

No. 97-5800

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

KANE FISHER AND SALVORS, INC., Defendants-Appellants.

MOTIVATION, INC., Plaintiff-Appellant
(United States of America-Intervenor)

v.

UNIDENTIFIED WRECKED AND
ABANDONED SAILING VESSEL, etc.

Appeals from the United States District Court for the
Southern District of Florida No. 92-10027 and No. 95-10051

**PETITION FOR REHEARING OF APPELLANTS KANE FISHER,
SALVORS, INC. AND MOTIVATION, INC.**

RICHARD RUMRELL
Florida Bar No. 132410
LINDSAY C. BROCK
Florida Bar No. 971669
Rumrell, Wagner & Costabel
10151 Deerwood Park Boulevard
Building One Hundred, Suite 250
Jacksonville, Florida 32256
(904) 996-1100
(904) 996-1120 FAX

WILLIAM VANDERCREEK
Texas Bar No. 20442000
W. SCOTT NEWBERN
Florida Bar No. 0098108
Post Office Box 1328
Tallahassee, Florida 32302
(850) 561-9147
(850) 561-9147 FAX

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Salvors, Inc. is a Florida corporation whose stock is owned by members of the Melvin A. and Dolores E. Fisher family and the stock is not traded.

Motivation, Inc. is a Delaware corporation whose stock is owned by members of the Melvin A. and Dolores E. Fisher family and the stock is not traded.

Michael and Taffi Adt

Michael Barnes

Richard Blaze

Billy D. Causey

Geoff Chapman

Pat Clyne

Chief Judge Edward B. Davis

Kane and Karen Fisher

Kim and Lee Fisher

Melvin A. and Deloris E. Fisher

Melvin Terry and Carla Fisher

Stephanie Fluke

Mark Fonseca

Mark S. Fonseca

Magistrate Judge Garber

UNITED STATES v. KANE FISHER AND SALVORS, INC. – MOTIVATION V.
UNIDENTIFIED WRECK - NO. 97-5800

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Syd Jones

Bobby Jordan

Brian E. Julius

Whitey Keevan

Curtis R. Kruer

Richard Macillistar

Andy Matroci

Duncan Matthewson

Larry E. Murphy

Dean Payne

Rick Rumrell

Anita Thornaug

Bancroft Thorne

William VanDercreek

Ole Varmer

Harold Wanless

Greg Wareham

Wiley Wright

Joseph C. Zieman

Eric Zobriet

CERTIFICATE OF TYPE SIZE AND STYLE

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I. GROUNDS FOR REHEARING

A. Right to Salvage.

The trial court expressly, and this Court by its affirmance of the summary judgment order holding no right to salvage appears to have, overlooked and failed to properly consider:

(a) that the Courts' orders on preliminary injunction recognized and allowed the right of salvage and, in accord with the Sanctuary Acts, only prospectively required Fisher to seek authorization for future use of prop wash deflectors, or mail boxes, in salvage work;

(b) that the submission for approval by NOAA to Congress and to the State of Florida before the sanctuary rules and regulations take effect (which govern and now recognize commercial treasure salvage activity) was mandated by Congress in the Act authorizing the Keys Sanctuary and was not done by NOAA, as represented to this Court, as an act of gratuitous congressional courtesy; and

(c) that the trial court opinion was expressly based upon cases where the salvage involved was prohibited or expressly restricted by applicable statutes and existing and published regulations – and was not supported or based upon any statute or existing regulations that purported to proscribe or restrict the 1992 salvage in Coffins Patch by Fisher.

B. Damages.

Trial court expressly, and this Court by its affirmance of the \$600,000.00 damage award for 1.6 acres seagrass appears to have, overlooked and failed to properly consider:

(a) that awarding damages for restoration monitoring, interest, etc., of approximately \$600,000 based upon retroactive application of statutes and rules that did not exist at time of incident or time of suit directly conflicts with applicable Supreme Court rulings;

(b) that use of the Oil Pollution Act's Habitat Equivalency Analysis to determine damages was not only contrary to the published regulations and final rule concerning scope of the Act, but also to the required conditions precedent that were to be followed in order to apply the Act and assess damages;

(c) that the \$600,000.00 award was unreasonable in comparison to Florida law for injury or destruction of seagrass (the salvage activity was close to, but just outside the three-mile limit for Florida waters) that would have been less than one-tenth as much, \$1.00 per square foot; and

(d) that the damaged area was assessed on the basis of the percent of sand and percent of seagrass beds in adjoining areas of Coffins Patch and not based upon the percent of sand and percent of seagrass in the actual area worked which established the area of injury to be substantially less than one-tenth of an acre, approximately 2,500 square feet.

C. COMMENT: Rule 36 Disposition - Not A Grounds For Rehearing.

Counsel recognizes that Rule 36 disposition is not grounds for rehearing. The grounds for rehearing are outlined above. Counsel further recognized that the very structure of the federal appellate system (and in particular some of the Circuits) faces an appellate numerical burden precluding traditional review and opinion practices of thirty or twenty years ago. Counsel also recognizes that in making Rule 36 disposition, that the Court still gives careful consideration to the substance of the appeal. It does, however, place counsel in a quandary where the trial court's ruling expressly overlooked and failed to consider material issues which are needed for resolution as reflected in the above grounds for rehearing.

Counsel would respectfully suggest, as this Court of necessity makes far greater use of Rule 36 dispositions, that the Court be more acceptable to Rehearing consideration. Historically this Court has been extremely chary in granting Rehearings.

In the case at bar, there are important issues of public policy and federalism concerning authorized activity that may be pursued during the interval between the date of designation of a sanctuary and the effective date of rules and regulations. These issues did not arise when a sanctuary was designated by the Secretary of Commerce as rules and regulations were submitted to Congress as a part of the proposed designation. When Congress does the designation, the proposed rules and management plan still must be submitted resulting in a substantial time interval

before final approval by Congress and, if a portion of the sanctuary is within a state, by such state. This matter was not resolved by this Court on the preliminary injunction or on this appeal because, as subsequently discussed, NOAA wrongly represented, albeit successfully, that the submission to Congress and to the State is a gratuitous formality of no substantive import.

II. ARGUMENT FOR REHEARING.

A. Summary Judgment Holding No Right To Salvage.

The trial court's summary judgment holding that there is no right to conduct maritime salvage was not only dispositive of the ownership of the articles of salvage recovered, preserved and restored by the Fishers, it also effectively established absolute liability for the assessment of damages. For reasons expressly overlooked, it was error.

Previously the trial court and this Court on appeal of the preliminary injunction both expressly held that the Fishers could continue with maritime salvage efforts and needed authorization only for future use of mail boxes or prop wash deflectors, one of several different available salvage tools.

This injunction should not bar the defendants from pursuing their livelihood by using other salvage techniques in the Sanctuary area.

United States v. Fisher, et. al., 22 F.3d 262, 266 (11th Cir. 1994).

Significantly, the preliminary injunction denied the Government's request for a total ban of salvage and the Government did not appeal nor contest the right of salvage of

the Fishers. The Government's right to the limited preliminary injunction could be supported by two different legal grounds: (1) the power of the federal admiralty court to control and supervise salvage activities as, in fact, had been done by federal courts in Florida concerning treasure salvage of ancient shipwrecks; and (2) for protection of sanctuary resources pending final approval and promulgation of rules and regulations to take effect (the sanctuary had been planning to issue interim regulations which would have governed salvage activities, but was precluded from publishing new regulations by presidential order).

The Courts' Orders on preliminary injunction allowing the right to salvage in 1992 were perfectly consistent with the right to engage in maritime salvage in Coffins Patch that were recognized prior to the 1990 designation of the sanctuary. Certainly the orders were in keeping with the purpose of the Sanctuary Act that "treasure salvaging must be allowed to continue" as expressed by the bill's co-sponsor in the Official House Report.¹ The right to salvage is also consistent with the rules and

¹ The Management Plan that is implemented should enable those who make their livelihood from the reefs to **continue to be able to do so**. While the reefs as an ecological treasure, they are also a valuable economic recreational source. For various cultural, historic and economic needs, activities such as commercial and recreational fishing and **treasure salvaging must be allowed to continue** responsibly where they will not cause damage to the reef itself. The consideration of the **continuation of these activities** must be a factor in the formulation of the management plan in a manner which is consistent with the NMSP's mission. [Emphasis Added]

regulations that were published and became effective on July 1, 1997 that provided, after concurrence with the objection by the State of Florida, for commercial treasure salvage activity (removal of “submerged cultural resources”). 62 F.R. 32154, 32160, 32161 (June 12, 1997) Significantly under the regulations, the cutoff date for recognizing and establishing prior rights and use of the sanctuary was not 1990, the date of the Act, but rather July 1, 1997, the effective date of management plan and the regulations. 15 C.F.R. § 922.167 The order on summary judgment is inconsistent with all of the above. Noteworthy, the trial court ruled there was no right to salvage – not that in conducting lawful salvage you must avoid sea grass injury.

With due deference, the keystone argument of NOAA is a proven fallacy. NOAA has misrepresented, and unfortunately very successfully, that there is no requirement to submit rules and regulations to Congress and Florida for approval, or even that they must have published rules and regulations in order to bar and ban prior lawful activity in the sanctuary. NOAA contended because Congress gave some thirty months to publish rules and regulations, that Congress really did not intend for NOAA to seek further approval of Congress or of Florida. (See references Initial Brief, pp. 28-33). NOAA, after extensions of the thirty month period, did actually submit to Congress and Florida proposed changes in rules and regulations. See, e.g. 62 F.R. 32154 (June 12, 1997). NOAA agreed to comply with Florida’s objections so

Hearing, Committee On Merchant Marine And Fisheries, May 10, 1990, H.R. 3719,

that the provisions, in particular commercial treasure salvage, would be applicable sanctuary wide. 62 F.R. 32154 and 32161 (June 12, 1997). At oral argument to this Court NOAA reiterated that this was simply a courtesy and a part of public relations with Congress. Hopefully this Court will not buy such an explanation. NOAA submitted the Plan and Rules under 16 U.S.C. § 1434(b) to Congress and Florida because the Keys Act § 7(a) expressly stated they “shall” do so. See, e.g. 62 F.R. 32154 (June 12, 1997). Congress in no way has lessened or diminished the mandate that **NOAA shall submit the matters to Congress and if the State is involved, to the State for sanctuaries designated by Congress.**

The Keys Act specifically prohibited only three matters, none of which could be construed to mean maritime salvage which would be subject to **future** regulations.² NOAA has admitted the Keys Act, itself, does not bar maritime salvage. R16-235-39.

Serial No. 101-94, admitted Ex.4, R8-31-149

² Under Section 6(b) the Keys Act mineral and hydrocarbon leasing, exploration, development and production were immediately barred. Section 6(a), 104 Stat. 3091-1092 expressly prohibited certain vessel traffic activity effective with new charts or **Other uses were subject to future regulations** that were to be recommended in the Management Plan, Section 7, 104 Stat. 3092-93 and Section 9, 104 Stat. 3094 It is very clear from Section 7(a)(1) that restriction on uses, i.e. treasure salvage, was to be prospectively by regulations approved under § 1434(b).

The general maritime sanctuary provisions, 16 U.S.C. § 1431(b), allows past lawful activity to continue until and unless such is found incompatible with the sanctuary's purpose. This section implicitly recognizes that the Management Plan and Rules must be approved under § 1434(b) for the sanctuary to "take effect." Because the right to salvage did exist under prior federal law, NOAA must show it was lawfully repealed or barred at the time and place of the 1992 salvage. The trial court ignored, as apparently inapplicable, cases which had recognized maritime right to salvage³ and relied expressly upon cases where the maritime salvage in question was either expressly barred by applicable federal statute or by existing and published rules and regulations or by both.⁴ None of these conditions were true in the case at bar. Congress can change maritime law, but Congress did not do so and had not done so in reference to the 1992 salvage at Coffins Patch.

The only prohibition that existed against conducting maritime salvage in the Coffins Patch area of the Keys sanctuary between 1990 and the 1997 effective date was hidden deep in the bureaucratic mind of NOAA. There was no notice to Kane

³ *California and State Lands Commission v. Deep Sea Research, Inc.*, 118 S.Ct. 1464 (1998); *Cobb Coin Company v. Unidentified Wreck*, 549 F. Supp 540 (S.D. Fla. 1982); *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp 311 (S.D. Fla. 1986); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).

⁴ *Craft v. National Park Serv.* 34 F.3d 918 (9th Cir. 1994); *Klein v. Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp 953 (M.D. Fla 1993); *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp 953 (M.D. Fla 1993).

Fisher or any other Salvor that to continue doing what they had been doing for years, i.e., maritime salvage, was ~~was~~ illegal and unlawful and would subject them to damage assessments of \$600,000.00 or more. NOAA admits that it never told anyone prior to Kane's salvage activities in 1992, that maritime salvage illegal. It even told some Salvors prior to Kane Fischer's salvage activity that it was o.k. for "doing business as usual".

NOAA has argued that the United States cannot be estopped by statements of its officers or agents. NOAA misses the point. It is not estoppel, it is lack of notice. A fundamental due process concept. This is also not an ignorance of the law excuse. There was no statute, act or regulation or even regulatory notice in existence at the time Kane Fisher conducted his 1992 salvage in Coffins Patch that denied or took away the right of maritime salvage. Indeed there was no salvage conducted by Kane Fisher after the NOAA's first warning letter, although it was stipulated for purposes of the preliminary injunction that the parties would engage in future salvage activities unless proscribed by the requested injunction. R2-33-9.

A citizen should not have to guess what the Government might do in the future and be in peril for not being a visionary psychic. Kane Fisher is being punished for not anticipating that his salvage action subsequently would be determined wrong without the Government proving that at the time of his salvage he violated any existing law or regulation. This is wrong. The activities which are not in accordance with the purpose of the sanctuary are to be set forth in rules and regulations. A user

does not have to foresee what the Government might restrict. A user has to know what is restricted.

Even if this Court holds that the Keys Sanctuary had fully taken effect without complying with Section 1434(b), the trial court still erred in holding no right to salvage. By so doing, the trial court automatically rejected consideration of defenses to liability under § 1443 (a)(3)(B) of whether “the destruction, loss, or injury was caused by an activity authorized by Federal or State law.” Maritime salvage is Federal law. See *California and State Lands Commission v. Deep Sea Research, Inc.*, 118 S.Ct. 1464 (1998) and 46 U.S.C. § 722; See discussion Reply Brief, at 6-8.

B. Damages Unauthorized, Unreasonable And Improperly Determined.

1. No Stipulation Of Entitlement Damages - No Presumption Of Reasonableness.

When confronted with the Court’s question at Oral Argument has anyone challenged the reasonableness of almost \$600,000.00 per acre and one-half of sea grass, the Government responded Fisher had stipulated to the damages and the trial court found to be reasonable. As stated in Court and in the Reply Brief by Fisher’s counsel this is a gross representation of the Stipulation which is merely to the total amount of the components of the damage claim, which was done to save court time in bringing an adding machine. The stipulations are as follows:

9. NOAA has incurred \$211,130 in assessment and response

costs in this matter. However, the Defendants do not stipulate that the United States may recover assessment and response costs in this matter.

10. As of January 1997, \$26,533 in interest has accrued on NOAA's assessment and response costs. However, the Defendants do not stipulate that the United States is entitled to interest in this matter.

R-185-11.

The Court on damages made three separate findings as follows:

17. The estimated cost of implementing the Prop Scar Restoration Project — totaling \$351,648 — is reasonable and appropriate. Accordingly, the United States is entitled to \$351,648 from Defendant to implement the Prop Scar Restoration Project.

18. Under the Sanctuaries Act, the United States is also entitled to recover the cost of response and damage assessment. 16 U.S.C. Sections 1432(6)(C) & (7). Therefore, the United States shall recover assessment and response costs in the amount of \$211,130 from the Defendants.

19. The United States is also entitled to recover interest on these assessments and response costs. 16 U.S.C. Section 1443(a)(1)(b). Accordingly, the United States shall recover \$26,533 in interest accrued on NOAA's assessment and response costs

R7-239-18, 19.

The trial court did find that \$351,000.00 damage figure to be reasonable, however this was awarded under the Oil Pollution Act whose rules and regulations for use of the Habitat Equivalency Analysis did not become effective until 1996, well after the activity in this case in early 1992. The \$351,000.00 figure also included \$194,082.00 for monitoring cost, which was not authorized in 1992. See discussion of retroactivity and the Oil Pollution Act. *Infra*.

The \$211,130.00 was NOT explicitly found to be reasonable by the trial court. The defendants disputed that it was a reasonable amount and the Government offered no proof to show that it was reasonable. The trial court made no finding that the statute created a presumption of reasonableness and indeed the statute does not. The trial court erred and the \$211,130 award must be vacated. In addition, the \$211,130.00 was also awarded under 16 U.S.C. § 1432(6)(C), which provides for “the reasonable costs of appropriate monitoring to the injured, restored or replaced resources.” The section did not exist in 1992 and was applied retroactively. See discussion, *infra*.

Interest on damages was solely awarded on the basis of the Statute, which did not exist in 1992. The trial court made no other finding to justify the award of interest. NOAA has no entitlement to the interest award. See discussion, *infra*.

If damages are to be awarded, Florida laws which calculate damages to sea grass \$1.00 per square foot would be more applicable. The defendant’s expert Dr. Thorhug testified that an acre and one-half of sea grass could be restored for approximately \$37,000.00 - far cry from the \$600,000.00. As this Court commented in Oral Argument, this is the same Government that has paid \$5,000.00 for a hammer.

2. Damages Were Based On Improper Retroactive Application Of Statutes.

The salvage incident occurred in the first three months of 1992. The Government’s suit was filed on April 21, 1992. The Oceans Act was amended substantially on November 4, 1992. The Government never amended its complaint or

asserted that it was entitled to have the statutes applied retroactively. The trial court made no finding that the statutes should be applied retroactively. Damages were awarded, nevertheless, upon the retroactive application of the statutes. The defendants have duly appealed and have assigned such error for review for this Court. The Government's position seeks to blame the defendants for the Government's failure: a) to claim retroactive application of damages, b) to request the trial court to rule that they were entitled to retroactive application of damages, and finally, c) for the failure of the trial court to make findings that the Government was entitled to retroactive application of damages. The Government is the plaintiff. The Government has failed as a matter of law in its proof. The decision to award retroactive damages is directly contrary to controlling Supreme Court cases. See *Hughes Aircraft Company v. United States*, 117 S.Ct. 1871, 1876 (1997) and cases cited therein.

3. Trial Court Erred In Using Habitat Equivalency Analysis Under Oil Pollution Act.

In addition to improperly and retroactively including \$194,000.00 in monitoring costs, the trial court further erred with the \$351,000.00 restoration determination in using Oil Pollution Act and Habitat Equivalency Analysis. The purpose in this scope of the Oil Pollution Act and the Habitat Equivalency Analysis were limited to oil spills, NOT to sea grass or other type of injuries. This was especially acknowledged by NOAA in the final rules published in referenced to Oil Pollution

Act and the use of the Habitat Equivalency Analysis as appears in 61 F.R. 459 No.4 (January 5, 1996).

Section 990.11 – Scope

Comment: One commenter requested that the rule clarify that its provisions apply only to assessments being conducted under this rule, not other causes of actions, for example cases under federal admiralty or maritime law.

Response: NOAA has explicitly stated in the rule that the various provisions of this rule would apply only to assessments being conducted under this rule for purposes of bringing a natural resource damages claim pursuant to OPA and thus do not affect claims brought under other authorities.

Use of the Habitat Equivalency Analysis under the Oil Spill Act (notwithstanding the unauthorized inclusion of substantial component monitoring cost) was not authorized at the time of this incident. As noted above, the scope of the Oil Spill Act did not include injuries caused by salvage activities. Finally the Government did not even follow the proper procedures that were necessary to allow a damage award Habitat Equivalency Analysis. 61 F.R. No. 4, 443 (January 5, 1996). *See* Initial Brief, at 39-40.

4. Area Of Sea Grass Injury Improperly Calculated.

This Court is well versed in the clearly erroneous rule. The trial court made specific fact findings of injury to 1.63 acres of sea grass. This calculation as done under the McIntosh Report, and adopted by NOAA's expert, was predicated upon first calculating the area of depressions or holes believed to have been caused by

Fisher's mailbox activity and then calculating the percent of sea grass and percent of sand in adjoining areas of Coffins Patch to determine the amount of sea grass that was injured by the mailbox operations. Aerial photos from prior to any activity by Kane Fisher clearly show the salvage track and line was primarily in a sand channel with a smaller percentage of sea grass, with predominately sandy bottom. Indeed, this is the same line which has been historically worked by salvers for years in the Coffins Patch area. The area of alleged injury by use of before and after aerial photos to calculate the actual percent of sea grass was only 2,500 square feet. The components of the Government's formula for calculating damages were wrong. The trial court's finding was clearly erroneous.

III. CONCLUSION

WHEREFORE for the foregoing reasons, this Petition for Rehearing should be granted.

Respectfully Submitted,



RICHARD RUMRELL
 Florida Bar No. 132410
 LINDSAY C. BROCK
 Florida Bar No. 971669
 Rumrell, Wagner & Costabel
 10151 Deerwood Park Boulevard
 Building One Hundred, Suite 250
 Jacksonville, Florida 32256
 (904) 996-1100
 (904) 996-1120 FAX

WILLIAM VANDERCREEK
 Texas Bar No. 20442000
 W. SCOTT NEWBERN
 Florida Bar No. 0098108
 Post Office Box 1328
 Tallahassee, Florida 32302
 (850) 561-9147
 (850) 561-9147 FAX

CERTIFICATE OF SERVICE

I certify that on this ^{12th}~~7th~~ day of April, 1999, a copy of the foregoing has been furnished by U.S. Mail to **Andrew C. Mergen**, Esquire, Department of Justice, Appellate Division, P.O. Box 23795, L'Enfant Plaza Station, Washington, DC 20026 and **Barbara Bisno**, Esquire, United States Attorney, 99 Northeast 4th Street, Miami, 33132.



William VanDercreek, Esquire