

APPELLATE COURT CASE NUMBER A-09-2223
STATE OF MINNESOTA
IN COURT OF APPEALS

M/V Joseph L. Block;
Indiana Harbor Steamship Co., LLC
A foreign corporation; and
Central Marine Logistics, Inc.,
A foreign corporation;
Arcelormittal USA Inc.,
a foreign corporation; and
Arcelmormittal Minorca Mine, Inc.,
a foreign corporation;

Appellants,

vs.

Daniel L. Willis,

Respondent/Plaintiff

and

Duluth, Missabe and Iron Range
Railway Company, d/b/a Canadian
National Railway(CN), a foreign
Corporation,

Respondent/Defendant.

APPELLANTS BRIEF AND APPENDIX

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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).

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Statement of Legal Issues

1. Whether The Negative Inference Jury Instruction on Spoliation Unfairly Prejudiced Appellants and was Not Warranted Under Federal or Minnesota Law Which Requires a New Trial on Liability and Apportionment Thereof?

The issue is that the trial court erred in granting a spoliation instruction to respondent dock during the jury charging conference. (R.1979-1981,2003)

Apposite Cases: *Wajda v. Kingsbury*, 652 N.W.2d 856 (Minn.App. 2002)

Fruge v. Parker Drilling Co., 337 F.3d 558, 566 (5th Cir. 2003)

Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436 (Minn. 1990)

Foust v. McFarland, 698 N.W.2d 24, 30 (Minn. App. 2005, review den., August 16, 2005)

2. Whether Appellants are entitled to a New Trial On Apportionment of Negligence?

This issue was last raised in appellants' post-trial Motion for New Trial/Judgment as a Matter of Law, which was denied.

Apposite Cases: *Koenigs v. Werner*, 263 Minn. 80, 116 N.W.2d 73 (1962)

Winge v. Minnesota Transfer Ry. Co., 294 Minn. 399, 404-405, 201 N.W.2d 259, 263 - 264 (1972)

Crawley v. Hill, 253 Wis. 294, 34 N.W.2d 123 (1948)

Schwarz v. Winter, 272 Wis. 303, 75 N.W.2d 447 (1956)

3. Whether Appellants Are Entitled to a New Trial on Liability or Apportionment of Damages Where the Trial Court Erroneously Charged the Jury That the Vessel Defendants' Contribution Claim Was to be Decided Under Minnesota Premises Law, Rather than Federal Maritime Law?

This issue was last raised and objected to during the jury charging conference. (R.1943-45)

Apposite Cases: *Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953, 956 (4th Cir. 1991)

General Contracting & Trading Co., L.L.C. v. Interpole, Inc., 899 F.2d 109, 113 (1st Cir. 1990)

Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 235 (5th Cir. 1985).

In Re Kreta Shipping, S.A., 1 F.Supp.2d 282 (S.D.N.Y. 1998)

4. Whether The Past Lost Wage Award is Not Supported by the Evidence?

The issue is appealed from the trial court's denial of appellants JMOL Minn R. Civ. App. P. 103.03(d) (Addendum 3-19)

Apposite Cases: *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998)

Peitrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980)

Hanson v. Chicago, Rock Island & Pac. R.R. Co., 345 N.W.2d 736, 739 (Minn. 1984)

5. Whether Appellants Are Entitled to a New Trial on Damages?

The trial court denied appellants JMOL for a new trial. (Addendum 3-19)

Apposite Cases: *Lind v. Slowinski*, 450 N.W.2d 353, 358 (Minn. App. 1990)

Hammarlund v. James, 2004 WL 1964871, 1964874 (Minn. App. 2004)

Fifer v. Nelson, 295 Minn. 313, 204 N.W.2d 422 (1973)

Rowe v. Munye, 702 N.W.2d 729 (Minn. 2005)

6. Whether the Trial Court Erred in Applying the Written Contribution Clause to Apportion Liability, Where:

(A) *Instead of the written contribution clause, the maritime Warranty of Workmanlike Performance should operate to indemnify defendants for third party defendant DM&IR Railway Company's breach of the warranty; and*

(B) *This Court erroneously made Central Marine, Indiana Harbor and ArcelorMittal USA agents of Minorca Mine under Sinkler by finding, without legal or factual support, that defendants were a "unitary enterprise"; and*

(C) There was no evidence that Central Marine, Indiana Harbor or ArcelorMittal USA were agents of Minorca Mine under agency principles?

This issue was last raised and decided by the Trial Court in discussion of directed verdict motions (R.1554-1560) and was objected to in the course of the discussion and during the instruction conferences. (R.1554-1560;1699;1921)

Apposite Cases: *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 365 (6th Cir. 1986)

Vierling v. Celebrity Cruises, Inc., 339 F.3d 1309 (11th Cir. 2003)

Sinkler v. Missouri Pacific R. Co., 356 US 326, 78 S.Ct. 758 (1958)

Lockard v. Missouri Pacific R. Co., 894 F.2d 299, 303-04 (8th Cir. 1990)

7. Whether Defendant ArcelorMittal Minorca Mine, Inc. is Entitled to Judgment as a Matter of Law on All Claims by Plaintiff Daniel Willis; Because it Was Not a "Vessel Defendant" and Indisputably Did Not Employ Plaintiff or Otherwise Involve Itself in Vessel Operations?

This issue was last raised in appellants' post trial Motion for New Trial Judgment as a Matter of Law, which was denied.

Apposite Cases: *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 36, 126 S.Ct. 1281, 1287 (2006)

8. Whether The Trial Court Erred by Denying Appellants Motion for Determination of Collateral Sources?

Appeal from the trial court's denial of set off on the basis that such payments were maintenance. (Addendum 3-19)

Apposite Cases: *Stanislawski v. Upper River Service, Inc.* 6 F.3d 537 (8 Cir. 1993)

9. Whether The Trial Court applied the wrong rate of Post Judgment Interest on the Verdict?

Appeal from Order denying defendant's Motion for JMOL/New Trial and setting interest. (Addendum 17)

Apposite Cases: *Pacific Indemnity Company, et al. v. Thompson-Yaeger, Inc., et al.*, 258 N.W.2d 762 (1977)

Bastianson v. Forschen, 294 Minn. 406, 202 N.W.2d 667, (1972)

McCormack v. Hanksraft Co. Inc., 281 Minn.
571, 161 N.W.2d 523 (1968)

Statement of Case and Facts

1. Court or agency of case origination and name of presiding judge or hearing officer:

Sixth Judicial District, St. Louis County, Duluth, Minnesota
The Honorable Eric L. Hylden Presiding

2. Nature of the Case and Disposition.

Respondent/Plaintiff Daniel Willis (plaintiff) was a deck utility man aboard the M/V (motor vessel) Joseph L. Block. On August 27, 2004, the vessel docked at Respondent/Defendant Duluth, Missabe and Iron Range Railway Company's ("DM&IR") dock No. 6 in Duluth, Minnesota. While he was assisting in tying up the vessel, plaintiff slipped on cargo residue left on the dock from two prior vessel dockings, fell to the dock, and injured his left knee. He subsequently developed deep vein thrombosis.

Mr. Willis commenced an action against defendants Indiana Harbor Steamship Co., LLC, (the owner of the M/V Block), Central Marine Logistics, Inc., (Mr. Willis's employer) and the M/V Block.¹ Plaintiff's claims were based upon alleged Jones Act negligence, vessel unseaworthiness and maintenance and cure. Central Marine and Indiana Harbor brought a third-party claim against the DM&IR based upon theories of tort indemnity, contribution, and breach of the maritime warranty of workmanlike performance.

Shortly before trial, plaintiff served an Amended Complaint adding as Defendants ArcelorMittal USA, Inc. (the vessel time charterer) and ArcelorMittal Minorca Mine, Inc., the owner and operator of a taconite pellet manufacturing facility in Virginia, Minnesota. Mr. Willis

¹ The M/V Block was dismissed prior to trial.

subsequently filed a Second Amended Complaint to assert a direct claim against the DM&IR and added Canadian National Railway as a Defendant.²

After the final amendments to the pleadings the claims stood as follows: Plaintiff claimed entitlement to maintenance and cure, and that his fall was caused by the negligence and/or vessel unseaworthiness of three entities: vessel owner Indiana Harbor, his employer Central Marine Logistics, and the vessel time charterer ArcelorMittal USA. ("The vessel defendants") Plaintiff also claimed his fall was caused by negligence of the dock owner/operator DM&IR Railway Company. The vessel defendants and DM&IR dock all denied liability and asserted that Mr. Willis's own negligence contributed to his injuries. The "vessel defendants" and DM&IR also cross claimed against each other for indemnity or contribution under both tort and contract theories under both federal and state law. DM&IR also cross-claimed for contribution under a Rail Transportation Contract against defendant ArcelorMittal Minorca Mine, claiming that the three "vessel defendants" were Minorca Mine's agents and acted negligently.

During the course of trial, the court determined that it would not include the maritime Warranty of Workmanlike Performance in the charge; that it would instead charge on the comparative fault principles in Section 13 of the Rail Transportation Contract (Ex. 65); that it would charge that the three "vessel defendants" and Minorca Mine were to be treated as one corporation because they were "a unitary enterprise" under FELA case law; and that the three "vessel defendants" were agents of Minorca Mine under the Transportation Contract. Consequently, the Court held all three vessel defendants and Minorca Mine were bound by the

²Canadian National Railway was dismissed prior to trial.

Transportation Contract's comparative fault clause, which overrode the maritime implied Warranty of Workmanlike Performance.

The Court also gave a negative inference spoliation instruction against the "vessel defendants", based on their failure to notify the dock that a spill had been left on the dock from two earlier vessel dockings.

The jury found that the "vessel defendants," the dock and plaintiff were all causally negligent, apportioned the negligence 85% to the "vessel defendants" and 7 1/2% each to the dock and plaintiff. They jury also found that the vessel was not unseaworthy and that no additional maintenance and cure was owed. The jury awarded damages totaling \$1,818,498, before reduction for comparative negligence.

Thereafter, the trial court entered judgment, which was followed by post trial motions for judgment as a matter of law or new trial. After these motions were denied this appeal by the three vessel defendants and Minorca Mine followed.

Background Facts

Plaintiff Daniel Willis, a deck utilityman aboard the M/V (motor vessel) Joseph L. Block, claims injury on August 27, 2004, while the vessel was docking at DM&IR dock No. 6 in Duluth, Minnesota. He slipped on cargo residue and fell to the dock, injuring his left knee. He subsequently developed deep vein thrombosis in his left leg. (R.387-408;429-431)

The M/V (motor vessel) Joseph L. Block is a 728 foot long bulk cargo carrier. On the date plaintiff claims injury, the M/V Block was preparing to unload a cargo of limestone by means of its self unloading conveyor boom into a receiving hopper on the dock. The vessel backed in

to the dock stern first, and put down its port side aft ladder. The M/V Block normally puts out six cables - numbers 1, 2, 3, 5, 6, and 7. It normally does not use No. 4 cable. Number 1 cable is on the bow, Nos. 2 and 3 cables are on the forward part of the vessel, No. 4 cable is amidships, Nos. 5 and 6 cables are on the vessel's deck aft, and No. 7 cable is on the stern. (R.1311-1321)

There are three versions of how the accident happened. At trial plaintiff admitted that at deposition he testified that he and one other crewmember went down the ladder onto the dock to handle mooring cables. Plaintiff and the other crewmember put out one of the aft cables, after which the other crewmember stayed aft and plaintiff went forward alone to put out Nos. 1, 2 and 3 cables. Plaintiff described several hundred feet of dock as being covered by a milky colored, wet, slippery limestone cargo residue. After putting out Nos. 1, 2 and 3 cables, plaintiff walked several hundred feet back to the ladder aft. As he was preparing to board the vessel, the Second Mate, [REDACTED] told him to go forward again and put out number 4 cable. Plaintiff walked forward again along the cement dock surface to a position opposite and below [REDACTED] who was on the vessel's deck at the rail beside the chock for No. 4 cable. [REDACTED] dropped the heaving line tied to No. 4 cable down to plaintiff. Plaintiff picked it up from the dock surface and began pulling toward the dock spile. As he did so, he slipped and landed hard on his left knee and his left side. As he got up, he could feel taconite pellets on the dock surface, under his hands and under the milky muddy water. Plaintiff got up and put the cable eye over the spile. (R.683-711)

Second Mate [REDACTED] testified at trial to the second version. [REDACTED] witnessed plaintiff's fall. [REDACTED] was on the vessel's deck,

about 20 feet above the dock, waiting to throw Mr. Willis the heaving line. ██████ testified that the muddy slippery area was about 24 feet wide and 80 feet long and that it ran from the edge of the dock to near the foot of a stairway up to a catwalk in the dock structure. ██████ testified that plaintiff had not walked along the dock surface, but had climbed down the stairway from the elevated catwalk. The foot of the stairway was on the far side of the muddy area from ██████ Plaintiff walked straight toward ██████ straight through the mud, rather than walking around it. When plaintiff fell he was right in the middle of the mud, still about fifteen feet from ██████ and the spile (bollard) at the dock's edge. ██████ had not yet thrown the heaving line to him. If plaintiff had walked around the spile instead of straight through it, he would have needed only two or three steps into the edge of the spill to reach the dock spile (bollard). ██████ drew the size of the spill and the location of the stairway down from the catwalk on Ex. 227 (R.1106-1120) Three other crewmembers testified that the elevated catwalk was always clean and dry, ran the entire length of the dock, and that crewmembers were trained to use it to avoid spillage on the dock. One testified he had personally so trained plaintiff. (R.1186-90;1215;1234)

The third version was plaintiff's testimony at trial that the other seaman did not stay aft, but went forward with him to help tie up one mooring cable, but he didn't know which one. At trial he recalled few facts before he fell, other than the mess on the dock, which covered three quarters the length of the boat and that he walked on the dock fender, not the catwalk. (R.387-408;682-713) The other two witnesses to his fall both saw him come down the stairway from the catwalk, and testified he was working on the dock alone. (R.1109;1186)

It was DM&IR dock policy to wash down the dock surface, known as the "fender," after every vessel, so that the fender was clean and safe for vessel personnel to work on. The dock's Book of Rules Item 19 at Page 30 (Ex.115C) requires this, and requires the dock to notify incoming vessels about unusual conditions. Once a vessel finished unloading, it was the foreman's responsibility to inspect the fender area to see if it needs to be cleaned. There also is a video camera mounted on the roof of the foreman's office, which gave a very good view of the fender, and was working in 2004. It had very good magnification, such that he could see individual pellets on the dock. One foreman would sometimes just use binoculars. The dock has a barge with a high-pressure hose mounted on it to push the spillage underneath the dock. If there is not enough time to hose, the dock can sweep the spillage under the dock with "a skid steer," a small front end loader, so that the men from the vessel have a safe place to work. Spillage on the fender was not unusual; some spillage on the fender happened "just about every time" a vessel unloaded limestone. The "skid steer" could go in while the vessel was docking. If a boat was already docked, they could bring the "skid steer" through the steel pillars on the dock forward of the hopper. One dock foreman testified that the spillage on which plaintiff fell must have come from the M/V Callaway, which was the vessel at the dock before the M/V Block. The M/V Callaway had completed unloading at 1245 hours and departed shortly thereafter. The M/V Block tied up at 1400 hours. Another dock foreman testified that the taconite pellets plaintiff fell on originated from limestone spillage that must have been there since at least 2:10 a.m. (about 12 hours before plaintiff fell), because that was when the dock finished loading taconite aboard the vessel that preceded M/V Callaway. (R.507-518;932-939;978-91)

After completing tying up No. 4 cable, Willis came back aboard the vessel to work in the vessel's tunnel. After about one hour, he called for relief, which Second Mate [REDACTED] immediately sent down to him. This was the first time Willis had said he was hurt and needed help to anyone. Willis was immediately sent by cab to St. Mary's Medical Center for treatment. (R.405-410)

1. Whether The Negative Inference Jury Instruction on Spoliation Unfairly Prejudiced Appellants and was Not Warranted Under Federal or Minnesota Law Which Requires a New Trial on Liability and Apportionment Thereof?

The standard of review is for an erroneous jury instruction. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). An error in a jury instruction is likely to be considered fundamental if the error destroys the substantial correctness of the entire jury charge or causes substantial prejudice to a party.

Appellants are entitled to a new trial as to liability and apportionment of liability because of the spoliation jury instruction given in error. The trial court granted DM&IR's motion to give a spoliation instruction and it was read to the jury and subsequently sent with the jury to their deliberations. It unfairly prejudiced the appellants in the jury's findings on both liability and apportionment of that liability. (R.1978-1981,2003).

Appellants were under no duty to preserve the evidence of the dock spill after plaintiff's fall. At no time was the spill on a dock solely owned by DM&IR ever under the vessel defendants' exclusive control and possession, which is strictly required under Minnesota law. DM&IR filed a memorandum during the jury charging conference seeking an adverse inference alleging defendants spoiled the evidence and argued *Wajda v.*

Kingsbury, 652 N.W.2d 856 (Minn.App. 2002), which it contends provided that "while normally imposed for the destruction of evidence under one's control and possession, sanctions should also be considered when the party knowingly allows the evidence to dissipate." 652 N.W. 2d 856, 861. The trial court granted its motion for such an instruction (R.1979-1981) However, *Wajda* requires **exclusive** possession and control, an important qualifier, and a supporting fact the trial court relied upon to uphold a jury instruction of adverse inference. The facts in *Wajda, supra*, involved a police squad car and a tow truck that collided, resulting in personal injuries and property damage. At issue was whether the squad car's siren had been activated, and a radio dispatch tape of the exchange between the officer and a dispatcher had been recorded. The tape had been re-used after 60 days and the evidence of the conversation between the two had been destroyed as a result. In *Wajda*, the court opined that the city had exclusive and unlimited access to the tape for 60 days, and that it went to the heart of the matter because anyone who listened to the tape could ascertain whether a siren could be heard in the background. The court upheld the district court's sanction of a negative inference jury instruction, since the tape was critical to the case and the siren could not be proven any other way. *Id* at 861.

That is not at issue here, due to the nature of this accident and plaintiff's fall. There is eyewitness proof that plaintiff slipped and fell in slurry on the dock. (R.1109) It is an undisputed fact in evidence via various witnesses and whether it was a slurry of limestone alone or pellets or a combination thereof is of no consequence to these facts, because plaintiff still fell. (R.1108-1111) DM&IR was not prejudiced in any manner by not examining the mess on the dock, due to the

nature of the accident and the ultimate issue which was proved through eyewitness testimony.

There is no evidence that appellants ever had exclusive control of either the dock or the spill left behind by at least two previous vessel loadings/unloadings. DM&IR alleged that the last iron ore pellet unload was three days prior to the accident. For the first time during trial, testimony indicated that the vessel unloading ahead of appellants' rinsed its deck onto the dock, which the dock knew was sometimes done. This knowledge constituted notice to DM&IR. (R.929-930)

Although the dock alleged that it did not find out about this claim until it was filed, evidence of a post accident complaint was sent via facsimile, accompanied by phone calls by CML's president, [REDACTED], the next business day. (R.1435-1436) DM&IR denies having received any notice. (R.1880-1882) During its opening and closing, DM&IR asserted possession and control (not exclusively) by the appellants by virtue of their presence at the dock to unload, but presented no evidence to support such possession and control. (R.162,2022-2025,2036) There was no evidence that dock personnel vacated the dock during the unload, or acquiesced to the vessel's possession and certainly no evidence was presented that the vessel had exclusive possession or control. The vessel was nothing more than a business invitee based upon the evidence adduced. Conversely, evidence was introduced that the dock personnel work on dock No. 6 during the unload, not only on activities related to the unload but also maintenance and monitoring of the operation. (R.478,1845-1848) Dock Foreman [REDACTED] said that it was a safety practice of keeping fenders clean for people moving around on it. "We have to keep the areas clean." (R.475)

The overwhelming apportionment of liability to appellants of 85% to the DM&IR's 7.5% together with the high monetary verdict, certainly indicated that reasonable minds came to but one conclusion, that the spoliation instruction read and sent with the jury to deliberation supported their finding that appellants had spoiled the accident scene to the detriment of the DM&IR in presenting its defense to the claim. (R.2157-2159) The appellants were treated as the insurer to the accident without regard to fault.

DM&IR argued that its inability to determine what was in the spill was detrimental to it. (R.2036) However, there is no testimony that the absence of pellets would have prevented the fall. DM&IR testified that the limestone was "slippery and very muddy." It contained taconite pellets in the spill. (R.404-405) Crew member [REDACTED] saw him fall in the middle of the spill to the dock. (R.1109) That is without dispute. DM&IR was not denied critical evidence since it was proven through eyewitness testimony. Evidence was adduced that DM&IR had not only written directives but superior knowledge in which to discover the condition of its dock, through the use of its personnel in the office who are responsible for keeping the dock in a safe condition. A high powered camera and binoculars capable of seeing individual pellets was stationed on dock No. 6 and was viewed from the field office. (R.495,517) The dock personnel knew appellant's vessel was coming in and that a spill would post a slipping hazard for all working on the dock, and if slippery it was dangerous. (R.503, Torgersen R.1877) The non-delegable duty to provide a safe dock for the vessel was violated by the dock. Admissions by dock witness [REDACTED] [REDACTED] stated that limestone and/or taconite routinely accumulates around the hopper. (R.507) Dock worker [REDACTED] emphasized

that the hopper and fenders had to be kept clean for the maintenance people of the dock to do work around the hopper. (R.478) This was directly contrary to the DM&IR's argument that it did not expect personnel to be in the hopper area to tie up vessel, when dock personnel were present doing maintenance and other work. (R.2022-2036) ██████ testified that cleaning was done after each boat left and it could take from one to four hours. (R.492-493)

Dock witness ██████ testified that it was customary that some vessels rinse off their deck onto the dock fender. (R.929-930) DM&IR had advance knowledge before this accident that with a vessel rinsing off its deck there may be unknown substances placed onto the fender for which it, as the premises owner, would try and rectify. (R.930) Instead, appellants were held accountable for the spill due to the improper introduction of spoliation into the case. DM&IR claimed that it had no knowledge of the mess or pellets in this area, which is contrary to the foregoing testimony by its own witnesses. (R.503,507,929-930) It has a non-delegable duty to provide a safe dock upon which defendants could work. ██████ testified that the dock had personnel whose job duties entailed inspection of the dock with binoculars and telescopic cameras that should have discovered and rectified the spill before the Joseph L. Block docked on August 27, 2004. (R.495,517) DM&IR violated its own rules and other standards related to dock conditions, but was apportioned too low a degree of the liability by this jury which can at least in part be attributed to the spoliation sanction. Further, pellets that lurked underneath the spillage were present for at least a 12 hour period without the dock cleaning the area as it had the duty to. (R.1844)

Minnesota case law has held that the Minnesota Supreme Court

adopted the federal standard for spoliation sanctions. *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995), *Aboud v. Dyab*, 2008 WL 313624 (Minn. App. 2008). In maritime cases in which federal law applies, federal courts have held that the loss of evidence shortly after accidents is not sanctionable. In *Fruge v. Parker Drilling Co.*, 337 F.3d 558, 566 (5th Cir. 2003), where a hose that failed caused personal injury, the court opined:

"Here, the hose was lost before the suit was filed, when no such order to preserve evidence had issued. Moreover, plaintiff presented no evidence suggesting bad faith on the part of [defendant]. Accordingly we discern no error in the district court's decision to dismiss [defendant] despite plaintiff's arguments regarding spoliation of evidence."

Here, it was dock policy to wash down the dock surface, known as the "fender," after every vessel, so that the fender was clean and safe for vessel personnel to work on. (R.923,1869) Dock manager [REDACTED] testified that the dock's Book of Rules Item 19 at Page 30 requires this, and requires the dock to notify incoming vessels about unusual conditions. (R.1869-1870) Foreman [REDACTED] "very often" used the video camera to look at the condition of the fender surface near the limestone hopper after a vessel left and could see individual pellets on the dock. (R.495,517) Dock witness [REDACTED] stated that if limestone is spilled during unloading, which routinely happens, the dock has a barge with a high-pressure hose mounted on it to push the spillage underneath the dock. (R.985) If there was not enough time to hose, they use the "skid steer" to clean quickly. (R.986)

Port manager [REDACTED] and employee [REDACTED] both testified that they never denied docking privilege at that dock to a vessel because of spilled cargo. (R.1877-1878). The vessel defendants did not create the

limestone spill on the dock, did not control the spill nor have possession of the spill, and did not own or control the dock where the spill occurred. (R.1867) DM&IR by its own Book of Rules is charged with the responsibility of maintaining its premises, and that must be done before the arrival of the next vessel. (R.939,1868) It is also charged with notifying the vessel of unusual conditions, but admittedly never did so. (R.1869) ██████ admitted that it would have taken only a half hour to forty five minutes to clean the mess under the conveyor belt as he termed it, and on cross examination admitted that they do not clear areas of dock only based on ship activities and unloads, but completely cleaned the fender. (R.947) ██████ admitted that a vessel loading taconite will shift and place vessel personnel into the hopper area anyway, but that they can use the center walk and the road underneath it to walk. (R.952-953)

The condition of the dock and the spill had been testified to by DM&IR and two crewmembers. As the foregoing citation to evidence shows, dock witnesses testified this sort of spill under the unloading hopper was common, and it was not unanticipated vessel personnel would be up and down the dock face. The clever argument by DM&IR that it could not anticipate men would put out wire No. 4 in the area of the hopper because appellants had put out a different cable due to the winches they normally used, combined with the jury's assessment that defendants spoiled evidence combined to create the unjust verdict. (R.2022-2036) Photos of the dock combined with crewmember and dock worker testimony, were proof that spilled pellets and limestone under the hopper were present and unfortunately not an uncommon phenomenon. (Ex. 225, 87 Q, 87 W, R.965-966, 974; DM&IR R.404-405, 685, 706-711; Delavan R.1126, 1136-1138, 1166; Curtis R.1193).

Spoliation's definition is the destruction of evidence or the failure to preserve property for another's use in pending or future litigation. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990). When examining a claim of **spoliation**, the court must evaluate the prejudice to the opposing party and examine the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice. A review of Minnesota citing references to *Federated Mut. Ins. V. Litchfield Precision Components*, supra, the leading case on the development of the tort of spoliation in Minnesota, cites no case in which a non-premises owner was charged with spoiling evidence on another's premises. (Appendix 1-4). The contemplation of such an extension of spoliation to the facts here would create a precedent that would effectively eliminate the requirement of exclusive possession and control recognized in *Federated Mut. Ins.* and its progeny for the last 19 years.

A recently decided Minnesota district court case that examined federal law on spoliation is authority in a Jones Act. In *Insignia Systems, Inc., v. News America Marketing In Store, Inc.*, 2009 WL 483850 (D. Minn.) the court declined to give a spoliation instruction where a report was destroyed while litigation was pending. The court, citing to Black's Law Dictionary 1409, (7th ed. 1999) defined spoliation as the "intentional destruction, mutilation, alteration, or concealment of evidence." There was no evidence here to support the first requirement whatsoever which requires the court's reversal of the jury verdict for a new trial. Besides the intent, there must be a finding of prejudice to the opposing party before imposing a sanction for the destruction of evidence. *Id.* at 483854. Spoliation sanctions typically are imposed when

one party gains an evidentiary advantage over the opposing party by failing to preserve evidence. *Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. App. 2005, review den., August 16, 2005).

In this instance, the adverse spoliation instruction was not warranted because DM&IR cannot demonstrate any likelihood that inspection of the area would have produced evidence **favorable** to it. This was an open and obvious condition observable to the eyewitnesses, and the testimony offered at trial was that DM&IR stepped into this mess and slipped and fell. If DM&IR had access to the exact conditions within a few minutes or prior to the next dock cleaning after the fall such would not have yielded any evidence that would have saved the dock from its failure to clean up this mess in the first place. Even if there were an absence of pellets, the presence of the limestone in and of itself still caused DM&IR's fall. Nothing in the physical evidence would have favorably benefited DM&IR based upon the nature of the accident itself. Without evidence of exclusive possession and control, the spoliation instruction given poisoned the jury's decision on liability and apportionment. Based upon the percentages of negligence, excessive damages and of course without knowing the exact effect on the jury's deliberation, the insertion of this issue proved gravely detrimental to the appellants.

In a case cited by the DM&IR, *Huhta v. ThermoKing Corp.*, the court examined a spoliation claim, and in granting summary judgment to ThermoKing stated:

"This Court is not unaware that its attached order gives rise to a harsh result. It is unquestioned, however, that this is a defective manufacturing claim and that Huhta and/or his employer had exclusive possession and control of the allegedly defective equipment and with sole responsibility for either its safekeeping or

destruction. Were the Court to allow this matter to go forward, ThermoKing would be left helpless in the fact of Huhta's testimony, totally deprived of an opportunity to inspect, examine, test or defend itself." (2004 WL 1445540, Minn. App. 2004)

In the present case, the DM&IR very successfully defended itself, even with the absence of a post accident inspection, by the low attribution of liability to it. In its Motion for Summary Judgment and supplemental motion made to the court during trial in preparation for the jury charging conference, DM&IR cited *Kmetz v. Johnson*, as authoritative, an early case almost thirty years predating the recognition of a tort of spoliation in Minnesota, which found that an unfavorable inference for failure to produce requested evidence applies where evidence was in the **exclusive** control and possession of the party required to produce the evidence. There is nothing adverse that could have been blamed on these appellants by DM&IR's inspection of the actual contents of the spill. Therefore, the judgment of the trial court should be reversed and appellants be given a new trial on the basis of this improper instruction.

2. Whether Appellants Are Entitled to a New trial on Apportionment of Negligence?

The denial of the JMOL is reviewable under *Jerry's Enter.Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) since the verdict was manifestly against the evidence. The standard of review based on an erroneous jury instruction is also applicable, as the erroneous spoliation instruction discussed above unfairly invited the jury to apportion more fault to the vessel defendants. An error in a jury instruction is likely to be considered fundamental if the error destroys the substantial correctness of the entire jury charge or causes

substantial prejudice to a party. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The jury apportioned negligence in the amount of 7.5 percent to both respondent and DM&IR, and the remaining 85 percent to appellants. There is a miscarriage of justice because appellants were assessed over eleven times the negligence of plaintiff, who knowingly walked through an obvious wet and slippery area, and the dock, which not only violated OSHA regulations (R.2002-2003), but also did not clean up the mess that had been there for at least 12 hours (R. 937-38) despite the mandate it do so by its own Book of Rules. (Ex.115C) When this evidence is considered in conjunction with the erroneous spoliation instruction that invited the jury to punish the vessel defendants, it is evident that the disproportionate percentage of negligence assigned to the appellants was not supported by the evidence. Appellants seek a new trial on the issue of apportionment of the negligence between these appellants, DM&IR and respondent. At worst appellants are guilty of an omission to act, in other words keeping respondent off the dock versus the commission of an act of negligence by DM&IR in its failure to clean up its own premises. DM&IR dock was solely charged with the responsibility for cleaning its dock premises and had both personnel, video monitoring and a variety of machines with which it could have accomplished the task. The jury in effect made appellants insurers in the disproportionate assessment of negligence between the parties.

Although courts are reluctant to interfere with jury findings on apportionment of negligence, if there is any doubt as to the findings of contributory negligence and the reasonableness of the apportionment of causal negligence, combined with other irregularities in the jury's

consideration, when taken together with the apparent unreasonableness of the verdict there is only one conclusion and that is that a party has been denied a fair trial on the issue of liability. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960); *Riley v. Lake*, 295 Minn. 43, 203 N.W.2d 331 (1972); *Martin v. Bussert*, 292 Minn. 29, 193 N.W.2d 134 (1971). It is evident that the apportionment issue sometimes cannot be judged independently of causal negligence. *Koenigs v. Werner*, 263 Minn. 80, 116 N.W.2d 73 (1962).

This verdict is so disproportionately inconsistent in its apportionment and award that it must be set aside for a new trial. In *Winge*, the court found that, although at that time the court had not faced the issue of whether the court could direct a verdict under a comparative negligent statute, where it appeared as a matter of law that the negligence of plaintiff was equal or exceeded that of the defendant, the appellate court could itself reapportion. *Winge v. Minnesota Transfer Ry. Co.*, 294 Minn. 399, 404-405, 201 N.W.2d 259, 263 - 264 (1972). "Certainly, in the vast majority of cases, a comparison of negligence should be submitted to the jury. In the rare case where the evidence compels a finding that plaintiff's negligence is equal to, or greater than, that of defendant, we see no reason why the trial court, applying the test embodied in Rule 50.01, should not direct the verdict."

In the arena of comparative negligence both Wisconsin and Minnesota have similar statutory provisions. In *Crawley v. Hill*, 253 Wis. 294, 34 N.W.2d 123 (1948), a pedestrian, while crossing a highway, ran in front of a car which struck and killed him. Under Wisconsin law the driver of the vehicle had the right of way. The jury apportioned 80 percent of negligence to the driver of the car and 20 percent to the

pedestrian. On appeal, the judgment was reversed because the negligence of the pedestrian was at least as great as the driver's. The holding was based upon the premise that a jury's findings will not be interfered with unless it appears to be absolutely necessary in order that justice be done.

A similar result was reached in *Schwarz v. Winter*, 272 Wis. 303, 75 N.W.2d 447 (1956), where a driver of a motor vehicle making a left turn failed to yield the right of way to an oncoming vehicle. The court's finding of 40 percent negligence on the part of the driver making the left turn and 60 percent negligence on the part of the oncoming driver was corrected by the court. It concluded that the negligence of the driver making the left turn was at least as great as that of the other driver:

"While we are ordinarily reluctant to change the apportionment made in the lower court, under the peculiar circumstance of this case where the evidence of the plaintiff's negligence is so clear and the quantum so great, we feel constrained to do so."

In *Martineau v. Nelson*, 311 Minn. 92, 247 N.W.2d 409 (1976), a husband and wife brought an action against a family doctor and surgeon for alleged malpractice and breach of warranty in connection with the performance of tubal ligation sterilization procedure on the wife, who afterwards became pregnant and gave birth. The district court denied plaintiff's motion for judgment notwithstanding the verdict and for new trial against the surgeon on the issue of damages or for a new trial against both defendants and plaintiffs' appealed. The Supreme Court held that the jury finding 50 percent comparative negligence on the part of plaintiff was contrary to the weight of the evidence and reversed and remanded. The court in its opinion concluded that a new trial should be granted for two reasons. First, plaintiff's husband could not be guilty of

any negligence and since the jury was asked to apportion negligence to husband and wife together, the court cannot be certain as to what extent the jury relied on erroneous theories as to the husband's negligence in making its apportionment. Second, there may be some evidence of negligence on the part of plaintiff's wife and while the apportionment of such negligence is normally within the province of the jury, the court thought the 50-50 apportionment was plainly contrary to the weight of the evidence.

Here, the fact that the spill was on the dock's premises, and that it knew a vessel had just unloaded a very slippery product and that it was typical that some of the product spilled and needed to be cleaned up, placed the dock in a superior position to correct the condition. The presence of taconite pellets under the slippery spill means the dock had not corrected the condition for at least 12 hours, all in violation of OSHA statutes. It is shocking to the conscience that these appellants were assigned 85 percent of the negligence. It is manifestly against the weight of the evidence that DM&IR was not assigned at least as much negligence as these appellants, if not a higher percentage. Further, plaintiff's apportionment is not supported by the evidence. Plaintiff was warned to stay out of the spill, yet he chose to proceed directly into the middle of the spill rather than walk around it to the far edge, where Second Mate [REDACTED] awaited him. His own negligence exceeds 7.5%. This is all the clearer given the likely effect of the erroneous spoliation instruction.

Minnesota appellate courts have not hesitated to upset the apportionment of negligence or grant a new trial in the interest of justice where the evidence indicates a disparity in duty, knowledge, or

ability to act among the parties. *Robertson v. Johnson*, 291 Minn. 154, 190 NW.2d 486 (1971). The erroneous spoliation instruction should strengthen such a result. The jury's apportionment is against the greater weight of the evidence and is fundamentally unfair. Appellants are entitled to reapportionment of the negligence percentages or a new trial by this court.

3. Whether Appellants Are Entitled to a New Trial on Liability or Apportionment of Damages Where the Trial Court Erroneously Charged the Jury That the Vessel Defendants' Contribution Claim Was to be Decided Under Minnesota Premises Law, Rather than Federal Maritime Law?

The standard of review is for an erroneous jury instruction. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672,676 (1974). An error in a jury instruction is likely to be considered fundamental if the error destroys the substantial correctness of the entire jury charge or causes substantial prejudice to a party.

Appellants are entitled to a new trial on apportionment of liability for the additional reason that the trial court wrongly instructed the jury to decide the vessel defendants' tort contribution claim against the DM&IR dock under Minnesota premises law, rather than federal maritime law. (R.2001) Appellants objected to this at the charging conference (R.1943-45).

Plaintiff's claims against the vessel defendants arose under the Jones Act and the general maritime law, and were undisputedly federal in nature. See, e.g., *Miles v. Apex Marine Corp.*, 489 U.S. 19, 111 S.Ct. 317 (1990). Where the principal claims are maritime, contribution claims arising from them are also maritime, and are governed by the substantive federal maritime law. *Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953, 956 (4th Cir. 1991); *General Contracting & Trading Co., L.L.C. v. Interpole*,

Inc., 899 F.2d 109,113 (1st Cir. 1990); *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229, 235 (5th Cir. 1985). In the context of a choice between maritime law and the law of a foreign country, there is authority that the federal choice-of-law provisions should govern. See, e.g. *In Re Kreta Shipping, S.A.*, 1 F.Supp.2d 282 (S.D.N.Y. 1998). Defendants have found no contrary authority in the context of a choice between federal maritime law and state law, where the controlling factor is that the right to tort contribution arises out of the same tortious conduct giving rise to liability in the principal claim. See, e.g., *White v. Johns-Manville Corp*, 662 F.2d 243, 247 (4th Cir. 1982).

Here, the unfair prejudice to appellants is that Minnesota state law provides defenses to the dock such as the 50% negligence bar and the open and obvious doctrine. The federal maritime law of tort contribution is a pure comparative scheme and does not apply the open and obvious doctrine. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708 (1975).

The improper instruction invited the jury to find that the spill was open and obvious and to reduce the DM&IR dock's negligence accordingly. This should require a new trial on apportionment. When added to the improper spoliation instruction, it is clear appellants are entitled to a new trial at least as to apportionment of liability.

4. *Whether The Past Lost Wage Award is Not Supported by the Evidence?*

The denial of the JMOL is reviewable under *Jerry's Enters.Inc v. Larkin, Hoffman, Daly & Lindgren, Ltd.* 711 N.W.2d 811, 816 (Minn. 2006) since the verdict was manifestly against the evidence. (Addendum 3-19)

"This court is free to grant a (JNOV) when the verdict is

manifestly against the weight of the entire evidence or...despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law." *Pouliot v. Fritzsimmmons*, 582, N.W.2d 221, 224 (Minn. 1998). In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty. *Peitrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980).

The decision to grant remittitur is entirely within the sound discretion of the court. *Hanson v. Chicago, Rock Island & Pac. R.R.Co.*, 345 N.W.2d 736, 739 (Minn. 1984). Here, the jury awarded \$281,468.00 for past lost earnings pursuant to special Interrogatory No. 11. (R.2159) The testimony related to this damage item came from only two witnesses, plaintiff's financial expert, Dr. [REDACTED] and [REDACTED] President of Central Marine Logistics. Dr. [REDACTED] totalled past lost wages at \$293,174.00 including a bonus of 15% (\$43,976) for a total of \$337,150. (R.1026-1027) It was conceded by Dr. [REDACTED] on cross-examination that pursuant to the union contract, the bonus is actually 10% if there is the requisite service time to qualify. (R.1050) Therefore, the bonus should have been \$29,317.00 in Dr. [REDACTED] calculation for a total of \$322, 491.40. Dr. [REDACTED] used a tax rate of 20.79%, so the correct deduction is \$67,045.96 for taxes and reduces the total lost wages properly to \$255,445.44. (R.1027) The jury award exceeds what is properly in evidence by \$26,022.56. (R.2158-2159) appellants, if a new trial is not granted, seek a remittitur and reduction of the award to \$255,455.44 in order to conform to the evidence presented at trial.

5. Whether Appellants Are Entitled to a New Trial on Damages?

The denial of the JMOL is reviewable under *Jerry's Enters.Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.* 711 N.W. 2d 811, 816 (Minn. 2006) since the verdict was manifestly against the evidence.

The grounds for the requested relief are that the magnitude of damages awarded to respondent can only be a result of the erroneous spoliation instruction and/or passion and prejudice. Prejudicial error is obvious upon the magnitude of the damages awarded to respondent. The erroneous award of nearly a million dollars in future lost earning capacity can only be a result of such passion and prejudice or an unintended effect of the spoliation instruction which should not have been given based on the facts of this case.

Appellants acknowledge that Dr. [REDACTED] testified to the lost earning capacity in this range, but substantial evidence through the cross examination of Dr. [REDACTED] as to plaintiff's sporadic work history, and past earnings that were either absent or routinely in the low four figure range support that this future loss earning capacity award is the result of speculation, or worse punishment based upon spoliation of the evidence or prejudice of the jury. (R.1054-1060,1068) Likewise, the award for future medical expenses was influenced by the same factors because of the speculation attributed to the evidence presented on this issue. *Lind v. Slowinski*, 450 N.W.2d 353, 358 (Minn. App. 1990) (vacating future damages award based on vague testimony of medical care that plaintiff would need).

In *Hammarlund v. James*, the Court ordered a reversal and remand for a new trial on future medical expenses and future lost earning capacity, because the court could not determine with any degree of certainty what medical expenses would be incurred from a flair up. 2004 WL 1964871, 1964874 (Minn. App. 2004). Appellate courts will set aside a

verdict when it is so excessive if it can only be the result of passion or prejudice or when the award is a result of speculation rather than the evidence presented at trial. *Fifer v. Nelson*, 295 Minn. 313, 204 N.W.2d 422 (1973).

Here, the future medical expenses of \$500,000 were based on evidence from respondent's health care consultant, [REDACTED] [REDACTED] (R.869,2159) However, there is no medical evidence, including from Dr. [REDACTED] which would provide the basis as to what extent the nursing or home care would ever be warranted which constituted about 80% of the cost estimate. (R.869-870) [REDACTED] opined about the need for future nursing/home care in the event that plaintiff is alone but it was pure speculation with no supporting evidence introduced as to when if ever plaintiff would need such care. (R.851-856)

Conversely, the dock's life care planner, [REDACTED] [REDACTED] directly applied the medical testimony done in advance of trial of strictly plaintiff's medical doctors, Drs. [REDACTED] and [REDACTED] and calculated that \$293,265.02 would be the value as to future medical expenses related to blood thinning and other medications, compression stockings, pain relief, Doppler studies and periodic physician visits to monitor plaintiff's condition. (R.1788) Further, Ms. [REDACTED] demonstrated that putting the compression stockings on could be done without any assistance whatsoever and therefore a home health aide is not indicated. (R.1789-1790) The \$500,000 awarded by the jury is based on a future event that has not been shown by the evidence that it may ever occur and is so speculative it is unjust. Appellants are clearly entitled to a new trial on damages related to future medical expenses and the future loss of earning capacity.

In *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005), a motorist brought a personal injury action against the driver of a vehicle, who eventually conceded liability. Following a jury trial on damages only, the district court entered judgment awarding plaintiff \$24,000 and denied defendant's motion for new trial. Defendant appealed, the Court of Appeals reversed and remanded, and in turn plaintiff then appealed. The Supreme Court of Minnesota affirming the Court of Appeals judgment opined that the "total effect of the erroneous jury instruction could not be determined and thus defendant was entitled to a new trial on damages". In that case it was a civil pattern jury instruction on a pre-existing medical condition and how aggravation was to be determined. The court in its opinion stated that defendant should only be responsible for the injuries legally caused by the defendant's negligence. *Id* at 734. In *Rowe*, the court concluded that the defendant had the stronger argument because the jury was not properly instructed in that case on aggravation of the injuries and one could not determine how the jury decided the question of damages. The award may have reflected that the jury did not apportion the damages, but found that plaintiff's claimed damages were excessive or it could reflect that the jury did apportion plaintiff's injuries. The jury verdict did not specify which of the outcomes was correct, so defendant was entitled to a new trial on damages.

"A complainant will not receive a new trial for error in jury instructions unless the error was prejudicial. In determining whether erroneous instructions resulted in prejudice, we must construe the instructions as a whole from the standpoint of the total impact on the jury. We will, however, give the complainant the benefit of the doubt by granting the complainant a new trial if the effect of the erroneous

instruction cannot be determined." *Id.*

The same rule of law applies here. It cannot be determined what effect that either a spoliation instruction or the arguments related to unitary enterprise, or agency, the "small cog in the big wheel of the steel making enterprise", combined in effect to prejudice and impassion the jury against appellants. The magnitude of the award coupled with the overwhelming liability attributed to these appellants is not supported by the competent evidence, and therefore a new trial is warranted.

6. *Whether The Trial Court Erred in Applying the Written Contribution Clause to Apportion Liability, Where:*

(A) *Instead of the written contribution clause, the maritime Warranty of Workmanlike Performance should operate to indemnify defendants for third party defendant DM&IR Railway Company's breach of the warranty; and*

(B) *This Court erroneously made Central Marine, Indiana Harbor and ArcelorMittal USA agents of Minorca Mine under Sinkler by finding, without legal or factual support, that defendants were a "unitary enterprise"; and*

(C) *There was no evidence that Central Marine, Indiana Harbor or ArcelorMittal USA were agents of Minorca Mine under agency principles?*

The standard of review is that an appellate court is not bound by and need not give deference to the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001)

The federal maritime law applies an implied warranty, known as the Warranty of Workmanlike Performance, which runs from dock owner/operators such as DM&IR Railway Company to vessel owners/operators such as Central Marine/Indiana Harbor/ArcelorMittal USA. In addition to the Warranty this case also involves a written Rail Transportation contract (Ex. 65) between DM&IR Railway Company and appellant ArcelorMittal Minorca Mine Inc., as successor to Ispat Inland Mining Company Inc. The written contract contains a contribution clause, which

provides that," Should [DM&IR Railway] and/or [ArcelorMittal Minorca Mine] suffer any harm through the joint negligence of [ArcelorMittal Minorca Mine] and [DM&IR Railway] acting pursuant to this Contract, such expenses will be apportioned between the parties in proportion to their negligence". (Contract, Ex. 65, Sec.13) The same section makes clear that this language also applies to **agents** of DM&IR and Minorca Mine.

The trial court refused to apply the maritime warranty, holding as a matter of law that it was overridden by the written contribution clause, and further holding as a matter of law that appellants Central Marine/Indiana Harbor/ArcelorMittal USA were agents of appellant ArcelorMittal Minorca Mine. The trial court then applied the written contribution clause as the basis for its instruction to the jury to apportion liability among the parties. (R.1554-60) This was error for three reasons, which we discuss below.

(A) Instead of the written contribution clause, the maritime Warranty of Workmanlike Performance should operate to indemnify defendants/appellants for DM&IR Railway Company's breach of the warranty.

The implied contract warranty of workmanlike performance, sometimes called the warranty of workmanlike service, (hereinafter WWLP) made its appearance in the law of admiralty in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956) to solve an imbalance in liability allocation among three admiralty players - longshoremen, stevedores and shipowners. As originally applied by Ryan, it gave shipowners indemnity from the stevedore, when the shipowner was held liable to longshoremen for vessel unseaworthiness, but where the unseaworthiness was due to the stevedore's actions.

The years following Ryan saw a significant expansion of the

WWLP. Liability without a contractual relationship was allowed, *Crumady v. The Joachim Hendrick Fisser*, 358 U.S. 423, 428, 79 S.Ct. 445, 448 (1959); *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 423-24, 81 S.Ct. 200, 201-02 (1960), and the WWLP was held to give rise to liability without fault, *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748 (1964) (remanded to *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 336 F.2d 124, 127 (9th Cir. 1964)). *Oregon Stevedoring* enunciated the policy that continues to control WWLP decisions today: "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." 376 U.S. at 324, 84 S.Ct. at 754 (emphasis ours). The WWLP today applies to cases where the shipowner/operator is also found to be liable, but where the vessel's conduct did not prevent performance of the WWLP. See, e.g. *Italia Societa*, 376 U.S. at 321, 84 S.Ct. at 752; *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 568, 78 S.Ct. 438, 441 (1958).

In 1972, in the specific context of the longshoreman - stevedore - shipowner trilogy, Congress amended the Longshore Act to remove from longshoremen the unseaworthiness remedy against the vessel that gave rise to *Ryan Stevedoring* sixteen years before, but did not overrule *Ryan*. The WWLP continues to apply today to too many maritime actors outside the longshoreman - stevedore - shipowner trilogy. One such maritime actor is a dock negligently causing personal injuries to seamen or other persons injured on a dock.

The WWLP runs from dock owners/operators to shipowners/operators, and includes "a duty to furnish a safe means of egress and ingress to berthed ships," *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361,

365 (6th Cir. 1986). Stated another way, the dock warrants "to maintain its dock in a reasonably safe condition." *Ammesmaki v. Interlake Steamship Co.*, 342 F.2d 627, 631 (7th Cir. 1965). The jury finding that DM&IR Railway Company was negligent (R.2158) necessarily includes a finding that the dock failed to use reasonable care to maintain its dock in a reasonably safe condition. (R.2001) This jury finding is the only jury finding necessary to prove that the WWLP was breached and that indemnity is owed to appellants, because the warranty of workmanlike performance parallels a negligence standard. See, e.g., *Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 763 at fn.17 (5th Cir. 1989).

We have found no Eighth Circuit or Minnesota state decisions addressing the WWLP. The WWLP has been applied to require docks to indemnify shipowners/operators for personal injuries on docks in at least four federal circuits: the Third, Sixth, Seventh and Eleventh. *Cooper v. Loper*, 923 F.2d 1045 (3d Cir. 1991); *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986); *Ammesmaki v. Interlake Steamship Co.*, 342 F.2d 627 (7th Cir. 1965); *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003). The Second and Fourth Circuits agree with the Supreme Court case law above that shipowner/operator negligence does not preclude indemnification under the WWLP. *Henry v. A/S Ocean*, 512 F.2d 401, 406 (2d Cir. 1975); *Farrell Lines, Inc. v. Carolina Shipping Co.*, 509 F.2d 53 (4th Cir. 1975). We have been unable to find any case law in those two circuits addressing injuries on docks. The First Circuit also likely would apply the WWLP to a dock. See, e.g., *La Esperanza de P.R., Inc., v. Perez Y Cia. de Puerto Rico, Inc.*, 124 F.3d 10,16-17 (1st Cir. 1997) (applying the WWLP to a negligent contractor performing dockside vessel

repairs). All courts deciding pierside cases continue to follow *Ryan Stevedoring* and its progeny, which they correctly view as controlling law.

In *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), a case almost exactly factually on point here, the vessel's Master, a Captain Scott, chose to dock at the C&O Coal Dock in Toledo following a storm. It was dusk, the dock lights were out due to the storm, and the dock surface was strewn with wet, slippery coal spillage. The dock knew the vessel was scheduled and arriving, but had not cleaned the spillage or told the vessel the spillage was there. In the course of docking with the only lighting being from the vessel, a vessel crewman slipped and fell from the dock into the water between the dock and the vessel, where he was crushed and killed instantly. *Id* at 362-63. In reversing the district court's denial of indemnity and awarding full damages, expenses and attorney's fees, the Court held that the dock had breached the WWLP because, in part, "the dock was strewn with wet coal." *Id* at 366. As a result the dock could defeat indemnity only if there was "conduct on [the shipowner's] part sufficient to preclude recovery," *Id* at 366, citing *Weyerhaeuser*, 355 U.S. at 567, 78 S.Ct. at 440. The *Oglebay* Court noted that, "conduct sufficient to preclude recovery" is "conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty of workmanlike service." *Id* at 366. The Court then found this standard not met: "Although Captain Scott could have avoided the danger by refusing to dock, he did not prevent or hamper the wharfinger's performance of its duty in accordance with its warranty of workmanlike service. In the absence of such a showing, a shipowner's negligence does not prevent recovery under this theory of indemnity." *Id* at 367. Of similar effect in the Sixth Circuit see *Sims v. Chesapeake and*

Ohio Railway Co., 520 F.2d 556 (6th Cir. 1975).

In *Ammesmaki v. Interlake Steamship Co.*, 342 F.2d 627 (7th Cir. 1965), Ammesmaki, a seaman, was injured when he fell on an icy dock while returning to his vessel from the shore. In awarding WWLP to Interlake the Court held, "we are of the opinion that any conduct on the part of Interlake which rendered it liable in damages to Ammesmaki was no bar to its right to recover for the breach of the railroad's warranty to maintain its dock in a reasonably safe condition." *Id* at 631. The Court went on, "Both *Ryan* and *Weyerhauser* clearly indicated that the negligence of a shipowner does not bar indemnity from a dockowner for the breach of a warranty to maintain the dock in a reasonably safe condition." *Id* at 632.

In *Cooper v. Loper*, 923 F.2d 1045 (3d Cir. 1991), the court awarded full indemnity to shipowner with its attorneys fees from defending against the seaman's claim and prejudgment interest. In *Cooper*, *supra*, an employee of the shipowner was injured when he was hit with a large bucket of fish suspended from the boom of a shore side crane. The dock employees had failed to catch the bucket and it swung back, striking the employee. The court opined that stevedores and other contractors give shipowners an implicit warranty that their services will be performed in a workmanlike manner. The only way the indemnity is defeated is if a stevedore can prove that the shipowner's conduct prevented or seriously impeded the stevedore from performing in a workmanlike manner. *Id* at 1051.

In *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003), the Court held that *Ryan Stevedoring* entitled the cruise ship owner/operator to indemnity from the dock owner for damages the ship paid to a passenger injured on the gangway provided by the dock, because the dock had breached its WWLP by failing to provide a safe way to board the

ship. Id at 1316. The cruise ship's "negligence or non-negligence" in failing to monitor and prepare for bad weather had no bearing on this result because the WWLP is a contract principle, and "tort principles are therefore inapplicable." Id at 1317. If the *Vierling* plaintiff had been a vessel crewman, rather than a passenger, the Court noted the result would have been the same. Id at 1318-1319.

Why should the appellants here be required to recover from the dock under tort indemnity/contribution principles when there is a clearly applicable maritime contract warranty? The case law cited above provides overwhelming authority applying the WWLP in fact situations like the case at bar. This court should enforce the WWLP against the dock.

Even if there were some factual basis on which to bind Central Marine, Indiana Harbor and ArcelorMittal USA to the contribution clause (there clearly is not) the WWLP is not displaced by the contribution clause. The contribution clause is written in general language - "all claims, demands, actions, and suits either at law or in equity." Such broad terms do not specifically address what the dock's implied WWLP here covered - the dock's duty, even in the absence of a contract with the vessel, to keep the dock in a reasonably safe condition for use by vessel crew in the course of docking and unloading. The general rule is that the implied WWLP is **not** excluded by the general language in an express contribution/indemnity term, where there is no language expressly disclaiming the WWLP. *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 336 F.2d 124, 127 (9th Cir. 1964) (Certiorari denied by *Oregon Stevedoring Co v. Italia Societa Per Azioni Di Navigazione*, 379 U.S. 973, 85 S.Ct. 668, (1965)); *Pettus v. Grace Line, Inc.*, 305 F.2d 151, 155 (2d Cir. 1962) (considering an express indemnity clause similar to the

DM&IR's here, 305 F.2d at 155 fn.5, and concluding that, "In the absence of an express disclaimer we cannot construe this clause as disavowing the fundamental obligation to provide workmanlike service."). If the DM&IR dock had wanted to include other entities under the contribution clause it could have negotiated to do so, either specifically by name, or generically as "vessel owners/operators." It did not do so. It should not be permitted now to escape the explicit terms of its contract which clearly do not include the other entities and as such its drafting should be construed against it, the three vessel defendants. The vessel defendants are entitled to indemnification from DM&IR Railway Company under the maritime WWLP for all damages awarded against them.

(B) This Court erroneously made Central Marine, Indiana Harbor and ArcelorMittal USA agents of Minorca Mine under Sinkler by finding, without legal or factual support, that appellants were a "unitary enterprise."

In 1958 the United States Supreme Court decided *Sinkler v. Missouri Pacific R. Co.*, 356 US 326, 78 S.Ct. 758 (1958), which dealt with a matter of contractual obligation between the Missouri Pacific Railroad and the Houston Belt & Terminal Railway Company. Houston Belt had, by contract, undertaken to switch cars for the Missouri Pacific Railroad Company from one track to another in the Union Station at Houston, Texas. The plaintiff, a Missouri Pacific employee and a cook on a Missouri Pacific railroad car, was injured when Houston Belt switched the car in a negligent manner. The Supreme Court first explained that Congress's purpose in treating the negligence of fellow employees as negligence of the employer was to expand the FELA remedy from the common law:

'Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this

legislation that the railroad was a **unitary enterprise**, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." 356 U.S. at 330, 78 S.Ct. at 762 (emphasis ours).

The Supreme Court then rejected Missouri Pacific's argument that it was not liable under the FELA because it had delegated **under contract** its switching duty to Houston Belt. In doing so the Court further expanded the meaning of "unitary enterprise" under the FELA:

"When a railroad employee's injury is caused in whole or in part by the fault of others performing, **under contract**, operational activities of his employer, such others are "agents" of the employer within the meaning of § 1 of FELA." 356 U.S. at 331-32, 78 S.Ct. at 763 (emphasis ours).

Two years later, the Supreme Court limited the reach of *Sinkler* in *Ward v. Atlantic Coast Line R. Co.*, 362 U.S. 396, 80 S.Ct. 789 (1960). In *Ward*, the plaintiff, a member of an Atlantic Coast Line track repair gang, was injured while replacing ties on a siding privately owned by M&M Turpentine Company. The private siding ran to M&M Turpentine's plant, so that M&M Turpentine's products could be carried by the railroad. The plaintiff argued, under *Sinkler*, that M&M Turpentine was an "agent" of Atlantic Coast Line because repairing the privately owned siding was an "operational activity" of the railroad. Applying *Sinkler*, the Supreme Court rejected this argument and held that M&M Turpentine was not an agent of Atlantic Coast, and that the plaintiff, while working on the private siding was not "engaged in furthering the operational activities" of the railroad. Thus it is clear that the "operational activities" expansion of "unitary enterprise" is limited.

In the 60 years since *Sinkler* was decided substantial case law has addressed whether two entities are a "unitary enterprise" under

Sinkler. The case law uniformly holds that a "unitary enterprise" may be found only if (1) a written contract exists between the employer and a second entity, and (2) if the contract delegates to the second entity "operational activities" of the employer. See, e.g., *Lockard v. Missouri Pacific R. Co.*, 894 F.2d 299, 303-04 (8th Cir. 1990) (where railroad employee slipped on icy boarding house steps, and boarding house had contract with railroad for employee lodging, boarding house was an agent of railroad).

Here, *Sinkler* cannot support a "unitary enterprise" for three reasons. First, *Sinkler* applies only to delegation of "operational activities" to alleged agents of FELA/Jones Act employers. Minorca Mine was not alleged or proved to be respondent's employer; that status applies only to ArcelorMittal USA and Central Marine. *Sinkler* cannot make anyone Minorca Mine's agent. Second, no entity can be found to be an agent of Minorca Mine under *Sinkler* (and hence under the written contribution clause) without a contract delegating some "operational activity" of Minorca Mine to some other defendant/appellant. Here no written contract between Minorca Mine and any of the three remaining defendant/appellants ArcelorMittal USA/ Central Marine/Indiana Harbor exists, nor is there evidence Minorca delegated any "operational activities" to anyone. Third, to apply *Sinkler*, the injury to plaintiff must arise out of the "operational activity" delegated. There is no evidence tying up the M/V Block was ever an "operational activity" of Minorca Mine - undisputedly it was an operational activity of ArcelorMittal USA/Central Marine, the Jones Act employers.

(C) *There was no evidence that Central Marine, Indiana Harbor or ArcelorMittal USA were agents of Minorca Mine under traditional agency principles.*

An agency relationship arises where the principal authorizes the agent to do acts in the name of the principal. *A. Gay Jenson Farms Co. v. Cargill Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). The two elements necessary to support a finding that an agency relationship exists are a manifestation by the principal that the agent acts for him and the right of control by the principal over the agent. *Teeman v. Jurek*, 312 Minn. 292, 299, 251 N.W.2d 698, 702 (1977). No one can become the agent of another person without the consent of the principal. *Nerlund v. Schiavone*, 250 Minn. 160, 165, 84 N.W.2d 61, 65 (1957).

An agency may be based upon an agent's actual authority, implied authority, apparent authority or agency by estoppel. Express authority is that authority that the principal directly grants to the agent. Implied authority includes only those powers essential to carry out the duties expressly delegated. *Hockemeyer v. Pooler*, 268 Minn. 551, 565, 130 N.W.2d 367, 377, (1964).

Apparent authority is authority that the principal holds the agent out as possessing or knowingly permits the agent to assume. *Hornblower & Weeks - Hemphill Noyes v. Lazere*, 301 Minn. 462, 471-72, 222 N.W.2d 799, 805, (1974); *Foley v. Allard*, 427 N.W.2d 647, 652, (Minn. 1988). Agency by estoppel arises in cases where the principal by his culpable negligence permits his agent to exercise powers not granted to him, even though the principal has no notice or knowledge of agent's conduct. *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 450, 124 N.W. 236, 240, (1910).

Where is the proof that Minorca as principal authorized anyone to do acts in its name, as required by *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981)? Where is the evidence that Minorca had the right to control the actions of any other defendant/appellant, as required by *Teeman v. Jurek*, 312 Minn. 292, 299, 251 N.W.2d 698, 702 (1977)? It is settled law that no one can become the agent of another without the consent of the principal. *Nerlund v. Schiavone*, 250 Minn. 160, 165, 84 N.W.2d 61, 65 (1957). Where is the evidence that Minorca consented to the creation of an agency and who is that agent?

Apparent authority requires (1) that the principal hold the agent out as having authority, (2) that the party dealing with the agent must have actual knowledge that the agent is held out by the principal as having authority, and (3) that the proof of the agent's apparent authority must be found in the conduct of the principal. *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). Where is Minorca's conduct supporting any of these three elements? Who at DM&IR had the actual knowledge required by the second element? It is not there.

Agency by estoppel arises only in cases where the principal, by its culpable negligence, permits an agent to exercise powers not granted to him, and where equity requires that the principal accept responsibility for the agent's unauthorized actions. *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 450, 124 N.W.2d 236, 240 (1910). Where is the evidence that Minorca negligently permitted any defendant/appellant to exercise powers in its name? There is none.

Finally, an agency relationship requires that the agent's actions are continuously subject to the will of the principal. *Jurek v.*

Thompson, 308 Minn. 191, 199, 241 N.W.2d 788, 791 (1976). Where is the evidence that the actions of any defendant/appellant were continuously subject to Minorca Mining's will?

One who alleges an agency has the burden of proving it. Unless DM&IR can point to specific facts establishing a *prima facie* case supporting all of the elements of one of the principal-agent theories, there is no evidence to uphold this court's decision that the written contribution clause binds anyone other than Minorca Mining, the only party to the written contract other than DM&IR dock.

Because there is no evidence to make ArcelorMittal/ Indiana Harbor/ Central Marine agents of Minorca Mine under any common law agency principle, and because there is no contract or evidence under which to make ArcelorMittal/ Indiana Harbor/ Central Marine agents of Minorca Mine under *Sinkler's* "operational activities" theory, there is no factual or legal basis upon which to uphold this court's conclusion that ArcelorMittal USA/ Central Marine/ Indiana Harbor/ Minorca Mine were a "unitary enterprise" and are bound by the written contribution clause in the DM&IR/ Minorca Mining contract. That finding by this court should be reversed and judgment against DM&IR Railway and in favor of Central Marine/ Indiana Harbor/ ArcelorMittal USA for the full amount of plaintiff's damages should be entered on the basis of the maritime Warranty of Workmanlike Performance. In addition judgment should be entered for ArcelorMittal Minorca Mine and against DM&IR Railway because there is no evidence Minorca Mine was negligent under its contract.

7. Whether Defendant ArcelorMittal Minorca Mine, Inc. is Entitled to Judgment as a Matter of Law On All Claims By Plaintiff Daniel Willis; Because it was not a "Vessel Defendant," and Indisputably Did Not Employ Plaintiff or Otherwise Involve Itself in Vessel Operations?

The standard of review is that an appellate court is not bound by and need not give deference to the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001)

Three defendants/appellants were identified in the instructions and on the special verdict form as "vessel defendants" - ArcelorMittal USA, Indiana Harbor and Central Marine. Minorca Mine was not a "vessel defendant." (R.1692,2006) The claim made against Minorca Mine throughout this suit and throughout trial was that the written contribution clause in Minorca's contract with DM&IR Railway Company controlled apportionment of liability. No claim was made by anyone that Minorca Mine was directly liable to plaintiff under any theory. Minorca Mine could be liable only if it were somehow liable under the contract contribution clause discussed above. As discussed immediately above, Minorca Mine was not liable under its contract with DM&IR. Such a failure of proof entitled Minorca Mine to judgment in its favor and against Plaintiff. See e.g., *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 36, 126 S.Ct. 1281, 1287 (2006).

8. Whether The trial court erred by denying Appellants Motion for Determination of Collateral Sources?

The standard of review is that an appellate court is not bound by and need not give deference to the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001)

Appellants moved the trial court for a determination of collateral sources in accordance with Minn. Stat. § 548.25 subd 1. In the motion for set off wages in the amount of \$200,339.37, which were verified per company records and the affidavit of [REDACTED] Exhibit 1 and 2,

were paid to respondent by appellants from the date of injury, August 27, 2004, through the date of trial. (Motion for Determination with Exhibits, Appendix 5-14)

The jury's award of \$281,468 as to past lost wages, minus advanced wages of \$200,339.37 minus maintenance payments of \$13,216.00 (which appellants admit are not subject to set off) yielded a revised figure of what was properly awardable as past lost wages of \$94,344.63. During the trial in this matter, it was agreed by the parties that amounts advanced to respondent would be addressed in a motion of determination of collateral sources to set off against the verdict. The trial court denied set off in its entirety and characterized such advances as entirely maintenance. This is clear error because the required maintenance rate per respondent's union contract (Ex. 48) was \$8.00 per day or \$56.00 per week. The trial court's decision is wrong and will have the effect of discouraging shipowners from advancing wages if they get no setoff for such an act at the conclusion of the case. An Eighth Circuit case in a seaman's case is directly on point with regard to the issue of setoff, *Stanislawski v. Upper River Service, Inc.* 6 F. 3d 537 (8 Cir. 1993). In *Stanislawski, supra*, plaintiff recovered a jury verdict and the district court amended the judgment to account for certain payments defendant had made to plaintiff before trial. Plaintiff appealed the reduction of his recovery in part because the wage compensation paid was actually maintenance and was not duplicated in his Jones Act recovery. The court reversed and remanded for an incorrect calculation of the reduction, but opined that he is entitled to one recovery under the Jones Act. *Id* at 541. Here, the required maintenance rate was 8.00 per day or 56.00 per week. In reality appellants paid supplemental wage compensation

of \$187,123.37 above the maintenance rate required by the collective bargaining agreement between respondent and appellants which was 56.00 per week for 236 weeks from date of injury through jury verdict for a total of \$13,216.00. This court should overturn the trial court's decision and award proper set off of \$187,123.37 based upon the payments advanced by appellants.

9. Whether The Trial Court applied the wrong rate of Post Judgment Interest on the Verdict?

The standard of review is that an appellate court is not bound by and need not give deference to the district court's decision on a question of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001)

The trial court in its order denying appellant's motion for new trial/judgment on the pleadings indicated "plaintiff is entitled to recover post-verdict interest of 4% pending final entry of judgment, whereupon interest will be in the amount of 10%." The parties to this action vehemently disagree as to what "final entry of judgment" means under the statute and the order of the trial court.

Appellants submit that post judgment interest should be assessed at the 4% rate as the effective date of the statute was after the judgment was entered here on May 28, 2009. (Addendum 1-2)

The revised version of Minn St. §549.09 became effective on August 1, 2009, and set a post judgment interest rate of 10% on verdicts exceeding \$50,000. The entry of the verdict in this case was May 28, 2009. The term at issue here is when does a judgment become finally entered. A case nearly on point is *Pacific Indemnity Company, et al. v. Thompson-Yaeger, Inc., et al.* 258 N.2d 762 (1977) which provided in

pertinent part:

Interest is provided for by Minn.St. §549.09, which reads:

"When the judgment is for the recovery of money, including a judgment for the recovery of taxes, interest from the time of the verdict or report until judgment is finally entered shall be completed by the clerk and added thereto." (Italics supplied.)

"The issue presented is one of first impression for this court. However, this court has previously considered the exact meaning of §549.09 in other contexts. Recently, in *Bastianson v. Forschen*, 294 Minn. 406, 202 N.W.2d 667 (1972), we held that interest is to be computed from the date a special verdict is rendered rather than from the date of the entry of judgment. It is also the rule in Minnesota that in cases where a general verdict is returned, interest on a money award accrues from the time of the rendition of the verdict. *McCormack v. Hanksraft Co. Inc.*, 281 Minn. 571, 161 N.W.2d 523 (1968)."

"[2] Thus, given the interpretations of §549.09 in our past decisions under similar circumstances, we believe the better-reasoned approach in this case is to look to the plain language appearing in §549.09 which clearly provides for the computation of interest from the time a report is entered in the action. In the present case, the referee was appointed pursuant to Rule 53.02, Rules of Civil Procedure. Rule 53.05(1) requires that a referee appointed by the court prepare a report upon the matters submitted to him for consideration (i.e., damages). Thus, it is rather obvious that the referee's report prepared to the present case is includible within §549.09 which provides for the computation of interest from the date of the report." *Id* at 762.

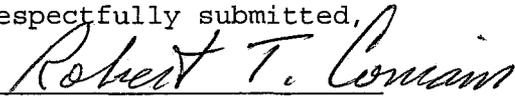
The plain language of the statute governs and clearly indicates an effective date after August 1, 2009, in order for the 10%

interest rate to accrue. This court should apply a 4% rate under the previous version of the statute since the judgment was entered by this court on May 28, 2009, and the jury returned its verdict on May 8, 2009, both before the effective date of the amended version of the statute.

Conclusion

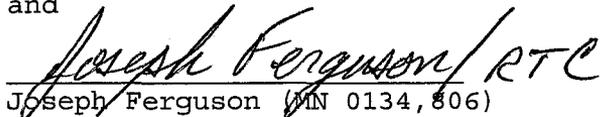
For the foregoing reasons appellants are entitled to a New Trial on some or all issues.

Respectfully submitted,



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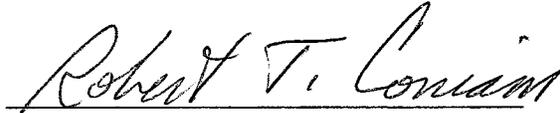


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CERTIFICATE OF SERVICE

A true copy of the foregoing Appellants' Brief and Appendix has been served on all parties this 23 day of March, 2010 by ordinary mail.



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Certificate of Compliance

Pursuant to Rule 132.01 subd. 3, the undersigned hereby certifies, as counsel for Appellants that this brief complies with the type-volume limitation as there are 13,737 number of words of proportional space type in this brief.

Dated this 22 day of March, 2010.

Respectfully submitted,

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