

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4704

Summary Calendar

Gulf States Utilities Co.,
Plaintiff-Appellee,
versus
M/V Chilbar, et al.,
Defendants,
Chilbar Shipping Co., and Keystone Shipping,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(CA1:91-711)

February 10, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

The issue in this case is whether the damages awarded to plaintiff should be reduced to avoid a windfall. Defendants admitted liability for damage caused when M/V Chilbar allided with a flume wall in the Neches River at plaintiff's power plant. After a bench trial on damages, the district court refused to reduce

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

plaintiff's recovery due to depreciation of the flume wall. We affirm.

Plaintiff Gulf States Utilities owns the Neches Power Station, located on the west bank of the Neches River below Beaumont. This power plant was originally built in the 1920's and enlarged in the 1950's. When generating electricity, the plant discharges warm water into the river. To facilitate the integration of effluent with the cooler river water, GSU was required to build a flume wall.

Pursuant to Army Corps of Engineers permits, GSU built and extended the flume wall in 1954 and 1956. The flume wall extends from the shore and then runs roughly parallel to the shoreline in the navigable waters of the Neches River. The wooden, steel, and concrete structure is approximately 770 feet long. Its sole purpose is to allow warm effluent to cool before entering the main river channel.

On February 15, 1990, M/V Chilbar negligently allided with the flume wall, running through and over the wall and crashing into the river bank. About 84 feet of the flume wall was destroyed, with damage to five pile clusters and their attachments. The Chilbar also destroyed a thermocouple located on the end of the flume wall.

Neches Power Station has not been used to generate electricity since 1984. Nonetheless, the plant has been kept in working order and a crew maintains the facility. At trial marine surveyor Robert Hanson testified, and the district court found as fact, that the flume wall's useful life would be indefinite.

Appellants' claims all resolve around the district court's refusal to reduce the compensatory damages awarded because of depreciation of the flume wall. They point to the testimony of marine surveyor Steve Hale, who stated that the flume wall had only six to seven years of useful life remaining. Appellants emphasize that GSU spent \$40,000 annually before 1984 maintaining the flume wall, and claim that it had deteriorated before the collision.

In maritime cases, the plaintiff is generally entitled to costs of repairs needed to restore damaged property to its condition before the collision. Tug June S v. Bordagain Shipping Co., 418 F.2d 306, 307 (5th Cir. 1969). The fact that repairs may utilize new materials does not affect the general rule in maritime cases. This well-settled principle was recognized in The Baltimore, 75 U.S. (8 Wall.) 377 (1869), which stated:

[W]here repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned

Id. at 385.

This principle, that plaintiff's recovery need not be reduced on account of new materials used for repair, has continued into this century. See e.g. Phillips Petroleum Co. v. Stokes Oil Co., 863 F.2d 1250 (6th Cir. 1988). In Stokes, the crew of a vessel contributed to a fire that damaged a terminal facility. The court

assessed damages based on the cost of restoring the damaged terminal to its condition before the fire. The court rejected an argument to reduce the damages on a "new for old" theory, noting that "usually repairs are made with new materials." Id. at 1257.

While the substitution of new materials for old does not equate with an unjust windfall, appellants note that courts will reduce plaintiff's recovery when repairs constitute a betterment to a structure and enhance its useful life. See e.g. Pizani v. M/V Cotton Blossom, 669 F.2d 1084, 1088 (5th Cir. 1982); Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 304 (5th Cir. 1976). Where repair costs form the basis of the damage award, the court must determine whether the repair adds new value to or extends the useful life of the property. Pillsbury Co. v. Midland Enterprises, Inc., 715 F. Supp. 738, 764 (E.D. La. 1989), aff'd, 904 F.2d 317 (5th Cir.), cert. denied, 111 S. Ct. 515 (1990).

In this case, the findings show that repair will not add value to or extend the life of the flume wall. The trial judge found that before the allision the flume wall "was still in sound condition" and that its useful life was "indefinite." The factual findings of the district court are presumed correct and should not be set aside unless they are clearly erroneous. Mills v. Damson Oil Corp., 931 F.2d 346, 351 (5th Cir. 1991). This standard of review applies to the trial judge's findings on the question of damages. Hernandez v. M/V Rajaan, 841 F.2d 582, 587 (5th Cir.), cert. denied, 488 U.S. 981 (1988). Moreover, the trial judge's decisions regarding the credibility and weight to be given evidence

are "integral parts of [the] findings of facts" to which we will give great weight. Tri-State Petroleum Corp. v. Saber Energy, Inc., 845 F.2d 575, 579 (5th Cir. 1988).

The district court heard appellants' evidence suggesting deterioration of the flume wall, and appellee's evidence to the contrary. The findings demonstrate that the trial judge gave greater weight and credibility to the latter. The court chose to give less weight to the appellants' expert because his testimony was found to be speculative and not credible. There was no evidence showing that the flume wall had deteriorated prior to the allision. On the other hand, the trial judge's finding was supported by evidence that the flume wall was in sound condition before the allision, and testimony that it would serve its purpose indefinitely. We note that much of the damaged portion of the flume wall was constructed of steel sheeting. Reviewing the whole record, we are not left with a definite and firm conviction that a mistake has been committed. See Lewis v. Timco, Inc., 736 F.2d 163, 166 n.2 (5th Cir. 1984)(citing Pullman v. Swint, 456 U.S. 273 (1982)).

This case most resembles Petition of M/V Elaine Jones (Canal Barge Co. v. Griffith), 480 F.2d 11 (5th Cir. 1973), modified, 513 F.2d 911 (5th Cir.), cert. denied, 423 U.S. 840 (1975). In that case, an alliding vessel damaged a bridge. The trial court found that before the allision the bridge was in sound condition and that it had a remaining useful life of an indefinite number of years. Id. at 27. We held that under these circumstances, the bridge

owner was entitled to restoration costs without reduction for depreciation. No recovery less than full repair costs would have replaced the bridge's value commensurate with its pre-allision worth. Id. "[W]here the repairs do not extend the useful life of the property as it existed just before the collision, there should be no deduction for depreciation." Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 305-06 (5th Cir. 1976); see also City of New Orleans v. American Commercial Lines, Inc., 662 F.2d 1121, 1124 (5th Cir. 1981)(holding depreciation inappropriate when structure not deteriorated).

On these findings, the same result will follow. Since repairs will not enhance the value of the flume, allowing GSU to recover the entire amount of its repair costs will not constitute a windfall. We need not address whether or not the flume is an integral part of the Neches Power Station.

AFFIRMED.