

File Name: 20a0382n.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Jun 26, 2020

DEBORAH S. HUNT, Clerk

Defendant-Appellant.

I

A

Mud Island sits in Memphis, Tennessee, where the Wolf River Harbor meets the Mississippi River. It is not in fact an island, but a peninsula running north-and-south down the Tennessee side of the Mississippi River. To the island's west lies the Mississippi River and then Arkansas; to its east lies the Wolf River Harbor and then downtown Memphis. Mud Island's undeveloped southern tip juts out where the Wolf River Harbor meets the Mississippi.

On July 6, 2015, Captain Jared LaFrance was piloting the M/V *Lucy Wepfer* southbound through the Wolf River Harbor toward the Mississippi. The *Lucy Wepfer* pushed a barge loaded with concrete slurry. LaFrance intended to make a "U-turn" and steer his vessel northward up the Mississippi River. As he entered the Mississippi, Mud Island was to his starboard (right) side. The Mississippi was high that day, and Mud Island's southern tip was submerged. LaFrance made his starboard turn into the Mississippi prematurely, and the *Lucy Wepfer* ran aground on Mud Island's submerged southern tip. In the language of admiralty law, this was an "allision," which "occurs when a moving vessel strikes a stationary object[.]" *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp.*, 596 F.3d 357, 362 (6th Cir. 2010). The *Lucy Wepfer* and the barge were extracted after some effort. The water's later receding revealed two large gashes on Mud Island's eastern shore.

B

Riverfront Development, Inc., Mud Island's managing agent, sued Wepfer Marine, Inc., the *Lucy Wepfer*'s owner, for negligence. Riverfront sought to recover the costs of repairing the damage to Mud Island. The City of Memphis later intervened as a plaintiff. (The distinction between the two plaintiffs does not matter on appeal so we will refer to them both as "Riverfront.")

The district court determined that Wepfer was fully liable and that the proper measure of damages was *restitutio in integrum*—the cost of restoring Mud Island to its previous condition. *The Baltimore*, 75 U.S. 377, 385 (1869).

The district court held a hearing to establish the cost of repairing Mud Island. Following the grounding, the Mississippi’s rising and falling waters had started filling the holes with sediment. The parties disputed whether this sediment needed to be removed to restore Mud Island to its original condition. Wepfer argued that the sediment was the same material that had built Mud Island and that the river would naturally refill the holes. Alternatively, Wepfer contended that it needed only to pay to fill the holes above the sediment. Riverfront, by contrast, maintained that the accumulating sediment would not restore Mud Island to its original condition. It wanted to excavate the sediment so that the holes could be “filled and packed by human intervention with sand and/or limestone.” At the hearing, then, the district court needed to resolve (a) the volume of the holes; (b) whether the sediment needed to be removed; (c) the material that should be used to fill the holes, if any; and (d) the total cost of the repairs.

1. *Volume.* The parties debated the size of the two large holes. Both sides measured the holes within eight months of each other.

James Reeder, a Riverfront project director with a bachelor’s degree in civil engineering, first measured the holes in November 2016, about 16 months after the accident. Reeder explained his process. Using a “tape measure and electronic devices,” he “divided the two gouges into five different areas” and then “took measurements of these five parts . . . and came up with the cubic yardage.” Reeder estimated the holes’ irregular depths by using “engineering judgment” and his own height as a reference. Based on rounded-up measurements, he calculated the volume of the holes as 10,000 or 10,100 cubic yards. When Reeder sought a quote for refilling the holes, he

added a 20-percent contingency to account for “compaction” of the material. This contingency was necessary, Reeder explained, “because a lot of times when you fill up holes, you have material that’s not compacted and you have to buy more material than what is the volume of the hole. So when you end up compacting it, you have to have 20 percent more material to get to the final grade.” That resulted in a total volume of 12,000 cubic yards of fill *material* to fill the 10,000 or so cubic yards of *holes*.

Wepfer hired Ollar Surveying Company to measure the holes again eight months later in July 2017. The court recognized Douglas Swink, the surveyor, as an expert in the fields of land surveying, topographic surveys, slope analysis, and soil analysis. Swink measured the holes using common surveyor methods. He calculated their volume as 2,792.30 cubic yards, a number that fell more than 70 percent below Reeder’s. But all agreed that Ollar’s measurements were more or less accurate in July 2017.

The disparities in measurements mattered greatly to Wepfer, as they suggested the amount of sediment accumulating in the holes. Wepfer tried to paint Reeder’s earlier tape-measure calculations as unsophisticated and inaccurate. Even Riverfront’s expert opined that it did not “seem very likely” that the holes could have filled with over 7,000 cubic yards of sediment in eight months. Benny Lendermon, Riverfront’s former president and a civil engineer, also agreed that, when he saw the holes in March 2017 (after Reeder’s measurements but before Ollar’s), it appeared that they “had filled in very little[.]” But Riverfront’s witnesses also suggested that erosion and “sloughing” (instability of the holes’ slopes) could account for some of the accumulation.

2. *Excavation.* The parties next debated whether the accumulated sediment needed to be removed before refilling the holes.

Riverfront’s witnesses testified that excavation was necessary because Mud Island is made of sand and the sediment accumulating in the holes was “muck.” Those witnesses included Reeder; Lendermon; and Clinton S. Willson, a professor of civil and environmental engineering. Dr. Willson testified that Mud Island, in its present form, is largely made of sand. Around the turn of the twentieth century, it was little more than a sand bar. But today, he explained, it is “a highly engineered system” composed of “dredged material that was . . . placed in a way that would allow for . . . development[.]” The dredged material was mainly “granular sand” from the bottom of the Mississippi River.

While Mud Island is made of sand, Riverfront’s witnesses testified that the sediment settling in the holes was likely “muck.” They admitted that they did not test the sediment to determine whether it was muck or sand—the most accurate way to answer the question. But they explained why they believed it was muck. According to Dr. Willson, the Mississippi carries a range of sediments, from “large course-grain sand, down through medium, fine, very fine sand,” and then “down into silts and clays[.]” The heavier sand settles near the river bottom. The finer material is no match for the Mississippi’s current and so remains afloat. The Wolf River Harbor, by contrast, has little to no current. An eddy thus forms as the Mississippi’s current meets the Wolf River Harbor’s stagnant water. The Wolf River Harbor’s lack of a current allows the Mississippi River’s fine materials to settle, resulting in “more loose material”—known as “muck”—accumulating in the harbor. Because the holes were on Mud Island’s harbor side, Riverfront’s witnesses testified, it was highly likely that they contained the settling muck rather than sand.

Riverfront’s witnesses added that muck is not a suitable replacement for sand. Dr. Willson defined muck as “typically some combination of water, mud, organic material . . . very fine

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