No. 18-646

In The
Supreme Court of the United States

MARQUETTE TRANSPORTATION COMPANY, L.L.C. AND BLUEGRASS MARINE, L.L.C.,

Petitioners,

v.

ENTERGY MISSISSIPPI, INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Entergy Mississippi, Inc. ("Entergy") is a Mississippi corporation and wholly owned subsidiary of Entergy Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Respondent Entergy Mississippi, Inc. ("Entergy") leases and operates a fuel oil storage facility adjacent to the Mississippi River in Vicksburg, Mississippi. *See* Pet. Appendix B, p. 15. The facility has a floating dock which is equipped with and protected by a mooring dolphin structure. *Id.* at pp. 15-17.

On April 5, 2008, the M/V ROBERT E. FRANE ("Frane"), a vessel owned by Petitioner Marquette Transportation Company, LLC and operated by Petitioner Bluegrass Marine, LLC, was navigating down river when its flotilla of barges struck a bridge pier and separated. An errant barge subsequently struck part of the dolphin structure at Entergy's dock. *Id*. at p. 17.

In 2011, Entergy filed this property damage suit against Petitioners under general maritime law. *Id.* at p. 22. After several years of protracted litigation and a trial, the District Court ruled the Frane was solely at fault, and consequently, Petitioners were liable for the damages. The District Court awarded Entergy the amount of its actual repair costs plus prejudgment interest calculated from the date of the loss. *Id.* at p. 57. The judgment was affirmed by the United States Court of Appeals for the Fifth Circuit. *See* Pet. Appendix A, at p. 8.

REASONS TO DENY THE PETITION

Petitioners argue a writ is necessary because the lower courts erred in applying the shifting burdens of proof and in failing to allocate all or some responsibility for the damages to Entergy. Petitioners also argue a writ is necessary because the lower courts erred in awarding prejudgment interest from the date of loss. These arguments are without merit and do not warrant review by this Court.

A. The Permit Issue and the *Pennsylvania* Rule

Petitioners continue to urge that the dolphin structure lacks a valid permit as required by the Rivers and Harbors Act ("RHA").[1] Even if this fact were true, it has no effect on the validity of the judgment below. The lack of a permit is not an absolute bar to recovery in tort; nor does this compel any allocation of comparative fault to Entergy.

Petitioners' argument is premised on the *Pennsylvania* Rule which in maritime collision cases shifts the burden of proof to the party who violated the law to show the violation did not cause the accident.[2]

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[1] The RHA requires the Army Corps of Engineers ("ACOE") to issue a permit for the construction of any structures in a navigable river. *See* 33 U.S.C. § 403.

[2] *See The Pennsylvania*, 86 U.S. 125, 127 (1873). Another relevant admiralty rule is found in *The Oregon*, 158 U.S. 186, 192-93 (1895), which shifts the burden of proof to the moving vessel in cases like this one involving an allision with a stationary object. In its ruling, the District Court thoroughly considered the application of both rules. *See* Pet. Appendix D, pp. 118-21.

Straining to manufacture a basis for review, Petitioners claim that a jurisprudential conflict exists as to how a violation of the RHA affects a property owner's right to recover in maritime collision cases and eminent domain cases. Petitioners begin with the unremarkable observation that, in order to recover "just compensation" for a structure taken by the government, a property owner must demonstrate "strict permit compliance" with the RHA. *See* Pet. Brief at pp. 20-21. Petitioners then suggest this same rule should apply in maritime collision cases such that a property owner cannot recover against a negligent third party without first establishing the damaged structure has a valid permit. *Id.* at pp. 24-36.

Attempting to show the relevance of this alleged conflict, Petitioners falsely represent that the lower courts "agreed there was no permit in place for the dolphin [structure]." Pet. Brief at pp. 9, 30. In the proceedings below, Entergy presented evidence that the dolphin structure qualifies as "pertinent auxiliary equipment" to the dock, and as such, has been covered by permits issued by the ACOE dating back to 1965. *See* Pet. Appendix D, pp. 124-27. Entergy also showed that the dock and the dolphin structure have been in place for over forty (40) years without any challenge from the ACOE or other authorities. *Id.*

Based on these facts, and contrary to Petitioners' misrepresentation, the District Court ruled that Petitioners had failed to establish "the [dolphin structure] lacked a proper permit from the ACOE." Pet. Appendix B, pp. 39-41. Whether a proper permit exists is an

affirmative defense, and the burden of proving a violation of the RHA "lies with the person asserting the violation." *Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F. Supp. 738, 761 (E.D. La. 1989), *aff'd*, 904 F.2d 317 (5th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990). Consistent with this well-established authority, the District Court correctly found that Petitioners' arguments were "unpersuasive" and that they had failed to meet their burden of proof on the permit issue.[3]

In its opinion, the Fifth Circuit observed that the subject permits do not "explicitly" reference the dolphin structure. *See* Pet. Appendix A, p. 5. However, contrary to Petitioners' misrepresentation, the Fifth Circuit did not make a specific finding or "agree" that this renders the dolphin structure in violation of the RHA. The Fifth Circuit did not directly address the adequacy of the permit descriptions; nor did it disturb the District Court's finding that Petitioners had failed to establish a violation of the RHA. *Id.* at pp. 4-9.

The District Court further found that "[e]ven if the ACOE never condoned the [dolphin structure]," this would not alter its ultimate determination of liability. Pet. Appendix D, pp. 127-28. The District Court reasoned the *Pennsylvania* rule could not be used as a shield against liability in cases like this one where the negligence of the offending vessel is "so glaring." *Id.* (*citing Dow Chemical Co. v. Dixie Carriers, Inc.,* 463 F.2d 120 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040

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[3] Pet. Appendix B, p. 39. Ignoring *Pillsbury* and the *Oregon Rule*, Petitioners wrongly contend it was Entergy's burden to disprove their mere allegation that a proper permit did not exist.

(1972)). Here, the captain of the Frane admitted he was familiar with this stretch of the river, including the presence of the dolphin structure, and the allision occurred because he lost control of his tow after hitting a bridge pier. *See* Pet. Appendix D, p. 125-28. No evidence was offered to rebut these facts or to show that the dolphin structure contributed to the allision simply by being there.[4] As confirmed by the Fifth Circuit, the record clearly supports the District Court's determination that the Frane was solely at fault notwithstanding any alleged violation of the RHA by Entergy. *See* Pet. Appendix A, pp. 4-6.

Even if the dolphin structure lacks a proper permit, the jurisprudential conflict urged by Petitioners is imaginary. Petitioners' argument ignores fundamental differences between eminent domain cases involving the taking of property for public use and maritime tort cases involving property damages caused by the negligence of private parties. The issue in eminent domain cases is the determination of "just compensation," not the allocation of liability for negligent conduct.

The rule that a valid permit is required to recover in eminent domain case emanates from the obvious principle that the government does not owe compensation to a property owner for an unlawful structure

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[4] *Id.* Petitioners suggest that the dolphin structure is an obstruction to navigation because it extends into the river channel. However, Petitioners failed to present any evidence to show that the size and/or location of the dolphin structure somehow contributed to this allision which occurred because the Frane lost control of its tow.

which could be "taken" through other means. Under the RHA, the Attorney General of the United States is authorized to seek the removal of any unlawful structure erected without a permit. *See* 33 U.S.C. § 406. It follows therefore that "[o]ne is not entitled to recover elements of value that the Government . . . might have destroyed under exercise of government authority other than power of eminent domain." *United States v. Fuller*, 409 U.S. 488, 491-92 (1973). This rule clearly has no application in maritime collision cases where liability is to be determined based on evidence of the parties' relative degree of comparative fault.

Petitioners' unsupported argument that "strict permit compliance" with the RHA should be an absolute prerequisite to recovery in tort is foreclosed by this Court's ruling in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). *Reliable Transfer* is the controlling authority on the issue raised by Petitioners, yet they fail to even address or distinguish this decision in their brief.

In *Reliable Transfer*, this Court abolished the admiralty rule of divided damages which required each party at fault to bear one-half of the damages regardless of their relative degree of negligence. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994) (discussing import of *Reliable Transfer*). This Court criticized the divided damages rule as unfair because "a minor statutory violation" would automatically require the violator "to bear half of the collision damage" regardless of the circumstances. *See Reliable Transfer*, 421 U.S. at 406 (noting the *Pennsylvania* rule

"magnified" the potential for unfairness). Therefore, this Court adopted a new rule that in maritime collision cases "damage is to be allocated among the parties proportionately to the comparative degree of their fault." *Id*. at 411.

Petitioners are asking this Court to borrow inapplicable concepts from takings cases and turn the *Pennsylvania* rule into something even more draconian than the old divided damages rule. Petitioners do not cite any circuit court case that has applied the *Pennsylvania* rule in such a manner. *Reliable Transfer* makes clear that, even if the dolphin structure is not in "strict permit compliance," this does not compel a determination that Entergy is solely or even partially responsible for the damage.[5] As to this point, the Fifth Circuit has succinctly stated:

> [The *Pennsylvania*] rule merely allocates a burden of proof; it does not fix liability. If a party fails to carry the burden imposed on it by the rule, the rule does not require that party to bear 100% of the responsibility for the allision. Liability still must be apportioned according to the comparative fault of the parties, as mandated by the Supreme Court's landmark ruling in [*Reliable Transfer*]. The rule

[5] Ignoring *Reliable Transfer*, Petitioners wrongly contend that, without a valid permit, Entergy lacks a proprietary interest in the dolphin structure and is *ipso facto* 100% responsible for the damages. In the proceedings below, Petitioners did not present any alternative argument that Entergy should bear some lesser percentage of comparative fault, and the District Court properly attributed all of the fault to the Frane.

> of *The Pennsylvania* concerns only the burden of proof for showing causation; it does not determine ultimate liability for damages.

Pennzoil Producing Co. v. Offshore Exp., Inc., 943 F.2d 1465, 1472 (5th Cir. 1991).

The lower courts correctly applied the applicable burdens of proof and determined Petitioners were 100% responsible for the damage based on the glaring evidence of the Frane's negligence. The lower courts were not obligated to allocate any comparative fault to Entergy based on an alleged statutory violation having no causal connection to the allision. Ultimately, the lower courts' allocation of liability is a factual determination which is not subject to review.

B. The *Robins Drydock* Rule

In addition to their meritless permit argument, Petitioners also suggest that, as a lessee of the facility, Entergy lacks a "proper proprietary interest" to recover any damages under *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303 (1927). *See* Pet. Brief at pp. 21, 25. Under *Robins Drydock*, a plaintiff in admiralty cannot recover negligently inflicted economic losses where there is no physical damage to any property in which the plaintiff has a proprietary interest. *See Pennzoil*, 943 F.2d at 1473 (discussing rule).

The *Robins Drydock* rule is inapplicable because, as specifically determined below, Entergy had a proprietary interest in the dolphin structure which sustained

physical damage as a result of the allision.[6] Moreover, the damages sought by and awarded to Entergy were limited to its actual repair costs and did not include any amounts for business interruption, lost profits or other economic losses. This issue is without merit and does not warrant review.

C. Prejudgment Interest

Petitioners urge several challenges to the duration of the prejudgment interest award, including some which have never been raised before. In the proceedings below, Petitioners unsuccessfully argued that the prejudgment interest award was in error because Entergy allegedly mismanaged the repair project and delayed the progress of the litigation. Petitioners' brief to this Court includes a new, albeit incoherent, argument that the District Court somehow "divested" its maritime jurisdiction over this case through a ruling made in a separate case involving a contractual dispute between Entergy and the repair contractor. *See* Pet. Brief at p. 38. Even if this Court were to consider this new argument, it is patently frivolous because the District Court retained maritime jurisdiction over the dispute between Entergy and Petitioners from start to finish.

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[6] *See* Pet. Appendix D, pp. 116-17. Rejecting Petitioners' standing challenge, the District Court ruled that Entergy had a proprietary interest in the dolphin structure because, under the lease, it was financially responsible for maintaining the dock. *Id.* Petitioners did not appeal this ruling to the Fifth Circuit; nor did they cite to *Robins Drydock* in their appeal briefs.

As this Court has made clear, prejudgment interest should be awarded in admiralty cases absent "peculiar or exceptional circumstances." *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 196 (1995). Whether such circumstances exist, "rests very much in the discretion of the [trial court]." *City of Milwaukee*, 515 U.S. at 196.

In affirming the prejudgment interest award in this case, the Fifth Circuit correctly noted "[e]ven if there were reasons that might have allowed the trial court to limit the time period for prejudgment interest, we find no abuse of discretion in following the normal rule" that it runs from the date of the loss. *See* Pet. Appendix A, pp. 7-8. This issue is without merit and does not warrant review.

CONCLUSION

The Petition should be denied in all respects.

Respectfully submitted,

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