

MAR 14 2005

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RODRIGO MAGANA, and his wife §
MARIA MAGANA, §

Plaintiffs, §

v. §

Civil Action No. H-03-1406

BO-MAC CONTRACTORS, INC.; §
HAMMER & STEEL, INC.; §
ROBERT B. MILLER & §
ASSOCIATES; and HOUSTON §
FUEL OIL TERMINAL §
COMPANY, §

Defendants, §

AND §

BO-MAC CONTRACTORS, INC. §
and THE GRAY INSURANCE §
COMPANY, §

Intervenors. §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 25-28, 2004, the Court conducted a non-jury trial on the above-referenced matter. The Court has reviewed the evidence, the post-trial submissions of the parties, and the applicable law. The Court now enters the following findings of fact and conclusions of law. Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be

construed as a finding of fact is hereby adopted as such.

Findings of Fact

1. Plaintiff Rodrigo Magana (“Magana”) was injured on January 4, 2001 on land at a Port of Houston work site . The injury occurred while Magana was acting in the course of his employment as a longshoreman with Defendant Bo-Mac Contractors, Inc. (“Bo-Mac”).
2. Plaintiff Maria Magana (“Mrs. Magana”) is, and was at the time of the incident, the wife of Magana.
3. Bo-Mac entered into an agreement with Houston Fuel Oil Terminal Company (“Houston Fuel”) to, *inter alia*, build a bulkhead at the Port of Houston.
4. Magana’s responsibilities on the date of the incident included handling 85 foot long steel pilings that were being used to construct the bulkhead.
5. Houston Fuel contracted with Defendant Hammer and Steel, Inc. (“Hammer”) to supply the 85 foot steel pilings used to build the bulkhead.
6. The contract between Houston Fuel and Hammer provided that the top 55 feet of each 85 foot steel piling would be coated with coal tar epoxy.
7. Bo-Mac and Hammer had no contractual relationship.
8. Hammer contracted with Poston Industrial Maintenance (“Poston”) in New Orleans, Louisiana to coat the pilings with the coal tar epoxy.

9. Poston applied the coal tar epoxy to the pilings at an outdoor facility. The facility had sandy soil. The pilings were left to dry in a horizontal position.
10. Although coal tar epoxy is sticky when wet, and will not dry at a temperature below 50 degrees Fahrenheit, two individuals testified that the epoxy on the pilings was dry before the pilings left the Poston facility.
 1. Douglas Picker (“Picker”), a Hammer corporate representative, testified he visited the Poston facility during the coating process. Picker touched the coated pilings and determined that the epoxy had dried.
 2. David Cowart (“Cowart”), who was retained by Houston Fuel to determine whether the epoxy coating complied with the terms of the Houston Fuel/Hammer contract, visited the Poston facility on two separate occasions. Cowart testified that the coated pilings were dry and smooth. Cowart also testified that he visually inspected all of the pilings. Cowart indicated that he saw no rock, asphalt, or concrete debris in the Poston facility area where Poston applied the coal tar epoxy to the pilings.
11. After coating with coal tar epoxy, Poston loaded the pilings by forklift onto a barge managed by Robert B. Miller and Associates (“Miller”). Poston horizontally stacked the pilings, one on top of the other, on the Miller barge.

12. Prior to loading the pilings on the Miller barge, David Kroll (“Kroll”), a surveyor retained by Miller, inspected the Miller barge and determined the barge was clean and free of debris. Kroll again inspected the Miller barge after the pilings had been loaded. Kroll’s inspection of the top and sides of the pilings revealed no debris on the pilings.
13. The Miller barge transported the pilings from the Poston facility to the Houston Fuel terminal at the Port of Houston. Miller covered the pilings during transport.
14. The pilings arrived at the Houston Fuel terminal on December 21, 2000.
15. The parties do not dispute that title to the pilings and control of the pilings passed from Miller to Houston Fuel upon arrival at the Port of Houston. Hammer had no control over the pilings after December 21, 2000.
16. Upon arrival at the Port of Houston, Bo-Mac removed the pilings from the Miller barge by crane. Bo-Mac lifted the pilings from the Miller barge and stacked them in a horizontal position on various construction barges (also known as deck barges or material barges) owned by Bo-Mac.
17. Samuel Glass (“Glass”), Bo-Mac’s barge foreman, testified that he observed some sand on the pilings when they were lifted from the Miller barge and placed on the material barges.

18. Buck Miller, a safety technician for Bo-Mac, observed the Miller barge from a distance, but did not see any debris in the Miller barge. Buck Miller did note a small amount of sand on the pilings, but the sand or other conditions with regard to the pilings did not cause him concern. He felt that any risk from the sand he observed would be from slipping on the pilings.
19. The Court concludes the evidence fails to demonstrate that any material larger than sand was present on the pilings when title transferred to Houston Fuel.
20. Upon arrival of the Miller barge at the Port of Houston, Bo-Mac placed a number of pilings from the Miller barge on to Construction Barge No. 01 (“construction barge”). This barge was one of the material barges owned by Bo-Mac.
21. The construction barge was cleaned prior to the pilings being stacked upon the barge.
22. The pilings remained horizontal during their movement from the Miller barge to the construction barge.
23. Bo-Mac used the construction barge to store the pilings until they were ready to be used to construct the bulkhead. Bo-Mac stacked the pilings horizontally on the construction barge.
24. The construction barge does not have a crew, living quarters, permanent

running lights and is not self-propelled. The construction barge has a raked bow and stern and is registered with the United States Coast Guard. The construction barge can be used as a form of transportation on the water.

25. The pilings remained on the construction barge for nine days before being used in construction of the bulkhead. Bo-Mac did not cover the pilings during this time period, nor did Bo-Mac cover the pilings at any time after they were placed on the construction barge.
26. Glass testified that, during the time period the pilings were on the construction barge, they were exposed to the elements. Further testimony indicated it rained frequently during the construction of the bulkhead.
27. The process of building the bulkhead required the pilings to be lifted from the construction barge and transported to shore by crane.
28. Bo-Mac used a crawler crane to move the steel pilings from the construction barge to the shore. A crawler crane has the ability to move itself from one location to another. The crawler crane used by Bo-Mac was located on a floating barge ("crane barge"). The crane was not permanently affixed to the crane barge.
29. The crane barge on which Bo-Mac's crawler crane was located was spudded down, or anchored, at the time of the incident. The crane barge does not have

self-propulsion, a radar system, permanent running lights, a lifeboat, or living quarters. The crane barge can be used as a means of transportation on the water. When the crane barge moves through navigable waters, personnel sometimes travel on the barge.

30. Bo-Mac employee Keith Nix (“Nix”), a member of the Bo-Mac construction crew, operated the crawler crane.
31. To facilitate the transportation of the pilings from the construction barge to the work platform on shore, Bo-Mac employees would walk onto the construction barge and attach the crane line onto the pilings.
32. Bo-Mac employees knew that sand and debris were frequently present on top of the pilings. The employees who attached the crane line bore responsibility for examining the pilings and cleaning any debris off of the pilings. Bo-Mac equipped the construction barge with a shovel for this purpose.
33. After Bo-Mac employees attached the crane line to the pilings, Nix would lift the pilings from their horizontal position on the construction barge to a vertical position.
34. When the pilings became vertical, most sand or debris on top of the pilings would slide off the piling. Bo-Mac employees were aware that debris and sand fell off the pilings as they were lifted. Some of such debris and sand would

- land in the water, and some would fall on top of the stack of pilings remaining on the construction barge.
35. After raising the piling to a vertical position, Nix, who was in the best position to see any debris on the lifted piling, would customarily tap or bump the piling against the construction barge to remove any excess sand or debris that had not fallen off upon lifting.
 36. Nix would then use the crane to swing the pilings over to the work platform where they would be threaded together and driven into the ground by another piece of machinery.
 37. The process of moving the piling from the construction barge to the shore work platform lasted between seven and ten minutes per piling.
 38. Approximately 100 sheet pilings had been transported from the construction barge to the work platform at the time of Magana's January 4, 2001 accident.
 39. On January 4, 2001, between approximately 8:30 a.m. and 9:00 a.m., Nix lifted a steel piling from the construction barge. Bo-Mac employees did not remove any debris from the piling in question and Nix did not tap the piling to remove any additional debris.
 40. Felipe Amaya ("Amaya") and Magana were approximately three feet apart working on the shore work platform as Nix moved the piling in question from

the construction barge to the work platform.

41. When the piling in question was directly above Magana, Nix noticed a patch of dirt on the piling. Nix signaled to Magana to look up in an attempt to warn him of the potential danger. Apparently, Magana looked up, but did not see anything so continued to work.
42. Thereafter, Nix and a number of other employees witnessed a stream of sand and debris, approximately six feet long and one foot wide, fall off the steel piling and strike Magana.
43. Amaya heard something hit Magana and saw Magana fall forward and hit his face before falling to the ground. Amaya attempted to stop Magana's fall by grabbing Magana's shirt.
44. No Bo-Mac employees, including Amaya, witnessed anything other than sand and dirt strike Magana.
45. After the fall, Magana experienced bleeding from his mouth and complained of numbness in his arms.
 1. Justin Chesson ("Chesson"), a Bo-Mac surveyor with emergency medical training, examined Magana and felt a bulge in Magana's neck.
 2. Magana informed Chesson that dirt fell on him and he fell off the platform.

3. Magana never lost consciousness. Bo-Mac employees stabilized Magana until an ambulance arrived.
46. Shortly after the incident, Chesson discovered sand, dirt, small chunks of concrete, and a piece of concrete roughly the size of a human hand in Magana's work area. The materials found by Chesson were somewhat different than the sand and soil naturally occurring in the work area.
47. Chesson also observed a six to eight inch material outline on the piling from which the materials that struck Magana fell. The debris outline was approximately fifty feet high on the piling. The debris outline was on the outside of the epoxy coating.
48. Prior to commencement of bulkhead construction, Houston Fuel removed a drain line containing cement from an area near the bulkhead. Nute Titsworth, a Houston Fuel representative, indicated that the piece of concrete found by Chesson looked similar to the concrete removed from the drain line.
49. A number of individuals examined the construction barge after the incident. Pictures of the barge reveal sand and chunks of debris both on the barge and on the steel pilings. Picker testified to seeing a scattering of small debris on the barge.
50. Bo-Mac's accident reports indicate its official position that Magana's injuries

were caused by a falling piece of concrete.

51. Evidence at trial failed to demonstrate that a piece of concrete struck Magana.
52. After the accident, Magana was taken to the hospital where he was treated for the damage to his neck.
53. The accident fractured Magana's neck and caused nerve damage.
54. Physicians subsequently placed Magana in a halo device to stabilize his neck.
55. Magana has undergone numerous surgeries, including two fusion surgeries on his neck, stemming from the incident.
56. Magana still suffers from pain, including numbness and tingling in his hands, related to the accident. Magana continues to take pain medications.
57. Magana has, and will likely continue to, suffer from various physical limitations stemming from his neck injuries sustained on January 4, 2001. Dr. Vivac Kushwaha, the physician that performed Magana's second fusion surgery, testified that he would not recommend employment for Magana where Magana would be required to lift more than 15 pounds or perform any type of repetitive work.
58. At the time of Magana's injury, Intervenor The Gray Insurance Company ("Gray") was the workers compensation carrier for Bo-Mac.
 1. Gray compensated Magana pursuant to its obligations under the

Longshoremen and Harbor Worker's Compensation Act ("LHWCA").

2. The parties stipulated that Gray has a lien in the amount of \$193,437.89 for any money recovered in this lawsuit.

Conclusions of Law

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1333 and 28 U.S.C. § 1367(a). Magana's claims against Bo-Mac are filed pursuant to 33 U.S.C. § 905(b).
2. Venue is proper because the accident occurred at the Port of Houston in the Southern District of Texas.
3. Magana asserts claims against Hammer under the theories of negligence and products liability.
4. Magana asserts claims against Bo-Mac for negligence.

Choice of Law

5. The Court must first determine whether Louisiana or Texas law governs Magana's negligence and products liability claims against Hammer.¹
6. Because the Court has jurisdiction over the claims against Hammer based on

¹The Court finds no basis for applying general maritime law to the claims asserted against Hammer. The Court is not exercising admiralty jurisdiction over Hammer. Further, the acts forming the cause of action asserted against Hammer occurred on land. Finally, the injuries complained of were not caused by a vessel. Therefore, the Court will not include maritime law within its choice of law analysis.

diversity of citizenship, the Court must apply Texas choice of law analysis to determine whether Texas or Louisiana substantive law applies. *See McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 425 (5th Cir. 2001).

7. As a general rule, Texas courts apply the law of the jurisdiction with the most significant relationship with the litigation. *Id.* The factors a court must consider are drawn from §§ 6 and 145 of the Restatement (Second) of Conflict of Laws. *Id.*
 - a. Factors a court considers under § 6 include, *inter alia*, the policies of the forum and other interested states, the relative interests of the states with an interest in the litigation, the basic policies underlying the area of law, and the uniformity and certainty obtained by applying a particular state's law. *Id.* at 425-26 (citing Restatement (Second) of Conflict of Laws § 6).
 - b. Under § 145, courts consider where the injury occurred, where the conduct causing the injury occurred, the domicile and place of business of the parties, and the place where the relationship of the parties is centered. *Id.* at 426 (citing Restatement (Second) of Conflict of Laws § 145).
8. Applying Texas choice of law principles, the Court makes the following determinations:

- a. Magana's injury occurred on land in the state of Texas;
 - b. Magana and Hammer have no relationship centered outside of the events that occurred in Texas;
 - c. Magana is a resident of Texas;
 - d. Texas has an interest in protecting its residents from tortious activities;
 - e. Louisiana has little cognizable interest in having its law applied;
 - f. Louisiana was merely the place where one of the events or omissions leading to the litigation could have occurred; and
 - g. Uniformity and predictability weigh heavily in favor of application of Texas law.
9. Therefore, the Court will apply Texas law in determining whether Hammer is liable for negligence and products liability because Texas has the most significant relationship with the litigation. *See id.*

Hammer's Negligence

10. Magana alleges Hammer acted negligently by failing to inspect the pilings for debris.
11. To prove negligence under Texas law, one must show: (1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach. *Van Horn v. Chambers*, 970 S.W.2d 542, 544

(Tex. 1998).

12. “In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.” *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).
13. Foreseeability of the risk is the dominant consideration in determining whether a duty exists. *Id.*
14. In examining whether Hammer had a duty to inspect the pilings for materials large enough to cause injury if such materials fell off a piling from a height of 85 feet, the Court determines:
 - a. The evidence at trial indicated that the coal tar epoxy would not dry at a temperature below 50 degrees. The sticky nature of the undried epoxy made attachment of large debris foreseeable;
 - b. Based on the use of the pilings, it was foreseeable that large debris attached to an 85 foot piling, which was designed to be placed in the ground vertically, could cause injury if such debris dislodged from the piling when raised from a horizontal to vertical position;

- c. A large falling piece of debris carries with it a high degree of risk of injury;
 - d. The inconvenience to Hammer to determine whether the pilings were dry and free of large debris was minimal because it routinely sent representatives to inspect the pilings for other purposes; and
 - e. The risk, foreseeability and likelihood of injury outweigh the burden on Hammer to inspect the pilings for large debris that could cause injury if detached from a vertical piling.
15. Therefore, Court determines that, under Texas law, Hammer had a duty to inspect the pilings after Poston had applied the coal tar epoxy to determine that the pilings were free from the type of debris that could cause injury if dropped from an elevated height. *See id.*
16. However, the Court distinguishes large debris, such as marble size chunks of concrete or larger debris, from sand and similarly sized small particulate matter and holds Hammer had no duty to inspect the pilings for sand and other small particulate matter.² *See id.*

² The Court recognizes its failure to define an exact size of debris that Hammer had a duty to discover and remove. However, the Court has determined that nothing larger than sand was present on the pilings when they left Hammer's possession. Such a distinction is made because of Magana's apparent theory that large materials attached to the pilings while they were in Hammer's possession. Although the Court determines Magana failed to prove

17. The Court determines:

- a. The risk of harm imposed by falling sand and small particulate matter is slight.
- b. Sand and other particulate matter in small quantities would not foreseeably cause injury to a person or property if dropped from the top of a vertical 85 foot piling.
- c. The likelihood of injury from falling sand and similarly sized particulate matter is minimal.
- d. Detailed inspections for small matter would provide no utility to the product itself or the ultimate use of the product.
- e. The burden on the defendant to discover such small particulate matter would be great.
 - i. The small size of such material would prevent individuals from readily identifying such material.
 - ii. Even a thorough inspection for such matter would not necessarily lead to its discovery.

18. Therefore, the Court determines that the relatively low risk of injury and unforeseeability of injury caused by sand sized debris on the pilings is

this theory, it will nonetheless examine Hammer's duty to inspect for such material.

outweighed by the immense burden placed on the defendant to discover and remove all such matter. *See id.*

19. The Court must next determine whether Hammer breached its duty to Magana to adequately inspect the pilings and remove large debris from the pilings. *See Van Horn, 970 S.W.2d at 544.* Hammer does not dispute that it failed to provide a formal safety inspection of the pilings to determine whether or not any debris, either small or large, had attached after the coating process. Therefore, the Court concludes Hammer breached its duty to inspect the pilings for debris that could cause injury when dropped from a vertical piling. *See id.*
20. The next determination the Court must make is whether Hammer's breach was the proximate cause of Magana's damages. *Id.*
21. Proximate cause includes cause in fact and foreseeability. *Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 784 (Tex. 2004).*
 - a. To prove cause in fact, one must show "the negligent act or omission was a substantial factor in bringing about injury without which the harm would not have occurred." *Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995).*
 - b. Foreseeability is judged based on whether a person of ordinary intelligence would have anticipated the danger created by his

negligence.³ See *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987).

22. The Court recognizes that Hammer had a duty to inspect the pilings for dangerous foreign objects larger than sand that could cause injury if dropped from the top of a piling and that it breached this duty by failing to provide any inspection of the pilings before it transferred title to Houston Fuel. However, at trial, Magana failed to demonstrate Hammer's failure to inspect the pilings and remove debris caused his injury. In fact, the weight of the evidence evinces that nothing but a small amount of sand had attached to the pilings when they were in Hammer's possession.
- a. The evidence dictates that the pilings were free from debris when they left the Poston yard.
 - b. Picker did not note any debris on the pilings and testified the pilings he examined were dry and not sticky .
 - c. Further, Cowart examined the pilings on two separate occasions and indicated that the pilings were dry and smooth. Although Cowart

³ Despite the use of a foreseeability test in both an examination of duty and causation, "Texas courts have not clearly defined the relationship between duty, proximate cause, and foreseeability." *Amaya v. Potter*, 94 S.W.3d 856, 861 (Tex. App.—Eastland 2002, pet. denied).

indicated that the Poston yard was sandy, he did not see any debris on the pilings. He indicated that the area where the pilings were located was relatively free from debris.

- d. After the pilings were loaded onto the Miller barge, Kroll inspected the pilings and indicated that he saw no debris on the pilings.
 - e. When the pilings arrived in Houston, Buck Miller indicated that, although he observed some sand on the pilings, the small amount of sand was not a concern to him as Bo-Mac's safety technician.
 - f. The other individuals who observed the pilings as they were taken off the Miller barge further indicated that they saw only sand on the pilings.
23. Thus, none of the evidence at trial indicated that any material larger than sand was on the pilings at the time they arrived at the Port of Houston.
24. The evidence further failed to demonstrate that the sand had attached to the pilings as opposed to being loose on the top of the pilings.
25. Because Magana failed to prove any debris attached to the pilings before they arrived at the Port of Houston, he necessarily failed to prove that an inspection of the pilings for large debris would have prevented his injury.
26. In other words, the Court, based on the evidence provided at trial, was not persuaded by a preponderance of the evidence that an inspection of the pilings

would have led to the discovery of any debris other than sand.⁴

27. The sand on the pilings was insufficient to be the proximate cause of Magana's injuries.
28. Therefore the Court finds, based on the facts proven at trial, Magana failed to demonstrate that Hammer's breach was the proximate cause of Magana's injuries.
29. Accordingly, the Court determines Magana failed to demonstrate that Hammer acted negligently by failing to inspect the pilings and remove debris from the pilings that could foreseeably cause injury.⁵

Products Liability

30. Magana next asserts a claim against Hammer under the theory of products

⁴The Court reiterates that the evidence produced at trial was that only a *small* amount of sand was present on the top of the pilings when Bo-Mac unloaded the pilings from the Miller barge.

⁵ The Court would have reached the same conclusion on the negligence claim had it employed either general maritime law or Louisiana law because they employ essentially the same test for negligence as Texas courts. For example, to demonstrate negligence under maritime law, a party must demonstrate the defendant owed them a duty that was breached and such breach caused actual damages. *See Dunbar v. Am. Commercial Barge Lines Co.*, 746 F. Supp. 1303, 1306 (M.D. La. 1990). Louisiana law employs a four prong inquiry that examines whether defendant owed plaintiff a duty, whether the duty was breached, whether the defendant's conduct was the cause in fact of the harm that occurred, and whether the risk and the harm caused was in the scope of protection afforded by the duty breached. *Mathieu v. Imperial Toy Corp.*, 646 So.2d 318, 321-22 (La. 1995). Hence, Magana's evidence failed to demonstrate the causation necessary to recover under any of the above negligence tests.

liability.

31. Texas follows the Restatement (Second) of Torts § 402A, *McLennan*, 245 F.3d at 426, which provides:

(1) One who sells any product in a defective condition or unreasonably dangerous to the user or consumer to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts § 402A.

32. “A product may be unreasonably dangerous due to a defect in the manufacturing process or in its design, or because of the manufacturer’s failure to provide adequate warnings or instructions on the products use.” *See McLennan*, 245 F.3d at 426.
33. Applying the Restatement test, Texas courts require a plaintiff to demonstrate “(1) a product defect; (2) that existed at the time the product left the manufacturer’s hands; (3) the defect made the product unreasonably dangerous; and (4) the defect was the producing cause of plaintiff’s injuries.” *Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 329 (Tex. App– Austin 2002, pet. denied).
34. Defect is the condition of the product that makes it unreasonably dangerous.

See Otis Spunkmeyer, Inc. v. Blakely, 30 S.W.3d 678, 690 (Tex. App.– Dallas 2000, no pet.). The Court determines that Magana failed to demonstrate a product defect in the piling for the following reasons:

- a. The piling performed as it was intended to;
 - b. The only substance attached to the piling, if any, at the time it remained in Hammer’s control was sand; and
 - c. Sand, if any, on top of the pilings did not make the pilings unreasonably dangerous.
35. Assuming, *arguendo*, sand on the pilings created a product defect, the Court acknowledges the facts proven at trial demonstrated some sand was present on the pilings before they left Hammer’s control.
36. The Court must next determine if the product defect makes it unreasonably dangerous. Unreasonably dangerous is defined as “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” Restatement (Second) of Torts § 402A cmt. i. The Court determines the pilings were not unreasonably dangerous based on the following:
- a. Bo-Mac employees, including Bo-Mac’s safety director, knew of the sand but made no complaints;

- b. Houston Fuel never complained about the condition of the pilings; and
 - c. Bo-Mac employees indicated sand and debris on the pilings was common.
37. The above facts demonstrate that the Bo-Mac employees and Houston Fuel anticipated some sand on the pilings, and the danger imposed by such sand was not beyond the contemplation of Bo-Mac employees or Houston Fuel. Therefore, the Court determines the pilings were not unreasonably dangerous.
38. The final factor the Court must consider under strict products liability is whether the product defect was the producing cause of plaintiff's injuries. In examining the standard for producing cause, Texas courts recognize "[p]roducing causation requires the same factual causation as proximate causation, and only lacks the element of 'foreseeability' embraced by the standard of proximate causation." *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 828 (Tex. App. – Dallas 1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995).
- a. Based on the foregoing negligence analysis, the Court concludes, for the same reasons enumerated above, Magana failed to demonstrate the condition of the pilings when they left Hammer's control caused his injuries.
39. Thus, the Court determines that Hammer has no liability to Magana under the

theory of strict products liability.⁶ See *Parsons*, 85 S.W.3d at 329.

Bo-Mac Negligence

40. Magana asserts a claim against Bo-Mac in its capacity as a vessel owner under 33 U.S.C. § 905(b).⁷ Section 905(b) provides:

In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, . . . may bring an action against such a vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any such agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

§ 905(b).

41. The construction barge and the crane barge owned by Bo-Mac are both capable

⁶ Again, the application of either general maritime law or Louisiana law would not have created liability under the facts demonstrated at trial because both Louisiana and general maritime law employ essentially the same tests for strict products liability. Under Louisiana law one must demonstrate “the defendant is the manufacturer of the product; (2) the claimants damage was proximately caused by a characteristic of the product; (3) this characteristic made the product unreasonably dangerous and (4) the claimants’s damage arose from a reasonably anticipated use of the product by the claimant or someone else.” *Butz v. Lynch*, 99-1070 (La. App. 1st Cir. 6/23/00). Further, courts in the Fifth Circuit, like Texas courts, have employed the Restatement (Second) of Torts strict products liability standard in admiralty cases. See, e.g., *Hebert v. Outboard Marine Corp.*, 638 F. Supp. 1166 (E.D. La. 1986).

⁷Bo-Mac is a defendant in this lawsuit in its capacity as owner and operator of the crane barge and construction barges. Bo-Mac is not being sued in its capacity as Magana’s employer under the LHWCA.

of being used as a means of transportation on water. Therefore, the Court determines that the construction barge and the crane barge are vessels within the meaning of § 905(b). *See Stewart v. Dutra Constr. Co.*, 125 S.Ct. 1118 (2005).

42. A vessel owner acting as its own stevedore may be sued in its capacity as a vessel owner, but not for its negligence in its capacity as a stevedore. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531 n. 6 (1983). Injuries caused by the negligence of other stevedores engaged in stevedoring activities are not actionable under § 905(b). *Durr v. Global Marine, Inc.*, 673 F.2d 740, 741 (5th Cir. 1982).
43. The Court determines that the activities of attaching the pilings to the crane and moving the pilings to shore by crane are stevedoring activities. *Id.* (loading and unloading by crane are traditional longshoring activities). Therefore, the Court need not consider whether Bo-Mac employees were negligent in moving the pilings from the construction barge to shore.⁸
44. The Court further determines that the evidence presented at trial indicates that the hazards to Magana were created by the longshoreman (i.e. Nix and the Bo-

⁸The evidence presented at trial indicates that Bo-Mac was negligent in its stevedoring activities by failing to keep the pilings free from the large piles of debris that had accumulated over the course of the bulkhead project.

Mac employees attaching the crane line) in the process of unloading the pilings. The evidence indicates the construction barge was free from debris when it was turned over from Bo-Mac acting in its capacity as a vessel owner to Bo-Mac acting as a stevedore.

45. Although the basic responsibility for the safety of longshoreman rests with the stevedore, a vessel may still be liable under three circumstances. *C.K. Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1245 (5th Cir. 1997).

These instances include:

- 1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known.
- 2) for injury caused by hazards under the control of the ship.
- 3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge of both the hazard and that the stevedore, in the exercise of 'obviously improvident' judgment, means to work on in the face of it and therefore cannot be relied on to remedy it.

Id. (emphasis removed).

46. Magana presented no evidence indicating either the crane barge or the construction barge held any latent defects at the time they were turned over to the Bo-Mac stevedoring crew. Trial evidence indicated that the construction barge was free of debris at the time the longshoreman began loading the pilings onto the construction barge. Therefore, Bo-Mac did not breach a duty to warn

of latent defects. *See id.*

47. Magana presented no evidence indicating he was injured by hazards under control of the construction barge or crane barge. Indeed, the evidence clearly indicated that the only hazards on the barge were created by the stevedoring activities.⁹ *See id.* The control of the vessel had been turned over to the stevedores prior to creation of the hazard.
48. In determining whether a vessel owner has a duty to intervene because he has actual knowledge of the danger to the longshoreman and actual knowledge that the longshoreman's employer is not acting reasonably to protect its employees from the danger, the Fifth Circuit examines a number of factors including:

(1) whether the danger was open and obvious; (2) whether the danger was located within the ship or the ship's gear; (3) which party created the danger or used the defective item and was therefore in a better position to correct it; (4) which party owned and controlled the defective item; (5) whether an affirmative act of negligence or acquiescence in the use of a dangerous item occurred; and (6) whether the shipowner assumed any duty with regard to the dangerous item.

Williams v. M/V SONARA, 985 F.2d 808, 815 (5th Cir. 1993).

49. In examining these factors, the Court determines:
- a. The danger of debris on the pilings was an open and obvious danger.

⁹Even assuming Nix was negligent in operating the crane, he was engaged in a stevedoring activity and was not operating the vessel. *Durr*, 673 F.2d at 741.

Anyone watching the pilings being moved from the construction barge to shore noted that material would fall from the pilings.

- b. The pilings were not part of the ship, but merely items placed on the ship by the stevedores for the stevedores' use.
- c. The longshoremen created the dangerous condition on the barge. The longshoremen created a dangerous situation by failing to clean debris off the pilings. Indeed, it appears that the accumulation of debris became more voluminous with each successive piling removed.
- d. The longshoreman had control of the debris-covered pilings. Magana did not demonstrate that debris on the barge caused his injuries.
- e. A combination of the longshoreman's negligence and acquiescence led to the hazardous condition. The longshoreman acquiesced to the condition of the pilings in their control. The longshoreman that attached the crane line were negligent in failing to clean off the piling in question.
- f. Despite the acts taken by Bo-Mac with regard to the piling at issue here, Bo-Mac longshoreman customarily removed debris from a piling immediately before transporting it to shore.
 - i. Bo-Mac employees had shovels to clean debris off the piling in

question, which they failed to do.

ii. Further, Nix would bang the pilings to remove excess debris.

g. Magana did not demonstrate that Bo-Mac, as a vessel owner, assumed any responsibility with regard to the pilings.

50. Therefore, based on the foregoing, the Court determines Bo-Mac, in its capacity as a vessel owner, had no duty to intervene. Bo-Mac, in its capacity as vessel owner, had no control over the stevedoring operations. Further, nothing indicated the procedure Bo-Mac's longshoreman employed to clean off the pilings would not be followed on the piling in question.

Res Ipsa Loquitur

51. The doctrine of *res ipsa loquitur* requires both that the accident is of such character that it would not occur without negligence, and the instrumentality causing the injury is under the control of the defendant. *See Barber v. Texaco, Inc.*, 720 F.2d 381, 384 (5th Cir. 1983).

52. The Court determines *res ipsa* is inapplicable to Magana's claims against Bo-Mac as a vessel owner because the Bo-Mac stevedoring crew had exclusive control over the pilings at the time of the incident. *See id.*

Loss of Consortium

53. Mrs. Magana's claims for loss of consortium must fail because Magana has

failed to show that either Hammer or Bo-Mac in its capacity as a vessel owner have committed negligence. *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978) (recognizing loss of consortium for injury caused by tortfeasor's negligence).

54. Plaintiffs failed to prove any of their theories of recovery against any of the Defendants by a preponderance of the evidence.
55. Plaintiffs shall take nothing from Defendants.

SIGNED at Houston, Texas, on this 14 day of March, 2005.

A handwritten signature in black ink, appearing to read "David Hittner", written over a horizontal line.

DAVID HITTNER
United States District Judge