Admiralty Practicum

Volume 1989
Issue 1 *Spring 1989*

Article 6

January 2018

Nunley v. M/V Dauntless Colocotronis United States Court of Appeals, Fifth Circuit, 23 January 1989 863 F.2d 1190

Sony v. Merivienti *(Cont.)*

Sony brought suit in 1983 based on breach of contract and negligence theories, while defendants asserted defenses under the Carriage of Goods by Sea Act (COGSA). Sony, prior to the trial, agreed that COGSA governed the action although it was not a basis in the original complaint. Under COGSA, Sony established a prima facia case merely by proving that the goods were received in good condition but unloaded damaged. *Terman Foods Inc. v. Omega Lines*, 707 F.2d 1225 (11th Cir. 1983).

The defendants argued that a latent defect caused the accident. This is listed in COGSA as an excepted cause which is sufficient if established to rebut a prima facia case, 46 U.S.C. App. §1304(2). Alternatively, defendants argued that if there was liability, it should be limited according to COGSA at $500 per package, 46 U.S.C. App. §1304(5), and that the number of packages should be one or fifty-two, but not 1,320. The district court disagreed, however, and awarded Sony damages for the full loss. This appeal followed.

ISSUE: **(1)** Whether the deck crane's motor failure was the result of an excepted cause, i.e., a latent defect.

(2) Whether the definition of "package", within COGSA, should be interpreted to equal fifty-two or 1,320.

ANALYSIS: The Eleventh Circuit resolved the first issue regarding liability by holding that the district court's findings were not clearly erroneous and therefore should not be overturned on appeal. Fed.R.Civ.P. 52(a); *McAllister v. United States*, 348 U.S. 19, 20 (1954). At the trial both parties introduced expert testimony relating to the cause of the motor failure. The defense witness claimed there were tiny cracks in the motor's piston, a latent defect, while the plaintiff offered expert testimony that the cause was a malfunctioning stop switch, which the carrier either knew of or should have known existed. The inconsistencies were resolved as a matter of law in favor of Sony because its theory explained areas that the defense could not. The court of appeals agreed that the defense failed to rebut plaintiff's prima facia case by establishing that the cause was a latent defect and affirmed the ruling.

The second issue deals with the ambiguous wording of §1304(5) of COGSA which provides that the carrier will not be liable for more than $500 per package unless the value is inserted in the bill of lading. Sony did not put the value on the bill of lading but the district court determined that each of the 1,320 cartons was a "package" and limited liability at $660,000, which covered the cassettes actual cost of $424,765.44, which Sony was awarded.

The circuit court analogized the instant case to *Vegas v. Compania Anonima Venezolana de Navegacion*, 720 F.2d 629 (11th Cir. 1983), where the cargo was 109 cartons consolidated onto two pallets. Under "No. of Pkgs." on the bill of lading the carrier wrote "2" and later tried to limit liability to $1,000 based on §1304(5) when the shipment was damaged. The *Vegas* court realized that both the individual cartons and the master cartons (pallets) could have fit the definition of package. To resolve this ambiguity they looked to the purpose of COGSA which "was to set a reasonable limitation on liability which carriers by law could not reduce by contract." *Id.* at 630 (citing *Allstate Ins. Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169, 171 (5th Cir. Unit B 1981)). In effect, Congress wanted to protect the shipper where the carrier who issued the bill of lading later claimed unrealistically low damages based on the bill of lading, when the goods were later lost or damaged. Consistent with this purpose the court could not find justification for limiting liability because the cartons were consolidated.

Here, the case was clearer because the bill of lading said 1,320 cartons and not fifty-two. Defendants, however, used *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076, 1082 (11th Cir. 1985) as precedent that "where the shipper overstates the number of packages in a container, the COGSA liability limitation should be applied to the actual number of packages in a container." In that case the bill of lading stated "2,641 pcs" under packages when there were actually five containers which held these pieces. Taken to its logical extreme such an interpretation of *Hayes-Leger* would mean that the container itself should be considered one COGSA package for all shipments. This approach was rejected by the court because in *Hayes-Leger* the description "was insufficient to indicate to the carrier that the goods were packaged." *Id.* at 1089 n.9. In the present case it is not necessary to look beyond the bill of lading because the description there is enough to indicate that Sony's goods were packaged. The Eleventh Circuit therefore rejected the defendants arguments and affirmed the district court's damages.

David A. Pellegrino '90

NUNLEY v. M/V DAUNTLESS COLOCOTRONIS

United States Court of Appeals, Fifth Circuit, 23 January 1989
863 F.2d 1190

A barge owner who abandoned recovery efforts for a barge that had broken away and was sunk as a result of an inevitable accident is not liable for a subsequent collision with the sunken barge. The cost for buoy markings of a sunken barge are to be borne by the owner if at that time there is no evidence of abandonment. One who has contracted to conduct dewatering at the site of a sunken barge can not bring a claim for recovery as a voluntary salvor.

FACTS: It began January 16, 1974, with what is now referred to as the "Great Barge Breakaway." As a result of inclement conditions on the Mississippi River during the winter of 1973-1974, large grain shipments, a longshoreman's strike, and an inaccessibility to upstream ports, thousands of barges were docked in the Port of New Orleans. On the evening in question, many vessels broke from their moorings and struck Combi Line's (Combi) barges causing them to tear away from their moorings. One of the barges struck was the Lash. It was the only one that was not recovered.

Diligent efforts by Combi were expended to recover Lash. Sitings in Algiers Lock Forebay (Algiers) and an area near the Tenneco Oil docks produced two barges below the surface that could have been Lash. The Algiers' siting was 67 feet below the water and the Tenneco's was 37 feet below, with the latter "constituting a hazard to navigation." Based upon the readings from a magnetometer and fathometer, Combi concluded that the barge near Algiers was in all probability Lash. This vessel did not pose a threat to navigation and Combi did not bother to mark it or raise it.

The United States Coast Guard found the other vessel and marked it on two occasions in early 1974.

In July, 1977 a fire broke out on the M/V Dauntless Colocotronis (Dauntless) as it approached the Tenneco refinery. A search of the river produced a sunken barge that was identified as the missing Lash. The Dauntless had struck this barge causing the pump room of her ship to be filled with crude oil and a fire ensued.

ChemLink had contracted with the Coast Guard to provide the equipment to remove water and oil from the Dauntless. The vice president of ChemLink, Captain Walter Nunley, aided in dewatering the Dauntless.

Dauntless brought an action against Combi alleging negligence in leaving its barge in a vulnerable location and in failing to mark or remove it from the river. The district court found Combi to be free from negligence because it had reasonably concluded that the vessel near Tenneco was not its barge.

The Coast Guard brought suit against Combi for its expenses in marking the barge and the district court granted the award.

Captain Nunley brought a salvage claim against the Dauntless

(Continued...)

Nunley v. Dauntless *(Cont.)*
claiming that his dewatering efforts were performed in an individual capacity not as a representative of ChemLink.

ISSUES: (1) Was Combi negligent in failing to conduct a good faith search for its barge prior to its decision to abandon it?

(2) Is the Coast Guard entitled to recover for its marking expenses?

(3) Does Captain Nunley have a valid salvage claim?

ANALYSIS: This court affirmed the district court and held that Combi used its best efforts to search for its sunken barge. The first day after the "barge breakaway" Combi joined the Coast Guard in a helicopter search. Subsequently it employed a skilled magnometer and fathometer reader to search under the water. The only option Combi did not employ was that of divers. However, river conditions were not conducive to a human search team. According to trial testimony, those river conditions lasted well into the summer of 1974, months after the breakaway.

As to the claim of abandonment by Combi, the district court noted that, "a valid abandonment occurs through the act of deserting the property without hope of recovery or intention of returning to it." In this case more than three years had elapsed since Combi ended its search and the Dauntless's accident. "In that interval Combi may safely be deemed to have abandoned the [Lash]."

In February, 1974 Combi notified its insurers that it had failed to locate the barge and stated its intent to abandon it. "Since Combi was a non-negligent owner and had abandoned its vessel before the Dauntless collision . . . [Combi] was free from negligence."

The three prong test set out for determining a valid salvage claim includes "(2) voluntary service rendered when not required as an existing duty or from a special contract." *The Sabine*, 101 U.S. 384 (1880). The district court found that Nunley's actions were not voluntary but rather were required by the contract ChemLink had entered into to supply tugs, pumps, and manpower to remove oil and water from the Dauntless. ChemLink's agreement contemplated that the efforts of Nunley would be utilized. As vice president he was often required to be on call 24 hours a day. Thus his claim to be working independently as a salvor, as opposed to working as per his contract, failed.

The River and Harbor Act, 33 U.S.C. §409 (the Wreck Act), provides that, "when a vessel . . . is wrecked and sunk . . . accidentally or otherwise it shall be the duty of the owner . . . to immediately mark it with a buoy or beacon." On January 30, 1974, the buoy that the Coast Guard had initially placed on the vessel was reported missing and the Coast Guard replaced it with a second larger buoy. Less than one month later the second buoy was reported missing. After the Dauntless's accident the Coast Guard maintained another buoy at the site of the wreck. Because the Coast Guard's first set of marking expenses was within three weeks of the sinking of Lash and at that time Combi was not considered to have abandoned it, the Coast Guard was entitled to recover for the first two markings. However, there is no recovery for the last buoy. By 1977 Combi had abandoned the sunken vessel.

Melanie A. Wood '90

STEPHENSON v. McLEAN CONTRACTING COMPANY
United States Court of Appeals, Fourth Circuit, 23 December 1988
863 F.2d 340

An individual injured while working on a crane barge to construct a bridge does not sustain his injury from an unseaworthy vessel in navigable waters nor does he qualify as a "seaman" under the Jones Act.

FACTS: Stephenson, the plaintiff-appellant was an employee of the McLean Contracting Company (McLean) which was building a bridge across the Choptank River in Maryland. He was assigned to the Annapolis, a crane barge being used as a platform to construct the bridge's support columns. He was injured March 26, 1986 while using a cutting torch on pilings in a cofferdam, a box-like structure designed to keep the river's water from the work area. Stephenson lost his footing on some loose gravel, precipitating a fall to the bottom of the cofferdam, which was alongside another crane barge owned and used by McLean. The fall resulted in injuries for which he now sues.

Stephenson brought this action in the United States District Court for the District of Maryland under the Jones Act, 46 U.S.C. App. §688 (a), and the maritime doctrine of unseaworthiness. The district court granted defendant's motion for summary judgment because Stephenson did not meet the definition of a "seaman" as set forth in the three prong test of *Whittingham v. Sewer Construction Co.* 541 F.2d 427 (4th Cir. 1976) and additionally because the plaintiff was injured in the cofferdam which was not part of the vessel. The plaintiff appealed.

ISSUE: Does a crane barge used as a platform to aid in the construction of a bridge constitute an "unseaworthy appurtenance of a vessel in navigable water" which would allow recovery under the doctrine of unseaworthiness?

ANALYSIS: In affirming the dismissal, the Fourth Circuit examined the Jones Act, 46 U.S.C. App. §688 (a), which provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ."

The test the court of appeals used to determine if Stephenson met the definition of a "seaman" was first set out in *Whittingham v. Sewer Construction Co.* 541 F.2d at 436. There, the court determined under a three prong test that a worker must be a "permanently attached" crew member of a vessel in navigable waters to qualify as a "seaman" under the Jones Act. The court of appeals followed the district court's assumption that Stephenson was permanently attached to the Annapolis and that it was in navigation, satisfying the first prong of the *Whittingham* test. Stephenson's duties in constructing the framework of the bridge such as welding and cutting pilings did not serve "naturally and primarily as an aid to navigation" thus failing to meet the second prong of the *Whittingham* test. The court found that the plaintiff as a bridge construction worker, in performing functions unrelated to the tasks of transportation, failed to meet the test of a "seaman" as set forth in *Whittingham*.

The court also determined that Stephenson's unseaworthiness claim did not present a genuine issue of material fact to go to the jury. For recovery under the maritime doctrine of unseaworthiness, the court again looked to *Whittingham*, where the plaintiff must show he was "doing the work of a seaman" and that his injury was caused by an "unseaworthy appurtenance of a vessel in navigable waters." Deciding that plaintiff's claim was without merit, the court concluded that Stephenson was a bridge construction worker when injured, not a seaman, and also that he was not working on a vessel, but working on an independent work site, the cofferdam, when he was injured.

Suzanne Remuzzi '90