IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DUNKARD MINING COMPANY, a Corporation; and FRANCIS FUEL, INC., a Corporation, Plaintiffs,	)	
v.	)	Civil Action No. 88-2181
MON RIVER TOWING, a Corporation, Defendant.	)	

MEMORANDUM OPINION AND ORDER

GARY L. LANCASTER,
United States Magistrate

This admiralty action was tried before the court without a jury.[1] Plaintiff[2], Dunkard Mining Company, owns and operates a coal mine and barge loading facility along the Monongahela River in Greene County, Pennsylvania. Defendant, Mon River Towing, owns and transports commercial barges along the river. Plaintiff seeks to recover the costs of raising a Mon River barge which sank at plaintiff's landing. Mon River counterclaims that the barge sank due to plaintiff's negligence. For the reasons set forth below, we find in favor of Mon River on plaintiff's claim and in favor of plaintiff on

[1]The parties consented to trial before a magistrate pursuant to 28 U.S.C. § 636(c)(1).

[2]By agreement of the parties, Francis Fuel, Inc. is no longer a party to this action.

Mon River's counterclaim.

A.

The stipulations, testimony, and exhibits establish the following material facts:

On June 5, 1987 at approximately 1:40 a.m., the Mon River towboat, Leo D. Guttman, piloted by Robert Carr, left the Union Railroad Company's Duquesne landing with several empty barges in tow, including barge No. 1440. The Guttman's destination was plaintiff's barge loading facility ("Poland landing"). Two of the barges were to be dropped off there, loaded with coal by plaintiff's employees, and thereafter retrieved by Mon River and delivered to various sites along the river.

Normally, at the time of pick-up and periodically thereafter, Carr visually inspects the empty barges to determine whether any are listing or contain water in their cargo hold or void compartments. Carr did not notice any abnormalities with No. 1440. Nor did he recall the Duquesne landing employees notifying him of any problems with No. 1440 while it was in their possession.

The trip from the Duquesne landing to the Poland landing was uneventful and took approximately 15 hours with the Guttman arriving at about 4:25 p.m. None of plaintiff's employees were present when the Guttman arrived; consequently,

Mon River employees tied off the two barges in tandem, parallel to the shoreline, with the No. 1440 on the outside or river side.

The barges remained in this position until June 9th when plaintiff's employees maneuvered No. 1440 under the coal loading chute in preparation for loading. Immediately prior to loading, Keith Beall, plaintiff's primary barge loader, inspected No. 1440. He looked into each of the end void compartments and determined that they were dry. He did not notice any holes or slices in the hull of either end void compartment. He then inspected the wing void compartment where he found water. Consequently, he placed a submersible pump into the inshore hatch of the wing void compartment and allowed it to pump the compartment dry while he began to fill the barge with coal.

Loading was complete by 2:15 p.m. Ordinarily, Beall did not inspect void compartments after loading unless he noticed some abnormality, i.e., that it was rolling or had less freeboard than normal. Beall did not observe anything abnormal with respect to the now fully loaded No. 1440. When he measured the amount of freeboard at three locations along the inshore side of the barge, he found that it was uniform and normal. Beall then tied No. 1440 underneath the

loading chute and, because it was the end of his shift, left the Poland landing between 2:15 p.m. and 2:30 p.m. No other barge loader was on duty at the Poland landing, thus, the barge was left unattended. Between 4:00 p.m. and 5:00 p.m., another of plaintiff's employees discovered that No. 1440 had sunk.

After the barge was raised, the inspectors discovered a "slice" or hole in the stern starboard rake knuckle. The slice was football shaped, ten and one-half inch wide at its apex, and three inches deep. It was located approximately five feet six inches below the deck line which would have placed it above the water line when the barge was empty but below the water line when loaded. Additionally, it was in such a unique and peculiar spot on the barge that it could not have been discovered with a routine visual inspection. In fact, in order to discover the slice, one would have to physically lower oneself into the compartment, walk over to where the slice was located and, if it is a bright sunny day, possibly detect the slice by the presence of incoming sunlight. None of the inspectors--employed by either plaintiff or defendant--undertook such an inspection, nor would such an inspection have been normally called for.

We heard from two expert witnesses, Terry Weber,

retained by plaintiff, and Richard Davis, retained by Mon River. Neither could pinpoint what caused the slice. However, they agreed that the damage was not the result of the gradual wearing away of the surface or general disrepair but resulted from a traumatic gouging of the knuckle by a projection of some sort. They both theorized that--based on the location of the slice--a passing fully loaded barge may have struck the empty No. 1440.

Neither expert could determine when the damage occurred other than it being of recent origin. However, Weber opined that the slice occurred prior to the barge's arrival at the Poland landing. He based his opinion on the fact that the slice appeared on the stern side, which when moored at Poland, was facing the river. Thus, the slice could not have resulted from the barge pounding against either the landing or the other barge. However, on cross-examination, Weber conceded that the slice could have occurred at the Poland landing as a result of No. 1440 being struck by a passing barge. He could not articulate any facts to support a finding that the slice occurred at the Duquesne landing. There is no evidence from any quarter that the damage occurred while the barge was en route from Duquesne to Poland. Thus, we find Weber's opinion unreliable given the paucity of any underlying factual

support.

Davis testified that from the position of the slice, he could only conclude that the damage occurred after the barge was unloaded at the Duquesne landing (otherwise it would have sunk there) and before it was loaded at the Poland landing. He indicated that any opinion more circumscribe would be sheer speculation.

We conclude that neither party has established by the preponderance of the evidence when the damage occurred. It is fundamental that where the evidence on a material fact is such that we can not determine where the preponderance lies, then the party having the burden of proof on that point has failed to carry its burden and we must find in favor of the opposing party. Accordingly, we must resolve the dispute by determining the parties' respective burdens of proof.

B.

A barge landing facility that accepts an empty barge for loading is a bailee of that barge during the time the barge remains at the landing. Consolidated Coal Company v. United States Steel Corp., 364 F. Supp. 1071 (W.D. Pa. 1973). As a general rule, by reason of the bailee-bailor relationship, where the owner delivers a seaworthy vessel to

the bailee and it is returned damaged, there is a presumption that the bailee was negligent. Id. However, implicit in the general rule is that the presumption arises only where the ship owner can show that the barge was seaworthy when delivered. Thus, in an owner's action against the bailee for damage to the barge during the bailment (as in Mon River's counterclaim), the burden of proving seaworthiness is on the owner. Id.

However, where, as here, the bailee claims that the damage was caused by the ship owner in delivering an unseaworthy vessel, the burden of proving the unseaworthiness of the vessel is on the bailee. Texaco, Inc. v. Universal Marine, Inc., 400 F. Supp. 311 (E.D. La. 1975); Consolidated Coal Co. v. United States Steel Corp., 364 F. Supp. 1071 (W.D. Pa. 1973); Berwind-White Coal Mining Co. v. Central Coal Co., 81 F. Supp. 655 (D.C. N.Y. 1948).

In this regard, plaintiff directs our attention to several authorities which hold for the general proposition that a presumption of unseaworthiness arises from the unexplained sinking of a vessel in clear, calm water. Although that is a recognized principle of law, it is inapplicable to the facts of this case because this is not an unexplained sinking. On the contrary, it is undisputed that

the sinking was caused by the slice in the stern rake knuckle. The only dispute in this case is when did the slice occur. In order for plaintiff to prevail on its claim, it must establish by a preponderance of the evidence that the slice occurred prior to No. 1440 arriving at the Poland landing. This it has failed to do.

Similarly, as stated infra, for Mon River to prevail on its counterclaim, it must prove by the preponderance of the evidence that the barge was seaworthy when it arrived at the Poland landing. Mon River's evidence in this regard is equally unpersuasive.

C.

Finally, Mon River asserts as an alternative theory of liability on its counterclaim that plaintiff was negligent in leaving the loaded barge unattended. According to Mon River, if plaintiff's employee had remained with the barge after loading, the watchman would have seen or heard the water flooding the barge and undertaken emergency measures to pump out the water and avoid sinking.

Generally, negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do in light of all of the surrounding circumstances. Spearing v. Starcher, 532 A.2d 36 (Pa. Super. 1987). Although the practice prevailing in a particular business is not conclusive on the question of negligence, it is a factor to use in determining whether certain conduct was reasonable. McKenzie v. Cost Brother, Inc., 409 A.2d 362 (Pa. 1979). In this regard, Mon River has failed to establish that leaving a loaded barge unattended contravenes a practice expected at a barge loading facility. Although Mon River's expert averred generally to the prudence of such a precaution, he conceded that there was no established pattern compelling the owner of a dock the size of the Poland landing to provide a watchman

for unattended barges.

Additionally, what is reasonable conduct is a relative term, that is, the conduct must be reviewed in the light of all the surrounding circumstances as shown by the evidence in the case. In the instant action, No. 1440 was inspected by Mon River employees upon pick-up at the Duquesne landing. It was periodically inspected en route to the Poland landing and there were no abnormalities found or noted. It remained at the Poland landing without incident for four days prior to loading. Immediately prior to loading, the barge passed the routine inspection by Beall without objection. Further, after loading, Beall determined that the freeboard was even and normal. All things considered, there were no indications that the barge was other than seaworthy and sound in all respects. Therefore, given the circumstances presented to Beall, there was no apparent reason for him to believe that leaving the barge unattended posed a risk of harm. The fact that he was wrong does not render his conclusion unreasonable. Therefore, we find that leaving the barge unattended was not negligence and Mon River's counterclaim fails on that basis also.

The appropriate order follows.

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ORDER

AND NOW, this day of , 1989,

IT IS HEREBY ORDERED that:

1) In the matter of Dunkard Mining Company v. Mon River Towing, we find in favor of Mon River Towing;

2) In the matter of Mon River Towing v. Dunkard Mining Co., we find in favor of Dunkard Mining Co.

_____
United States Magistrate

Dated:

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