IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RUSSEL BUSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIV. ACT. NO. 1:21-cv-137-TFM-B**
	)	
B&D MARITIME, INC. and RANDY BOGGS,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION ON BENCH TRIAL

This matter came before the Court for a bench trial that was held on November 15, 16, and 17, 2023, with the Court entering verdict in favor of Plaintiff Russel Buster and against Defendants, B&D Maritime, Inc., and Randy Boggs. Defendants B&D Maritime, Inc. and Randy Boggs are jointly and severally liable for damages awarded in the amount of $**666,058.47**.[1] Pursuant to Fed. R. Civ. P. 52(a)(1) the Court issues this opinion with its findings of fact and conclusions of law.[2]

I. NATURE OF THE CASE

This case arises from an allision[3] that occurred during Hurricane Sally 2020; Hurricane

[1] The amount of damages is corrected from the oral announcement from the bench pursuant to Fed. R. Civ. P. 60(a). The Court inadvertently included a typographical error in its prior calculation resulting in a $10.00 differential. Additionally, for consistency, the Court now includes all decimal places during the calculations until the final amount when it rounds the number to two decimal points. Finally, because of the delay from the oral pronouncement on November 17, 2023, to the issuance of the written final judgment pursuant to Fed. R. Civ. P. 58, the Court also had to adjust the number of days when calculating prejudgment interest from 1157 days to 1181 days.

[2] "'[T]he judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts.'" *Stock Equip. Co., a Unit of Gen. Signal Corp. v. Tenn. Valley Auth.*, 906 F.2d 583, 592 (11th Cir. 1990) (quoting FED. R. CIV. P. 52 advisory committee's note to 1946 amendment).

[3] An allision occurs when a moving object strikes a stationary object, whereas a collision occurs

Sally made landfall near Gulf Shores, Alabama at on September 16, 2020, producing hurricane-force winds, a complex pattern of storm surge flooding, and record river flooding resulting from heavy rainfall. At the time of Hurricane Sally, Plaintiff owned a home at 26594 Cotton Bayou Drive, Gulf Shores, Alabama. Defendant TCJ Holdings LP ("TCJ") owned a 2007 68-foot convertible Hatteras named the Ashley Marie Grace ("AMG"). Defendant B&D Maritime, Inc. ("B&D") owned a 1986 89-foot Gulf Craft named the Weather or Knot ("WOK") which was a commercial fishing charter. Defendant Randy Boggs ("Mr. Boggs") was the charterer who manned, supplied, and navigated the Weather or Knot. Defendant Randy W. Boggs owned San Roc Cay Marina ("San Roc Cay"), located at 27267 Per dido Beach Boulevard, Orange Beach, Alabama 36561.

Prior to Hurricane Sally's landfall, Defendants each made the decision not to move their respective vessels from their moorings, and at the time Hurricane Sally made landfall both the Weather or Knot and the Ashley Marie Grace were moored at the Marina. Doc. 98 at 5; Doc. 100 at 4-5. During the hurricane, both vessels became unmoored and drifted down Cotton Bayou, ultimately coming ashore and alliding with Plaintiff's property located on Cotton Bayou. Doc. 98 at 8; Doc. 100 at 6; Doc. 108 at 2.

Plaintiff claimed that both vessels allided with his home damaging it due to the negligence of Defendants, jointly and severally. Specifically, Plaintiff asserts that the vessel owners should have moved their vessels to a safer location for the storm. *See* Doc. 108. The parties dispute whether the strength and path of Hurricane Sally were predictable, as well as whether Orange Beach was within the forecast or cone of uncertainty ("the Cone"), particularly early on enough for Defendants to be on notice to move their vessels. Doc. 98 at 5; Doc. 100 at 5; Doc. 108 at 5-7.

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when two or more objects strike each other.

The parties also disputed the extent to which the vessels caused damage, if any, to Plaintiff's property. Doc. 98 at 10-11; Doc. 100 at 7; Doc. 108 at 14-15. All Defendants contested and denied negligence. In addition, B&D and Randy Boggs, as the "owner" of the WOK, sought protection under the Limitation of Liability Act in the amount of $450,000.00. *See.* 46 U.S.C. §§ 30501, *et seq*. Plaintiff disputed that either Defendant was entitled to the protection under the Limitation of Liability Act and further disputed the amount of any purported limitation.

II. PROCEDURAL HISTORY

Plaintiff filed his Complaint in this Court on March 25, 2021. Doc. 1. In the Complaint, Plaintiff brought claims for negligence and wantonness against Defendants. *Id*. Defendants timely filed their respective answers. Docs. 3, 23. Additionally, Defendants filed respective third-party complaints for exoneration from or limitation of liability, along with respective motions for interim relief and entry of a concursus order. Docs. 4, 5, 18, 20. The Court entered order approving the letters of undertaking, prosecution of claims, and setting claims deadlines on the questions of exoneration and limitation of liability. Docs. 9, 24. This included an initial restraint and injunction on claims under the admiralty process. Plaintiff filed answers to the third-party complaints along with his claims against Defendants. Docs. 14, 21. Boggs Defendants filed an answer to Williams Defendants' third-party complaint. Doc. 25. Defendants filed their respective answers to Plaintiffs claims. Docs. 17, 27. Williams Defendants filed a response to Boggs Defendants' answer. Doc. 31. Williams Defendants then filed an amended answer to Plaintiff's complaint. Doc. 36. Put simply, there were claims, counter claims, third party claims, exoneration and limitation of liability issues, and admiralty injunctions – like some statuses on social media "it's complicated."

On September 15, 2022, all Defendants filed their respective motions for summary judgment and briefs in support. Docs. 98, 99, 100. Plaintiff timely filed his consolidated response,

and Defendants filed their replies. Docs. 108, 114, 118. After the respective motions for summary judgment were fully briefed, the collective Defendants settled with Claimant Marina Village Owners Association LLC ("Marina Village"), and Marina Village was dismissed from this case with prejudice. See. Docs. 132, 135, 137. On June 30, 2023, Defendants moved the Court for permission to file a supplemental brief to their motions for summary judgment. Docs. 148, 149. The Court granted the motion and ordered the parties to file their supplemental briefs. Doc. 150. Defendants filed their supplemental briefs, and Plaintiff filed a supplemental brief in opposition. Docs. 151, 152, 153. Defendants' motions for summary judgment (Docs. 98 , 99) were denied by the Court in its Memorandum Opinion and Order issued on August 22, 2023. Doc. 155.

After resolution of the above motions, the parties filed a joint motion to dismiss in which all of Plaintiff's claims against Defendants Williams Management, LLC and Thomas P. Williams, Jr. and Plaintiff's wantonness claims against TCJ Holdings, LP, B&D Maritime, Inc., and Randy W. Boggs on October 6, 2023. Doc. 165. The Court granted the motion in part, dismissing without prejudice Williams Management, LLC and Thomas P. Williams, Jr. as parties and allowed Plaintiff to file an amended complaint to drop the wantonness claims issue as agreed upon by the parties. Doc 166.

Plaintiff's amended complaint was filed on October 30, 2023 alleging the remaining defendants were negligent in failing to properly secure their vessels, failing to move their vessels to a safe location, failing to have, maintain and/or follow hurricane plans, failing to follow the warnings of the National Hurricane Center, violating their policies and procedures for hurricane preparedness, failing to have proper/adequate moorings for said vessels, failed to train, supervise, and/or hire personnel regarding mitigating the effects of a hurricane; and the Boggs Defendant knew, or should have known, that the pilings in the Marina were inadequate to safely secure the

Ashley Marie Grace and the Weather or Knot. Doc 168. Defendants timely filed their respective answers. Docs. 175, 176.

On November 13, 2023, just prior to trial, TCJ filed a notice of settlement of all claims and charges filed against it by Plaintiff. Doc 182. [4] That left only the claims involving Russel Buster, B&D Maritime, Inc., and Randy Boggs.

This non-jury trial began on November 15, 2023 and concluded on November 17, 2023. Extensive testimony and evidence were presented by both parties, including testimony from various experts.

III. STANDARD OF REVIEW

> The burden of proof in civil cases is the same regardless of whether the finder of fact is a judge in a bench trial or a jury. *See Cabrera v. Jacobitic*, 24 F.3d 372, 380 (2d Cir. 1994). That is, a plaintiff bears the burden of satisfying the finder of fact that he or she has proven every element of his or her claim by a preponderance of the evidence. A preponderance of the evidence means such evidence that, when considered with the opposing evidence, has more convincing force, and demonstrates that what is sought to be proved "is more likely true than not true." *Pattern Jury Instructions*, Basic Instruction No. 6.1, U.S. Eleventh Circuit District Judges Association (Civil Cases) (1999).
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> In bench trials, the judge serves as the sole fact-finder and, thus, assumes the role of the jury. In this capacity, the judge's function includes weighing the evidence, evaluating the credibility of witnesses, and deciding questions of fact, as well as issues of law. *See Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir. 1993) (holding that "it is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony").
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> Moreover, "a trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence." *Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979) (citing *Wright v. Southwest Bank*, 554 F.2d

[4] Plaintiff and Defendant TCJ filed a joint stipulation of pro tanto dismissal of claims with prejudice, without effect on Plaintiff's claims, against Defendants B & D Maritime, Inc., and Randy W. Boggs. *See* Doc. 198. Though this occurred after the bench trial, it was clear to all parties and the Court that TCJ was no longer a party for the purposes of the trial and the dismissal paperwork was merely concluded after the settlement had been fully consummated. It has no effect on the findings and conclusions here.

661 (5th Cir. 1977));[5] *see also Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 776 n.5 (11th Cir. 1982) (stating that the court has "broad discretion over the admission of evidence in a bench trial").

Prickett v. United States, 111 F. Supp. 2d 1191, 1192 (M.D. Ala. 2000).

Having carefully considered evidence submitted at trial, applying the above standard, and having studied the numerous exhibits, pleadings, and arguments of counsel, the Court gave its verdict and oral findings on the record at the close of trial on November 17, 2023. It now enters the following written Findings of Fact and Conclusions of Law supporting its decision.

IV. FINDINGS OF FACT

The Court finds Plaintiff proved the following facts by a preponderance of the evidence.

On Saturday, September 12, 2020, tropical storm Sally crossed the southern peninsula of Florida. Computer models were already indicating that Sally would intensify into a significant hurricane and posed a major threat to the northern coast of the Gulf of Mexico. A hurricane and storm surge watch were issued by the National Hurricane Center ("NHC") at 5:00 p.m. on September 12, 2020, stretching from southeast Louisiana to the Alabama/Florida state line, which includes Orange Beach. A hurricane watch means hurricane conditions are possible in 48 hours.

At 4:00 a.m. on Sunday September 13, 2020, the NHC issued a hurricane warning from southeast Louisiana to near the Alabama/Mississippi state line. A warning means those conditions are likely within 24 hours or are already occurring. A hurricane watch was issued for the entire Alabama coast, including Orange Beach. At 10:00 p.m. on Sunday, the NHC issued a hurricane warning from southeast Louisiana to Mobile Bay; Orange Beach remained under a hurricane

[5] Decisions of the former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

watch.

On Monday, September 14, 2020, at 10:00 a.m., the NHC issued a hurricane warning to the Alabama/Florida state line which included the Orange Beach area. Orange Beach was also included within the Cone. The tropical force winds remained offshore. According to Defendants' weather expert, Alan Sealls, the sustained wind at Cotton Bayou at 10:00 a.m. on September 14, 2020, was approximately 13 mph; wind gusts were as much as 28 mph. The sustained winds remained at 13 mph until around 4:00 p.m. At 8:00 p.m. CST, the sustained winds were 20 mph, with gusts of 38 mph. The sustained winds did not reach tropical force until 4:00 p.m. CST on Tuesday, September 15, 2020. In summary, Orange Beach was under a hurricane watch 84 hours prior to landfall, and under a hurricane warning for 43 hours prior to landfall. Sally's track and potential for damage was very well forecasted according to Defendant expert Alan Sealls. The Court found Mr. Sealls to be extremely knowledgeable and credible.

B&D, which is owned by Boggs, was the owner of San Roc Cay Marina located in Orange Beach, Alabama when Sally came ashore on September 16, 2020. B&D is the owner of the WOK and Boggs is her captain. San Roc Cay Marina is located at the mouth of Cotton Bayou near the Perdido Pass Bridge and Gulf of Mexico. Boggs had a written hurricane plan prior to the arrival of Sally, which stated, in pertinent part "Once the storm is determined to be a likely threat to the vessel's safety based on predictions by the National Weather Service the captain will do all appropriate measures to move the vessel to a safe location" and "Move vessel to Ingram's Bayou where we bow the boat on dry land." According to Boggs, the same plan was used during Hurricanes George, Ivan, Katrina, and several others and his vessels were undamaged in those storms.

Boggs testified that he is a Master Captain who had been running boats since he was a kid

and had captained crew, utility, tugs, and fishing boats. In preparation for Hurricane Sally, Boggs evacuated all the lightweight boats on and removed all the boats from the lifts that were normally housed at San Roc Cay Marina on September 13, 2020. He also encouraged and told other boat captains that they needed to take their boats and move. However, he and some of the owners chose to stay. Mr. Boggs left the WOK in the marina because it had new moorings and custom slip; he believed he finished securing the WOK on September 12, 2020, securing with heavy duty nylon ties in a method commonly used during storms. Clay Dubuisson also rode out Hurricane San Roc Cay Marina aboard his vessel, Da Grits. His truck was parked at the Marina lot and was lost in Sally, but his boat survived. The Court found both Mr. Boggs and Mr. Dubuisson generally credible. In fact, the Court found the testimony of Mr. Boggs credible as his years of experience coupled with his actions in previous storms, in contrast to his actions in Sally, emphasized his failure to act with reasonable care in the case at hand.

Despite these efforts, the WOK broke from its moorings about 1:30 a.m. to 2:00 a.m. on Wednesday, September 16, 2020, as Sally approached Orange Beach. After breaking loose, the WOK began drifting west down Cotton Bayou. Jere Goldsmith ("Goldsmith") is an owner and lives at Marina Village Condominiums immediately to the east of Buster's house on Cotton Bayou. During Sally, Goldsmith and his significant other, Elizabeth Watson ("Watson") were in their Marina Village Condominium watching the storm. Goldsmith and Watson saw the WOK traveling west on Cotton Bayou around 3:15a.m. Both testified that saw lights of the vessel coming from afar; the lights were so bright and large in scale they assumed a military ship was passing in the water. Goldsmith and Watson also testified that the WOK was travelling very fast, coming in stern first, initially aliding with the property pools and then starting to spin in a north/south direction. After hitting the pool, the WOK sailed toward Buster's house. Following the storm, Goldsmith

saw blue paint on the pool deck, the same color as the blue paint on the WOK. Goldsmith also saw the same blue paint on Buster's house and on the wooded bulkheads for the pool. Ten minutes after the WOK passed, the AMG passed by also adrift and heading toward Buster's house. The Court found both Goldsmith and Watson testified credibly and gave the testimony considerable weight on the order of events that occurred.

Martin Pitts, a structural engineer hired by Buster to access the damages to his house, made three visits to Buster's house following the storm: September 24, 2020, September 30, 2020, and October 6, 2020. Based on his inspection of Buster house and the boats, Pitts testified that both the WOK and the AMG struck Buster's house with the WOK striking first. Pitts also saw blue markings on the south side of Buster's house. In Pitt's opinion, the WOK caused substantial damage to Buster's house requiring Buster to demolish his house because it was structurally unsound due to the impacts caused by the WOK's bow. Pitts noted the size of the WOK, specifically its height and extended bow, in comparison to the smaller AMG, as to why he assessed the WOK impact caused the vast majority of the damage to the Buster Properties. The vessels also destroyed Buster's gazebo and damaged his seawall. The Court found Pitts' testimony to be credible and gave it significant weight.

Based on Pitts' opinion and Plaintiff's concern for the safety of those who might venture onto his house, Plaintiff testified that he had the property demolished; he paid $32,043.65 for the demolition. The Court found that testimony credible.

Buster hired real estate appraiser Andrew D. Watson ("Watson") to appraise the value of his house at the time of loss. This calculation did not consider that two large vessels were in his yard, the value of the gazebo that was destroyed, or the value of the seawall that was destroyed. Watson testified that, in his opinion, the fair market value of damages to the Buster home was

$500,000.00. Evidence was introduced by Defendant of a separate appraisal conducted by plaintiff expert, Damon Faunce, which determined the replacement and/or repair value of the seawall and gazebo and landscape in an amount in excess of $350,00.00. Mr. Faunce did not testify at trial; his report was introduced by defense during cross examination of Andrew Watson and excerpts were used by both parties during the testimony of Watson. The Court found the testimony of Watson to be credible; in addition, the Court took into consideration the ancillary damages noted in the Faunce report.

CONCLUSIONS OF LAW

A. Liability

In proceeding under the Limitation Act in maritime cases, the Court applies a two-step analysis. First, to answer the question of exoneration, the court must first determine what acts of negligence, if any, caused the accident. *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1036 (11th Cir. 1996). Liability is established only where the vessel owner's negligent acts were "a contributory and proximate cause of the accident." *Hercules Carriers, Inc. v. Claimant State of Florida, Dep't of Transp.*, 768 F.2d 1558, 1566 (11th Cir. 1985) (citing *Bd. of Comm'rs of the Port of New Orleans v. M/V Farmsum*, 574 F.2d 289, 297 (5th Cir.1978)). If the shipowner is free from any contributory fault, he is exonerated from all liability. *See American Dredging Co. v. Lambert*, 81 F.3d 127, 129 (11th Cir. 1996). On the other hand, if negligence was at least partly what caused the accident, the Court then proceeds to the second step of the analysis and determines whether the vessel owner had knowledge of, or was in privity with, the acts of negligence. *Beiswenger Enterprises*, 86 F.3d at 1036. If the vessel owner successfully shows a lack of privity or knowledge, he remains liable but is able to limit that liability to the value of the vessel(s) involved in the accident. *Id*. Then, the available funds are then equitably distributed among the

eligible damage claimants.

Under "the Louisiana Rule", it is a well-established principle governing the determination of liability and fault in admiralty cases that if a moving vessel strikes a stationary object, the vessel owner is presumed to be at fault. *The Louisiana*, 70 U.S. (3 Wall.) 164 (1865); *see also Skanska USA Civil Se. Inc. v. Bagelheads, Inc* ,75 F. 4th 1290 (11th Cir. 2023) (stating "the Louisiana rule," creates a rebuttable presumption that a vessel is negligent when it collides with a stationary object); *Hatt 65 LLC v. Kreitzberg*, 658 F.3d 1243, 1247 (11th Cir. 2011) (stating and citing same).

The vessel owner has a heavy burden to rebut this strong presumption by proving one of the following: "(1) that allision was the fault of the stationary object, (2) that the moving vessel acted with reasonable care, or (3) that the allision was an unavoidable accident (Act of God)." *Bunge Corp. v. Freeport Marine Repair,* 240 F.3d 919, 923 (11th Cir. 2001). In the hurricane preparation context, "reasonable care amounts to whether the owner used all reasonable means and took proper action to guard against, prevent or mitigate the dangers posed by the hurricane." *Fischer v. S/Y Neraida*, 508 F.3d 586, 594 (11th Cir. 2007) (citing *Stuart Cay Marina v. M/V Special Delivery*, 510 F. Supp. 2d 1063, 1072 (S.D. Fla. 2007)).

In *Skanska USA*,75 F.4th 1290, the Eleventh Circuit Court of Appeals applied the Louisiana Rule in affirming liability against the owners of barges that broke loose in Pensacola during Sally.[6] *Id.* at 1292. The appellate court discussed that the trial court "rejected Skanska's assertion that it was 'caught off guard' by the storm" and found that the only surprise to the

[6] The Court notes that Pensacola, Florida is approximately 27 miles east of Orange Beach, Alabama, is also located on the Gulf Coast. Additionally, in *Skanska USA*, the facts were part of the same storm discussed in this case. As such, the Court finds that the binding case analysis is extremely applicable here.

defendant "was its unreasonable choice to discount – or even ignore the clear warning of an approaching tropical storm turned out to have harsh consequences." *Id.*

Under the Limitation Act, 46 U.S.C.S. §§ 30501-30530, when a vessel causes loss, damage, or injury by collision without the vessel owner's privity or knowledge, the owner's liability is limited to the value of the vessel and its pending freight. 46 U.S.C.S. § 30523. The Eleventh Circuit has identified a two-step analysis in a Limitation Act case: "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." *Skanska USA*, 75 F.4th at 1306 (quotation and citations omitted). As such, a district court determination that a vessel owner was negligent in failing to secure its vessels adequately during Hurricane Sally and did not lack privity or knowledge of the negligent acts means no limitation of damages could apply and the owner had no right to exoneration. *Id.* at 1298.

A threshold question here is whether an allision between the WOK and the Buster home occurred. The Court finds it is unquestionable that the WOK did allide with the stationary home. Therefore, the Louisiana Rule applies, and Defendants are presumed to be at fault unless they can rebut the presumption by establishing by a preponderance of the evidence one of the following three defenses: (1) that the allision was the fault of the Buster property, (2) the Defendants acted with reasonable care, or (3) the allision was an unavoidable accident.

Here, the Court found the testimony of Mr. Boggs as to his years of experience coupled with his actions in previous storms, in contrast to his actions in Sally, emphasized his failure to act with reasonable care in the case at hand. Boggs had a written hurricane plan that he successfully followed in previous storms resulting in no damage to his vessels. Further, in preparation for

Hurricane Sally, Boggs evacuated all the lightweight boats on and removed all the boats from the lifts that were normally housed at San Roc Cay Marina. He also encouraged and told other boat captains that they needed to take their boats and move. However, Boggs left the WOK in the marina although his hurricane plan only required him to move his boat thirty miles inland to a safe and secure location. Therefore, the Court finds the Defendants did not act reasonably by failing to move their vessels to a safer location because Orange Beach was in the Cone established by the National Hurricane Center five (5) days before Sally came ashore, was under a hurricane warning three (3) days before Sally came ashore, and Boggs failed to follow his hurricane plans for the WOK after requiring other owners move their vessels out of the marina in the days prior to the storm.

Having determined that negligence occurred, the first question on the limitation question has been answered and the Court turns to the second inquiry - whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. The Court finds that B&D cannot limit its liability because Boggs, as the owner of B&D made the decision to not move the WOK to a safer location despite the hurricane warnings and his advice to other boat owners. As such, B&D has privity and knowledge of all facts relating to B&D's failure to move the WOK to a safer location which the Court finds to be negligent. Plainly stated, it was clear for a significant period of time that Orange Beach was in the Cone and the area included by hurricane warnings. There was no surprise here. While true that Sally may have shifted slightly farther east that originally projected to make landfall, the Orange Beach area was always within the geographical area where storm could hit and certainly Defendants had enough notice to adjust but chose not to do so. Therefore, limitation and exoneration are not at issue in this case and do

not apply. Therefore, the petition for exoneration from and limitation of liability is dismissed, and the injunction (Doc. 9) is dissolved.

B. Damages

Having found that Defendants are liable, and that limitation or exoneration are inapplicable, the Court now turns to damages including any comparative fault from other parties not part of the bench trial.

Damages in a maritime case are governed by federal law. *Pelican Marine Carriers, Inc. v. City of Tampa*, 791 F. Supp. 845, 856 (M.D. Fla. 1992), *aff'd*, 4 F.3d 999 (11th Cir. 1993). "The purpose of compensatory damages is to place the injured party as nearly as possible in the condition he would have occupied if the wrong had not occurred." *Id.* at 856 (citation omitted); *see also Petition of M/V Elaine Jones*, 480 F.2d 11 (5th Cir. 1973),[7] *amended by Canal Barge Co., Inc. v. Griffith*, 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 423 U.S. 840, 46 L. Ed. 2d 60, 96 S. Ct. 71 (1975) ("A party suffering injury to his property is entitled to no more than restoration to its condition prior to the wrong.").

The Court then looks to whether there is a total loss (whether actual or constructive) or if the property can be repaired. A constructive total loss is when the costs of repairs exceed the pre-allision value of the property. *See Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F. Supp. 738, 763 (E.D. La. 1989), *aff'd and remanded*, 904 F.2d 317 (5th Cir. 1990), *cert, denied*, 498 U.S. 983 (1990). Actual total loss is when the property is damaged beyond physical repair. *See Pillsbury*, 715 F. Supp. at 763. Plaintiff and Defendants both cite to *Orange Beach Water, Sewer & Fire Prot. Auth. v. M/V Alva*, 680 F.2d 1374 (11th Cir. 1982) as to the proper measure of damages in

[7] Decisions of the former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

for cases involving constructive or actual loss. When a structure is totally lost in an allision, the measure of damages is the market value at the time of destruction, less salvage value. *Id.* at 1383 (citations omitted). In cases where there is not a readily available market value other evidence is admissible to establish the value of damages such as the opinion of surveyors, engineers, the cost of reproduction, less depreciation, the condition of repair which the (structure) was in, and the like. *Id.* at 1384 (citations omitted).

The cost of repairs performed internally by the injured party, including overhead, are recoverable in a maritime negligence action. *Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 304 (5th Cir. 1976). Engineering and surveying costs are as necessary and integral a part of replacement costs as are a contractor's construction costs. Without this preliminary work, a contractor is unable to perform. Thus, to the extent they are reasonable, these incidental costs are recoverable. *Pillsbury Co.*, 715 F. Supp.at 768; *see also Tampa Port Auth. v. M/V Duchess*, 65 F. Supp. 2d 1279, 1298 (M.D. Fla. June 6, 1997) (holding Plaintiff was entitled to recover its expenses for damage reports as well as surveyor bill, and expenses directly related to the allision.). Further, the general rule in admiralty is that the court should award prejudgment interest absent peculiar circumstances. *See e.g. Pelican Marine Carriers*, 791 F. Supp. at 857. The trial court has discretion to deny prejudgment interest only where peculiar circumstances would make such an award inequitable.

In the maritime context, where two or more parties are at fault in causing property damages, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. *United States v. Reliable Transfer*, 421 U.S. 397, 411 (1975). Liability may be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. *Id.* at 411. “Fault which produces liability must be

a contributing or proximate cause of the collision." *Harbor Tug & Barge, Inc. v. Belcher Towing Co.,* 733 F.2d 823, 826 (11th Cir. 1984). "District courts have considerable discretion in assigning comparative fault." *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1469 (5th Cir. 1991)).

Turning to the case at hand, the Court determines that as a matter of law, the appraisal submitted by Plaintiff's expert Watson is accurate and will be used when calculating damages to the home itself which the Court finds is a constructive loss where the repairs would exceed the value pre-allision. Next, the Court took into consideration the proposed award of damages presented by each party in closing, the testimony from Plaintiff on the stand as to his valuation of the damages, and the ancillary damages noted in the excepts from the Faunce report introduced during the trial in determining a value for the seawall, gazebo, and landscaping of the property. Finally, the Court finds that certain incidental costs are recoverable to include the cost of surveying and demolition. However, the Court does not find that all the costs sought by Plaintiff are recoverable.

The Court now turns to the question of comparative negligence, if any. The Court determines that the AMG contributed to the damage of the Buster property. Noting that the WOK struck the property first and caused the vast majority of the structural and adjacent property damage, the Court then assigned ten (10) percent of liability to the AMG. Therefore, that percentage will be offset when calculating the damages owed by Defendants.

The Court also finds that pre-judgment interest at a rate of 7.5% per annum is recoverable and that Defendants are jointly and severably liable for the damages awarded to Plaintiff.

Now that the Court has made those findings, for ease of determination, the Court includes the calculated total of **$666,058.47**.as broken down in the next section.

V. DAMAGES BREAKDOWN

Home (as appraised by Plaintiff's Expert Andrew Watson)	$500,000.00
Property (seawall/gazebo/etc.) -Amount takes into consideration depreciation	$50,000.00
Incidental Costs -Survey/Damage Reports ($13,500.00) -Demolition ($32,043.65)	$45,543.65
Base Damages Award	$595,543.65
Comparative Fault of Third Parties (10%)	($59,554.365)
Adjusted for Comparative Fault Award	$535,989.285
Prejudgment Interest -7.5% per annum ($40,199.1964 per annum) divided by 365 days (This results in an assessment of $110.134785 per day) -1181 Days[8] (since accident, not including day of judgment) $130,069.181	
Final Damages Calculation	**$666,058.466**

The Court now rounds the number up to only two digits after the decimal, which results in an award of **$666,058.47**.

VI. CONCLUSION

Based on the Court's findings of facts, conclusions or law, and the final damages calculation, the Court awards **$666,058.47** to Plaintiff Russel Buster.

A separate judgment will be entered pursuant to Fed. R. Civ. P. 58.

DONE and **ORDERED** this 15th day of December 2023.

/s/Terry F. Moorer
TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

[8] *Supra* note 1 for discussion on correction.