UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE COTE CORPORATION,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-169-P
	)	
THOM'S TRANSPORT	)	
COMPANY, INC.,	)	
	)	
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

The parties tried this matter before the Court on February 8 and 9, 2000 in Portland, Maine. Based upon the evidence presented and the stipulations of the parties, I find that the following facts have been established:

On February 4, 1998, a boom truck (also referred to as a crane) was damaged when it overturned in Plaintiff's yard in Auburn, Maine. The Cote Corporation, Plaintiff in this action, owned the boom truck. Plaintiff's business includes the retail sale of such items and this particular boom truck was intended for resale on the retail market. While holding the crane for resale, Plaintiff decided on the afternoon of February 4th to use the crane to load ten generators onto flatbed tractor trailer trucks for shipment to North Carolina following the use of the generators during the January 1998 Ice Storm. The operator of the crane, Blinky Greenwood, a longtime Cote employee, used the crane to lift five of the

[1]Pursuant to 28 U.S.C. 636(c)(1993), the parties have consented to proceed before the United States Magistrate Judge

ten generators onto the first of the two flatbeds. The fifth generator was positioned on the flatbed, but still attached to the crane's cable when Mr. Greenwood left the crane to assist his co-worker in digging the sixth generator out of a snowbank.

The boom truck capsized after the fifth generator had been loaded when the driver of the first tractor trailer, Ken Burwell, moved his vehicle prior to the removal of the crane cables from the fifth generator. The two truck drivers, employees of Defendant, Thom's Transport Co., Inc., and Mr. Greenwood conferred prior to commencement of this project and agreed that the drivers would unhook the cable from the crane in each instance after the generators had been properly and securely positioned on the flatbed. In this instance the second driver, Cleve Herrin, forgot to undo the cable and signaled to Mr. Burwell to move the truck, resulting in the accident. The parties have stipulated that Mr. Herrin and/or Mr Burwell failed to act as a reasonably prudent person would have acted under similar circumstances, and that such failure was a proximate cause of the capsize of Plaintiff's boom truck.

Although there is a dispute in the testimony, I find that at the time Mr. Greenwood got down from the crane controls the cable was still taut and up to ten percent of its weight remained on the crane's boom. Mr. Greenwood, aware of the potential that the load might move, by his own testimony cautioned the truck drivers that the cable was still attached, but the drivers did not apparently hear him. Thom's Transport's expert witness, Joseph Pichetti, opined that if Blinky Greenwood, the crane operator, had not left the crane controls to assist his fellow worker in digging another generator out of a snowbank, he could have prevented the capsize of the crane by simultaneously lowering the boom and spooling out more cable when it became apparent that Mr. Burwell was revving up his truck in anticipation of pulling away from the crane.

Based upon the testimony of James Harkins and Kevin Robinson regarding the operation of this particular piece of equipment and the time sequence involved in putting the machine into "high speed" and lowering the boom while spooling out more cable, I am satisfied that Blinky Greenwood would not have been able to prevent this accident in that fashion even if he had remained at the controls. All three witnesses to the occurrence agreed that the time sequence was extremely short after Mr. Burwell revved his engine. Between 2.5 and 3 seconds elapsed before the crane began to capsize and Mr. Greenwood would not have had time to go through the necessary maneuvers to spool out the additional cable. Had he remained at the crane controls it is more likely than not that he would have suffered serious personal injury.

Mr. Greenwood, as the operator of the crane, was the "captain of the ship" who assumed overall responsibility for the lift while the load was suspended. It is a breach of the applicable standard of care for a crane operator to leave the controls when a load is still suspended based upon the testimony of all witnesses, including Plaintiff's expert, James Harkins. However, merely leaving the crane's engine running in cold Maine weather when the machine is entirely dogged off (incapable of moving on its own) is not a departure from the ordinary standard of care. However, Mr. Greenwood also left the controls while the cable was still taut and under ordinary understanding the load was still suspended to some degree. Mr. Greenwood's departure from the controls at that point in time was negligent, but his failure to be at the controls was not a proximate cause of this accident.

As indicated above, had he remained at the controls once the truck revved up and began to move, he more likely than not would have been seriously injured. If he had remained at the controls up to the point when Mr. Burwell got into his truck cab, he might or might not have been able to prevent

the accident. Mr. Burwell's entry of the truck's cab was not necessarily a signal that he intended to drive away because it was a cold February day and a driver might get into the cab to get warm. Thus even if Mr. Greenwood had remained at the controls, there is no way to determine whether it is more likely than not that he could have honked the horn or hollered to get the driver's attention before the truck's engine started revving.

Once the crane capsized it was damaged beyond repair. The parties have stipulated that it had a salvage value of $41,111.11 and that the salvage value should be subtracted from the total damages. In addition to the damage to the crane, the Plaintiff incurred other costs related to uprighting the equipment, cleaning and towing it, preparing it for inspection, and storing it. These additional damages totaled $4,666.10, based upon the rate that Cote would have charged to a customer for the same services, which rate includes a twenty percent profit margin, over and above the actual costs incurred by Cote.

Based upon the testimony presented I find that the crane had a fair market value of approximately $165,000.00 at the time of the accident. Plaintiff had purchased the crane for $138,500 in September of 1997 and at the time of the accident it was practically new. The market for cranes in Maine was set by Cote as they were the only dealers who sold this item. Cote's actual acquisition costs for the damaged crane were in the vicinity of $154,281. When placing it on the market for sale, Cote anticipated that it would garner a profit margin of approximately $12,000 based upon the historical market. While not dispositive on the issue of value, it should be noted that the replacement cost for a similar crane would have been $165,000.00 if Plaintiff had chosen to purchase a second crane from a dealer in another market area.

Discussion

Liability Issues

In the present case the mere fact that Mr. Greenwood may have breached the applicable standard of care by leaving his machine when a load was still technically "suspended", does not mean that the negligence was itself a proximate cause of the accident. The Maine Law Court has said ". . . the mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the courts . . . [to reject a claim of comparative negligence]". *Champagne v. Mid Maine Medical Center,* 1998 ME 87, ¶ 10, 711 A.2d 842, 845 (quoting RESTATEMENT (SECOND) Of TORTS § 433 B cmt. a, at 442 (1965)). The evidence in this case is clear that if Mr. Greenwood had been at the crane controls when the truck started to move, it would have been impossible for him to do anything to stop the accident without risking grave personal injury. The evidence as to what he might have done prior to the truck's engine signaling that the truck was about to move is equally speculative. Thus even though Mr. Greenwood's failure to remain at the controls until the cable was slack and the load firmly placed on the truck bed may have been negligent, that failure cannot be said to be a proximate cause of this accident.

Damages

In a property damage case such as this, the proper measure of damages is the difference in value of the property before and after the actionable injury. Andrew M. Horton and Peggy L. McGehee, MAINE CIVIL REMEDIES § 4.16 (3d ed. 1996). Additionally in this case the Plaintiff incurred other expenses associated with the clean up and storage of the crane. While the measure of

damages should avoid a windfall to either party, it should compensate the Plaintiff as precisely as possible for the loss without recourse to speculation and conjecture. *Wendward Corp. v. Group Design, Inc.*, 428 A.2d 57, 62 (Me. 1981).

In the present case the best estimate of the value of the crane is its fair market value on the day of the accident. The fair market value is the price which a willing buyer would have paid a willing seller for a Manitex 2592 mobile crane in Maine in February of 1998. Daniel Gagne, as agent for the Plaintiff, was qualified both as an expert witness and as the owner of the property, to give his opinion regarding the value of the crane. *Nyzio v. Vaillancourt*, 382 A.2d 856 (Me. 1978). His testimony, as corroborated by the documentation, supports the conclusion that $165,000.00 was the value of the crane prior to the accident.

Plaintiff also seeks to recover money that it expended after the capsize. Those damages would be actual costs incurred by Plaintiff as a direct result of the accident and they amount to $3,732.88 ($4666.10 minus twenty percent profit margin or $933.22). Clearly Plaintiff incurred the costs for clean up and towing because its employees had to be paid and they could not perform other tasks while doing this work. The storage costs were not a direct cost to Plaintiff, but should be recoverable nonetheless because of the lost opportunity cost associated with storing the huge crane on the lot for so extended a period of time. Economic loss damages in tort cases often derive from contract law principles and include damages for lost investment and even lost profit. Donald N. Zillman et al., MAINE TORT LAW § 19.02 at 19-8 (1994). Based on the foregoing, Plaintiff's total damages are $127,621.77 ($165,000 + $3,732.88 - $41,111.11).

Conclusion

Judgment is entered for the Plaintiff on the complaint in the amount of $127,621.77, plus interest and costs.

SO ORDERED.

Dated this 25th day of February, 2000.

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Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-169

COTE CORPORATION v. THOMS TRANSPORT CO Filed: 05/20/99

Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Defendant

Demand: $125,000 Nature of Suit: 380

Lead Docket: None Jurisdiction: Diversity

Dkt# in other court: None

Cause: 28:1332 Diversity-Property Damage

COTE CORPORATION PETER M. GARCIA

plaintiff 784-3200

[COR LD NTC]

JAMES E. BELLEAU, ESQ.

SKELTON, TAINTOR & ABBOTT

P.O.BOX 3200

95 MAIN STREET

AUBURN, ME 04212-3200

784-3200

v.

THOMS TRANSPORT COMPANY INC WILLIAM C. NUGENT

defendant [COR LD NTC]

ATTORNEY AT LAW

PO BOX 4811

75 PEARL STREET
SUITE 216
PORTLAND, ME 04112
828-0035