UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN NAVELSKI, LINDA NAVELSKI, ERICK ALEXANDER, JACOB HUTCHINS, AMBER HUTCHINS, JEANNE HENDERLY, RICHARD BULLARD, and BEVERLY BULLARD, on their own behalf and those others similarly situated,

Plaintiffs,

v. CASE NO. 3-14-cv-445 MCR/CJK

INTERNATIONAL PAPER COMPANY,

Defendant.

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR NEW TRIAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 59

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Treatises

I. INTRODUCTION

Plaintiffs should be granted a new trial under Federal Rule of Civil Procedure 59 for, *inter alia*, the following six independently sufficient reasons:

1. The jury's verdict on negligence was against the clear weight of the evidence, thus mandating a new trial. *See* Fed. R. Civ. P. 59; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

2. The Court committed errors of law by allowing into evidence seven unfairly prejudicial government-agency documents that bore directly on the negligence question. These documents were used by Defendant during opening and closing arguments, and throughout the testimony of Christopher Curb ("Mr. Curb"). (Trial Transcript ("Tr."), Day 1, at 59-80; Day 4, at 45-107; and Day 5, at 186-220.) As a related but analytically distinct point, the Court erred as a matter of law by allowing Mr. Curb, an employee of Escambia County, to testify as an expert, instead of restricting Mr. Curb's testimony to facts of which he was personally aware and by not allowing Plaintiffs to introduce a National Weather Service document to impeach Mr. Curb.

3. The Court committed an error of law by dismissing Plaintiffs' strict liability claim on Defendant's Federal Rule of Civil Procedure 50(a) motion and argument made at the close of Plaintiffs' case. (Tr., Day 4, at 3-10; Docket No. 222, at 1.)

4. The Court committed an error of law by failing to instruct the jury properly on Plaintiffs' negligence theory concerning abandonment of the dam.

5. The Court committed an error of law by failing to instruct the jury on the "Act of God" affirmative defense.

6. The Court committed an error of law by allowing Defendant to introduce evidence at trial that violated the collateral source rule.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action was commenced in the United States District Court for the Northern District of Florida on September 9, 2014, by Defendant's filing of a Notice of Removal of Plaintiffs' Complaint originally filed in the Circuit Court for the First Judicial Circuit for Escambia County, Florida. (Docket No. 1.) Prior to trial, a number of motions *in limine* were filed and ruled upon, some of which are pertinent to Plaintiffs' Motion for New Trial. (*See, e.g.*, Docket No. 187.) They will be discussed, only as necessary, below.

A five-day liability-only trial was conducted from February 20, 2018 to February 26, 2018. During trial, the Court dismissed Plaintiffs' strict liability claim on Defendant's Federal Rule of Civil Procedure 50(a) motion made at the close of Plaintiffs' case-in-chief. (Docket No. 222.) The Court issued jury instructions on February 26, 2018. (Docket No. 225.) During trial, all necessary objections were preserved, either (1) through the Court's repeated explanations that all prior

objections, including those contained in briefings on motions *in limine*, were preserved and did not need to be repeated on the record at trial, and/or (2) because Plaintiffs made timely objections at trial. (*See, e.g.*, Tr., Day 4, at 83-89.)

Later on that same date, February 26, 2018, the jury returned a verdict answering "No" to the following question: "Do you find, by a preponderance of the evidence, that International Paper was negligent in its design, maintenance, or continued operation of the Kingsfield Road dam structure?" (Docket No. 226, at 1.)

The Clerk of the Court entered the final judgment order on March 1, 2018. (Docket No. 229.) This Motion ensued.

III. LEGAL STANDARDS

Pursuant to Federal Rule of Civil Procedure 59(a)(1)(A), "[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). As explained by the United States Supreme Court in the watershed, and still definitive, case on motions for new trial:

> The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940); *see also In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1461-62 (11th Cir. 1990); *United States ex rel. Weyerhaeuser Co. v. Bucon Constr. Co.*, 430 F.2d 420, 423 (5th Cir. 1970) (upholding grant of new trial).[1]

IV. DISCUSSION

The Court should grant a new trial for each of the six independently sufficient reasons set forth below.

A. Clear Weight of the Evidence

The jury's verdict on negligence was against the clear weight of the evidence, which is grounds for a new trial. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

1. Negligent Design of the Dam

The jury should have found that IP was negligent in the design of the dam for three independently sufficient reasons: (1) the history of erosion put IP on notice of the dam's defective design; (2) the new dam built in 2006 was weaker than the prior dam; and (3) the new dam was made of unarmored sand. Further, IP's corporate representative, Kyle Moore ("Mr. Moore"), stated unequivocally that there was no

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit as of September 30, 1981.

structural, safety, or other impediment to removing the dam, and that IP could have afforded financially to do it. (Tr., Day 2, at 79-80.)

Plaintiffs' geotechnical engineer Dr. W. David Carrier ("Dr. Carrier") offered unrebutted testimony on the following issues: (1) that Defendant was negligent in the design, maintenance, and operation of the dam, as well as its abandonment, and (2) the design of the dam allowed it to be overtopped easily, resulting in failure. IP did not introduce any expert testimony on design, maintenance, or operation of the dam to contradict Dr. Carrier's testimony.

Dr. Carrier testified that he is a geotechnical engineer with nearly 50 years of experience, 40 of which have involved work in Florida. (Tr., Day 2, at 267-68.) He explained that, from December 16 to 17, 2014, he visited IP's dam, observing the area surrounding the dam, the soil, the breach, and the remains of the dam. Dr. Carrier is familiar with the regulatory permits required for dams in Florida, and also reviewed the regulations relevant to the permitting of dams by the Northwest Florida Waste Management District ("NWFWMD"). (Tr., Day 2, at 278-81.) Dr. Carrier also reviewed discovery from IP that discussed the design of the dam, maps of IP's wastewater and storm water facilities, repairs and modifications to the dam in the years preceding the storm, photos of the dam at various times, including photos taken at the dam the morning of April 30, 2014, and IP's post-breach plans for the restoration of the dam area to a natural channel. (Tr., Day 3, at 12-20.)

Based on his review, Dr. Carrier testified that the dam had a long, troubled, cyclical history of overtopping, damage and repair, due to improper design, maintenance, and operation of the dam: April 1996, September 2004 (Ivan); April 2005 (twice), and this recent event of April 2014. (Trial Tr., Day 3, at 12-35; *see also* Pls.' Ex. 89 (quoting IP employee saying, "I remember the [1996] event that actually breached a portion of the pond and undermined supports for the 48" diameter main spillway and the Kingsfield road bridge as well . . . a nightmare."). Obviously, as Dr. Carrier pointed out, undermining the support for the downstream Kingsfield Road bridge posed a high-hazard risk. IP's former safety manager, Mike Steltenkamp ("Mr. Steltenkamp"), even recognized the possibility of a flood compromising the structural integrity of the Kingsfield Road Bridge downstream. (Tr., Day 4, at 218-20.) Moreover, needing to construct a new dam every nine years placed IP on more than fair notice that the design of the dam was seriously flawed. (Tr., Day 3, at 12-35.) There was never any engineering stamped plans for the dam. Finally, some of the calculations that did exist, assumed that flow would be increased, but only by running water over the earthen, unarmored sections of the dam, thus leading to erosion. (Tr., Day 3, at 20-35.)

In addition, the dam was largely made of sand. (Pls.' Exs. 178(f), and 271.) These exhibits made obvious that the soil was sand, which is easily erodible. Because of this, Dr. Mark Ross ("Dr. Ross") said that once the dam became

overtopped in this storm, it would have failed in under one hour, maybe minutes. (Tr., Day 3, at 120-42.) Dr. Lan, on cross examination, agreed. (Tr., Day 4, at 91.) Dr. Carrier said that dams made with erodible soil must be armored with concrete or rip-rap. (Tr., Day 3, at 25-27.) IP did not armor the dam and had actually removed the concrete "turtle shell" that had protected earlier versions of the dam. (Tr., Day 3, at 27.)

Any one of the three foregoing reasons concerning negligent design should have been overwhelming evidence requiring a jury to return a verdict in favor of Plaintiffs. When all three reasons are combined, then no reasonable jury could have found otherwise.

2. Negligent Maintenance and Operation: The Safety Valve and Lack of Meaningful Safety Inspections

IP was further negligent in the maintenance and operation of this dam.

There was no evidence offered that IP conducted a meaningful safety inspection, per the standards agreed upon by experts from both sides during trial. Exhibits 61 and 183(F)-(H), and the testimony of Kyle Moore ("Mr. Moore"), IP's safety manager, make this point well. (Exs. 61 and 183(F)-(H); Tr., Day 2, at 121-24.) Exhibits 61 and 183(F) show the state of disrepair that the four-foot-wide safety valve on the concrete spillway box of the dam had reached. (Exhibits 61 and 183(F).) International Paper's witnesses admitted that they never opened that gate after they

cut the two little notches in the top of the box in 2012. (*See* 183(F).) It is undisputed that IP retired the safety valve. (Tr., Day 2, *passim*.)

Dr. Carrier and Mr. Steltenkamp both said that that bottom gate needed to be functional—and it was ***not*** functional—for proper maintenance to occur. (Tr., Day 3, at 12-35; Day 4, at 195, 214-215.) IP had eleven hours between the storm events to open up the safety valve; it never did so. (Tr., Day 3, at 253-54.) Mr. Steltenkamp was very clear that it was standard operating procedure when he was safety manager to drain that impoundment using that safety valve in advance of storms. (Tr., Day 4, at 195, 214-215.) Simply put, IP failed to maintain a critical part of its dam, and that is negligence.

IP also never had a Professional Engineer qualified to assess the safety and stability of the dam. There was no evidence of a single safety inspection during the eight years the dam stood. Dr. Carrier testified that periodic certification by a professional engineer is required, as opposed to a "drive by" inspection. (Tr., Day 3, at 11-35.) All of these factors lead to the conclusion that IP was negligent in its maintenance and operation of the dam.

3. Abandonment: Failure to Remove

In case bad design, negligent maintenance, and not operating the safety valve in a storm were not enough, after 2012 there was simply no reason for this dam to

be in the middle of Eleven Mile Creek. By that point, the dam had been abandoned—but negligently so. (Tr., Day 3, at 11-35.)

Dr. Carrier explained that abandonment is a formal process in Florida, requiring a permit from NWFWMD and design by a qualified, licensed engineer. Dr. Carrier found no evidence—and, indeed, there was no evidence—that the dam was properly permitted or that IP took any precautions with respect to the dam after 2012. Dr. Carrier stated that proper abandonment of a dam required the removal of the dam and restoration of the channel to its pre-construction topography. (Tr., Day 3, at 11-35.) Because IP's dam was still in place prior to the storm, Dr. Carrier opined that it had not been properly abandoned. (Tr., Day 3, at 32-35.) Again, Dr. Carrier's testimony was uncontroverted by any other expert at trial.

Mr. Moore, clearly and without reservation, admitted that after 2012 there was no operational impediment to removing the dam and at all relevant times IP had the financial ability to remove this structure. (Tr., Day 2, at 79-80.) IP should have done so, and its failure to do so constitutes negligent abandonment of the dam.

Thus, while the parties may have had a genuine dispute on causation, there was no genuine or meaningful dispute on the question of negligence in terms of the design, maintenance and operation, and abandonment of the dam. Accordingly, the clear weight of the evidence favored a finding of negligence, and the case should be

re-tried, without the influence of any or all of the items discussed immediately below.

B. Evidentiary Errors and the Expert Testimony of Mr. Curb

1. Errors of Law

The Court committed errors of law by allowing into evidence seven government-agency documents that bore directly on the negligence question, despite these exhibits' failure to meet the "Public Records" hearsay exception under Federal Rule of Evidence 803(8). These unfairly prejudicial exhibits were Defendant Trial Exhibits Nos. 48, 51, 52, 53, 54, 66, and 80. These errors of law caused unfair prejudice that was not harmless.

2. Abuse of Discretion

Separately, it was an abuse of discretion for the Court to admit these documents over Plaintiffs' objection to them on grounds that they were unfairly prejudicial pursuant to Federal Rule of Evidence 403.

3. Unfair Prejudice on the Negligence Question

As explained in detail below, the admission of these unfairly prejudicial exhibits had a severe and negative impact on the jury's consideration of the negligence question. The point of negligence is to permit an analysis, by the jury, of how a reasonable person should act. If, as these exhibits unfairly suggest, the flooding had "nothing to do" with IP, (Tr., Day 4, at 86-87), then there would be no meaningful grounds for the jury to consider IP's conduct to be unreasonable because

IP's conduct allegedly had "nothing to do" with the events in question. Similarly, the "unreliable" conclusion[2]—that "Champion is only a very small fraction" of the runoff compared to the size of the basin was allowed in (Tr., Day 4, at 38, 54)—making it difficult for any jury to focus seriously on whether IP was negligent in its design, maintenance and operation, and abandonment of the dam, simply because the jury wouldn't care about whether IP was reasonable or not because IP's conduct amounted to a "drop in the ocean," so to speak.

As set out in detail below, Mr. Curb testified to a raft of similar conclusions—all in support of the general point that IP had "nothing to do" with the storm or flooding—on areas outside of his personal knowledge, and based on his reliance on the seven documents prepared by outside experts in dispute in this section of the brief. These alleged "conclusions" never should have been put in front of the jury, because they were not based on Mr. Curb's personal knowledge and were instead based on a series of undisclosed expert opinions that IP presented through the back door, when those opinions would not have been allowed to come in the front door due to IP's failure to disclose the underlying experts during discovery (and for other reasons). In this way, the incorrectly admitted exhibits and the allowance of Mr.

[2] And this was indeed an unreliable conclusion, since Mr. Curb gave this testimony based solely on the work of two other experts who were never disclosed as experts in this case.

Curb to testify on "expert" issues outside of his personal knowledge, worked together to create severe and unfair prejudice to Plaintiffs.

The Court erred as a matter of law by allowing Mr. Curb, an employee of Escambia County, to testify as an expert, instead of restricting Mr. Curb's role to testifying about facts of which he was personally aware.

The Court's ruling on the subject was as follows:

> Plaintiffs also move to preclude Christopher Curb from presenting "expert or hybrid-expert" testimony at trial. The Court agrees that, because Curb was not timely disclosed as an expert witness and did not prepare an expert report, he may not testify as an expert at trial or offer an expert opinion on causation. ***However . . . . to the extent Curb was personally involved in Escambia County's preparation or issuance of any of the six reports or models listed in Plaintiffs motion, and those materials are ultimately admitted at trial, he may testify about the materials to the jury. Curb also may testify about Escambia County's characterization of the April 2014 storm (e.g., describing the rainfall "as approaching [a] 500-yr storm" event), see ECF No. 155-21 at 6, so long as his testimony is supported by specific Escambia County materials.***

(Docket No. 187, at 9-11 (emphasis added).)

4. **Specific Exhibits at Issue and the Related Testimony of Mr. Curb**

In total, seven of the Defendant's trial exhibits are at issue. (*See infra*, Section III.B.4(a)-(g). These are examined *in seriatim* below, although the Court should consider them both individually and in totality when considering the question of whether these exhibits created unfair prejudice that was not harmless to Plaintiffs.

Objections to all of these exhibits were preserved by Plaintiffs and the Court. (*See, e.g.*, Tr., Day 4, at 83-89.)

a) Defendant's Trial Exhibit No. 48 (January 27, 2015)

This document is the "Lake Charlene Area of Warrington Basin Study (Including Other Areas of Escambia County)," dated January 27, 2015. The fact that the study reaches an alleged conclusion—that "[t]he egregious flooding in the region was a combination of extreme rainfall, already saturated soils, high water levels in the bay and ocean, and onshore winds"—does not *ipso facto* render that conclusion admissible, for the specific reasons mentioned below.

The unfair prejudice to Plaintiffs is obvious now, although it might not have appeared obvious prior to the trial. Thus, a new trial is warranted in light of how this evidence played out. Defendant used this exhibit to have Mr. Curb testify, outside of his personal knowledge, that the storm was between a "300- to 500-year storm event[]." (Tr., Day 4, at 71.) That answer came in response to the question, "And did this report lead to any conclusions by the County about the April 2014 storm event?" (Tr., Day 4, at 71.) That testimony was unfairly prejudicial because it tended to show that no "reasonable person" could have concluded that the dam was a part of the problem, so why even worry if someone constructed a dam that was reasonable or not? And the fact that this testimony came from alleged "third-party expert," with no purported bias makes it even more unfairly prejudicial than if it had just come

from an expert aligned with one side. Moreover, the statement was untrue as it related to this neighborhood and the watershed at issue, which were directly downstream from the dam.

This proposed exhibit should have been struck for several reasons. First, it was a mere "proposal," and it is almost entirely based on the work of two "third-party" experts—i.e., two non-Escambia County experts. It is furthermore just a summary, and the "rainfall frequency" reports were prepared by third parties who were never disclosed as experts. Further, this document is not "trustworthy" because Plaintiffs did not have a full and fair opportunity to depose any third-party experts (since their identities were not disclosed as experts during discovery), and thus Plaintiffs cannot verify the rainfall data/inputs employed. Also, this proposed exhibit lacks the "finality" required under Federal Rule of Evidence 803(8), as there was no "action" by the county (*i.e.*, no vote or conclusion). Indeed, IP's own expert on rainfall, Mr. Steven Wistar ("Mr. Wistar"), testified that certain portions of this report were flat "wrong." (Tr., Day 4, at 37-38 ("This data looks wrong.").)

b) Defendant's Trial Exhibit No. 51 (2008 and 1999)

This proposed exhibit is the 2008 "Eleven Mile Creek Basin Study" prepared by Hatch Mott McDonald, along with an embedded 1999 study of yet another third party, as discussed below. With respect to the document itself, page 3-2 states that "Champion is only a very small fraction of the flow through this area." (Def.'s Ex.

No. 1, at 3-2.) This bears on the question of negligence because it implies that IP's (prior to this, Champion's) operation of the dam posed no significant risk of harm to downstream property owners. Mr. Curb reinforced this statement in his testimony on Day 4. (Tr., Day 4, at 54-57.)

> Q. So there was questionnaire process that was incorporated in the 1998 -- I'm sorry -- the 1999 County study?
>
> A. Yes, sir. . . . ***And pretty much Champion is a fraction of the runoff compared to the size of the basin.*** And several of the homes are constructed in that 100-year floodplain. So, the conclusion was that Champion is not the cause of the flooding in -- the flood stage at Elevenmile Creek.

(Tr., Day 4, at 54 (emphasis added); *id.* at 56 ("Simply put . . . . International Paper is a very small fraction of the flow compared to the 11,000 acres that drain through the creek.") (emphasis added); *id.* at 57 ("The reason is, International Paper is a small contribution to the basin compared to the entire basin." (emphasis added).) On cross-examination of Mr. Curb, Plaintiffs attempted to introduce a document from the National Weather Service about the 1998 rain event, Hurricane Georges (Pls.' Trial Exhibit No. 306), to explain the rainfall amount in the 1998 event compared to the 2014 event, but the Court denied the admission of the National Weather Service document on hearsay grounds. (Tr., Day 4, at 103-104.) The Court's ruling was error because the National Weather Service document meets the "Public Records" hearsay exception. *See* Fed. R. Evid. 803(8).

This document should have been struck from trial for a number of clear-cut reasons. First, this is the work of Hatch Mott MacDonald, a third party. It lacks finality, as this is an "ongoing" study. The document was, moreover, disclosed merely two weeks before the close of discovery, when deposition for the last ten days of discovery had already been set, and thus there was no chance to test the trustworthiness of the studies since experts had already been disclosed and deposed. Plus, the two studies—the 2008 map and the "Eleven Mile Creek Drainage Study and Preliminary Cost Analysis" prepared by CarlanKillam Consulting Group, Inc., in August 1999 —were based on models which were not disclosed to Plaintiffs (and neither were the inputs behind the models). These factors demonstrate a lack of trustworthiness. Moreover, there was no "action" by Escambia County; therefore, this proposed exhibit lacks county-action and finality.

c) Defendant's Trial Exhibit No. 52 (May 2008)

This document is the "Escambia County, Florida ICPR Modeling Portion of Eleven Mile Creek Watershed," dated May 2008.

The core issue here is that this document shows a flood zone to which Mr. Curb should not have been allowed to testify as a hybrid-expert. This is a follow-on to the 1999 study that had concluded IP was a very small fraction of the flow through class area. Mr. Curb reinforced these points in his testimony. (Tr., Day 4, at 58; *id.* at 60-61.)

This document should have been struck for all the same reasons expressed in response to Defendant's Trial Exhibit No. 51, immediately above. In short, it is a Hatch Mott MacDonald Report, not a report prepared by Escambia County; its purported "conclusions"—such as the need to prioritize the area of "Eleven Mile Creek, Between Interstate 10 and Highway 297A—lack "finality" as it was an ongoing study; it lacks "trustworthiness" because none of the experts who prepared it were identified as trial experts in discovery (and their models and data inputs were likewise not disclosure during discovery); and there has been no "ultimate action" by the County with respect to this report.

d) Defendant's Trial Exhibit No. 54 (July 28, 2015)

Defendant's Trial Exhibit No. 54 is the "Stormwater Advisory Team (SWAT) County-Wide Stormwater Recommendation Report," dated July 28, 2015. The "recommendations" (***not*** conclusions), are neither final nor adopted, and are not relevant, on even a *prima facie* level, to any material issue in the case.

Referencing the document, Mr. Curb testified that there was 19.56 inches of rain in the storm. (Tr., Day 4, at 76.) Mr. Curb again testified outside his personal knowledge about how rainfall impact is different in a 24-hour period as opposed to rainfall in a shorter period of time (Tr., Day 4, at 77.) He likewise testified that the Bristol Park restoration project was the No. 5 priority out of 228 projects. (Tr., Day 4, at 79.) Mr. Curb further testified that the county was demolishing homes in Bristol

Park that were in the 100-year floodplain. (Tr., Day 4, at 79.) Mr. Curb also testified that FEMA was paying money for the project to "remove the hazard" — the clear implication of which is that the risk of flooding was attributed to the properties themselves, not IP. (Tr., Day 4, at 80.)

Additionally, Defendant's proposed exhibit should have been struck because it is a subsequent (post-flood) SWAT report. The document was prepared two years after the storm, but despite that, it still lacks finality because these are mere "recommendations," not final actions. The recommendations also relied extensively on third-party work. There was further a lot of hearsay-within-hearsay present, under Federal Rule of Evidence 805.

e) Defendant's Trial Exhibit No. 53 (October 19, 2015)

This document is the "Federal Emergency Management Agency ["FEMA"] Hazard Mitigation Grant Program Application, DR-4177, prepared by Escambia County for 'Bristol Park Area Acquisitions' for Projects Locations Bristol Park Neighborhood, Cantonments, Florida, 32533." This document should not have been admitted.

Page 2 of this document discusses a "demolition of 27 residential properties," and at the bottom it talks about a buyout of homes at a cost of "no more" than $267,000 each. (Def.'s Trial Ex. No. 53, at 2.) This information was published to the jury, which resulted in a curative instruction which was not sufficient. A document

telling the jury that Plaintiffs may have already received, or stood to receive, up to $267,000 each was unfairly prejudicial to Plaintiffs on the question of negligence because it effectively told the jury that there is no need to worry about the reasonable or unreasonable behavior of IP because Plaintiffs were getting paid anyway.

Mr. Curb testified that the reason for the county's grant application has "nothing to do" with IP. (Tr., Day 4, at 87.) Mr. Curb also testified that the flood risks to these homes had "nothing to do" with IP. (Tr., Day 4, at 88-89.) The last two items are important because they essentially told the jury that the 2014 storm damage was not IP's fault in any fashion. This testimony must have had a strong impact on the jury's consideration of negligence.

This proposed exhibit should have been struck for several reasons. First, this was just an "application" to FEMA; there was no "finality," as the application and program are still ongoing. Indeed, defense witness Mr. Curb (as Escambia County employee) had earlier stated that it will take seven years to complete the application and grant process, of which this 2015 application is just the beginning, so there is no finality. This document is also irrelevant and a violation of the collateral source rule. It is important to note that subsequent remedial measures are a sword to prove liability; they are not a shield to disprove liability. That too is a fundamental distinction which renders the document inadmissible.

f) Defendant's Trial Exhibit No. 66

Defendant's Trial Exhibit No. 66 is a map commonly referred to as Eleven Mile Creek Drainage Study. This document suffers from the same defects as Exhibit 52, discussed *supra*. Additionally, Mr. Curb testified outside of his lay experience to explain flood recurrence intervals and their reference to the model constructed. (Tr., Day 4, at 63-64.) Mr. Curb further testified that FEMA contracted with NWFLWMD to update the flood maps, which was hearsay and to which Plaintiffs objected at trial. (Tr., Day 4, at 65.)

The reasons supporting the striking of this document are clear. First, this is yet again a Hatch Mott McDonald report, so there is an obvious third-party objection per Federal Rule of Evidence 803(8). As explained above, when an agency report relies too heavily on third-party materials, courts have excluded them. *See, e.g.*, *Brown v. Sierra Nevada Mem'l Miners Hosp.*, 849 F.2d 1186, 1189-90 (9th Cir. 1998).

Hatch Mott McDonald was never disclosed as an expert during discovery. Thus, there was no full and fair opportunity to cross-examine these undisclosed engineering experts who prepared the ICPR modelling, so there is a manifest lack of trustworthiness. *See* Fed. R. Evid. 803(8). The map at issue is based on ICPR Modeling, but again, no inputs and data were provided.

g) Defendant's Trial Exhibit No. 80

This is one of the Damages Assessment Maps of Escambia County. (Def.'s Tr. Ex. 80.) This unfairly prejudicial exhibit was entered into evidence over objection. (Tr., Day 4, at 68-69.) In the parties' pretrial stipulations, they noted that "the parties have also agreed to the use of static or live versions of: . . . (2) the 2014 Escambia County Damages Assessments Map." (Docket No. 166 at 7.) Plaintiffs agreed to "use" this map as a demonstrative, without waiving any objection to relevance. Of equal importance, Plaintiffs had agreed to use the map of just the neighborhoods where the class members resided—not the maps of the entire county. When IP offered the entire county as a demonstrative, not just the Plaintiffs' neighborhoods (as Plaintiffs had included as their own Exhibit 44), Plaintiffs objected, noting that "[t]his demonstrative is misleading because it shows damage in other areas, as remote as Perdido Bay and southwest Pensacola that are miles from the relevant area. It is unfairly prejudicial to suggest that Plaintiffs or class members were harmed in the same manner as the rest of Escambia county when there are no facts that support the timing or severity of these damages marks." (*See* Ex. A, Email re IP's Proposed Demonstratives at 4, line 37.)

This map was also unreliable because it was based on alleged "reports" from unknown persons. For instance, people may have had an incentive, based on reasons relating to financial recovery or qualification for a government subsidy program, to

overreport their damage. Similarly, the map, as prepared, unfairly depicted IP's dam as but a proverbial "blip" on the map.

The unfair prejudice was obvious. This document allowed Mr. Curb to testify, seeming scientifically to the jury, that there were over 3,000 homes flooded in Escambia County and thus the negligence of IP was a drop in an ocean that didn't matter. (Tr., Day 4, at 67 ("There were reported through building inspections department over 3,000 homes that had flooded in the April storm event. More projects than we could handle. We -- ponds blown out all over Escambia County, damage to people's property. It was devastating. Simply put, it was a devastating storm event.").) What happened to other homeowners on the other side of the county has, in truth, no bearing on what happened to the residents who lived in the subdivisions at issue in this lawsuit.

All told, then, whether these exhibits are viewed individually or in combination, there was grave and unfair prejudice to Plaintiffs' case on negligence. These exhibits all tended to unfairly and misleadingly claim that IP had "nothing to do" with the flood events at issue, and thus their admission was unfairly prejudicial to Plaintiffs' case. The Court should grant a new trial for this reason alone, and allow said trial to be conducted without the unfairly prejudicial impact of these seven pieces of evidence.

C. Plaintiffs' Strict Liability Claim

The Court committed an error of law by dismissing Plaintiffs' strict liability claim on Defendant's Rule 50(a) motion made at the close of Plaintiffs' case. (Docket No. 222, at 1.) This error was compounded by the Court's earlier ruling that the only evidence of an abnormally dangerous condition Plaintiffs could submit concerned the possibility of flooding downstream structures, as evidenced by prior failures of the dam. (Docket Nos. 156, and 187, at 5.) This latter ruling precluded Plaintiffs from introducing evidence that Defendant's discharge of effluence also bore on the strict liability question concerning abnormally dangerous activity.

On the third day of trial, February 22, 2018, counsel for Plaintiffs and Defendant presented their arguments concerning strict liability. (Tr., Day 3, at 276-85.) The next morning, on February 23, 2018, the Court issued its ruling from the bench that, as a matter of law, Plaintiffs could not present their strict liability claim. (Tr., Day 4, at 3-10.) The Court subsequently entered an Order affirming its ruling from the bench on strict liability. (Docket No. 222.)

The Court's ruling was incorrect, (Tr., Day 4, at 3-10), for several reasons but two in particular. First, the Court's finding on "common usage" was not supported by the facts. In other words, there was no commonality of usage, although the Court still found that the impoundment of large amounts of water was not "usage" that could be considered abnormally dangerous. IP did not present any evidence that

there was any other industrial dam situated anywhere in Escambia county or that the usage of the dam was common to the area. And second, the Court ruled, again as a matter of law, that there was no "substantial risk of harm" downstream. But Exhibit No. 89 clearly demonstrated that the dam had failed previously to such an extent that caused damage to a downstream bridge. (Pls.' Ex. No. 89.) So, this risk factor was severely discounted, constituting an error of law.

Florida courts recognize the general principle that, "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity although he has exercised the utmost care to prevent the harm." *Bunyak v. Clyde J. Yancy & Sons Dairy, Inc.*, 438 So.2d 891, 894 (Fla. Dist. Ct. App. 1983) (citing *Restatement (Second) of Torts* § 519); *Cities Service Co. v. State*, 312 So.2d 799, 802 (Fla. Dist. Ct. App. 1975) (citing *Restatement (Second) of Torts* § 520).

In *Cities*, the Florida appellate court affirmed the circuit court's finding that a mine operator was strictly liable for damage caused by escape of phosphatic waters after a dam maintained by defendant broke. *Cities*, 312 So.2d at 803. The court was persuaded by the fact that the phosphatic slime impounded by the dam "had a high potential for damage to the environment" and that, "[i]f a break occurred, it was to be expected that extensive damage would be visited upon property many miles away." *Id.* The court's conclusion is consistent with other case law recognizing that

maintaining a dam in a populated area may constitute an abnormally dangerous activity. In *In Greenberg Investment Partnership L.P. v. Cary's Lake Homeowners Assoc.*, No. 3:14-cv-05096, 2016 WL 2766675 (D.S.C. May 13, 2016), the strict liability claim survived dismissal when the plaintiff alleged that a dam was abnormally dangerous because the damage to Plaintiff's business "was foreseeably and directly and proximately caused by the breakage of [Defendant]'s abnormally dangerous manmade dams, as [the dams] were improperly constructed, maintained, monitored, operated and/or otherwise managed in an unreasonable manner." *Id.* Similarly, in *Clark-Aiken Co. v. Cromwell-Wright Co., Inc.*, 367 Mass. 70 (1975), plaintiff sought to recover for damage caused when water allegedly stored behind a dam on the defendant's property was released and flowed onto its property. The Massachusetts court recognized that the doctrine "distinguishes cases where large quantities of water are stored 'in dangerous location in a city' from those in which 'water is collected in a rural area, with no particularly valuable property near,' imposing strict liability in the former but not the latter case."

As to factor (d) of the *Restatement (Second) of Torts* §§ 519-520, an "activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. . . . Water collected in large quantity in a hillside reservoir in the midst of a city or in coal mining country is not the activity of any considerable portion of the population, and may therefore be regarded as

abnormally dangerous; while water in a cistern or in household pipes or in a barnyard tank supplying cattle, although it may involve much the same danger of escape, differing only in degree if at all, still is a matter of common usage and therefore not abnormal." *Restatement (Second) of Torts* § 520 (1977), comment I, cited by *Peoples Gas Sys. V. Posen Constr., Inc.*, No. 2:11-cv-231-FTM-29, 2012 WL 2358161, at *3 (M.D. Fla. June 20, 2012). Factor (e) is somewhat tied to the value to the community in factor (f). Applying factor (e), if these activities are of sufficient value to the community in factor (f), they may not be regarded as abnormally dangerous when they are so located, since the only place where the activity can be carried on must necessarily be regarded as an appropriate one. *Id.*, comment j. An example may be coal mining that must be done where there is coal, but it has sufficient value to the community not to be abnormally dangerous. *Id.* Finally, factor (f) is present where the community is largely devoted to the dangerous enterprise and its prosperity largely depends upon it. *Id.*, comment k.

The *Restatement (Second) of Torts* § 520, comment j specifically recognizes the inherent risk of impounding water in a heavily populated area: "[T]he collection of large quantities of water in irrigation ditches or in a reservoir in open country usually is not a matter of any abnormal danger. On the other hand, if the reservoir is constructed in a coal mining area that is honeycombed with mine passages, or on a bluff overhanging a large city or if water is collected in an enormous standing tank

above the same city, there is abnormal danger and strict liability when, without any negligence, the water escapes and does harm." *Restatement (Second) of Torts* § 520 (1977), comment j. Accordingly, as demonstrated in *Cities* and the other decisions discussed above, courts nationwide have recognized that collecting water in unsuitable or dangerous places is a typical abnormally dangerous activity under the *Restatement (Second) of Torts* §§ 519 and 520 (1977).

Here, IP impounded water in large quantities that consisted of runoff from its wastewater treatment facility. The wastewater is pollution. But as the case law above demonstrates, the impounding of even clear water is an abnormally dangerous condition, so Plaintiffs' argument can be made even without reference to any waste or effluence in the water. There was a significant risk of harm from the dam breaking that could result in the flooding of many residents downstream, and the Kingsfield Road bridge as well. (Tr., Day 3, at 12-35; Day 4, at 218-20.) The risk of having the dam may have been eliminated by exercising due care, but that would have required either removing the dam entirely or building a completely different dam that was legally permitted as safe. Impounding water in mass quantities is not a matter of common usage, and there are no other similar dams in the surrounding community. The activity was not appropriate for its location because no legal approval for the impoundment was sought from the District. Finally, the dam was not used to benefit

the community and had no public value. All six factors weigh in favor of finding that the dam was an abnormally hazardous activity.

Plaintiffs therefore ask the Court to order a new trial and instruct the jury that IP's maintenance of and responsibility for the dam constituted an abnormally dangerous activity, as to which the jury may then consider the issue of causation.

D. The Court's Failure to Instruct on Plaintiffs' "Abandonment" Theory of Negligence Liability

The Court committed an error of law in failing to instruct the jury properly on Plaintiffs' negligence theory concerning abandonment of the dam. This was an error of law that deprived Plaintiffs of one of their best theories on negligence.

As explained earlier, Dr. Carrier testified that abandonment is a formal process in Florida, requiring a permit from NWFWMD and design by a qualified, licensed engineer. Dr. Carrier found no evidence—and, indeed, there was no evidence—that the dam was properly permitted or that IP took any precautions with respect to the dam after 2012 and prior to the storm. (Tr., Day 3, at 12-35.) Dr. Carrier stated that proper abandonment of a dam required the removal of the dam and restoration of the channel to its pre-construction topography. Because IP's dam was still in place prior to the storm, Dr. Carrier opined that it had not been properly abandoned. (Tr., Day 3, at 12-35.)

But on the jury verdict form, the Court decided not to include the words "abandon" or "abandonment" in describing Plaintiffs' theories of negligence.

Instead, the Court used the phrase "***continued operation*** of the Kingsfield Road dam structure," thus suggesting strongly that IP never abandoned the dam and contradicting the theory advanced by Plaintiffs during trial. (Docket No. 226, at 1 (emphasis added).) The jury thus ruled against Plaintiffs without ever being allowed to consider Plaintiffs' abandonment theory as grounds for negligence. This is an error that in and of itself justifies a new trial. (Tr., Day 4, at 237-40; Tr., Day 5, at 3-4, 16-17, 134-37.)

E. The Court's Error on the "Act of God" Affirmative Defense

The Court's failure to instruct the jury on the "Act of God" affirmative defense constitutes harmful error. While declining to instruct the jury on the "Act of God" issue, the Court at the same time allowed Defendant to introduce evidence of, and argue in closing about, "events of nature" being the non-negligent explanation for the flooding in question. (Tr., Day 5, at 186-220.) This ruling allowed for the proverbial "wolf in sheep's clothing" to steal away the negligence question.

"An event may be considered an act of God when it is occasioned exclusively by the violence of nature." 38 Fla. Jur. 2d § 10 (2018). An "act of nature" includes rainfall. *Id.*; 1 Am. Jur. 2d Act of God § 4 (2018) (citing *Wm. G. Roe & Co. v. Armour & Co.*, 370 F.2d 829 (5th Cir. 1967) (applying Florida law) and cases from across the country, and explaining that a claim that "weather conditions"—such a "thunderstorm or rainstorm," or "high winds or a hurricane," or "flooding"—was

the non-negligent explanation for the flooding, raises an "act[] of God" defense requiring proper instruction to the jury) (emphasis added).)

So, an "Act of God" instruction should have been given, even if in closing defense counsel referenced only "rainfall" as being the non-negligent explanation for the events in question, instead of using the precise terms "Act of God" or "*Vis Major*." This point militates strongly in favor of granting Plaintiffs' Motion for New Trial.

F. Violation of the Collateral Source Rule

The Court committed an error of law by allowing Defendant to introduce evidence at trial that violated the collateral source rule. Under Florida substantive law, any evidence of outside payments to Plaintiffs from insurance companies or entities such as FEMA is barred under the collateral source rule. But such information, in fact, got into the case. And once this information was presented to the jury, it was more likely than not the case that jurors felt that there was no need to return a verdict in favor of Plaintiffs that would, eventually, allow for an award of damages. This evidence was so damaging that it was impossible to cure, even through the issuance of a curative instruction. (Tr., Day 4, at 83-85.)

The trial record in this case is replete with references to the FEMA Hazard Mitigation Program, pursuant to which Escambia County and the Plaintiffs have either received, or will receive, payments after the incident in this case. Defendants

snuck in such evidence, principally through the testimony of Mr. Curb, to demonstrate that the Plaintiffs have already been compensated in this case or that the Defendant or Escambia County took actions after the flood incident in order to demonstrate allegedly good-faith behavior. (*See* Tr., Day 4, at 45-106.)

V. CONCLUSION

In light of the foregoing, the Court should grant Plaintiffs' Motion for New Trial in its entirety.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

In accordance with N.D. Fla. Loc. R. 7.1(B) counsel for the Plaintiffs and Defendant conferred about Plaintiffs' Motion for New Trial. The parties were unable to reach a resolution and Defendant opposes the relief sought by Plaintiffs' Motion for New Trial.

LOCAL 7.1(F) CERTIFICATION

The undersigned counsel hereby certifies that this pleading is compliant with the limitations imposed by the Court and, according to Microsoft Word's "Word Count" function, pursuant to the methodology contained in Local Rule 7.1(F), this pleading is 7,929 words, which includes headings, footnotes, and quotations.

Dated: March 28, 2018

Respectfully submitted,

/s/ James L. Kauffman
James L. Kauffman, Fl. Bar No. 12915
Brian A. Glasser, *Pro Hac Vice*
Jonathan R. Marshall, *Pro Hac Vice*
BAILEY & GLASSER LLP
1054 31st Street, N.W., Suite 230
Washington, DC 20007
Telephone: (202) 463-2101
Fax: (202) 463-2103
jkauffman@baileyglasser.com
bglasser@baileygalsser.com
jmarshall@baileyglasser.com

Jeremiah J. Talbott
Law Office of J.J. Talbott, P.A.
900 East Moreno Street
Pensacola, FL 32503
jj@talbottlawfirm.com

Christopher M. Vlachos
Vlachos Injury Law, P.A.
244 East Intendencia Street
Pensacola, FL 32502
chris@vlachosinjurylaw.com

Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 28th day of March 2018 that a true copy of the foregoing pleading was served via electronic delivery on counsel below:

Daniel W. Nelson
D.C. Bar No. 433415
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: 202-887-3687
dnelson@gibsondunn.com

Charles F. Beall, Jr.
cbeall@mhw-law.com
Florida Bar No. 66494

Larry Hill
lhill@mhw-law.com
ljohnson@mhw-law.com
Florida Bar No. 173908

Kimberly S. Sullivan
ksullivan@mhw-law.com
Florida Bar No. 101408
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street
SunTrust Tower, 9th Floor
Pensacola FL 32502
Telephone: (850) 434-3541

Attorneys for Defendant

Patrick Clerkin *Pro Hac Vice*
Texas Bar No. 24040702
Aaron S. Imhoff *Pro Hac Vice*
California Bar No. 310743
Clerkin Sinclair & Mahfouz, LLP
530 B Street, 8th Floor
San Diego, CA 92101
Telephone: 619-308-6550

/s/ James L. Kauffman
James L. Kauffman