

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.

REPLY BRIEF OF APPELLANTS TO RESPONSE BRIEF OF DM&IR RAILWAY COMPANY

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Corrections to The Dock's Statement of Facts

- At page 4 the dock implies that plaintiff Willis was required to wear an immobilizer for part of one day because he rode home on a bus. The evidence is that he wore the immobilizer not just for the bus ride, but continuously for nine days thereafter. He got home the morning of Sunday, August 29, 2004. On Monday morning, August 30 he called his family doctor, Dr. [REDACTED] and got a same-day appointment. Willis continued to wear the immobilizer all of the 10 days from August 29, 2004 to September 8, 2004, due to his knee injury from his fall on the dock. An ultrasound on September 8 revealed deep vein thrombosis due to the immobilization. Willis was immediately hospitalized. (R. 721-731).

- At page 6 the Dock talks at length about why it couldn't clean the dock. It ignores throughout the fact that it owned and operated the dock, that vessels came on the dock's schedule, and that it was the dock's mess left over from unloading the boat that preceded the M/V Block on which plaintiff slipped.

- At page 7 the Dock states that its contract with Minorca Mine allowed Minorca's "agents" to come to the dock to unload cargo, but cites no contract language saying this. That's because there is none. One of the central issues on this appeal is that there is no evidence that Central Marine or Indiana Harbor or ArcelorMittal USA were Minorca's "agents" under the DM&IR - Minorca Rail contract (Ex. 65).

- At page 8 the Dock states that Mr. [REDACTED] testified to the "interconnectedness" of the appellants. What the cited testimony (R. 198-199) actually says is that Mr. [REDACTED] (amongst other things) coordinates the transport of limestone to Minorca Mine to make taconite pellets and coordinates the transport of taconite pellets from Minorca

Mine to ArcelorMittal's steel mill in Indiana Harbor, Indiana. Such coordination includes such things as telephone calls to Minorca Mine and to DM&IR Dock regarding available dock space and how much stone there is on hand "up there." If there is not enough space Minorca would refuse the load of stone. (R. 262-63). Mr. [REDACTED] also testified that Minorca Mine gets its orders not from him, but from ArcelorMittal Mining Europe. (R. 191).

- At page 9 the Dock falsely implies that Mr. [REDACTED] does not know which of the four appellants employs him. Mr. [REDACTED] testified, (R. 199-200), that he is not sure whether he is employed by ArcelorMittal USA Inc. or ArcelorMittal Indiana Harbor, Inc. (not a party to this action). At no point does he or anyone else try to establish that he is employed by Minorca Mine, or by Central Marine, or by Indiana Harbor.

- Contrary to the Dock's statement at page 9, all products carried on the Indiana Harbor/Central Marine vessels do not "go to feed the Minorca Mine." These vessels primarily carry raw materials to supply the steel mill at Indiana Harbor, and also carry materials to and from numerous other ports for third parties. (R. 183, 227, 683-84).

- At no point does Mr. [REDACTED] say that "what the vessels do" is "all for the benefit of the Minorca Mine", as the Dock claims, Brief P.9. Mr. [REDACTED] purpose is to keep ArcelorMittal USA Inc.'s steel mills, including the mill in Indiana Harbor, supplied with raw materials to make steel. (R. 174-75, 258). The dock would have the Minorca pellet plant's tail wag the steel-mill dog.

- While appellants agree, Dock's brief page 8, that limestone and taconite pellets are transported to the steel mill in Indiana Harbor

in Central Marine's vessels, limestone and taconite pellets are also transported to the Indiana Harbor steel mill - and other ArcelorMittal steel mills- by virtually every commercial carrier on the Great Lakes, including Interlake Steamship, American Steamship, Seaway Marine Transport, Canada Steamship Lines, Lower Lakes Towing and Grand River Navigation Company. (R. 183-84). Some of these carriers also carry limestone to DM&IR dock in Duluth bound for the Minorca Mining pellet plant in Virginia, Minnesota. (R. 218-219). Under the Dock's reasoning, this would make these other carriers part of a unitary enterprise, and agents of Minorca Mine.

1. **Spoliation**

The fact that taconite pellets had been present on the dock for at least 12 hours before plaintiff fell is established by the testimony of plaintiff that he felt pellets under his hands when he fell and the testimony cited by the dock in footnote 2 that if in fact pellets were there, they have to have been there for at least 12 hours.

The Dock states at the bottom of page 16 that, "at p. 14, [Appellants] state," "Photos of the dock . . . were proof that the spilled pellets and limestone under the hopper were present. . ." This is false. The statement actually made is at page 13 of appellants' brief, and states, "Photos of the dock **combined with crew member and dock worker testimony**, were proof that spilled pellets and limestone under the hopper were present and unfortunately not an uncommon phenomenon."

While the dock spends eight pages arguing spoliation, nowhere does it address the central issue: no spoliation instruction is proper where appellants did not **exclusively** possess or control the dock. Respondent Dock omits the word **exclusive** on page 13 of its brief when

discussing possession and control despite appellants' correction of the dock's misrepresentation at the charging conference on pages 7-8 of our principal brief. Make no mistake - the law requires exclusive control and possession in order to find spoliation. *Wajda v. Kingsbury*, 652 N.W.2d 856 (Minn. App. 2002). The respondent dock wishes to rewrite the standard by omission. The dock used the improper instruction to argue that the vessel defendants had hidden the evidence: "So I think - and that's part of the instruction that the judge gave you. If one party prevents another party from getting evidence in some fashion, whether by negligence or whether directly, you're allowed to infer that that the evidence would not have been favorable to that party." (R. 2024).

The spoliation instruction was improper and unfairly prejudicial to appellants, as argued in our principal brief, pp. 7-16.

Minnesota law requires that the item spoiled must be critical to the proof of the case. The dock's assertion that it could not defend itself is not worthy under the law. Photographic, demonstrative or testimonial evidence about a lost item in question cannot suffice in order to find spoliation. Certain items must be critical to the proof of a case because they are needed for testing to actually prove up a defect or other pieces of the liability puzzle, like a defective care brake. For instance, a sidewalk hole is not such an item of evidence since there are many other ways to establish liability in such a case. *Dardeen v. Kuehling*, 344 Ill. App. 3d 832, 801 N.E.2d 960 (2003). *Dardeen* is on point here, the dock spillage, like a sidewalk hole, is capable of proof through other means and one does not direct testing of it to establish liability.

There has never been an instance of a non-premises owner being liable for spoliation upon another's premises. Appellants argued at the charging conference that the present case is akin to slip and fall cases in grocery stores. (R. 1979-80) For instance, the squashed grape requires notice to the store owner which in part is based upon the condition of the grape immediately after a fall. If the dock's position is viable, a slip and fall claimant in a grocery store could be charged with a potential spoliation claim if the grape was not preserved, although they did not have exclusive possession of the premises. Here, Appellants were merely invitees permitted to dock and unload cargo and by no stretch of the imagination ever exercised exclusive control and possession of dock No. 6 under the law to properly impose spoliation upon them.

In reality the rule permitting an unfavorable inference to be drawn is bottomed on the belief that, if the evidence had been produced, it would have been unfavorable to the one having control over it. It is a dangerous inference, which is why the law requires **exclusive** control and possession. *Kmetz v. Johnson*, 261 Minn. 395, 403, 113 N.W.2d 96, 101 (1962). The wrongful application of this inference to the vessel defendants was unfairly prejudicial and requires a new trial.

2. The Apportionment of Fault

The dock says it did not know plaintiff would be tying up near the hopper (shiploader). It does not claim he should not have been there. The dock has two rows of spiles for tying up vessels near the shiploader, one row at the edge of the dock and the other row about 25 feet back from the edge on the superstructure, one of which plaintiff used. (R. 1110-1113; Photo, Ex. 227). Spillage is known to be the worst near the

shiploader. (R. 489). There is no testimony that vessels ever call ahead to tell the dock how they will tie up.

The Dock's discussion of apportionment glaringly leaves out any discussion of the unfairly prejudicial effect of the spoliation instruction, which is the principal reasonable explanation for why a dock whose own rules require it to inspect and clean the dock between vessels, but did not do so, was apportioned only 7 1/2% of the fault for this accident.

3. Appellants' Contribution Claim Against the Dock is Governed by Maritime Law, not Minnesota State law.

Appellants have no quibble with the Minnesota State law cited regarding contribution, but it is accurate only for the negligence claim made against it by plaintiff. At no point does the dock ever discuss the legal principles governing the maritime nature of the tort contribution claim made against it by appellants. The principal claims asserted against appellants by plaintiff (Jones Act negligence, unseaworthiness, and maintenance and cure) are all undisputedly maritime. Where the principal claims are maritime, the tort contribution claim based on them is also maritime, as set forth in appellants' principal brief at pp. 21-22. The court's incorrect charge allowed the dock to argue (successfully when combined with the erroneous spoliation instruction) that the law required the vessel defendants to be aware of open and obvious conditions (R. 2007), and that if the condition is open and obvious the dock is not liable. This wrong standard was unfairly prejudicial to the vessel defendants, and requires a new trial.

6a. The Maritime Warranty of Workmanlike Performance

The Dock first argues, citing no cases, that the Rail Transportation Contract (Ex. 65) between Minorca Mine and DM&IR dock overrides the maritime WWLP. The Dock cites no cases for this bald statement, and ignores appellants' argument in their principal brief, pages 33-34, that under settled maritime law principles the WWLP may not be displaced by the written contribution clause unless the written clause **expressly disclaims** the WWLP. The Rail Contract's written clause (Ex. 65, Sec. 13, p. 16 of 24) fails to do this. State law principles may not be applied to vary this settled federal rule.

The Dock also argues, brief at 27, citing only the 1998 *Knight* case, that the WWLP is "outdated." The dock ignores the most recent federal circuit court opinion continuing to apply the WWLP in our context, which was decided five years **after Knight**, see *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003), discussed at pages 32-33 of appellants' principal brief. ***Knight* involved an injury at sea, where WWLP indemnity normally does not apply.** The *Knight* plaintiff was injured at sea while he was helping transfer fish from his fishing vessel, the F/V Endurance, to a factory ship that processes fish, the M/V Eiyō Maru. The court refused to apply the WWLP and instead applied comparative fault principles. While *Knight* does not say so, the reason is explained in *Vierling*, 339 F.3d at 1317-18. ***Vierling*, which involved an injury on a dock, explained that the WWLP began life in *Ryan Stevedoring* as a warranty by a maritime contractor to a vessel at a dock, not at sea. *Vierling* then discussed an earlier Eleventh Circuit case that refused to apply the WWLP**

and explained that the refusal was because the injury occurred at sea. *Vierling* then applied the WWLP to its dock injury, explaining that, "The case at hand involves the typical pierside accident. It also involves negligent conduct by a maritime contractor, an area where courts are especially apt to apply indemnity." *Id.* At 1318.

The WWLP is a long established contract warranty unique to the maritime law, which applies even in the absence of a contract, and does not depend on the absence of comparative fault. It places responsibility on dock owners who fail to keep their docks safe for seamen who come there. It clearly applies here, and should be applied to require the dock to indemnify appellants.

6b. Unitary Enterprise

At pages 32-33 the dock makes an amazing argument - that the U.S. Supreme Court's decision in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958) and its progeny do not "offer controlling precedent or determinations of unitary enterprise." This is an amazing statement. *Sinkler* is the **source** for the unitary enterprise doctrine, as discussed at length in appellants' principal brief, pages 34-36. If *Sinkler* does not state the controlling precedent, then there is none. This does perhaps explain the dock's argument that this Court should ignore the *Sinkler* requirements that there must be a written contract delegating "operational activities" to some other entity before making that entity an agent of the Jones Act employer.

The dock also supports its unitary enterprise argument by citing to the testimony of Mr. [REDACTED] which, according to the dock, shows that Minorca Mine, Indiana Harbor and Central Marine are under the complete control of Mr. [REDACTED]. This is wrong.

What Mr. [REDACTED] testified to is that ArcelorMittal is the umbrella name for a global business. (R. 187-88) Mr. [REDACTED] is employed by ArcelorMittal USA as Manager - Marine Raw Material Logistics, to feed this steel mill at Indiana Harbor and other mills with raw materials needed to make steel. (R. 174-75, 258). This includes not only waterborne transport, but some rail and truck transport as well. On the waterborne side, he utilizes not only the three Indiana Harbor/Central Marine vessels, but virtually all carriers on the Great Lakes, both American and Canadian: Interlake Steamship, American Steamship Company, Seaway Marine Transport, Canada Steamship Lines, Lower Lakes Towing and Grand River Navigation. (R. 183-84). Four of the companies involved are the four appellants: his employer ArcelorMittla USA Inc.; ArcelorMittal Minorca Mine; and two non-ArcelorMittial companies, Indiana Harbor and Central Marine. (R. 180-82, 192).

One aspect of Mr. [REDACTED] job is to coordinate transportation of limestone to DM&IR dock in Duluth, so that Minorca Mine can make taconite pellets, and transportation of taconite pellets from DM&IR dock to the steel mill at Indiana Harbor (and other steel mills) to make steel. (R. 198-99). This requires him to communicate regularly with both Minorca Mine and DM&IR dock. He also communicates with Central Marine Logistics on a daily basis. (R. 198, 207, 216, 263). He exercises his authority through a "time charter", a long recognized maritime contract under which ArcelorMittal USA "time charters," or leases, the three Central Marine vessels. Under a time charter the charterer (ArcelorMittal USA) has the authority to tell the vessel owner and manager what ports to go to and what cargoes to load. The vessel owner and manager retain the authority to manage the vessel on a day to day basis -

they employ, hire, fire, and discipline the crew, schedule the crew and administer labor contracts, purchase vessel supplies, and provide engineering services - everything that is required in the vessel's day to day management. The time charterer controls only where the vessel goes and what it carries. (R. 184-85, 211, 223-38).

Mr. [REDACTED] and ArcelorMittal USA also have time charters with other fleets on the Great Lakes, specifically Interlake Steamship Company and American Steamship Company each for one boat. (R. 185) Thus, Central Marine vessels are not the only vessels delivering stone bound for Minorca Mine to DM&IR dock.

Part of Central Marine's responsibility is to "nominate" boats to make upcoming stone deliveries to DM&IR dock. If there is insufficient room, the dock will refuse the boat. (R. 262). Not all stone cargoes delivered to DM&IR dock are carried on Central Marine vessels. (R. 218-19). There is also testimony from Central Marine's President, [REDACTED] [REDACTED] that Central Marine also manages vessels not time chartered to ArcelorMittal. (R. 1385-86).

It is important to keep in mind what the case law does and does not say when considering what plaintiff is asking this court to do. The *Sinkler-Hopson* - unitary enterprise theory of agency has been used sparingly to find a principal and agent relationship between **two** entities. *Sinkler* found that two entities - the railroad and a separate switching company - were a "unitary enterprise". It did this to avoid the unfair result of leaving the injured railroad worker with his only recourse against a switching company that was not his employer. The "unitary enterprise" construct saw to it that the railroad that employed him remained liable for its employee's on-the-job injury. Here, plaintiff is

asking this court to affirm its use to find such a relationship among **four entities** - Minorca Mine, ArcelorMittal USA, Central Marine and Indiana Harbor. This is error.

In this case, with no analysis, not two, but **four separate entities** have been held to be a "unitary enterprise". This despite the fact that the alleged negligent acts were committed by Central Marine's own employees, not by some other entity to whom "operational duties" of Central Marine were delegated. There is no precedent for such a holding. Where "operational duties" of plaintiff's employer are not delegated, *Sinkler* does not apply. Yet plaintiff encourages this court to go where no court (save the trial court) has ever gone before, and find not two but **four companies** to be a "unitary enterprise."

There is no case law holding that the existence of a time charter establishes an agency under traditional agency principles, or a "unitary enterprise" under *Sinkler*, which after all is a way to find an agency in Jones Act cases where traditional principles fail. Nor has any court held that the corporate relation of parent - subsidiary alone does so. *Sinkler* required the existence of a written contract from the Jones Act employer/principal delegating "operational activities" of the employer to another entity before applying "unitary enterprise" to find an agency existed. Here there is no such contract. Absent such proof there can be no "unitary enterprise."

The trial court's decision that the four appellants ArcelorMittal USA, Central Marine, Indiana Harbor and Minorca Mine were a "unitary enterprise" was prejudicial error.

6c There is No Principal - Agent Relation Between Minorca Mine and the Remaining Three Appellants.

Finally, without analyzing any facts, the Dock argues that there is either an apparent agency or an agency by estoppel. It is important to remember that, under the Rail Transport Contract (Ex. 65, Sec. 13), what the dock must show is that Minorca Mine as principal held out Indiana Harbor or Central Marine or ArcelorMittal USA as its agents, and that the purported agent negligently caused plaintiff's fall. The dock cannot do so.

Plaintiff ignores the black letter 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). Plaintiff also ignores that apparent authority requires (1) that the principal (Minorca) 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), and that 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).

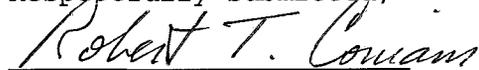
None of these theories can be proven without some evidence from the principal satisfying these elements. Here, the purported principal is Minorca Mine. No one from Minorca Mine was deposed. No one from Minorca Mine testified at trial. This fact alone should demonstrate

that this argument by the dock must fail. It certainly should demonstrate that the elements of agency cannot be met here, and that none of the other three appellants were acting as Minorca Mine's "agents" under the DM&IR Dock - Minorca Mine written contract (Ex. 65, Sec. 13, p. 16 of 24). It also explains why the dock makes no attempt to show specifically how the elements of any agency theory are satisfied.

Conclusion

The trial court during the argument on appellants JMOL certainly recognized the errors committed during this two week trial. The court asked counsel for appellants how long a retrial on apportionment of liability would take and that if he agreed with reapportionment "would it not be the best solution to have a new trial on liability as to the dock and the boat." (Proceedings of August 11, 2009, R.19,59) For the foregoing reasons, appellants should prevail on their appeal, and this case should be remanded to the trial court for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true copy of the foregoing Reply Brief Appellants to Response Brief of DM&IR Railway Company has been served on all parties this 10 day of May, 2010 by ordinary mail.

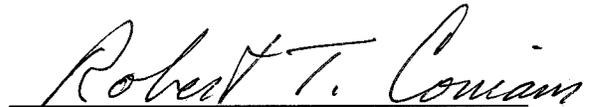
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Certificate of Compliance

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 3,603 number of words of proportional space type in this brief.



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