquiry as to his financial ability to do so. This was undertaken despite a letter from the hospital given to him stating that Willis was in need of medical transport home. The jury heard the sequence of events – largely undisputed – that resulted in the many hour bus ride back to Escanaba and the eventual development of DVT. The evidence at trial highlighted that Willis's major physical problems are not the result of a temporary knee strain suffered in

his fall, but rather the ongoing permanent disability of chronic deep vein thrombosis. The post-injury treatment and bus transportation of Willis back to Escanaba took place because of the actions of his employer and the jury could rightly conclude that the DM&IR was not primarily at fault for Willis's permanent disability.

Beyond the post-accident treatment of Willis, the jury also had substantial evidence upon which to conclude that the Vessel Defendants bore some responsibility for the fall itself. Only the vessel personnel knew that winch No. 4 was going to be used because of the broken winch No. 2. (R. 1343) It was only the vessel captain who was in a position to tell the dock of the need to clean around the hopper area when past practice indicated that virtually no vessels ever tied at the hopper area. (R. 1341) Captain Sheldon was the one who was in the best position to see and indeed did see the debris and residue on the dock near the hopper. (R. 1297) Despite this, Captain Sheldon did not ask that the area be cleaned and Willis was sent in to the area in spite of the condition. With all of this evidence, the jury chose to apportion fault in a manner that placed the majority on the Vessel Defendants.

Competent evidence exists in the record to support the jury's apportionment of liability. Because they had before them all of the evidence concerning not only circumstances leading up the accident itself, but the post-accident treatment of Willis by his employer, the jury could easily choose to place the majority of fault

on the Vessel Defendants. Taking the verdict in a light most favorable to the prevailing party, there is no reason to set it aside.

**3. The Trial Court Was Correct In Instructing The Jury To Decide DM&IR's Negligence Under Minnesota Law.**

Vessel Defendants next claim that a new trial is required because the court instructed the jury that DM&IR's negligence was to be determined under Minnesota premises liability law rather than federal maritime law. (See jury instructions at RA 1-2) The court was correct in its instruction for two reasons. First, the contract that controlled the transportation of limestone is governed by Minnesota law and requires that liability for claims by third parties be divided in proportion to the parties' negligence. Second, DM&IR is not a Jones Act employer of Willis, so the duty owed to Willis is the Minnesota common law duty to a business invitee, not the higher non-delegable duty of a Jones Act employer to provide a safe workplace for its employees.

This issue is one that flows from the trial court's decision to apply the terms of the Transportation Contract to the unitary enterprise of limestone shipping on behalf of the Minorca mine, and the court's implicit recognition that the actors in that unitary enterprise are agents of Minorca Mine. Both of these issues are addressed at length below. Given that the court's ruling on those questions is correct, it was proper to apply Minnesota law when interpreting the meaning of "proportionate" when dividing up liability under the Transportation Contract.

As is explained more fully below, the Transportation Contract that governed the movements of limestone at this dock enroute to the Minorca mine contained an express indemnification provision that controlled the allocation of liability when claims are made against one of the parties as a result of the joint negligence of the DM&IR, Minorca mine or their agents. The indemnification provision provides that “should railroad [DM&IR] and/or company [Minorca Mine] suffer any harm through the joint negligence of company and railroad acting pursuant to this contract, such expense will be apportioned between the parties in proportion to their negligence.” (Indemnification provision, Section 13, reproduced at RA-5) This clause is far from unusual in its allocation of fault under a commercial arrangement. Thus, one of the tasks given to the jury in this case was to weigh the proportion of negligence between Minorca Mine and its agents on one side and DM&IR and its agents on the other in determining how to apportion fault for injuries to Willis.<sup>3</sup>

The Transportation Contract also provides that it is to be construed in accordance with the laws of Minnesota. This court gave to the jury standard instructions on Minnesota premises liability law. If the court was correct in the applicability of the Transportation Contract, then its instructions based on Minnesota law were not an abuse of discretion.

---

<sup>3</sup> It is not unusual for a Jones Act or FELA jury to confront differing bases for liability when third parties are brought into such cases as third party defendants. See, e.g., *Cazad v. Chesapeake and Ohio Railway Co.*, 622 F.2d 72, 75 n.3 (4th Cir. 1980).

**4. DM&IR Joins In The Appellants' Position On The Jury's Determination Of Past Wage Loss.**

DM&IR joins in the Appellants' argument that the jury's award of damages for past wage loss was not supported by the evidence.

**5. DM&IR Takes No Position On Whether A New Trial Is Required On The Jury's Damage Award.**

DM&IR takes no position on the Vessel Defendants' argument that they are entitled to a new trial on damages.

**6A. The Indemnification Provisions Of The Transportation Contract Govern The Appellants' Contribution Claim, Not An Inapplicable Common Law Warranty.**

Appellants argue that the trial court erred when it held that the Transportation Contract's indemnification clause governed the apportionment of liability rather than the common law maritime Warranty of Workmanlike Performance. This argument fails because under Minnesota law, parties are free to enter into contracts that remove them from common law determinations of fault. The Transportation Contract explicitly did so and the trial court was correct in applying it here.

It is undisputed that the Rail Transportation Contract between the DM&IR and Minorca mine's predecessor ISPAT Inland Mining Company controlled the delivery and unloading of the limestone. (R. 220-21) The Contract contains an express indemnification provision. Section 13 of that contract, found at page 16, provides:

“Indemnification – Railroad [DM&IR] will defend, indemnify and save harmless Company [Ispat] now ArcelorMittal Minorca Mine] from any and all claims, demands, actions, suits, either at law or in equity, including court costs, reasonable attorneys’ fees and any and all expenses whatsoever, instituted or threatened to be instituted by any person not a party to this contract against company resulting solely from the negligence of Railroad, its agents or employees acting pursuant to this contract. Company will defend, indemnify and save harmless the Railroad from any and all claims, demands, actions, suits, either at law or in equity, including court costs, reasonable attorneys’ fees and any and all expenses whatsoever, instituted or threatened to be instituted by any person not a party to this contract against the Railroad resulting solely from the negligence of company, its agents or employees acting pursuant to this contract. Should railroad and/or company suffer any harm through the joint negligence of company and railroad acting pursuant to this contract, such expense will be apportioned between the parties in proportion to their negligence.”

Section 13 of the Transportation Contract, reproduced at RA-5. The terms of the specific contract provision relating to the limestone operation in this case define both indemnification and contribution, and the circumstances under which those remedies are available. This express contract requires Minorca to accept responsibility for the negligence of its agents when that negligence results in a claim brought by a third party.

Minnesota courts have adhered to the common law rule that parties are free to enter into contracts that allocate liability along pre-determined formulae. *Ploog v. Ogilvie*, 309 N.W.2d 49, 54 (Minn. 1981). See also, *Ford v. Chicago, M. St. P. & P.R. Co.*, 294 N.W.2d 844, 847 Minn. 1980). *Ploog* and *Ford* involved contracts between railroads and their customers over the operation of trackage that served the customers’ industries. Like Section 13 of the contract here, the

industrial track agreements governed the apportionment of fault between the parties should there be an injury. In both cases, the provision was challenged and in both cases, the terms of the contract were enforced by the court. Because parties are allowed under Minnesota law to enter into contracts that apportion fault in a manner inconsistent with the common law, the express indemnification provisions were enforced. Like the parties in *Ploog* and *Ford*, DM&IR is entitled to enter into a contract regarding apportionment of damages, and it did so here. With respect to the delivery of limestone to DM&IR Dock No. 6, the parties have agreed that liability for injuries would be apportioned a certain way, and such an agreement is wholly enforceable under well-settled Minnesota law.

Section 13 of the contract anticipates that Minorca would utilize agents for part of the transportation of the limestone and taconite, and provides that Minorca would absorb any fault of those agents should any claims for damages arise. The terms of that contract are unambiguous in that they apply to all claims brought by “any person not a party to this contract,” a clause that certainly defines the Indiana Harbor and Central Marine claims against DM&IR for contribution and indemnity. The terms of that contract also require that when there is joint negligence, the expense is “apportioned between the parties in proportion to their negligence.”

There can be no dispute that there is negligence on the part of Minorca’s agents that triggered the proportionate liability term. After two weeks of testimony about the accident, the jury attributed 85% of fault on the Vessel

Defendants. As described above, there is ample evidence supporting the allocation of fault onto the Vessel Defendants. Because the jury found fault on part of both DM&IR and Minorca's agents, the contract's comparative fault provisions – fully allowed under Minnesota law – control the apportionment of fault here.

But even if this court were to ignore the express terms of the contract, Appellants' argument that the Warranty of Workmanlike Performance applies is misplaced. Where the negligence leading to the injury is attributed to both parties, the more favored approach requires that comparative fault principles be applied in determining ultimate liability for injuries to seamen. A number of courts have abandoned the approach advocated by the defendants, rejecting the approach in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 350 U.S. 124 (1956), in favor of a comparative fault analysis. Courts in Minnesota have not addressed this issue, but as noted above, have enforced contracts that contain liability and indemnity provisions chosen by the parties. *Ploog* and *Ford*, *supra*.

Despite a well-supported finding by the jury that the Vessel Defendants bore 85% of the fault for Willis's injuries, they still argue that they should – by virtue of an outdated legal doctrine – be relieved of all responsibility for the injury to Willis. The Ninth Circuit case of *Knight v. Alaska Trawl Fisheries, Inc. v. Northstar Terminal*, 154 F.3d 1042 (9th Cir. 1998) illustrates the better approach. There, a seaman aboard a vessel was seriously injured during the transfer of cargo and the court found both defendants at fault. On appeal, the Ninth Circuit Court of Appeals rejected the vessel's argument stating, "We hold that a negligent ship

owner is not entitled to receive *Ryan* indemnity from a negligent contractor when the ship owner is found liable under both negligence and unseaworthiness theories.” *Id.* at 1046.

The court stated several policy reasons to support its ruling. First, the court noted that the purpose of the *Ryan* warranty or indemnity was to allow a non-negligent ship owner to recoup from a negligent contractor damages that it was forced to pay to an injured party. To require a non-negligent ship owner to bear the costs of damages caused by the negligence was unfair, and the warranty allowed for the tortfeasor to be held responsible. When the ship owner itself is negligent or bears some fault for causing an injury to a seaman, the *Knight* court held that the *Ryan* warranty should not apply. Further, the court recognized that application of comparative fault has met the goal that *Ryan* attempted to achieve, that is, to place liability on the party that was truly at fault. Comparative fault actually achieves the most just and equitable allocation of damages. Finally, that applying comparative fault in seamen injury cases in which the ship owner is partially at fault is consistent with other maritime cases, such as when the Supreme Court has established a rule of comparative fault for ship collision cases. *Id.* at 1046-1047.

In general, *Ryan* indemnity is only available to the shipowner when liability has been imposed based on the unseaworthiness of the vessel. *In re TPT Transp.*, 191 F. Supp. 2d 717, 722 (M.D. La. 2001). But when there is no viable claim of unseaworthiness and only a Jones Act claim, a negligent ship owner cannot receive *Ryan* indemnity from a third party such as DM&IR. *Knight*, 154 F.3d at

1045. See also, Note: Indemnification or Comparative Fault: Should a Tortfeasor's Right to Receive "Ryan Indemnity" in Maritime Law Sink or Swim in the Presence of Comparative Fault? 67 Fordham L. Rev. 1609, 1636 (March 1999). The jury in this case specifically found that the Block was seaworthy in its answer to the question on the verdict form. The court in *Knight* recognized that the trend in maritime law is to impose a duty of care on all parties to avoid accidents and held that comparative fault should be applied where there is evidence of negligence on the part of the vessel as well as on the stevedore or dock company. Here, the jury examined the facts and found that most – but not all – of the fault lay with the Vessel Defendants. Imposing *Ryan* indemnity would allow the party found most liable for Willis's injuries to escape liability entirely.

What Vessel Defendants are asking the court to do here is to replace a finding by the jury that apportioned the majority of fault with the Vessel Defendants with a legal determination of fault that has never been applied under Minnesota law. They are also asking the court to ignore the bargained-for terms in a contract in favor of an all-or-nothing apportionment of fault that strays far from the findings of a jury. Neither is appropriate under the facts of this case or the applicable law.

**6B. The Unrefuted Testimony Fully Supports The Finding That The Delivery Of Limestone To The Dock Was A Unitary Enterprise.**

Appellants also seek judgment as a matter of law on the question of whether their actions were properly determined to be a "unitary enterprise." The

argument of Vessel Defendants that they are not a unitary enterprise is not supported by the evidence that was submitted at trial regarding the interrelatedness of the Vessel Defendants as they performed the duties and received the benefits of the Transportation Contract. The court correctly held that the “closeness and entanglement of the various companies can lead to no other conclusion that the four are engaged in furthering the operational activities of each other.”

The testimony of Daniel Cornillie, read at trial, formed the primary basis for the court’s decision on this question. Mr. Cornillie described connections between the Vessel Defendants in their roles in performing the duties in carrying out the Transportation Contract. From that testimony, a picture emerged that left no doubt that the movement of limestone and taconite was controlled by Cornillie for the benefit of the Minorca Mine and ultimately its parent, AMUSA. The relationship between AMUSA and the owner of the vessel Indiana Harbor is exclusive. (R. 227) No other party can use the Block except at the direction of AMUSA. (R. 227) Through Cornillie, AMUSA directs what the ship is actually doing on a daily basis, and he testified that he is in daily contact with Central Marine, the entity that manages the ship. (R. 190) Virtually all movement of the vessel is at the direction of AMUSA. (R. 208) AMUSA even signs the labor agreements with the union that represents the crewmembers. (R. 228-229) If AMUSA is dissatisfied with the operation of the vessels it can request that a manager or captain be replaced. (R. 230) In fact, AMUSA pays all the bills related to the operation of the vessel and even has the vessel crews on the

AMUSA payroll. (R. 235) In essence, the vessels owned by Indiana Harbor and operated by Central Marine accomplish the business of AMUSA. The Vessel Defendants, acting in concert at trial, did not submit any testimony to contradict the testimony of Mr. Cornillie as to the interrelatedness of the Vessel Defendants' operations.

The evidence at trial about the roles of the Vessel Defendants supports the legal conclusion that Indiana Harbor and Central Marine were performing duties to benefit the Minorca Mine as well. Because the overarching goal of all the Vessel Defendants was to move product for the operations of the mine, they were properly considered as part of single enterprise. Minorca cannot avoid the joint liability provisions of Section 13 of its contract merely by hiring agents to perform those duties. Utilizing agents to perform activities at the dock does not in any way relieve Minorca from the terms of the bargain it struck with DM&IR that calls for both the application of comparative negligence and Minorca paying for the negligence of its agents under circumstances such as this. Handing the duties of performance to an agent or subcontractor does not relieve Minorca from living up to the terms of the contract, especially a contract that recognizes that some of the tasks will be performed by agents. DM&IR negotiated a contract with Minorca's predecessor under certain terms and conditions for a specific price. Whatever the relationship between Minorca and its agents its parent company chooses to use to ship the limestone to Minorca, DM&IR is entitled to the benefit of its bargain with Minorca that Minorca indemnify DM&IR for the negligence of Minorca's agents

under the contract. While Indiana Harbor and Central Marine are admittedly not signatories to the contract, the entity for whom they performed their services is.

The court ruled at trial that the actions were so interrelated that they constituted a single enterprise, and defendants cannot point to any meaningful evidence to the contrary. Mr. Cornillie's testimony established this interrelatedness and there is nothing to refute that testimony. The court was entirely correct in its determination that the Vessel Defendants were operating as a unitary enterprise such that Minorca, acting through its agents Indiana Harbor and Central Marine, must have its liability determined on a comparative fault basis.

Appellants contend that a finding by the court of unitary enterprise violates limitations contained in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S 326 (1958). The court, however, reached its conclusion based upon the facts at trial, not entirely on the *Sinkler* case. Moreover, Vessel Defendants have misconstrued *Sinkler* in an effort to limit its applicability to a determination that had nothing to do with the core holding in *Sinkler*. *Sinkler* stands for the proposition that a FELA or Jones Act employer cannot avoid liability for injuries to its employees when those employees suffer injuries due to the negligence of third parties by relying on contracts that place liability onto third parties. *Sinkler* prevents a Jones Act employer from escaping responsibility for worker injuries by utilizing a very limited "agency" rationale to make the third party an "agent" of the employer vis-à-vis the injured worker. It is not an expansion or limitation on common law agency principles nor does it offer controlling precedent on determinations of

“unitary enterprise.” Appellants make their arguments on the inapplicability of *Sinkler* as though *Sinkler* was the only foundation for the trial court’s determination when that is simply not the case.

**6C. When Minorca Mine Utilized A Vessel Owned And Operated By Indiana Harbor And Central Marine To Deliver Its Limestone To The Dock, Those Entities Were Acting As Agents Of The Mine.**

Despite Appellants’ claims, the unconverted testimony at trial and the terms of the Transportation Contract established that Indiana Harbor and Central Marine were acting as the agents of Minorca Mine when they delivered the limestone.

The Transportation Contract that controlled the delivery of limestone at the dock contemplates Minorca Mine utilize agents to do the actual delivery of limestone and the pickup of taconite. Indeed, Minorca Mine does not own or possess any vessels and routinely has the task performed exclusively by Central Marine and Indiana Harbor under the control of AMUSA’s Cornillie.

It has been standard operating procedure for the course of the contract that Minorca’s materials are delivered by those acting under the direct and exclusive control of its parent, AMUSA. Only Minorca has the right under the Transportation Contract to unload limestone, and when vessels owned and operated by Indiana Harbor and Central Marine deliver and accept product owned by Minorca and destined to be delivered to Minorca’s mine, they are acting as agents for Minorca.

A third party can infer that a presumptive agent is acting on behalf of a principal under two agency doctrines, apparent authority and agency by estoppel.

“Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal.” *Hagedorn v. Aid Assoc. for Lutherans*, 297 Minn. 253, 257-58, 211 N.W.2d 154, 158 (1973); *see also Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988) (stating that apparent authority requires, among other things that the principal must hold the agent out as having authority or must knowingly permit the agent to act on its behalf). The relationship of principal and agent may be evidenced by acts of the alleged principal or by appearances of authority he permits another to have which lead to the belief that an agency has been created. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555-56 (1970).

Contrary to the allegations in the Appellants’ brief, there is apparent authority here in that Minorca has its limestone delivered by vessels operated by Indiana Harbor and Central Marine. DM&IR has actual knowledge that the vessels are delivering materials owned by Minorca and for Minorca’s benefit, a course of dealing that has taken place over the life of the contract. The agent’s apparent authority is also evidenced by the conduct of the principal, in that Minorca accepts the limestone delivered by vessels such as the Block and ships out taconite pellets on those very same vessels operated by Indiana Harbor and Central Marine. All of the facts demonstrate that Indiana Harbor and Central Marine act under the apparent authority of Minorca, making them agents under the Transportation Contract.

Beyond that, Minorca is estopped from denying that Indiana Harbor and Central Marine are acting as its agents. Under the doctrine of agency by estoppel, if the principal places an agent in such a situation that a third person is justified in assuming that the agent has authority to perform a particular act and deals with the agent on that assumption, the principal is estopped from denying the agent's authority. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. at 499-500, 176 N.W.2d at 556 (1970). In this case, the undisputed facts at trial showed that Minorca must be estopped from denying that Indiana Harbor and Central Marine are its agents under the Transportation Contract. The product that Minorca owned was routinely transported in and out of Dock No. 6 on vessels operated by Indiana Harbor and Central Marine. Those vessels were controlled exclusively by Minorca's parent company, AMUSA under the daily supervision of Cornillie. Because the product was delivered under the contract, DM&IR was obligated to accept it and had no right to refuse it unless there was no storage space available. Minorca cannot act in a manner that would lead any observer to believe that Indiana Harbor and Central Marine were acting as its agents and then after the negligence of those agents cause harm be allowed to disavow the agency.

Any argument for judgment as a matter of law based on the absence of an agency relationship has no factual support in the record. In fact, the undisputed evidence is that Indiana Harbor and Central Marine and ArcelorMittal USA were all acting as agents for Minorca in arranging and carrying out the terms of the Transportation Contract.

Up to and through the trial and this appeal process, the four Vessel Defendants have taken legal positions that essentially bounced liability in this case off of themselves in a way that ensured that none of them would be held liable for any share of Willis's damages. AMUSA argued it was not responsible because it was not a Jones Act employer and does not actually own any vessels. Minorca Mine argued that it, too, was not a Jones Act employer and took the position that even though the limestone was being delivered under its Transportation Contract it was not their fault someone else's employee fell. Central Marine and Indiana Harbor argue that although they are Jones Act employers, they are not responsible because they are not bound by the indemnification provisions of the Transportation Contract, and therefore the Warranty of Workmanlike Performance is applicable, even though all of their actions are wholly controlled by AMUSA. This compartmentalization of the corporate functions to avoid any liability was rejected by the trial court, but appellants continue to make those arguments here. These entities have never acted – either in their regular operations or in this litigation – as separate parties engaged in arms' length business dealings. The simple fact is that DM&IR entered into a contract that governs all aspects of the movement of product on and off this dock, including terms that controlled liability when a third party such as Willis is injured. The Vessel Defendants' round robin of finger pointing cannot be allowed to end up entirely on a party a jury determined to be only 7.5% at fault for this accident.

**7. DM&IR Takes No Position On Whether ArcelorMittal Minorca Mine Was A Jones Act Employer.**

DM&IR takes no position on the Vessel Defendants' arguments about whether or not the ArcelorMittal Minorca Mine was a Jones Act employer of Willis.

**8. DM&IR Takes No Position On The Court's Holdings On Collateral Source Set-Offs.**

DM&IR takes no position on Appellants' arguments regarding the court's calculation of collateral source set-offs of Willis's damages.

**9. DM&IR Joins Appellants' Arguments On The Applicable Post-Judgment Interest Rate.**

DM&IR joins in Appellants' arguments on the applicable post judgment interest rate and relies on the arguments they have advanced.

**CONCLUSION**

The trial court in this matter took great care in addressing all of the issues presented by Appellants. The limited spoliation instruction was called for under the facts of this case and was a narrow one designed to cure the prejudice suffered by DM&IR. The court applied the proper law in formulating the jury instructions. The court was correct in rejecting the arguments of the Appellants regarding the applicability of an inappropriate all-or-nothing warranty when a contractual indemnification provision applied. There was sufficient evidence for the jury to apportion fault as it did. Accordingly, Respondent DM&IR respectfully requests that the trial court be affirmed in all respects.

Respectfully submitted,

Dated: April 26, 2010

**RICKE & SWEENEY, P.A.**

By 

Diane P. Gerth, Id. No.: 180786

Alfonse J. Cocchiarella, Id. No.: 157910

Suite 600 Degree of Honor Building

325 Cedar Street

St. Paul, MN 55101

(651) 223-8000

Attorneys for Respondent Defendant Duluth,  
Missabe and Iron Range Railway Company  
("DM&IR")

**Certificate of Compliance**

This brief complies with the word limitations in Minn. R. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 10,151 words.



A handwritten signature in cursive script, appearing to read "Quinn Cook", is written above a horizontal line.