

Graci v. United States, 435 F. Supp. 189 (1977) (Graci III) - edited

MEMORANDUM OPINION

HEEBE, Chief Judge:

This case presents consolidated individual actions emanating from the flooding that occurred in certain portions of Orleans and St. Bernard Parishes attendant upon the striking of the Louisiana coast by Hurricane Betsy on September 9 and 10, 1965. *191 The plaintiffs in these proceedings allege negligence on the part of the United States of America in design, construction and operation of the Mississippi River Gulf Outlet. The United States has filed a third party complaint against the Board of Commissioners of the Port of New Orleans based upon an indemnity agreement whereby the Board of Commissioners agreed that it would hold and save the United States free from all claims and damages due to construction, maintenance and operation of the Mississippi River Gulf Outlet.

Based upon the evidence presented at the trial of this matter, the Court makes the following Findings of Fact and Conclusions of Law in support of its decision denying liability of the United States and of the Board of Commissioners of the Port of New Orleans for the damages arising out of Hurricane Betsy alleged by plaintiffs.

I. FINDINGS OF FACT

Topography

1. The Chalmette area, in which plaintiffs' property damage occurred, is bordered on the south and southwest by the Mississippi River, on the west by the Inner Harbor Navigation Canal (IHNC), on the north by the Gulf Intercoastal Waterway (GIWW), on the northeast by Lake Borgne, and on the southeast by open marsh leading to the Gulf of Mexico.
2. Between Lake Borgne and the Chalmette area are approximately seven miles of marshland intersected on the Lake Borgne side by the Mississippi River Gulf Outlet (MRGO).
3. Elevations in the marsh are generally at or below mean sea level (msl), never rising above +2 feet above msl. Elevations in the remaining Chalmette area range from 0 to +4 feet above msl. The marsh area, excepting the MRGO spoil bank, is completely inundated with tides of + 2.6 feet or greater.
4. At the time of Hurricane Betsy (9-10 September 1965), the residential area of Chalmette was enclosed by a levee at the 40 arpent line (i. e., approximately 1.45 miles from the Mississippi River). This levee, the Chalmette Back Levee, was a non-federal project maintained by the Chalmette Back Levee District. Testimony of Mr. Earl Magner, of the Louisiana Department of Public Works (DPW) and the official DPW levee height measurements before Hurricane Betsy indicated the levee height at Cougar Drive to be +7.8 feet above msl. Other measurements indicated: 100' north of Cougar Drive = +7.8; 200' north = + 8; 300' north = +8; 400' north = + 8.4; 100' south of Cougar Drive = + 7.4; 200' south = +8.0; 300' south = +8.3; 400' south = +8.2.

5. There existed no natural barriers to water flow into the marsh area between the Chalmette Back Levee and Lake Borgne (to the northeast) or the Gulf of Mexico (to the south). Cypress stumps, oyster grass and three-cornered grass comprise the vegetation in the marsh area with no appreciable change in density prior to or following MRGO construction as reflected in the testimony of Mr. Victor Molero.

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Hurricane Betsy

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46. The hurricane surge experienced during Betsy influenced an area in excess of 150 miles along the Gulf Coast. Of this distance, 120 miles experienced a surge in excess of +8 feet, from Grand Isle to Biloxi, Mississippi. Government Exhibits No. 4 and No. 18 indicate the enormity of the coastal area inundated during Betsy.

47. The MRGO has a width of 500 feet. Within 120 miles of coastline receiving a surge of + 8 feet or greater during Hurricane Betsy, the MRGO represents approximately .000789%, or less than one one-thousandth of the affected area.

48. The MRGO did not in any manner, degree, or way induce, cause, or occasion flooding in the Chalmette area. All flooding was the result of natural causes working upon local waters which have before threatened and caused flooding in the area due to the inadequate non-federal local protective features.

II. CONCLUSIONS OF LAW [Note – the DFE is not mentioned.]

1. This Court has jurisdiction of the parties, and under 28 U.S.C. Section 1346 and 28 U.S.C. Section 2671, et seq., (Federal Tort Claims Act) has subject matter jurisdiction over this suit by plaintiffs against the United States for damages allegedly received as a result of defendant's construction of the MRGO.

2. In a suit brought under the Federal Tort Claims Act, the United States is amenable to damages in the same manner and to the same extent as a private individual in like circumstances. 28 U.S.C. Section 2674.

3. In determining the liability of the United States to be cast in judgment for damages, the substantive laws of Louisiana (the state in which the incident occurred) are controlling. *Standefer v. United States*, 511 F.2d 101 (5th Cir. 1975); *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963).

4. Under Louisiana law, every act of the United States that causes damage to another as a result of the fault of the United States obliges the United States to repair that damage. LSA C.C. Art. 2315.

5. The elements of a cause of action under Article 2315 are Fault (which embraces all conduct falling below a proper standard), Causation, and Damage. *Weiland v. King*, 281 So.2d 688, 690 (La.1973).

6. Under Louisiana law, the United States is responsible for the damage it occasions not only by its acts, but also by its negligence, imprudence and want of skill. LSA C.C. Art. 2316.

7. The United States as grantee of the right of way, builder and maintainer of the MRGO assumed a high standard of care with relations to damages caused by the works to neighboring lands and individuals. LSA C.C. Art. 667; Carr v. *City of Baton Rouge*, 314 So.2d 527 (La.App.1975).

*1968. The failure to exercise that degree of care ordinarily expected of a reasonably prudent person under similar circumstances constitutes negligence. *Fire & Gas Ins. Co. of Conn. v. Garick*, La.App., 312 So.2d 103, writs denied, 313 So.2d 845 (La. 1975).

9. The Congress of the United States authorized the design and construction of the deep water channel known as the MRGO. Public Law 455, 84th Congress, approved March 29, 1956.

10. The MRGO was built as an aid to navigation, not as or in connection with a flood control project; and Congressional directives provided no authorization for construction of flood control works in coordination with construction of the MRGO. *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971).

11. Plaintiffs have evidenced no variance between the project as completed and the construction of the project as directed by Congress.

12. Plaintiffs have failed to show by a preponderance of the evidence any fault by the defendant in the design, construction or functioning of the MRGO.

13. Nor have plaintiffs shown by a preponderance of the evidence any negligence by the defendant in the design, construction or functioning of said project.

14. Nor have plaintiffs shown by a preponderance of the evidence any causal connection between the MRGO and any damages which plaintiffs may have sustained.

15. Inasmuch as this Court finds no liability by the defendant, United States, there is also no liability of the third-party defendant, the Board of Commissioners of the Port of New Orleans, on its agreement to indemnify the United States.