

### **Moench v. Marquette Transportation Company Gulf F.3d (2016) United States Court of Appeals for the Fifth Circuit (Filed September 29, 2016)**

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**DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING OWNER OF DAMAGED VESSEL ATTORNEY FEES AS A SANCTION AGAINST TOWING VESSEL OWNER, NOR DID IT ABUSE ITS DISCRETION IN NOT FURTHER LOWERING ITS AWARD OF ATTORNEY FEES**

*Moench v. Marquette Transportation Company Gulf*

**F.3d (2016)**

United States Court of Appeals for the Fifth Circuit  
(Filed September 29, 2016)

**The Fifth Circuit Court of Appeals held that the pre-casualty value of the vessel was determined to be \$417,000 and that the cost to repair the vessel exceeded its pre-casualty value and was a constructive total loss. The Fifth Circuit also found that the tow owner's substantial rights were not affected by the district court's exclusion of expert testimony and that the district court did not abuse its discretion in awarding the owner of the damaged vessel fees, and did not abuse its discretion in not further lowering its award of attorney fees.**

Plaintiff- Appellee George T. Moench filed suit against Marquette Transportation Company for damages the appellants' towing vessel caused Mr. Moench's private vessel after colliding with it.<sup>1</sup>

Moench's private vessel was located in a fleeting facility to protect it from expected flooding in Louisiana.<sup>2</sup> The river that the towing vessel floated on was encountering hostile tides, and the captain took a short coffee break and left the vessel's command to an on-duty deckhand who was supposed to be monitoring the situation.<sup>3</sup> However, when the captain returned, the river current had gotten worse and overwhelmed the towing vessel.<sup>4</sup> Therefore, out of the safety for the two barges in tow, the captain proceeded towards allision with the private vessel.<sup>5</sup> An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier."<sup>6</sup> The allision saved damaging the two barges in tow, but the private vessel in turn was damaged.<sup>7</sup>

Moench asserted general maritime negligence and unseaworthiness claims against Marquette.<sup>8</sup> Moench's expert testified that the pre-casualty value of his vessel was between \$850,000 to \$1.5 million.<sup>9</sup> A pre-casualty value is the total value of an object before an unforeseen event harms the value like a natural disaster, shipwreck and the like. He testified that the replacement cost, less depreciation of the vessel was \$5 million-\$7.5 million.<sup>10</sup> In contrast, Marquette's first expert testified that the pre-casualty value was \$50,000, the second expert

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<sup>1</sup> *Moench v. Marquette Transportation Comp. Gulf.*, F.3d WL (5<sup>th</sup> Circuit 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>7</sup> *Moench v. Marquette Transportation Comp. Gulf.*, F.3d WL (5<sup>th</sup> Circuit 2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

testified that the pre-casualty value was \$75,000-\$100,000, and the third expert testified that the repair costs would total \$120,000.<sup>11</sup>

The district court concluded the vessel was a constructive total loss,<sup>12</sup> that the pre-casualty value of the vessel was \$417,000 and found that Marquette's handling of the case was an abuse of the process and bad faith.<sup>13</sup> Overall, it awarded Moench \$295,436.09 that represented the pre-casualty value of the vessel, less the value of materials and equipment that Moench could have preserved following the allision.<sup>14</sup> It also found that reasonable attorneys fees should be awarded to Moench and that is also included in the number.<sup>15</sup>

On appeal, Marquette asserted that the district court erred in its constructive total loss determination, in refusing to allow Larry Strouse (Marquette's third expert) to opine on the vessel's pre-casualty value, and imposing attorneys fees as a sanction for its handling of the case and awarding the amount of fees.<sup>16</sup>

In terms of the constructive total loss determination the Fifth Circuit held that the pre-casualty figure of \$417,000 provided by the district court was valid, considering that court had the benefit of witnessing expert testimony on the price and value of the private vessel.<sup>17</sup> The private vessel was unique, therefore the calculations were based on purchase price and cost of materials and equipment to improve it, rather than comparable sales value.<sup>18</sup> The Fifth Circuit upheld the district court's determination that the cost of repairing the severely damaged private vessel exceeded its pre-casualty value and, therefore, a constructive total loss was present.<sup>19</sup>

The Fifth Circuit then proceeded to discuss the exclusion of one of the recorded repair experts from testifying on the pre-casualty amount.<sup>20</sup> It declined to find issue with the district court's decision to not include testimony from the repairs expert on the pre-casualty amount of the private vessel.<sup>21</sup> A pre-casualty amount was not included in the repairs expert's report and even if he was made to testify as to an amount it would likely not change the outcome of the decision, but rather confirm the totals reached by Marquette's other experts.<sup>22</sup>

Finally, in assessing the attorneys' fee award, the Fifth Circuit upheld the district court's findings that Marquette acted in bad faith when it continued to contest liability throughout the trial proceedings, despite having knowledge Moench was not involved in the allision, but rather Marquette's captain sole actions.<sup>23</sup> The district court was justified in issuing sanctions and was in their authority as the *Chambers* test indicates, "sanctions are warranted when a party

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<sup>11</sup> *Id.*

<sup>12</sup> A constructive total loss is an insurance term where the cost of a repair for an item is more than the current value of that item. BLACK'S LAW DICTIONARY (Online 2nd Ed.).

<sup>13</sup> *Moench v. Marquette Transportation Comp. Gulf.*, F.3d WL (5<sup>th</sup> Circuit 2016).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

knowingly or recklessly raises an objectively frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.”<sup>24</sup>

The attorneys’ fee calculation was based on the two-step lodestar test where, “a court must first calculate the lodestar amount by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers.”<sup>25</sup> The court then has the freedom to decrease the amount based on the circumstances of the case. Marquette contended that the district court did not weigh the *Johnson* factors in this consideration, but the Fifth Circuit disagreed.<sup>26</sup> It cited the district court’s processing of Marquette’s objection to the initial fee request because the fees were disproportionate to the amount involved. It analyzed the results obtained and provided a consistent review of Moench’s billing records to determine if some fees could be reduced or eliminated.<sup>27</sup> The district court, while finding there was liability to pay some fees, reduced some based on Marquette’s objection.<sup>28</sup> The Fifth Circuit found that the district court’s analysis was valid.<sup>29</sup>

The judgments of the district court were affirmed.<sup>30</sup>

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<sup>24</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123.

<sup>25</sup> *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5<sup>th</sup> Cir. 1998).

<sup>26</sup> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5<sup>th</sup> Cir. 1995).

<sup>27</sup> *Moench v. Marquette Transportation Comp. Gulf.*, F.3d WL (5<sup>th</sup> Circuit 2016).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*