

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00586 COA**

**ARKANSAS RIVER COMPANY**

**APPELLANT**

**v.**

**SCF TRANSPORTATION, INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ERNEST LANE III

ATTORNEYS FOR APPELLEE:

FRANK S. THACKSTON, JR

C. W. WALKER III

NATURE OF THE CASE: MARITIME-NEGLIGENCE

TRIAL COURT DISPOSITION: JUDGMENT ENTERED AGAINST ARKANSAS RIVER  
COMPANY AND IN FAVOR OF SCF TRANSPORTATION, INC.

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

COLEMAN, J., FOR THE COURT:

Both SCF Transportation, Inc. (SCF) and Arkansas River Company (Arkansas River) operated tow boats to tow barges on the Mississippi River. At SCF's request, Arkansas River recovered Barge MGC-104, which had broken loose from the tow of M/V JANET MARIE, a tow boat owned by SCF, after it ran its tow onto the West bank of the Mississippi River south of Greenville. Arkansas River sued SFC on an open account in the amount of \$10,700 for its services in retrieving Barge MGC-104. SFC counterclaimed against Arkansas River to recover damages for the loss of its barge which occurred when the barge sank while M/V JOHNNY MURDOCK was towing the barge up the river back to Greenville to unload its cargo of corn. Arkansas River owned and was operating the M/V JOHNNY MURDOCK when SFC's barge sank. SFC based its counterclaim against Arkansas River on the negligence of Kenny Foster, the Captain of the M/V JOHNNY MURDOCK, in the operation of this tow boat while it was towing the barge. After a bench trial, the Washington County Circuit Court entered a judgment against Arkansas River for \$218,466.42, which was the difference between the value of Barge MGC-104 and the amount of Arkansas River's open account for \$10,700. We affirm the trial court's judgment.

## **I. FACTS**

SCF Transportation Company, a foreign corporation with an office located in Greenville, Mississippi, owned and operated inland-water tow boats, utilized to move barges from point to point on the river. On November 12, 1990, M/V JANET MARIE, one of SCF's river tow boats, was proceeding in a southward direction on the Mississippi River with 28 loaded grain barges in her tow. Barge MGC-104 was the lead barge on the starboard side of the tow and was loaded with a cargo of corn. During M/V JANET MARIE's maneuvers, the MGC-104 struck the right bank of the river and sustained severe damage to its bow, stern, and starboard side. This occurred at mile marker 525.

Arkansas River Company, a Mississippi corporation located in Greenville, Mississippi, also owned and operated river tow boats which were utilized to push barges from point to point on the inland-water system. After the M/V JANET MARIE's accident, Brenda Davidson, Operations Manager for SCF, asked Arkansas River Company for assistance in salvaging the twenty eight barges that were in the tow of the M/V JANET MARIE. In response to SCF's request for assistance, Arkansas River Company prepared and provided two vessels, the M/V ANN MURDOCK and the M/V JOHNNY MURDOCK, to SCF.

At approximately 11:30 P.M. on November 12, 1990, Arkansas River's M/V JOHNNY MURDOCK left Greenville, Mississippi at mile marker 537 and headed downriver to assist the M/V JANET MARIE. Sometime near 5:00 A.M. the next day, the crew of the M/V JOHNNY MURDOCK located barge MGC-104 on a sandbar at mile marker 499.5. The tow boat's crew then proceeded to wire the loose barge into the M/V JOHNNY MURDOCK's tow. The vessel then proceeded some five miles upriver with MGC-104 in tow to mile marker 504.5, where the M/V JANET MARIE was waiting. The M/V JOHNNY MURDOCK's initial objective had been only to return barge MGC-104 to the M/V JANET MARIE's tow. After further discussion among various persons at the scene of the M/V JANET MARIE, the M/V JOHNNY MURDOCK began towing barge MGC-104 from the M/V JANET MARIE's location upriver to Waterways Marine in Greenville for removal of its cargo of corn and dry dock repair. The barge sank while the M/V JOHNNY MURDOCK was towing it back to Greenville.

## II. LITIGATION

We have already noted that Arkansas River sued SCF on an open account for \$10,700.00 for its services rendered in salvaging SCF's barge MGC-104. SCF responded by filing a counterclaim against Arkansas River for the loss of Barge MGC-104. In its counterclaim, SCF alleged claims for Arkansas River's breach of warranty in its agreement that the towage contract would be performed in a workmanlike manner and its negligence in operating the M/V JOHNNY MURDOCK.

Among the findings of fact which the trial judge made after the trial without a jury are the following:

The MGC-104 has voids at the bow and stern and four wing tanks, each of which is separated from the other and from the hopper box by watertight bulkheads. As a result of the collision, the bow tank, No. 1 wing tank and stern tank were flooded to river level. The No. 2, 3, and 4 wing tanks and the cargo box remained watertight.

The last barge, the MGC-104, was located on a sandbar at Mile 499.5. Mr. Chewning [a marine surveyor] boarded the barge and determined that the bow and stern void and the No. 1 wing tanks were river full but that the No. 2, 3, and 4 wing tanks were dry as was the cargo of corn. This inspection of the barge by Mr. Chewning occurred approximately eight hours after the initial collision.

Mr. Chewning then directed the pilot of the M/V JOHNNY MURDOCK to face up to the MGC-104 and pull it away from the sandbar to determine whether the barge would float. When the maneuver was completed, the barge floated. The M/V JOHNNY MURDOCK then proceeded with the MGC-104 in tow upriver to the M/V JANET MARIE which was then located at Mile 505. Prior to moving the MGC-104 upriver, Chewning had instructed the pilot to proceed near shallow water so that if there were problems with the barge, it could be beached. The M/V JOHNNY MURDOCK arrived at Mile 505 with the MGC-104 safely in tow where it was then placed back in the M/V JANET MARIE's tow.

Mr. Chewning inspected the barge again and found no change in the situation. The bow and stern compartments and the No. 1 wing tank were still flooded river full, but the No. 2, 3, and 4 wing tanks and the cargo were dry. This inspection occurred around noon on November 13, 1990, approximately 12 hours after the initial collision.

Mr. Chewning then had a discussion with Ms. Davidson [the SCF operations manager] who made the decision to return the MGC-104 to Waterways Marine at Greenville, as Chewning had informed her that he thought they could proceed cautiously to move the MGC-104 to a place where it could be off-loaded. Mr. Chewning then left the M/V JOHNNY MURDOCK with instructions to the pilot to proceed to Greenville staying as close to shallow water as possible so that the barge could be beached if problems developed.

After noon on November 13th, the pilot of the M/V JOHNNY MURDOCK received instructions from SCF and Arkansas River to move the barge northbound to Waterways Marine at Greenville for off-loading. The pilot of the A/V JOHNNY MURDOCK knew what the condition of the barge was and was aware that if he pushed it too fast the bow of

the barge could be driven under.

As the A/V JOHNNY MURDOCK with the MGC-104 in tow proceeded northbound, the crew of the tow continued to check the barge to make sure that it was not taking on anymore water. The barge continued to maintain its same draft and did not get heavier in the water as it continued northbound.

When the A/V JOHNNY MURDOCK with the MGC-104 in tow reached Mile 528.6 at Anconia Point, the tow was proceeding at half ahead throttle in the middle of the channel. The current at that point increases because of work by the Corps of Engineers which has narrowed the river. As the boat and tow passed Anconia Point, the pilot noticed that the bow of the barge went down. At that point the pilot brought the throttle back to neutral and the bow of the barge emerged from under the water. The pilot sent deckhands out to check the barge to make sure that no water was coming in, and the inspection revealed that the No. 2, 3, and 4 wing tanks were still dry. The captain then came back ahead on his throttles at half ahead. Upon encountering the swift current the second time, the bow dove again, and the barge sank.

The barge sank because of the swiftness of the current, the speed at which the pilot of the A/V JOHNNY MURDOCK attempted to push it through Anconia Point and the error in judgment on the part of the pilot in attempting the maneuver when he had already observed what was likely to happen if he pushed ahead at that point at half throttle.

After he made the foregoing findings of fact, the trial judge then made the following conclusions of law:

At the time the MGC-104 was sunk, Arkansas River was attempting a salvage operation. At the time the MGC-104 was retrieved by the M/V JOHNNY MURDOCK at Mile 400.5, the barge was in a state of peril and subject to numerous hazards. The fact that the barge was capable of floating and being moved in tow does not alter the fact that it was being salvaged.

As this was a salvage operation, Arkansas River contends that it may not be held liable for its pilot's negligence absent a showing of gross negligence or willful misconduct.

The cases support Arkansas River's contention that when a distressed vessel is damaged by the original peril to which it was exposed, the salvor is liable for damages arising only from its gross negligence or willful misconduct. However, when a distressed vessel is removed from its original peril and later suffers a distinguishable injury from the negligence of the party undertaking the salvage operation, the salvor may be held liable for damages.

The MGC-104 did not sink because of the original peril to which it was exposed. Nor did it sink because of the holes found in the bow's slope sheet when the barge was later raised and dry-docked. Had the original collision produced these holes, the cargo would have

been flooded and the barge would not have floated for nearly 24 hours over a course of 54 miles. The only reasonable inference which may be drawn about the holes is that they were caused during the salvage of the sunken barge. The barge sank because of the negligence on the part of the pilot of the M/V JOHNNY MURDOCK in attempting to push the barge at half throttle through a narrow channel where the current was too swift to accommodate such a maneuver. Had the barge sunk on the initial attempt to push it past Anconia Point, it might be said the pilot was unlucky. But, when he attempted the same maneuver in the same manner in the face of a near sinking of the barge on the first attempt, he was negligent.

As a consequence of the pilot's negligence, SCF is entitled to recover the stipulated damages, and Arkansas River is entitled to a credit in the amount of \$10,700 for services rendered in the salvage operation.

Consistent with these findings of fact and conclusions of law, the trial judge entered a final judgment against Arkansas River for the benefit of SCF in the amount of \$218,466.42, which was the difference between the value of SCF's loss, \$229,166.42, and Arkansas River's open account in the amount of \$10,700. Arkansas River appeals from this final judgment.

### **III. Issues and the law**

In its brief, Arkansas River frames the issues it submits for this Court's resolution as follows:

1. The trial court applied the wrong legal standard in holding that the pilot of the M/V JOHNNY MURDOCK was negligent, therefore, the clearly erroneous standard does not apply. Alternatively, the trial court's opinion was contrary to all, or in any event, the overwhelming weight of the evidence.
  
2. The trial court failed to follow the comparative fault doctrine that is legally mandated in admiralty and maritime cases, and assessment of 100% fault against Arkansas River Company was contrary to all, or in any event, the overwhelming weight of the evidence.
  
3. The trial court erred in adopting expert Damon Deal's opinions regarding:
  - (a) the cause of the sinking of Barge MGC-104;
  - (b) the negligence of the M/V JOHNNY MURDOCK while being operated by Captain Foster.

As though to state the foregoing issues in the manner most favorable to it, SCF counters in its brief with these three issues:

1. The trial Court applied the correct legal standard in holding that the pilot of the M/V JOHNNY MURDOCK was negligent. Therefore in order to be reversed this finding of fact must be shown to be "clearly erroneous." The evidence was overwhelming that the pilot on the M/V JOHNNY MURDOCK was indeed negligent.

2. The Trial Court correctly held that all damages due to the sinking of the MGC-104 were the direct proximate result of the negligence of the pilot of the M/V JOHNNY MURDOCK. Therefore this case was not one in which the damages should be divided on a comparative fault basis.

3. The Trial Court's finding of fact that the cause of the sinking of MGC-104 was due to excessive speed while being pushed against a strong current and the Court's finding of fact that the pilot of the M/V JOHNNY MURDOCK was negligent are both amply supported by evidence in the record including testimony of all the fact witnesses as well as the expert testimony of Captain Damon Deal.

Because we find each of SCF's issues to be but the restatement of each of Arkansas River's three statements in the way most favorable to SCF, we arrange our opinion around Arkansas River's three issues.

#### **A. Standard of Review:**

In *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3, 6 (Miss. 1990), the Mississippi Supreme Court repeated the well established standard of appellate review in cases where, as in this case, a circuit judge tries a case without a jury:

Inssofar as its findings of fact and conclusions of law are concerned, the judgment of a circuit or county court in a non-jury trial is entitled to the same deference on appeal as a chancery court decree.

In *Madden v. Rhodes*, 626 So. 2d 608, 616 (Miss. 1993), the Mississippi Supreme Court recapitulated the appropriate standard of review where an appellate court must review the decision rendered by a chancellor:

On appeal this Court will not reverse a Chancery Court's findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence supporting those findings.

We must consider the entire record before us and accept all those facts and reasonable inferences therefrom which support the chancellor's findings.

The findings will not be disturbed unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied. And

the chancellor, being the only one to hear the testimony of witnesses and observe their demeanor, is to judge their credibility. He is best able to determine the veracity of their testimony, and this Court will not undermine the chancellor's authority by replacing his judgment with its own.

## **B. First Issue:**

1. The trial court applied the wrong legal standard in holding that the pilot of the M/V JOHNNY MURDOCK was negligent, therefore, the clearly erroneous standard does not apply. Alternatively, the trial court's opinion was contrary to all, or in any event, the overwhelming weight of the evidence.

In its brief SCF observes that "[t]he trial court did not expressly rule that Arkansas River was acting as 'tower' and nor a 'salvor' at the time barge MGC-104 sank though, with candor, the Lower Court's opinion can reasonably be interpreted as a ruling to that effect." However, SCF then writes contradictorily that "due to the nature of the Trial Court's opinion, a fair reading of the opinion would seem to indicate that the Trial Court determined that Arkansas River maintained its status as salvor throughout the time that it had the MGC-104 in tow." Arkansas River's position is that it was acting as a salvor when the barge sank. Arkansas River argues that as a salvor, its negligence must be "gross and negligent." We note that in his conclusions of law, the trial judge wrote, "As this was a salvage operation . . . ." We again quote in full the following paragraph from his conclusions of law because from it we deduce that the trial judge concluded that Arkansas River's salvaging operation was continuing when Barge MGC-104 sank:

The cases support Arkansas River's contention that when a distressed vessel is damaged by the original peril to which it was exposed, the salvor is liable for damages arising only from its gross negligence or willful misconduct. However, when a distressed vessel is removed from its original peril and later suffers a distinguishable injury from the negligence of the party undertaking the salvage operation, the salvor may be held liable for damages.

### **1. Applicable Standard of Law**

The second sentence in this paragraph which we have quoted from the trial judge's conclusions of law constitutes the core of his decision. If it is the law that "when a distressed vessel is removed from

its original peril and later suffers a distinguishable injury from the negligence of the party undertaking the salvage operation, the salvor may be held liable for damages," then pursuant to our standard of review, we cannot find that the trial judge applied an "erroneous legal standard" to the facts in this case as he found them from the evidence which the litigants adduced at trial.

Among the cases which the trial judge cited to support the proposition that when a distressed vessel is removed from its original peril and later suffers a distinguishable injury from the negligence of the party undertaking the salvage operation, the salvor may be held liable for damages was *The Noah's Ark v. Bentley & Felton Corp.*, 292 F.2d 437, 440-41 (5th Cir. 1961). The facts in *The Noah's Ark* which are relevant to the case *sub judice* are the following.

The NOAH'S ARK was a shrimper which lost its motor on New Year's Day, 1958, south of Key West, Florida. *Id.* at 438. The CUDJOE, another shrimper, came to its rescue, and after considerable difficulty, the CUDJOE managed to tow the NOAH'S ARK into the Key West harbor at the end of a four-hundred-fifty foot long steel trawl cable. *Id.* According to the trial judge's findings, which he made from somewhat vague evidence, the masters of the two shrimpers agreed that on arrival in Key West Harbor, the NOAH'S ARK would make fast to the cable vessel WESTERN UNION regularly anchored in the Bight. *Id.* When the two vessels entered the harbor at about 6:00 P.M. on January 2, the winds were then sixty to seventy two miles per hour. *Id.* The CUDJOE heading into the wind made a line fast from her bow to a Navy finger pier on the north side of the harbor. *Id.* The NOAH'S ARK streaming on the trawl cable was parallel to and close by the WESTERN UNION. The trial court found that the wind held the NOAH'S ARK alongside the WESTERN UNION several moments, but with wind and waves affecting both shrimpers, it was not possible to secure the NOAH'S ARK to the WESTERN UNION. *Id.* at 439. At this point, the CUDJOE cast off the trawl tow line. *Id.* The trial court found categorically that while the master of the CUDJOE believed that the NOAH'S ARK was fast to the WESTERN UNION the CUDJOE cast the line loose 'without any warning to the NOAH'S ARK.' *Id.* The Cudjoe knew that the Noah's Ark's radio was no longer serviceable. *Id.* The NOAH'S ARK, a helpless, powerless derelict, was caused to drift with the high wind several hundred yards across the harbor, where she came alongside of and in contact with a sand dredge tied to the seawall on the south side of Key West Bight.

In its brief, SCF notes that the United States Court of Appeals for the Fifth Circuit found that the CUDJOE's actions "did not amount to gross negligence or wilful misconduct." *The Noah's Ark*, 292 F.2d at 440. The Fifth Circuit proceeded to find that the damage sustained by the NOAH'S ARK after the Cudjoe had released it was separate and independent of the injury, *i.e.*, loss of its motor, from which the vessel had been salvaged. *Id.* The Fifth Circuit emphasized the importance of its finding that the damage was separate and independent from the reason for salvaging the shrimper by writing:

For distinguishable independent damages done by the salvor, we are of like opinion that the maritime law holds the salvor to the usual standard of ordinary prudence. Norris, a well regarded text writer, in the *Law of Salvage* (1958) draws these conclusions from all of the American cases which he cites and discusses. "The salvors who undertake a service to distressed property obligate themselves to take reasonable care of the property in their charge and they may be responsible for damages which they inflict on that property." . . . This duty has been defined as binding them 'to take the same kind of care, and exercise the same degree of diligence in keeping the property placed in their custody, that a prudent

man ordinarily takes and exercises in keeping his own property." . . . . The basic principle is then succinctly stated. 'When a distinguishable injury to the salvaged property has resulted from the negligence of persons undertaking a salvage service, it may result not only in a diminution of the award or of a total forfeiture, but in an affirmative award of damages against the salvaging vessel or the salvors.' Norris, *supra* at 206.

*Id.* at 440-41.

*Basic Boats, Inc. v. United States*, 352 F. Supp. 44 (E. D. Va. 1972), was the second case on which the trial judge relied for the legal standard which he applied to the facts in this case. In that case, Basic Boats, Inc., owner of the yacht, CONJUR MAN, through its insurance carrier, sued the United States of America for damages to the CONJUR MAN which were caused by a naval destroyer, WALLACE L. LIND (LIND). *Id.* at 46. The damage occurred when the LIND was attempting to rescue the CONJUR MAN after it had lost its main mast and later its mizzen mast during the yacht's return voyage from Bermuda to Annapolis, Maryland. *Id.* The LIND's commander decided to contact the CONJUR MAN amidships on the lee side since boarding the yacht might become necessary for various reasons. *Id.* at 47. Shortly after a one-inch nylon line from the CONJUR MAN was attached to the destroyer, a large ground swell swept down the side of the LIND. *Id.* This caused the yacht to rise fairly high relative to the destroyer and then drop suddenly. *Id.* This sudden strain on the line caused it to part and the CONJUR MAN began to move aft. *Id.* The CONJUR MAN's two crew members decided to abandon ship. *Id.* The Navy personnel then became concerned primarily with the safety of the two crew members who had jumped overboard from the yacht. *Id.*

The CONJUR MAN struck the LIND's screw guard, which damaged the cabin structure. *Id.* The CONJUR MAN floated off, but the destroyer's crew succeeded in getting a tow line to it and having it attached. *Id.* The next day the yacht was turned over to a Coast Guard cutter which completed the tow to Norfolk. *Id.* The district court held that the standard of care applicable to private individuals would be the standard of care which it would apply to the United States. The district court then opined:

The consequences of a negligent salvage will vary depending on the type damage caused thereby. If the misconduct prevents a successful salvage, generally there will be no affirmative damages awarded against the salvor unless there is a finding of gross negligence or willful misconduct. Conversely, there will be no award made to the voluntary salvor, since the operation was unsuccessful.

The more difficult situation is when the distressed vessel is removed from its peril, but in the process suffers some distinguishable injury-that is, a type of damage other than that which could have been suffered had not salvage efforts been undertaken. The cases seem to hold the salvor liable for ordinary negligence. While this seems harsh, it should be remembered that an award for salvage is much larger than if based on quantum meruit, thus a salvor is being paid to exercise care over the property in his control.

Some authorities draw a distinction between conduct undertaken while both ships are subjected to the peril, and conduct during the disposition of the salvaged vessel after removal from peril. In the former instance, courts should be reluctant to find negligence. This is not to say that, in the proper case, the salvor should not be held accountable in damages for negligence in the act of salvage.

The rule seems to be that for a distinguishable injury, if there is negligent conduct which is the proximate cause thereof, the salvor shall be held accountable. It likewise seems to be the rule that the salvor's recovery may not only be diminished, it may be forfeited entirely, or in the proper case he may be liable by way of affirmative damages. An award of damages to the salvaged vessel seems to be contingent upon the degree of culpability and lack of care shown by the salvor.

*Id.* at 48-49 (citations omitted). The district court found that the CONJUR MAN's crushed cabin was not a peril it faced absent a salvage attempt, thus the damage was a "distinguishable injury," for which the LIND would be "accountable for any negligent conduct which was the proximate cause of the injury sustained." *Id.* at 49. The district court found that the actions of the LIND did not fall below the standard of ordinary care and therefore denied Plaintiff, Basic Boats, Inc., any relief. *Id.*

This Court concludes that in the case *sub judice* the trial judge applied to the facts which he found the correct standard of law, *i.e.*, "when a distressed vessel is removed from its original peril and later suffers a distinguishable injury from the negligence of the party undertaking the salvage operation, the salvor may be held liable for damages."

## **2. Findings of fact**

Now this Court must review the trial judge's findings that the sinking of Barge MGC-104 was a "distinguishable injury" which happened after it had been "removed from its original peril," the proximate cause of which distinguishable injury was the negligence of the M/V JOHNNY MURDOCK. In compliance with our standard of review, this Court will not reverse the trial judge's findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence to support those findings; furthermore, this Court must consider the entire record before us and accept all those facts and reasonable inferences therefrom which support the chancellor's findings. We will not disturb the trial judge's findings unless he abused his discretion, was manifestly wrong, or clearly erroneous.

The original peril from which M/V JOHNNY MURDOCK rescued Barge MGC-104 was that barge's having been grounded on a sand bar in the Mississippi River. As the trial judge found from the evidence, "The MGC-104 did not sink because of the original peril to which it was exposed." Otherwise, "[t]he barge would not have floated for nearly 24 hours over a course of 54 miles." We find that these findings of the trial court, while contained in his conclusions of law, were supported by substantial evidence. The trial judge did not abuse his discretion in so finding, and his findings were not arbitrary. Thus, we affirm his finding that the sinking of the MGC-104 was an injury which was distinguishable from the original peril from which the M/V JOHNNY MURDOCK had first rescued it. Was the trial court further correct in finding that the sinking of the MGC-104 was caused by the negligence of the skipper of the M/V JOHNNY MURDOCK?

These are the trial court's findings on the matter of whether Captain Kenny Foster was negligent in his operation of the M/V JOHNNY MURDOCK and whether his negligence proximately caused the sinking of the barge:

When the A/V JOHNNY MURDOCK with the MGC-104 in tow reached Mile 528.6 at Anconia Point, the tow was proceeding at half ahead throttle in the middle of the channel. The current at that point increases because of work by the Corps of Engineers which has narrowed the river. As the boat and tow passed Anconia Point, the pilot noticed that the bow of the barge went down. At that point the pilot brought the throttle back to neutral and the bow of the barge emerged from under the water. The pilot sent deckhands out to check the barge to make sure that no water was coming in, and the inspection revealed that the No. 2, 3, and 4 wing tanks were still dry. The captain then came back ahead on his throttles at half ahead. Upon encountering the swift current the second time, the bow dove again, and the barge sank.

The barge sank because of the swiftness of the current, the speed at which the pilot of the A/V JOHNNY MURDOCK attempted to push it through Anconia Point and the error in judgment on the part of the pilot in attempting the maneuver when he had already observed what was likely to happen if he pushed ahead at that point at half throttle.

We repeat his conclusion of law that:

The barge sank because of the negligence on the part of the pilot of the M/V JOHNNY MURDOCK in attempting to push the barge at half throttle through a narrow channel where the current was too swift to accommodate such a maneuver. Had the barge sunk on the initial attempt to push it past Anconia Point, it might be said the pilot was unlucky. But, when he attempted the same maneuver in the same manner in the face of a near sinking of the barge on the first attempt, he was negligent.

In *Sprayberry v. Blount*, 336 So. 2d 1289, 1294 (Miss. 1976), the Mississippi Supreme Court wrote:

It is well settled that actionable fault on the part of a defendant must be predicated on action or non-action prompted by knowledge, actual or implied, of facts, which make the result of his conduct not only the probable result, but also a result which he should in view of the facts, have reason to anticipate.

This standard applies to the question of whether Captain Foster was negligent because he repeated his actions which had nearly sunk the barge the first time. His first experience with the lowering of the barge's bow at half-throttle surely "ma[de][the sinking of Barge MGC-104] the result of his conduct [of proceeding to resume half-throttle] not only the probable result, but also a result which he should in view of the facts, have [had] reason to anticipate." Included in the evidence to support the application of this principle to this case was the opinion of SCF's expert, Damon Deal, that Captain Foster was negligent when he attempted to resume half-throttle a second time after he had

nearly sunk the barge the first time in the swifter current of the river. Dan Chewning, the marine surveyor whom SCF hired to assist in the recovery of the barges which the M/V JANET MARIE had been towing, testified that he had instructed Captain Foster to tow the barge close to the river's bank in shallow water and to be prepared to beach the barge at the first sign of difficulty. Captain Foster had that alternative after the first time the barge's bow lowered in the water.

This Court will not undermine the trial judge's authority by replacing his judgment with our own. Pursuant to the previously quoted standard of review we hold that the trial judge did not apply the wrong legal standard in holding that the Captain of the M/V JOHNNY MURDOCK was negligent and that his opinion was not contrary to all the evidence, or even the overwhelming weight of the evidence. Thus, we resolve this issue adversely to Arkansas River.

### **C. Second Issue:**

2. The trial court failed to follow the comparative fault doctrine that is legally mandated in admiralty and maritime cases, and assessment of 100% fault against Arkansas River Company was contrary to all, or in any event, the overwhelming weight of the evidence.

In response to this issue, SCF argues that Arkansas River must fail on this issue for two reasons. First, the parties stipulated to the damages before trial, and, secondly, the trial court held that the injury which caused the sinking of Barge MGC-104 was separate, distinguishable, and independent from the original peril. Arkansas River counters by pointing out that the United States Supreme Court "mandat[ed] comparative fault in admiralty cases" in *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L. Ed. 2d 251 (1975). It argues that "[s]ince 1975, it has been the 'law of the land' in admiralty cases that damages must be apportioned among the parties according to their respective degrees of fault." Arkansas River also argues, we think correctly, that its stipulation on damages was strictly about the amount of each litigant's damages. It insists that it did not stipulate that these amounts were not subject to the application of the principles of comparative negligence. Again we agree.

Arkansas River then argues that "[t]he trial court did not even discuss the issue of comparative fault; and whether or not the comparative fault doctrine should be applied in this particular factual situation." After both parties had rested, the trial judge stated:

I'm prepared to rule now that Arkansas River Company was engaged in a salvage operation on behalf of SCF from the time it left the Waterways Marine terminal up until the time the barge 104 was towed to the Janet Marie, and that it is entitled to compensation for the services rendered in that operation up to that point.

What I think is at issue is the nature of the service provided from the time the 104 departed in tow from the Janet Marie until it sunk, and whether the Arkansas River Company was negligent and that its negligence caused or contributed to the sinking of the barge. Those are the issues that I'm primarily concerned about. Up to that point I don't think there's much in dispute.

From its review of the record, this Court can not find where the Appellant, Arkansas River, moved the trial court to rule on this its second issue. As permitted by Rule 52 of the Mississippi Rules Civil Procedure, Arkansas River did not move that the trial judge find the facts and state separately the conclusions of law to determine whether SCF had been negligent, and if it had been negligent, whether its award of damages ought to be reduced by the percentage of its negligence which contributed to its damages. The final judgment is silent on this issue. After the trial judge entered his opinion and the judgment, Arkansas River did nothing pursuant to Rule 59(e) of the Mississippi Rules Civil Procedure to move the trial judge to amend his opinion and judgment to rule on the issue of whether comparative negligence should be applied to the reduction of the amount of SCF's damages as the trial court calculated them. We even agree with Arkansas River's conclusion that "[t]his Court can only speculate regarding the lower Court's failure to apply the 'comparative fault doctrine.'"

Now Arkansas River asks this Court to rule on an issue which it did not first present to the trial judge for his decision.

In *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1985), the Mississippi Supreme Court dealt with a similar omission by an appellant, who claimed that the chancellor erred by denying her defense of laches. *Id.* at 423. The supreme court wrote:

The problem with Aletha's laches claim is that though pled it was never litigated nor decided. There is nothing in the record suggesting that the trial judge was requested to make findings of fact or enter conclusions of law regarding the laches plea, see Rule 52(a), Miss. R. Civ. P., and, not surprisingly, the point is mentioned neither in the trial judge's memorandum opinion of October 26, 1983, nor his final judgment entered November 7, 1983.

As a prerequisite to obtaining review in this Court, it is incumbent upon a litigant that he not only plead but press his point in the trial court. See *Nationwide Mutual Insurance Company v. Tillman*, 249 Miss. 141, 156-57, 161 So. 2d 604, 609 (1964) and particularly *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47 (Miss.1984) where we recently refused on appeal to consider whether defendant was entitled to a new trial where it had filed a formal motion for a new trial but had not obtained from the trial judge a ruling on that motion. Aletha having failed in this regard, we deny her assignment of error predicated upon a plea of laches.

*Allgood*, 473 So. 2d at 423.

In the case *sub judice* Arkansas River did not plead the doctrine of comparative negligence in defense of SCF's counterclaim. We cannot speculate on an issue at a party's request which that party did not present to the trial judge for his resolution. Besides, we have already affirmed the trial court's finding that the injury which caused the sinking of Barge MGC-104 was separate, distinguishable, and independent from the original peril. This finding precludes the application of the doctrine of

comparative negligence because to apply that doctrine to an event that the trial court adjudicated to be separate, distinguishable, and independent from the original peril, for which SCF's operation of its tow boat, the M/V JANET MARIE, was responsible, is contradictory. In short there is no evidence in the record that would support the trial court's consideration of this issue, but were there such evidence in the record, Arkansas River did nothing to insure that the trial court ruled on this issue. Therefore, we resolve this issue adversely to Arkansas River.

#### **D. Third Issue:**

3. The trial court erred in adopting expert Damon Deal's opinions regarding:

(a) the cause of the sinking of Barge MGC-104;

(b) the negligence of the M/V JOHNNY MURDOCK while being operated by Captain Foster.

In its brief, Arkansas River lists this issue, but it offers neither argument nor authority to support its position on this issue. Therefore, we need not consider it. *See Van Slyke v. Board of Trustees*, 613 So. 2d 872, 880 (Miss. 1993) (a complaining party has an affirmative duty to address the issue and provide authoritative support for its position; and its failure to do so relieves an appellate court of the obligation to consider the issue); *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992) (appellant's failure to cite authority in support of assignments of error precludes this Court from considering these claims on appeal). Thus, we decline to review this issue.

#### **IV. CONCLUSION**

The trial judge applied the appropriate legal standard to the issues in this case. His findings of fact were supported by substantial evidence, and he did not abuse his discretion in so finding them. Our standard of review requires that we not undermine the trial judge, who heard and observed the witnesses, by substituting our judgment for his. We conclude that the evidence in the record supports the trial judge's adjudication (1) that the sinking of Barge MGC-104 was distinguishable from the original peril, grounding on a sand bar, from which the barge had been salvaged, (2) that Captain Foster was negligent in the operation of M/V JOHNNY MURDOCK, and (3) that as the proximate consequence of that negligence, SCF was damaged by the sinking of its barge. Thus, we affirm the trial court's judgment.

**THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

**THOMAS, P.J., BARBER, DIAZ, KING, AND PAYNE, JJ., CONCUR. FRAISER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, P.J., MCMILLIN AND SOUTHWICK, JJ. BRIDGES, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., MCMILLIN AND SOUTHWICK, JJ. MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY**

**FRAISER, C.J., BRIDGES, P.J., AND SOUTHWICK, J.**

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00586 COA**

**ARKANSAS RIVER COMPANY**

**APPELLANT**

**v.**

**SCF TRANSPORTATION, INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

BRIDGES, P.J., DISSENTING:

I respectfully dissent. I agree with both Chief Judge Fraiser and Judge McMillin in their separate dissents. However, I would simply like to reiterate the degree of negligence required to hold a salvor liable for damages. As previously stated by the majority and the Fifth Circuit Court of Appeals, wilful or gross negligence is required to hold a salvor liable for injuries sustained to a salvaged vessel. However, it seems that for distinguishable independent damages done by the salvor, maritime law holds the salvor to the usual standard of *ordinary prudence*. *The Noah's Ark v. Bentley & Felton Corp.*, 292 F.2d 437, 440 (5th Cir. 1961) (emphasis added). Because of obvious policy considerations to encourage the human response of men of the sea to the saving of life and property, it is true that the salvor's mistaken action of the salvor in the efforts to effectuate salvage is treated with *considerable lenience*. *Id.* at 441 (emphasis added). The key to the correct legal principle is the character of the injury inflicted -- i.e., distinguishable or, as sometimes called, independent. The requirement for wilful or gross negligence as an element of salvor liability relates to injuries of a nondistinguishable, nonindependent kind. In a very broad sense, the latter covers errors that made the salvage ineffectual. A distinguishable injury, on the other hand, is some type of damage sustained by the salvaged vessel other than that which she would have suffered had not salvage efforts been undertaken to extricate her from the perils to which she was exposed. *Id.* (emphasis added). In other words it is a harm distinct from that which the vessel is being saved.

It is undisputed that the salvor had virtually completed its efforts to salve the damaged barge. I believe, however, that it is of utmost importance in attributing negligence in this case that we consider the fact that it was SCF's agent that ordered the pilot to return the barge to Greenville, and not the decision of the salvaging pilot. Additionally, I believe that the pilot acted reasonably prudent in his decision to once again attempt to tow the barge back to Greenville. After its bow began to submerge into the water, the pilot brought the bow back to a normal tow position. After an inspection, the pilot determined that no additional damage was caused to the barge. It was reasonable for the pilot to believe that another attempt would be successful considering the former events brought no additional damage to the barge, and it was still in a condition to tow. This error in judgment does not, in my opinion, constitute negligent conduct. I would therefore reverse the decision of the lower court.

**FRAISER, C.J., McMILLIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.**

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**McMILLIN, J., DISSENTING:**

I respectfully dissent. I can find nothing much beyond 20/20 hindsight to establish that the pilot of the JOHNNY MURDOCK was negligent in his second attempt to tow the damaged barge through the faster current near Anconia Point. In my view, the trial court placed undue reliance upon the opinion of an expert that held the pilot to an unreasonably high standard of conduct in determining the issue of negligence. Because there is little else in the record to support such a finding, I would conclude

that the trial court erred as a matter of law.

This case seems to me to be distinguishable from many of the salvage cases discussed in the briefs and the majority opinion. In those cases, the salvaging entity was operating with a degree of autonomy and independence of action that, to a large extent, was lacking in this case. In this case, at the time of the incident in question, the JOHNNY MURDOCK was not operating independently and exercising wide discretion in a salvage operation, but was following the explicit directions and commands of the Plaintiff's agents in transporting a damaged barge to an unloading point.

The facts are undisputed that the JOHNNY MURDOCK had essentially completed its salvaging efforts as to the damaged barge when it towed the barge back to the JANET MARIE and the barge was re-placed in the JANET MARIE's tow. It was only after the completion of this salvage assistance that an agent for SCF decided that the more prudent course was to remove the damaged barge from the JANET MARIE's tow and return it to Greenville to be unloaded. SCF's agent issued the towing instructions directly to the JOHNNY MURDOCK's pilot, which instructions appear to have consisted essentially of informing him of his destination and directing him to stay near the buoy line so that he could beach the barge if problems developed.

This state of affairs informs us of two essential points: (1) There were serious reservations in the minds of SCF officials as to the integrity of the damaged barge, and (2) Despite these reservations, SCF officials were satisfied to risk a tow of the damaged barge over a relatively short distance on the assumption that, if trouble developed, there would be ample time to beach the barge and prevent the total loss of the barge and its cargo. In my mind, it is SCF's miscalculation as to the second consideration that can more properly be seen as the cause of the barge's loss, rather than any negligence on the part of the JOHNNY MURDOCK's pilot.

Admittedly, the pilot of the JOHNNY MURDOCK observed a potential problem the first time he attempted to travel through the faster current near Anconia Point, which was that the bow of the barge appeared to nose down. However, when the pilot brought the throttle back to neutral, the barge returned to its previous attitude and a thorough inspection indicated that there was no additional damage to the barge nor had it taken on any additional water. At that point, the pilot appeared to face two possible choices. He could either attempt the maneuver again or proceed to immediately abandon any further effort to deliver the barge to the assigned destination. Under those circumstances, the pilot elected to attempt the Anconia currents one more time, apparently in the hope that the earlier incident was simply an anomalous event, and that the current could be successfully navigated. In making that decision, the pilot was aided by the reasonable belief that, if he encountered the same difficulties and became convinced beyond doubt that the currents could not be navigated, he would be able to throttle back, move out of the swifter current, and beach or otherwise secure the barge. Such a course of action does not seem so unreasonable as to constitute negligent conduct in view of the circumstances under which he was operating and the fact that, immediately after the last attempt, the barge had promptly returned to its previous attitude after he throttled back.

Though the law of physics may operate with a high degree of predictability in the carefully controlled atmosphere of the laboratory, common experience tells us that, in the rough and tumble laboratory of real life, many unexplained things occur. Events that outwardly seem identical sometimes produce different results. In such real-life situations, not being armed with the physicist's knowledge of all of

the forces and energies at play in a particular situation, it is not uncommon, when an undesired and unexpected result is obtained, for a person to simply make a second attempt, thereby either verifying the inevitability of the prior result or obtaining another more preferable result. Past experience is, at best, a predictor of the future only in approximate terms. Thus, a second attempt does not seem an unreasonable course of action, especially when it can be made with only a seemingly modest degree of risk. A pole-vaulter traveling down the same track at apparently the same speed, using the same pole, and expending, for all our powers of observation, the same effort, fails to clear the bar once, but succeeds the second time. We are delighted or dismayed by this result, depending upon our relation to the vaulter and his competitors, but we are not unduly surprised. Neither do we walk away after the first failure, assured beyond doubt that all subsequent efforts are doomed to failure because of the initial lack of success.

It seems to me that, based upon his previous experience, the pilot of the JOHNNY MURDOCK was reasonably entitled to believe that it was substantially likely that the worst thing that could occur if he attempted the current a second time was a repeat of events substantially similar to the first event, in which case he would have little alternative but to abandon the mission. With such a seemingly small downside risk, it was not, in my mind, unreasonable or negligent to attempt the maneuver a second time in an effort to avoid the necessity of beaching the barge loaded with cargo in an inaccessible stretch of the river. There is no proof in the record that would charge the pilot with the insight necessary to foresee the likelihood that the barge would precipitously sink.

Being wrong and being negligent are not necessarily synonymous.

I think that a finding of negligence on these facts constituted a manifest abuse of discretion, and I would reverse the judgment of the trial court and render judgment for Arkansas River for the amount sued for, namely \$10,700.00.

**FRAISER, C.J., BRIDGES, P.J., AND SOUTHWICK, J., JOIN THIS DISSENT.**

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FRAISER, C.J., DISSENTING:

I respectfully dissent. In addition to agreeing with Judge McMillin, I believe we should remain cognizant that Arkansas River in its attempt to take the severely damaged barge to Greenville undertook a difficult mission under harsh circumstances. We must therefore judge the actions of the Arkansas River pilot consistent with the conditions he faced. While the trial judge emphasizes the fact that the pilot was advised to stay near the beach during the time he was attempting to push the barge toward its destination, we observe the further fact that the river narrowed and its current became swifter near the point where the barge ultimately sank. The record does not show whether accessible beaches existed on either side of the river at this point. We are told that the river is narrower and more swift. The pilot, in his endeavors to accomplish his assignment necessarily sought reasonable available measures to do so. He took action that he reasonably believed would get him through the narrower channel without harming the barge. While his first attempt to do so was not successful, it was in no way an indicator that a second try would lead to total submersion of the barge. On the other hand, if the pilot had chosen not to proceed, how are we to know that any alternative action would not have caused the crippled vessel to sink. To place negligence upon the pilot under those circumstances makes Arkansas River an insurer of the undertaking. Under the peculiar facts and circumstances of this case, I fail to see how negligence could or should be imputed to Arkansas River.

**BRIDGES, P.J., MCMILLIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.**