

**UNITED STATES COURT OF APPEALS
For the Fifth Circuit**

No. 94-20778

HOUSTON FUEL OIL TERMINAL COMPANY,

Plaintiff,

VERSUS

M/V CITY OF AKAKI, ET AL.,

Defendants,

EAST COAST MARINE CO.,

Cross-Plaintiff-Appellee,

VERSUS

SEARIVER MARITIME,

Cross-Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(1:93-CV-491RR)

February 23, 1996

Before KING, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:*

Appellant SeaRiver Maritime, Inc. ("SeaRiver"), appeals the district court's finding that SeaRiver is solely liable for the allision between the merchant vessel, the CITY OF AKAKI, and the Houston Fuel Oil Terminal dock. We AFFIRM.

FACTS AND PROCEDURAL HISTORY

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

On January 25, 1994, the merchant vessel CITY OF AKAKI was docked starboardside to Omniport Dock No. 2 in the Port of Houston in Houston, Texas. Directly astern of the CITY OF AKAKI was another vessel docked at Omniport Dock No. 3.

Houston harbor pilot Captain Robert M. Bratcher was assigned to pilot the CITY OF AKAKI during her outbound passage through the Houston Ship Channel. The tugs SEA KING and SAN JACINTO were hired as auxiliary power to assist the CITY OF AKAKI in the undocking maneuver.

Shortly before departure, the SEA KING picked up Bratcher at a nearby facility and transported him to the CITY OF AKAKI. While in transit, Bratcher discussed the undocking procedure with both Captain Sinclair of the SEA KING and Captain Williams of the SAN JACINTO. Pilot Bratcher told both tug captains that his plan was to come clear of the ship astern and then back the CITY OF AKAKI until such a time when the SAN JACINTO would push the port-side stern of the CITY OF AKAKI at a 90-degree angle, thereby rotating the bow of the vessel by 90 degrees to port. This maneuver was intended to position the CITY OF AKAKI for a bow-first entry into the Houston Ship Channel.

After Bratcher was delivered to the CITY OF AKAKI, the tugs proceeded to take their positions alongside the CITY OF AKAKI. Per Bratcher's orders, the SEA KING tied-up to the CITY OF AKAKI's port bow while the SAN JACINTO tied-up to the CITY OF AKAKI's port quarter (stern). Bratcher situated himself on the starboard bridge so that he could monitor the CITY OF AKAKI's clearance from the vessel astern at the Omniport Dock No. 3.

The lines to the dock were released and the tugs proceeded to pull the CITY OF AKAKI sidewise away from the dock so as to provide safe clearance from the vessel astern. Once the CITY OF AKAKI was clear of the vessel moored behind it, the tugs stopped assisting the CITY OF AKAKI and Bratcher began the backing procedure utilizing only the CITY OF AKAKI's power. At this point, the stern of the CITY OF AKAKI was approximately 2,000 feet from the Houston Fuel Oil dock.

In order to correctly position the CITY OF AKAKI for exit out of the channel, it was imperative that, at some point in maneuver, the SAN JACINTO “wing out” or pivot on her bow to a position 90 degrees to CITY OF AKAKI’s hull. From this position, the SAN JACINTO would push the port stern of the CITY OF AKAKI in a starboard direction, thus causing the bow of the CITY OF AKAKI to turn to port. The successful completion of this maneuver would allow the CITY OF AKAKI to enter the shipping channel bow-first.

For disputed reasons, the SAN JACINTO never succeeded in achieving the necessary 90-degree angle. As a result, it was never able to apply sufficient pressure to the stern of the CITY OF AKAKI to achieve the necessary rotation. The CITY OF AKAKI, thus, continued its backward motion until it allided with the Houston Fuel Oil dock.

Houston Fuel Oil brought suit and named as *in rem* defendants the M/V CITY OF AKAKI and the tugs SEA KING and SAN JACINTO. Houston Fuel Oil also named as *in personam* defendants East Coast Marine Co., Ltd. ("East Coast Marine"), SeaRiver, G&H Towing Co. ("G&H"), and harbor pilot Captain Robert M. Bratcher.¹ SeaRiver filed a cross-action against East Coast Marine and East Coast Marine filed a cross-action against SeaRiver. Prior to trial, Houston Fuel Oil settled its claim with East Coast Marine for \$85,000. Also prior to trial, G&H, SEA KING, and Captain Robert M. Bratcher were dismissed. The case proceeded to trial on the issue of the respective liabilities of East Coast Marine and SeaRiver.

On September 9, 1994, the district court issued from the bench its oral findings of fact and conclusions of law.² The district court made the following relevant findings: (1) the evidence was “heavily in favor” of a finding that Bratcher’s order to the SAN JACINTO was to take up a position at the stern of the CITY OF AKAKI and maintain a 90-degree angle to the hull of the vessel; (2) this

¹ At the time of the accident, East Coast Marine was the owner/operator of the CITY OF AKAKI, SeaRiver was the owner/operator of the tug SAN JACINTO, and G&H was the owner/operator of the tug SEA KING .

² The district court did not issue separate written findings.

maneuver was not unreasonably risky; (3) the SAN JACINTO never maintained or reached an angle of 90 degrees; (4) the SAN JACINTO did not carry out its order; (5) Williams was negligent in failing to advise the harbor pilot, Bratcher, that the SAN JACINTO could not carry out its orders; (6) a prompt warning by Williams would have given the harbor pilot enough time to avoid the allision; (7) the harbor pilot did not fail to monitor the speed of the CITY OF AKAKI and he did not place an unreasonable burden on the SAN JACINTO; and (8) the failure of Williams to advise the harbor pilot that the SAN JACINTO could not maintain position was the sole cause of the allision.

Final judgment was entered on October 4, 1994. The district court found SeaRiver liable to East Coast Marine for the total amount of \$109,116.14. SeaRiver timely filed a notice of appeal.

DISCUSSION

On appeal, SeaRiver argues that the district court erred in finding that the SAN JACINTO was solely at fault for the CITY OF AKAKI's allision with the Houston Fuel Oil dock. Specifically, SeaRiver argues that the district court erred when it found that Pilot Bratcher ordered the SAN JACINTO to *maintain* a 90-degree angle to the CITY OF AKAKI *throughout* the maneuver. Next, SeaRiver claims that the district court erred by not finding that the master of the CITY OF AKAKI failed to recognize the development of a dangerous situation and take appropriate action. SeaRiver lastly contends that Bratcher was statutorily derelict in his duties as pilot and that the district court clearly erred by not making such a finding. After a careful review of the record, we are not able to find that the district court's findings were clearly erroneous.

“In admiralty cases tried by the court sitting without a jury, as in other cases, the district court's findings of fact are subject to the clearly erroneous standard of review, while questions of law are subject to *de novo* review.” **Mendes Junior Int. Co. v. M/V Sokai Maru**, 43 F.3d 153, 155 (5th Cir. 1995). The clearly erroneous standard of review applies to Court of Appeals' inquiry into all findings of fact, including damage awards. **Nichols v. Petroleum Helicopters, Inc.**, 17 F.3d 119 (5th Cir. 1995).

A highly deferential standard of review applies to credibility calls by trier of facts. **Port Arthur Towing Co. v. John W. Towing, Inc.**, 42 F.3d 312 (5th Cir. 1995). Mere disagreement with the district court's analysis of the record is insufficient; we will not reverse a factual finding of the district court, in spite of evidence to support a contrary conclusion, unless on reviewing the entire evidence we are left with the definite and firm conviction that a mistake has been committed. **Nichols**, 17 F.3d at 121. "[T]his Court should be wary of attempting to second guess the district court, which has the decided advantage of first hand experience concerning the testimony and evidence presented at trial." **Id.**

On review of the record, we find that the testimonies of Captains Bratcher, Sinclair, and Williams sufficiently support the district court's findings. We cannot say that we are left with the definite and firm conviction that a mistake has been committed, nor do we find that the district court's findings are clearly erroneous. In the absence of clear error, we cannot substitute our judgment for that of the district court.

Accordingly, the judgment of the district court is

AFFIRMED.