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Columbus America Discovery Group v. Atlantic Mut. Ins. Co., CA4, 56 F.3d 556, 1995 AMC 1985, 6/14/95

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Recent Admiralty Cases

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Salvage

COURT USES *BLACKWELL* FACTORS TO AWARD 1857 TREASURE WORTH $1 BILLION TO SALVAGE TEAM

Recovery group awarded ninety percent of salvage; subrogated underwriters to receive balance if able to establish proof on 138-year-old claim.

(Columbus America Discovery Group v. Atlantic Mut. Ins. Co., CA4, 56 F.3d 556, 1995 AMC 1985, 6/14/95)

On September 8, 1857, the S.S. *Central America* departed Havana enroute to New York, carrying almost 600 passengers and gold valued in excess of $1,200,000. On the second day out, the ship ran into a hurricane which caused it to take on water. As a result, the ship's boilers were extinguished, which in turn caused the pumps to fail. For over thirty hours, passengers and crew frantically bailed water. Their efforts were to no avail. The *Central America* sank on September 12th with a loss of 425 lives and all the gold on board.

In 1987, after several fruitless years, the Columbus-America Discovery Group (Discovery Group) located what appeared to be the *Central America*. The following year an undersea robot was lowered into the water in an area approximately 160 miles east of the Carolina coast. After descending 8000 feet (about one and one half miles), the robot's camera confirmed that the salvors had found the *Central America*'s remains.

An *in rem* action was commenced against the wreck in U.S. District Court for the Eastern District of Virginia to establish rights to the sunken vessel and her cargo. Numerous British and American insurance companies (Insurers) and their successors-in-interest also filed claims. They asserted a right equivalent to the original insurance amount paid at the time of the loss. In addition, a group of investors and scientists (Intervenors) that had collaborated in an earlier unsuccessful search for the ship intervened as of right. They claimed that their data gathered during previous expeditions had been instrumental in the wreck's 1988 discovery.

The district court dismissed both the Insurers' and Intervenors' claims and awarded sole possession of the *Central America* to the Discovery Group. A divided fourth circuit determined that the district court had erred in applying the law of finds and remanded the case with instructions that the law of salvage be used to arrive at the parties' respective shares.

On remand, the district court awarded Discovery Group 90% of the salvage without making specific findings as to whether the Insurers had established their subrogation rights. The district court also held that the salvage group should exclusively handle the liquidation of the gold and that the Intervenors, having again failed to establish their claims, were thereby precluded from any share of the cargo. Both the Insurers and Intervenors appealed, while Discovery Group cross-appealed the salvage award apportionment.

Using the clearly erroneous standard of review, the fourth circuit affirmed the district court, pointing out that there was a lack of evidence showing that the data of the Intervenors assisted the Discovery Group in locating the *Central America*.

In reviewing the salvage award, the appellate court first dismissed the Insurers' contention that the moiety rule barred Discovery Group from receiving more than 50% of the salvage award. Developed long ago to reward mariners who rescued disabled vessels and crew, the rule compensated successful salvors with one half of the salved cargo. The fourth circuit interpreted the rule as a mere minimum level of salvage compensation, holding that the moiety rule did not bar awarding the Discovery Group more than half of the recovery.

The court of appeals revisited the six factors traditionally applied in admiralty when determining salvage awards, as originally enunciated in *The Blackwell*, 77 U.S. (10 Wall.) 1, 13-14 (1869): (1) the labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property salvaged; and (6) the degree of danger from which the property was rescued. In addition, the court determined that, in light of the age of the wreck, a seventh factor had to be taken into account: the degree to which the salvors had worked to protect the historical and archaeological value of the wreck and items salvaged.

Applying the seven factors, the court noted the Discovery Group had surveyed an area totalling 1400 square miles, expending 411,295 hours of labor at a cost of $8,421,734. The salvors had employed scientific, archaeological and maritime experts to assist, while also using or building the most advanced equipment available in order to effectuate the recovery. Moreover, Discovery Group had deployed machinery valued in excess of $6 million, while operating under high risk conditions some 160 miles from the nearest shore. Furthermore, it was recognized that the cargo represented one of the largest treasures ever recovered under exceptionally dangerous circumstances, having been situated over 8000 feet beneath the ocean surface. Last, the court acknowledged that the salvors had exercised a very high degree of care as evidenced by recovery of several fragile items, including a cigar from the ship's hold, which was examined by the judges during oral argument.

Given the fact that the *Blackwell* factors militated toward a finding in favor

of the salvors and that maritime law has traditionally favored liberal salvage awards in order to encourage recovery, the court of appeals affirmed the lower court judgment granting Discovery Group 90% of the cargo. Because of the magnitude of the gold's value— estimated at almost $1 billion— the court upheld the district court's finding that it would be better to coordinate sales so as not to depress world gold prices.

The case was remanded to consider evidence establishing the validity of Insurer claims as a prerequisite to underwriter recovery.

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In Rem Actions

IN PERSONAM ACTION ON SALVAGE CLAIM BARRED BY *IN REM* LIABILITY DECISION

Once *in rem* liability is established in an admiralty action, it is *res judicata* and binding on all parties; attempts to convert salvage claims to *in personam* actions are barred.

(Darlak v. Columbus-America Discovery Group, CA4, 59 F.3d 20, 7/7/95)

[*NOTE FROM EDITOR:* The following is provided as a companion to the case, *supra*. It is illustrative of the position taken by the "Intervenors" in that case.]

Jack F. Grimm and Harry G. John (Grimm and John) commissioned an expedition to perform a sonar survey of a section of ocean floor thought to be the location of the S.S. *Central America*, which had sunk in 1857. Grimm had designated Joseph W. Darlak (Darlak), who spent six months researching the *Central America*'s position, as his representative on the expedition. On February 26, 1984, the expedition departed from Norfolk, Virginia, aboard the research vessel, *Robert W. Conrad*. The group included Darlak and a team of oceanographers from Columbia University. The survey revealed a target close to where the *Central America* was later discovered by Columbus-America Discovery Group (Columbus-America) in 1988.

After locating the *Central America*, Columbus-America filed an *in rem* action in district court to determine its salvage rights in the ship. The court granted Grimm and John leave to intervene in the proceeding, based on their claim that they were entitled to a share of the salvage due to Columbus-America's alleged use of the position information gathered during the *Conrad* expedition. Darlak was present with his own attorney when counsel for Grimm and John made his opening statement. The proceeding resulted in a determination, on appeal, that Columbus-America did not rely on the position information gathered by the *Conrad* expedition. *Columbus-America Discovery Group* v. *Atlantic Mut. Ins. Co.*, 56 F.3d 556 (4th Cir. 1995.)

During the proceeding, Darlak entered into an agreement with Grimm and John stating that he had developed the position information used during the *Conrad* expedition, and that in consideration of his not intervening in the proceeding, Darlak would not be prejudiced in any future action regarding his claim to the salvage of the *Central America*. Darlak also agreed to testify and provide records for Grimm and John in their action.

Darlak later independently filed an action in the Southern District of New York against Columbia University, Columbus-America Discovery Group, Inc. and its president, Thomas G. Thompson (Thompson), when he learned of the decision in district court adverse to the claim of Grimm and John. The case was transferred to the Eastern District of Virginia, whereupon Darlak disregarded his agreement with Grimm and John and moved to intervene in the *in rem* action. Columbus-America and Thompson were granted summary judgment on the motion and Darlak appealed.

The fourth circuit considered whether Darlak's *in personam* action seeking a share of the salvage could be entertained following the determination of the liability phase of an *in rem* action. The court recognized that there was validity in the argument against Darlak's making a separate claim from that of Grimm and John, because he had no cognizable proprietary interest in the information he provided to the *Conrad* expedition for two reasons. First, Darlak's claim was derivative in nature, since he was acting as an agent of Grimm in supplying the information. Second, the position information Darlak provided to the expedition was already public knowledge. Although the fourth circuit agreed with Darlak that both points involved issues of fact, it affirmed summary judgment because Darlak had failed to assert his claim during the *in rem* proceeding.

The court noted that *in rem* actions were designed to decide the rights to "specific property as against all of the world, and judgments in such cases are binding to the same extent." *Darlak*, 59 F.3d at 22 (citing Black's Law Dictionary 713 (5th ed. 1979)). *In rem* actions in admiralty receive the same treatment as general *in rem* actions. "The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision." *Thorsteinsson* v. *M/V Drangur*, 891 F.2d 1547, 1553 (11th Cir. 1990) (quoting *The Mary*, 3 U.S. (9 Cranch) 126, 144 (1815)).

Darlak's claim to a percentage of salvage was based on the assertion that Columbus-America used his proprietary information to locate the *Central America*. Were the assertion true, Darlak could have recovered a portion of the salvage *res*. The claim should have been asserted during the liability phase of the *in rem* action, the court said, and thus the completion of the *in rem* liability phase had a *res judicata* effect on Darlak's claim. (The court acknowledged that Darlak had ample notice of the *in rem* action.) The result was that the *in personam* action was barred.

Darlak failed in his attempt to convert his potential *in rem* claim into an *in personam* action, because he twice decided to avoid intervening and "[was] not entitled to a bite of a different apple merely because he could not taste the first one." *Darlak*, 59 F.3d at 23.

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