IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30574

Summary Calendar

IN RE: IN THE MATTER OF THE COMPLAINT OF MAGNOLIA MARINE TRANSPORT COMPANY, A CORPORATION, AS OPERATOR AND/OR OWNER PRO HAC VICE OF THE M/V ERGONOT, for Exoneration from or Limitation of Liability:

POINTE COUPEE, INC.,

Claimant-Third Party Defendant-Appellant,

and

ECKSTEIN MARINE COMPANY,

Claimant-Appellant,

versus

MAGNOLIA MARINE TRANSPORT COMPANY,

Third Party Plaintiff-Appellee.

****

IN RE: IN THE MATTER OF THE COMPLAINT OF POINTE COUPEE, INC., and ECKSTEIN MARINE COMPANY, AS OWNER OF THE M/V POINTE COUPEE for Exoneration from or Limitation of Liability:

POINTE COUPEE, INC., and
ECKSTEIN MARINE COMPANY, as Owner of the M/V POINTE COUPEE,

Petitioners-Appellants,

versus

MAGNOLIA MARINE TRANSPORT COMPANY,

Claimant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-1361-I c/w 90-3053-I & 91-2086-I)

(June 13, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Pointe Coupee, Inc. and Eckstein Marine Company, the owner and demise charterer of the tug M/V POINTE COUPEE, filed a limitation of liability petition in response to having been impleaded as a third party defendant by Magnolia Marine Transport Company, the owner of the M/V ERGONOT, in a suit arising from a collision on the Mississippi River. The district court refused to exonerate Pointe Coupee and Eckstein of all liability, concluding that the M/V POINTE COUPEE had contributed to the death of the captain of another vessel, the M/V SAM LEBLANC. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 1988, the harbor tug M/V SAM LEBLANC, travelling downstream in heavy fog on the Mississippi River near Baton Rouge, collided with a barge being towed by the M/V ERGONOT, a tug travelling upstream. After its impact with the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

ERGONOT, the SAM LEBLANC cut across the Mississippi and rammed into a barge being towed by the M/V POINTE COUPEE, also headed upstream. As a result of the SAM LEBLANC's impact with the POINTE COUPEE, Captain Joseph Frye of the SAM LEBLANC was washed overboard and is presumed drowned.[1] Captain Frye's widow, as Administratrix of his estate, filed suit against Magnolia Marine Transport Company ("Magnolia"), the owner and operator of the ERGONOT, and E.N. Bisso, Inc. ("Bisso"), the owner and operator of the SAM LEBLANC. Both Magnolia and Bisso filed petitions seeking limitation of liability. Magnolia impleaded Pointe Coupee, Inc. and Eckstein Marine Company (collectively "Pointe Coupee"), the owner and demise charterer of the POINTE COUPEE. Pointe Coupee also filed a petition seeking limitation of liability.

Frye settled her claims against Magnolia and Bisso, leaving for the district court's consideration only the petitions for exoneration or limitation of liability filed by Pointe Coupee. The district court concluded that Pointe Coupee was not entitled to complete exoneration of liability for Captain Frye's death. Accordingly, Pointe Coupee was ordered to pay an amount which had been stipulated by the parties as Pointe Coupee's limitation of liability in the event that the district court denied complete

[1] Pointe Coupee argues that Captain Frye's body was never found and that the district court erred in finding that Captain Frye fell into the river. This challenge to the district court's factual finding is addressed *infra*.

exoneration.[2] Pointe Coupee filed a timely appeal to this court, alleging that the district court made various erroneous factual findings and erred as a matter of law by misapplying the burden of proof, failing to apply the in extremis doctrine, and concluding that the Pointe Coupee violated several Inland Navigation Rules. Finding these contentions to be without merit, we affirm.

II. STANDARD OF REVIEW

In an admiralty action tried by the court without a jury, the factual findings of the district judge are binding unless clearly erroneous. American Home Assurance Co. v. Sletter M/V, 43 F.3d 995, 997 (5th Cir. 1994); Avondale Indus., Inc. v. International Marine Carriers, Inc., 15 F.3d 489, 492 (5th Cir. 1994). A finding is clearly erroneous if the reviewing court is left with a firm and definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Henderson v. Belknap (In re Henderson), 18 F.3d 1305, 1307 (5th Cir.), cert. denied, 115 S. Ct. 573 (1994). If the district court's account of the evidence is plausible in light of the record viewed as a whole, we may not reverse it even though convinced that, if we had sat as the trier of fact, we

[2] Specifically, the parties stipulated that in the event pointe coupee was not completely exonerated of liability, Pointe Coupee would be entitled to limitation of liability equal to the post-accident value of the POINTE COUPEE, which was $225,000, plus the $11,361.30 value of her pending freight, plus interest.

would have weighed the evidence differently. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

Points of error regarding the district court's legal conclusions are, of course, subject to plenary review. Sletter M/V, 43 F.3d at 997; Prudhomme v. Tenneco Oil Co, 955 F.2d 390, 392 (5th Cir.), cert. denied, 113 S. Ct. 84 (1992).

III. ANALYSIS

A. Alleged Factual Errors.

Pointe Coupee contends that the district court erred in its determination of the relative positions of the vessels at the time of the initial collision between the ERGONOT and the SAM LEBLANC. Specifically, Pointe Coupee argues that the district court believed that the POINTE COUPEE was ahead (i.e., upstream) from the ERGONOT and that this mistake "permeates the entire opinion." We disagree.

The portion of the district court's opinion which Pointe Coupee cites as its basis for this argument has been taken out of context. In a section entitled "Progress of the ERGONOT and POINTE COUPEE prior to the accident," the district court states that

> Just above the I-10 Bridge at the Capital Marine Fleet, the ERGONOT was overtaking the POINTE COUPEE such that the head of the ERGONOT tow was slightly the stern of the POINT [sic] COUPEE travelling in the clear water and favoring the eastbank of the river.

This language does not indicate that the district court misunderstood the relative positions of the vessels. Indeed, the

above-quoted language indicates that prior to the first collision, the ERGONOT was overtaking the POINTE COUPEE. Indeed, later in the same paragraph quoted by Pointe Coupee, the district court stated that "[t]he ERGONOT was proceeding in the fog bank as it passed the POINTE COUPEE without incident . . . ." (emphasis added). We think it unmistakably clear that the district court properly understood the relative positions of the vessels; thus, its finding in this regard is not clearly erroneous.

Pointe Coupee's second asserted factual error concerns the district court's determination that the navigable portion of the Mississippi River in the area of the collision was 1800 feet. Specifically, Pointe Coupee argues that the correct figure should be 3000 feet, the width indicated on a navigational map introduced as evidence by Pointe Coupee and concurred to by Pointe Coupee's expert witness, Frank Buck.

The district court discounted Buck's testimony, stating that it must be "viewed . . . with considerable skepticism given his responses on cross examination and his apparent misunderstanding of the applicable Inland Navigational Rules." The court then noted the source of its skepticism by pointing out the specific portions of Buck's testimony that it found to be incredible. The court instead chose to credit the deposition testimony of Captain Deshotel[3], who testified that his vessel, the POINTE COUPEE, was

[3] Captain Deshotel died of natural causes prior to the beginning of the trial.

running parallel to the western shore of the Mississippi River approximately 600 feet from the shoreline and that although his vessel was not in the fog, the other two-thirds of the river was completely enveloped in fog. The district court discerned that if Deshotel was 600 feet from the shoreline, with the remaining two-thirds of the river fogged in, the river's width must be closer to 1800 feet than 3000 feet. In addition, the district court noted that while Buck's testimony indicated a total width of 3000 feet, the navigable width of the river at the collision sight would necessarily be less "in light of the numerous barge fleeting facilities in the area which extended out into the river."

The district court was clearly aware of the Pointe Coupee's contention regarding the width of the river but concluded that it was not credible in light of the skeptical worth of Buck's testimony, Deshotel's contrary testimony, and the presence of the fleeting facilities which narrowed the navigable channel. The weight to be accorded expert testimony in a case with no jury is within the discretion of the district court. Pittman v. Gilmore, 556 F.2d 1259, 1261 (5th Cir. 1977). Viewing the record as a whole, we are not left with a definite and firm conviction that a mistake has been made. Accordingly, the district court did not clearly err in determining the navigable width of the Mississippi River at the point of collision to be 1800 feet.

Pointe Coupee next contends that the district court committed clear error in determining that Captain Deshotel was

not properly monitoring his radar at the time of the collision as required by Rule 7 of the Inland Navigation Rules.[4] In reaching this determination, the district court noted that Captain Deshotel admitted that he was not aware of the location of the SAM LEBLANC until it emerged from the fog bank some 300 feet from the POINTE COUPEE. The district court stated that it could "find no satisfactory explanation why the navigation of the SAM LEBLANC could not have been tracked by Deshotel on his radar other than that Deshotel was not properly monitoring his radar or that it was not functioning properly."

Pointe Coupee argues that this factual finding by the district court is clearly erroneous because its expert witness, Buck, testified that he did not believe that Deshotel would have seen the SAM LEBLANC on radar because it was too close to the ERGONOT to show up as a separate object. As Magnolia correctly points out in its brief, however, Buck's testimony was controverted by the testimony of Magnolia's two expert witnesses,

---

[4] Rule 7(a) provides in relevant part:

> **(a) Determination if risk exists**
> Every vessel shall use all available means appropriate in the prevailing circumstances and conditions to determine if the risk of collision exists. If there is any doubt such risk shall be deemed to exist.
>
> **(b) Radar**
> Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

33 U.S.C. § 2007.

Herb Wilson and Douglas Halsey, who testified that there was no reason why Deshotel would not have been able to monitor the SAM LEBLANC except for the brief period of contact with the ERGONOT. Given this conflict in testimony, the district court, as the trier of fact, was required to make a credibility choice. The district court chose to credit the testimony of Wilson and Halsey over that of Buck; in so doing, we can discern no clear error.

Pointe Coupee's next asserted factual error is that the district court erred in determining that Captain Frye of the SAM LEBLANC fell overboard at the moment of, or shortly before or shortly after, impact with the POINTE COUPEE. Pointe Coupee baldly states that "there is absolutely no direct evidence of when Captain Frye departed the M/V SAM LEBLANC." We disagree. Robert Jordan, the SAM LEBLANC's engineer, testified during his deposition that he fell into the water upon impact with the POINTE COUPEE and that, after he came to the surface, he saw another person in the water who called his name twice. Jordan stated that he originally thought the person was deckhand Huey Wattigney, but later concluded that the person must have been Captain Frye because Wattigney never fell into the water.

Magnolia argues that

> the district court entirely discounts the testimony of two members of the M/V POINTE COUPEE crew that there was an individual standing on the deck of the vessel as she was backing into the fleet subsequent to the collision between the M/V SAM LEBLANC and the M/V POINTE COUPEE's tow. Additionally, the district court, although recognizing that someone had to put the vessel in reverse at the time of the initial impact with the M/V POINTE COUPEE, concludes that Captain Frye was not in the wheelhouse at the time of the impact, but was

> somewhere on the outside of the vessel where he could be thrown overboard.

The district court specifically stated that it found Jordan's testimony to be more credible than the testimony of Deshotel and POINTE COUPEE first mate Kendall Frickey to the effect that they saw an individual on the stern of the SAM LEBLANC prior to ramming the fleet moored to shore. The district court concluded:

> The Court is of the opinion that Frye had to be in the wheelhouse to respond as he did to [the Captain of the ERGONOT] after colliding with the ERGONOT, and Frye had to be in the wheelhouse to put his engines in full reverse either at the moment of impact with the head of the POINTE COUPEE tow, seconds before or seconds after. Impact of any kind was not sufficient to reverse the engines; the gears had to be engaged to do so.
>
> . . . .
>
> The Court further finds it more likely than not that after placing his engines in reverse, Frye fell into the river when the SAM LEBLANC listed severely to starboard upon its initial impact with the POINTE COUPEE.

Thus, contrary to Pointe Coupee's assertion, the district court found that Frye himself placed the engines in reverse and was thrown from the tug, not while standing at the stern (as the testimony of Deshotel and Frickey implied), but while inside the wheelhouse and attempting to maneuver the SAM LEBLANC away from the POINTE COUPEE. The district court's credibility choice in this matter is entitled to great deference and we are not left with a definite and firm conviction that it was mistaken in its choice.

B. In Extremis Doctrine.

The district court declined Point Coupee's invitation to invoke the in extremis doctrine, which requires a court to leniently judge errors in judgment committed by a vessel "put in sudden peril through no fault of her own . . . ." Union Oil Co. of Cal. v. Tug Mary Malloy, 414 F.2d 669, 674 (5th Cir. 1969). The district court concluded that the POINTE COUPEE was not put in "sudden peril through no fault of her own" because

> aided by two radios, radar, and the full knowledge of the presence, location, and direction of all three vessels, two of which were in dense fog, the POINTE COUPEE had more than five minutes in which to do something to avoid these collisions, and instead chose to do nothing at all until seeing the SAM LEBLANC three hundred (300) feet away. At that point Deshotel's peril upon sighting the SAM LEBLANC emerging from the fog bank was hardly sudden nor without fault of the POINTE COUPEE.

In light of the district court's conclusions, Pointe Coupee's reliance on Afran Transp. Co. v. S/S Transcolorado, 458 F.2d 164 (5th Cir. 1972), is misplaced. In that case, we held that "[t]he choices of stopping engines or going ahead, going to port rather than starboard, are to be judged not by an armchaired admiral who has hours, days, weeks, months or years to reflect, but in light of choices suddenly forced on by the neglect of the one now seeking total absolution." Id. at 166-67. The district court's underlying factual conclusion that the POINTE COUPEE had more than five minutes in which to do something to avoid collision has not been shown to be clearly erroneous and the legal conclusion which necessarily flows from it is that the POINTE COUPEE was not in "sudden peril through no fault of her own" which would entitle her to invoke the in extremis doctrine.

Accordingly, Pointe Coupee's contention that the district court erred in failing to invoke the in extremis doctrine is without merit.

C. Navigation Rules.

Pointe Coupee challenges the district court's determination that the POINTE COUPEE violated Inland Navigation Rules 2, 5, 7, 8 and 19. Specifically, Pointe Coupee argues that with regard to Rule 5, the "Look-out Rule," the district court failed to give proper weight and credence to the testimony of their expert, Frank Buck, to the effect that the SAM LEBLANC would not have been visible as a separate object on radar because she was too close to the ERGONOT. This argument is little more than a restatement of Pointe Coupee's contention that the district court's factual finding was clearly erroneous. As discussed above, we can discern no error in the district court's conclusion.

Pointe Coupee's argument with regard to Rule 7 is likewise nothing more than a restatement of the argument that the district court erred in its findings regarding the relative positions of the vessels and the width of the Mississippi River. As discussed above, we can discern no error in the district court's conclusions.

With regard to Rule 8, which requires a vessel to "slacken her speed or take all way off by stopping or reversing her means of propulsion," if "necessary to avoid collision or allow more

time to assess the situation," 33 U.S.C. § 2008(e), Pointe Coupee argues that

> there is absolutely no evidence that Captain Deshotel was aware of a collision between the M/V SAM LEBLANC and the M/V ERGONOT's tow until the M/V ERGONOT informed him on the radio of the collision, which was after the M/V SAM LEBLANC was visually sighted by Captain Deshotel, and when Captain Deshotel was already taking action to determine the M/V SAM LEBLANC's intentions.

The district court found that Deshotel was aware of the collision between the SAM LEBLANC and the ERGONOT because Deshotel admitted in a handwritten statement given to the Coast Guard that he had heard radio communications between the ERGONOT and the SAM LEBLANC in which the SAM LEBLANC proposed a risky port-to-port passing and that

> [a]bout five minutes later, I heard the M/V ERGONOT ask the M/V SAM LEBLANC if he was alright. The M/V SAM LEBLANC responded by saying that he thought he was sinking. About two minutes later I noticed the M/V SAM LEBLANC coming out of the fog bank and heading for the bow of my tow.

The district court determined that from the time Deshotel learned of the risky passing agreement between the SAM LEBLANC and the ERGONOT, he took no action to avoid collision. We think it a reasonable construction of the evidence for the district court to conclude that upon hearing the SAM LEBLANC's captain say that he was sinking, Deshotel knew or should have known that the POINTE COUPEE was in peril. Thus, the district court did not err in determining that the POINTE COUPEE's failure to slacken speed, reverse her engines, or take other measures violated Rule 8.

The Pointe Coupee further argues that the district court erred in discounting the testimony of their expert, Frank Buck, who testified that if the POINTE COUPEE had slowed or reversed her engines, she would have risked "topping around," i.e., turning to port or starboard, thereby placing her and her cargo at risk of additional collision with the barges moored to the west bank of the Mississippi.

The district court stated:

> The Court is aware of Buck's testimony that POINTE COUPEE might not have maintained control of its tow had it slowed or reversed. The Court finds this improbable given the ease with which the POINTE COUPEE recovered its lead barge, which broke off from the tow when hit the second time by the SAM LEBLANC. In any event, the possible risk of loosing steerage momentarily was worth taking in order to avoid the risk of collision or collision itself.

Pointe Coupee offers no evidence that the district court's conclusion is wrong other than to suggest that the district court should have given greater credence to the testimony of Buck and Captain Brones, a captain of the ERGONOT who testified that a speed of two miles per hour would be necessary under the existing conditions in order to maintain control. The district court found Buck's testimony to be incredible. Moreover, Brones' testimony is not inconsistent with the district court's conclusion since Brones was never asked about the risk which may or may not have existed if the POINTE COUPEE had reversed her engines. Magnolia's expert, Captain Wilson, also testified that Deshotel would not have faced any risk if he had slowed or reversed his engines. In short, this argument by Pointe Coupee

is yet another disagreement with the district court's exercise of its discretion in making a credibility choice. Pointe Coupee has not proffered evidence which convinces us, looking down at the cold record, that the district court's on-site credibility choice is not entitled to deference; thus, we find this argument to be without merit.

With regard to Rule 19, which sets forth the obligations of vessels in areas in or near an area of restricted visibility, Pointe Coupee argues that the district court erred in finding that the POINTE COUPEE was operating in an area of restricted visibility or that, even if it was, the POINTE COUPEE did not violate Rule 19. We find these contentions to be without merit. Although the POINTE COUPEE was herself travelling outside of the fog bank, it is clear that the POINTE COUPEE was operating sufficiently "near" an area of restricted visibility to come within the ambit of Rule 19. See 33 U.S.C. § 2019(a); Valley Towing Serv., Inc. v. S/S American Wheat, 618 F.2d 341, 344 (5th Cir. 1980) (holding that a vessel operating near periphery of fog bank was within ambit of Rule 19); accord The Edward E. Loomis, 86 F.2d 705, 708 (2d Cir. 1936) ("A vessel which may herself be in the clear is not excused from observance of the rules when skirting or approaching a patch of haze from which an obscured vessel may suddenly emerge.").

Pointe Coupee argues that the district court erred in finding a violation of Rule 19(e), which requires a vessel in a close-quarters situation to "reduce her speed to the minimum at

which she can be kept on course." 28 U.S.C. § 2019(e). The rule further provides that such a vessel "shall, if necessary, take all her way off and, in any event, navigate with extreme caution until danger of collision is over." Id. As discussed above, we find no error in the district court's credibility determination among expert witnesses who differed as to whether it would have been appropriate for the POINTE COUPEE to have slowed or reversed her engines. We also agree with the district court's conclusion that, in order to satisfy Rule 19(e)'s mandate to "navigate with extreme caution," the POINTE COUPEE should have, at a minimum, announced her presence to the SAM LEBLANC. Thus, we find no error in the district court's determination that the POINTE COUPEE violated Rule 19 by failing to exercise the appropriate caution in an area of restricted visibility.

D. Burden of Proof.

In a related argument, Pointe Coupee contends that the district court erred in placing the burden of proof upon Pointe Coupee to show that her fault did not contribute to the death of Captain Frye because the POINTE COUPEE had violated several Inland Navigation Rules. The gravamen of Point Coupee's argument is that Deshotel and the POINTE COUPEE did not violate the navigation rules; hence, it was improper to shift the burden of proof to Pointe Coupee. In light of our conclusion that the district court did not err in concluding that the POINTE COUPEE and Deshotel violated several Inland Navigation Rules, this

contention is without merit. The so-called "Pennsylvania Rule" holds that

> when . . . a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.

The Pennsylvania 86 U.S. 125, 136 (1873); accord Tempest v. United States, 404 F.2d 870, 872 (4th Cir. 1968); Lee v. Candies, 216 F. Supp. 665, 666-67 (E.D. La.), aff'd, 323 F.2d 363 (5th Cir. 1963).

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.