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United States v. Capital Sand Co., Inc. United States Court of Appeals for the 8th Circuit 466 F.3d 655 (Decided October 25, 2006)

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However, on Eko-Elda's final *in personam* claim against OWC for breach of contract, it was found that the district court erred in dismissing the claim. OWC should not have been considered a party subject to the district court's jurisdiction and thus the district court abused its discretion.

It is thus established that Eko-Elda has no possible claim for recovery in either Supplemental Rule B or C because it cannot establish a maritime lien. However, Eko-Elda's claim for breach of contract *in personam* against OWC is valid and should be reversed.

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RECOVERY OF OVERHEAD COSTS UNDER 33 U.S.C. § 576 PERMITTED

The United States Court of Appeals for the Eighth Circuit upheld the decision of the District Court for the Eastern District of Missouri, holding that that overhead costs claimed by the Army Corp of Engineers, related to repairs made to a lock and gate damaged in allision, were "sufficiently related" to the work, justifying the awarding of overhead costs. The Court of Appeals also held that the District Court was correct in finding that the amount of overhead awarded was reasonable.

United States v. Capital Sand Co., Inc.
United States Court of Appeals for the 8th Circuit
466 F.3d 655
(Decided October 25, 2006)

The M/V JAMIE LEIGH, owned by defendant, struck miter gate number two of Lock 25 on the Mississippi River, while towing a barge, damaging the gate. Lock 25 is maintained and operated by the Army Corps of Engineers ("Corps").

In order to repair a miter gate, the damaged gate must be pulled from a lock and replaced temporarily until the permanent gate can be repaired and reinstalled. The Corps made the repairs itself and simultaneously repaired miter gate one, which had previously been damaged in an allision in 1999, although repair to this gate was not an urgent issue. After repairs were completed on February 9, 2002, the Corps apportioned repairs costs: the Corps estimated the damage done to gate two by the defendants to be between \$350,000 and \$600,000. It was decided by the Government that the defendant owed \$303,511.53. When the defendant did not make any payments after receiving a bill, the Government filed suit in the Southern District of Illinois. The case was then transferred to the Eastern District of Missouri at defendant's request. The Government then recalculated the damages in accordance with the rule of *United States v. Am. Commercial Barge & Line Co.*, No. 88-1793-C-7, slip op. at 19 (E.D.Mo. Sept. 30, 1991), *aff'd in part on other grounds*, 988 F.2d 860 (8th Cir. 1993), which requires that damages be apportioned in accordance with the repairs that were actually needed and which were caused by the specific allision (not including damages resulting from other sources or everyday wear).

Damages were recalculated at \$280,545.06, including charges for labor (which included overhead), plant rental, general overhead, travel, supplies, and other expenses.

In addition to holding that defendant was liable for these damages, the district court also awarded a 2.25 percent per anumum to the Government. The district court further fined the defendant \$1,000 under 33 U.S.C. § 411. On appeal, defendant disputes the award of \$98,814.69 in overhead expenses within the total award for damages. The district court provided a detailed breakdown of the damages awarded to plaintiff, which included a labor cost for \$189,344.00, \$22,702.93 of which was attributed to General and Administrative overhead and \$76,111.76 attributed to Indirect Cost overhead.

The Court of Appeals for the 8th Circuit, citing *Peavey v. Barge Line*, 748 F.2d 395, 399 (C.A. Ill. 1984) (citing *United Elec., Radio & Mach. Workers v. Oliver Corp.*, 205 F.2d 376, 387 (8th Cir. 1953)), held that “the purpose of overhead is to allow a company to recover ‘its general operating expenses, which are not directly allocable to a particular project.’” The court of appeals held that this rule would apply to the plaintiff, even though it had made the repairs itself as hiring an outside company and submitting a bill to defendant would have had the same effect. The plaintiff, pursuant to 33 U.S.C. § 576, is obligated to recover overhead costs. The statute created a fund for “necessary expenses related to the maintenance and repair of facilities and equipment used in the Corps’ civil works functions,” such as the gate at issue in this case, and these expenses can include overhead. *Capital Sand*, 466 F.3d at 659. Using its own equipment, employees, and facilities, the Corps were able to repair damage done to the gate by defendant.

The defendant relied on *United States v. M/V GOPHER STATE*, 614 F.2d 1186 (8th Cir. 1980) in asserting that the awarding of these damages was erroneous as a matter of law. However, the court of appeals distinguishes this case from the case at hand on the facts: unlike in *Gopher State*, there is no double recover issue, and the record provided by the plaintiff for the damages in this case is more detailed than that in *Gopher State*. While the defendant argues that the damages awarded here are unreasonable, such as the damages awarded in *Gopher State*, damages caused by the defendant were at the low end of the original estimate provided by the Corps.

Here, the General and Administrative overhead included personal costs for those involved in the repairs, including those who effectuated purchases of materials for use in this specific repair. The court of appeals held, in agreement with *Gopher State*, that so long as additional overhead is justifiable, it may be recovered. Although the defendant argued that, under *Gopher State*, for overhead to be justifiable and recoverable, it must be directly connected to a specific repair project, the court here holds that this requirement would be in conflict with the definition of overhead, which requires simply an indirect connection. Testimony on behalf of the plaintiff showed that the overhead costs were justifiable and related to the repairs made on the gate damaged by the defendant. Furthermore, the court found that the Corps made certain that no more was recovered in overhead costs than necessary. An independent accountant confirmed that 109% of the overhead costs were reasonable and consistent with industry norms.

Therefore, the court of appeals held that the Corps did not need to establish a direct link between the overhead charges presented to the defendant and the repair project it undertook on its own, and that it is sufficient to justify overhead charges so long as they bear some reasonable relationship to the repair.

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