UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN NAVELSKI, et al.,

Plaintiffs,

v. **Case No. 3:14cv445/MCR/CJK**

INTERNATIONAL PAPER COMPANY,

Defendant.
_____/

ORDER

This matter is before the Court on Plaintiffs' motion for a new trial, ECF No. 231, which Defendant opposes, ECF No. 233. Having carefully reviewed the trial record, the applicable law, and the parties' arguments, and for the reasons set forth below, the Court finds that Plaintiffs' motion is due to be denied.

I. Background[1]

Plaintiff property owners filed this suit against Defendant International Paper Company, alleging claims of negligence, nuisance, trespass, and strict liability. The Court bifurcated the issues of liability and damages, and certified a liability-only class with respect to Plaintiffs' claims. A five-day jury trial on liability was held on February 20-26, 2018. At the close of Plaintiffs' case-in-chief, the Court granted

[1] The Court assumes familiarity with the facts, procedural history, and rulings, both oral and written, entered in this case. *See, e.g.*, ECF Nos. 187, 192, 201, 208-09, 211, 214, 222.

Defendant's motion for judgment as a matter of law with respect to Plaintiffs' nuisance, trespass, and strict liability claims.[2] Plaintiffs' negligence claim was submitted to the jury, which returned a defense verdict, finding that Plaintiffs failed to establish by a preponderance of the evidence that International Paper was negligent in its design, maintenance, and/or continued operation of the Kingsfield Road dam structure. *See* Verdict, ECF No. 226. Plaintiffs now move for a new trial, pursuant to Federal Rule of Civil Procedure 59, arguing that: (1) the Court committed substantial and unfairly prejudicial errors of law in its rulings on various evidentiary issues, in crafting the jury instructions, and in granting Defendant's motion for judgment as a matter of law on strict liability; and (2) the jury's verdict was against the "clear" weight of the evidence.

II. Discussion

Rule 59 provides that, following a jury trial, a new trial may be granted, on all or some of the issues, for any of the reasons for which new trials have previously been granted in federal courts. Fed. R. Civ. P. 59(a)(1)(A). Recognized grounds for a new trial include circumstances in which the verdict is against the clear weight of

[2] Following the parties' oral arguments on February 22, 2018, the Court orally granted Defendant's motion for judgment as a matter of law as to Plaintiffs' trespass and nuisance claims, and denied the motion as to Plaintiffs' negligence claim. See Trial Transcript ("Tr."), ECF No. 230-3 at 281-82. On February 23, 2018, the Court orally granted Defendant's motion for judgment as a matter of law with respect to Plaintiffs' strict liability claim, for reasons stated fully on the record. *See* Tr., ECF No. 230-4 at 3-10.

the evidence or will result in a miscarriage of justice, the damages are excessive, there were substantial errors in the admission or rejection of evidence or the instructions to the jury, or the trial was otherwise not fair to the moving party. *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1254 (11th Cir. 2016) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). When considering a motion for new trial, a district court is free to independently weigh both the evidence favoring the verdict and the evidence in favor of the moving party. *See Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982). However, the court may not simply substitute its judgment for that of the jury, and for this reason, a new trial is not appropriate on evidentiary grounds "unless the verdict is against the great—as opposed to greater—weight of the evidence." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). The disposition of a motion for new trial is a matter of judicial discretion and a district court's ruling will not be disturbed absent a clear abuse of that discretion. *See Mekdeci By and Through Mekdeci v. Merrell Nat. Labs.*, 711 F.2d 1510, 1513 (11th Cir. 1983).

A. Evidentiary Error

Plaintiffs argue that the Court abused its discretion by admitting into evidence "seven government-agency documents" as public records, pursuant to Federal Rule of Evidence 803(8), which resulted in unfair prejudice and constituted reversible error. *See* ECF No. 232 at 15. The problem with Plaintiffs' argument is that, both

in the current briefing and in their pretrial submissions, they offer virtually no authority compelling a conclusion that the seven documents were inadmissible under Rule 803(8). For example, the single case cited in Plaintiffs' motion for new trial—*Brown v. Sierra Nev. Mem'l Miners Hosp*., 849 F.2d 1186 (9th Cir. 1988)—is factually distinguishable from the circumstances in the instant case. In *Brown*, the Ninth Circuit affirmed a district court's exclusion of letters submitted to a government agency by outside consultants during an administrative investigation because the consultants' letters were not reports or statements by the agency. *See id*. at 1189-90. In contrast, the "seven government-agency documents" admitted in this case were either: (1) documents prepared and issued by Escambia County itself;[3] or (2) reports prepared by third-parties, but commissioned, adopted, and relied on by Escambia County in fulfilling its public safety responsibilities.[4] *See* ECF Nos. 209, 211. As the Court explained more fully in previous Orders, the factual findings and recommendations set forth in these seven documents thus resulted from investigations by a government agency, or its proxies, into matters within the agency's jurisdiction. *See* ECF Nos. 209, 211; *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168-69 (1988) (holding that evaluative opinions and conclusions, as well as facts, fall within the Rule 803(8)(C) exception); *Barnes v.*

[3] *See* Defendant's Trial Exhibit Nos. 53, 54, and 80.

[4] *See* Defendant's Trial Exhibit Nos. 48, 51, 52, and 66.

District of Columbia, 924 F. Supp. 2d 74 (D.D.C. 2013); *United States v. Davis*, 826 F. Supp. 617 (D.R.I. 1993). Plaintiffs have never made an affirmative showing that these documents are untrustworthy. *See* Fed. R. Evid. 803(8) (burden is on party opposing admission to "show that the source of information or other circumstances indicate a lack of trustworthiness"). Therefore, the "seven government-agency documents" were properly admitted under Rule 803(8).

The fact that these seven documents may have been prejudicial to Plaintiffs did not preclude their admission at trial. *See* Fed. R. Evid. 403. "Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. Sawyer*, 799 F.2d 1494, 1506 (11th Cir. 1986). Here, the Court engaged in a Rule 403 balancing analysis of these documents before they were admitted into evidence and, as a result, excluded portions that were substantially more prejudicial than probative. *See* ECF Nos. 209, 211. On review, the Court finds no error in that determination. Nor does the Court find error in its reversal of this decision with respect to a single paragraph in Defendant's Trial Exhibit 51, which described how residents believed that runoff from Defendant's property caused flooding in their neighborhoods during the 1990s and then explained why the residents were wrong. The Court initially excluded this paragraph under Rule 403 because its marginal relevance to the events at issue in this case was substantially outweighed by the

potential for unfair prejudice, confusion, and misleading the jury. *See* ECF No. 209 at 5-6. It was only after Plaintiffs opened the door to this area of inquiry—by eliciting testimony about a "freak accident" involving runoff from International Paper that caused flooding in the subject neighborhood in the 1990s, *see* Tr., ECF No. 230-2 at 258-59—that the Court, in its discretion, allowed Defendant to introduce the previously excluded paragraph to remove any unfair prejudice that otherwise may have resulted, *see* Tr., ECF No. 230-3 at 3-4. This was a proper exercise of judicial discretion under Eleventh Circuit precedent. *See Bearint ex rel. Bearint v. Dorell Juvenile Grp., Inc*., 389 F.3d 1339, 1349 (11th Cir. 2004) (stating that "when a party offers inadmissible evidence before a jury, the court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created").

The Court also finds no error with respect to the testimony of Christopher Curb, Escambia County Engineering Stormwater Manager. Because Mr. Curb was not timely disclosed as an expert witness and did not prepare an expert report, he was not permitted to testify as an expert at trial or offer an expert opinion on causation. However, he was permitted to testify regarding relevant factual matters within the scope of his personal knowledge and, with proper evidentiary foundation, to give lay opinion testimony based on the "particularized knowledge" he developed "by virtue of his" role with Escambia County. Thus, because Mr. Curb was

personally involved in Escambia County's preparation and issuance of the seven above-described documents, it was permissible for him to testify about those documents to the jury. *See United States v. Toll*, 804 F.3d 1344, 1354-55 (11th Cir. 2015).

Finally, and perhaps most importantly, all the evidence that Plaintiffs claim should have been excluded relates solely to the question of causation. The jury, however, found that Defendant was not negligent in the design, maintenance, and/or continued operation of the Kingsfield Road dam structure. *See* Verdict, ECF No. 226 at 1. In other words, the jury found that Defendant did not breach its duty of reasonable care. Consequently, the jury did not reach the special verdict question regarding causation. *See id*. Therefore, the Court finds that any error in the admission of the challenged evidence was at most harmless and did not have "a substantial influence on the jury's verdict." *See Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1333 (11th Cir. 2011) (evidentiary rulings will not be overturned unless the moving party shows that the error "probably had a substantial influence on the jury's verdict"); *see also Kovelesky v. First Data Corp*., 534 F. App'x 811, 815 (11th Cir. 2013) (any error in admission of evidence related to damages was not reversible because the jury found for defendant on liability and, therefore, did not reach the issue of damages); *see also Carolan v. J.I. Case Co*., 102 F.3d 344, 346 (8th Cir. 1996) (any error in the admission of evidence regarding causation was harmless

where the jury found for appellee on the question of breach of duty); *Middleton v. Harris Press & Shear, Inc*., 796 F.2d 747, 751 (5th Cir. 1986) (holding that because the jury found that the defendant's product was neither defectively designed nor unreasonably dangerous as marketed, it did not reach the issue of causation, so any flaw in the causation jury instruction was not plain error). Accordingly, Plaintiffs' motion for new trial based on alleged evidentiary errors is due to be denied.

B. Strict Liability

Plaintiffs also argue that the Court erred in granting Defendant's motion for judgment as a matter of law with respect to their strict liability claim.[5] The Court disagrees. On Plaintiffs' motion, *see* ECF No. 200 at 5-8, the Court found that determining whether Defendant's "use" of the Kingsfield Road dam structure constituted an abnormally dangerous activity for purposes of strict liability presented a question of law for the Court to decide in light of the evidence at trial and the six factors for assessing abnormal dangerousness under the Restatement (Second) of

[5] To the extent Plaintiffs' argument may be read as a challenge to the Court's exclusion of evidence regarding the chemical composition of Defendant's effluent discharge, this challenge also fails. As the Court explained in a prior Order, under Florida law, strict liability claims are "limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *See* ECF No. 187 at 3-6; *see also Bunyak*, 438 So.2d at 894. In this case, the alleged harm associated with Defendant's use of the Kingsfield Road dam structure, according to Plaintiffs, was the risk that the Dam might fail and cause downstream flooding. *See* ECF No. 159 at 7 ("It wasn't 'chemicals' or 'waste' in the water that caused, or substantially contributed to the flooding in this case. It was the dam, and issues concerning the safety of the dam, that caused or substantially contributed to the flooding here."). The chemical composition of the effluence is not a fact of consequence with respect to dam safety or the harm associated with flood damage; therefore, exclusion of such evidence was proper. *See* ECF No. 187 at 3-6.

Torts and Florida law, *see* ECF No. 201 at 1-2.[6] Accordingly, at the close of Plaintiffs' case, the Court concluded, as a matter of law and for reasons explained fully on the record, that the Restatement factors weighed against a finding of abnormal dangerousness with respect to Defendant's "use" of the Kingsfield Road dam structure. *See* Tr., ECF No. 230-4 at 3-10. On review, the Court finds no error in that determination. It is consistent with *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), the seminal case on strict liability, and with Florida case law involving abnormally dangerous activities. *See Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So.2d 510 (Fla. 3d DCA 1984); *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc*., 438 So.2d 891 (Fla. 2d DCA 1983); *Cities Serv. Co. v. State*, 312 So.2d 799 (Fla. 2d DCA 1975); *see also Romanoff v. City of Mansfield*, 1981 WL 6354, at *15 (Ohio 5th DCA 1981); *Dye v. Burdick*, 553 S.W.2d 833, 840 (Ark. 1977). Because the Court properly granted Defendant's motion for judgment as a matter of law on the strict liability claim, Plaintiff is not entitled to a new trial on this basis.

[6] Under the Restatement (Second) of Torts, which Florida has adopted, courts consider six factors in assessing abnormal dangerousness: (1) whether the activity involves a high degree of risk of some harm or hardship to the person, land or chattels of others; (2) whether the harm which may result from it is likely to be great; (3) whether the risk cannot be eliminated by the exercise of reasonable care; (4) whether the activity is not a matter of common usage; (5) whether the activity is appropriate to the place where it is carried on; and (6) whether the value of the activity to the community is outweighed by its dangerous attributes. *See* Restatement (Second) of Torts § 520 (1977).

C. Jury Instructions

Plaintiffs next argue that they are entitled to a new trial because the Court declined to give two of their proposed jury instructions. District courts have "wide discretion as to the style and wording employed in" jury instructions, so long as "the instructions accurately reflect the law." *Eskra v. Provident Life & Accident Ins. Co*., 125 F.3d 1406, 1415 (11th Cir. 1997). A district court's refusal to give a requested jury instruction is reversible error only if: "(1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party." *Jennings v. BIC Corp*., 181 F.3d 1250, 1254 (11th Cir. 1999). "If the instructions as a whole correctly instruct the jury, even if technically imperfect, no reversible error is committed." *Eskra*, 125 F.3d at 1415.

Plaintiffs challenge the Court's decision not to use the words "abandon" or "abandonment" in describing Plaintiffs' theories of negligence. *See* ECF No. 232 at 33. This challenge fails. A district court's refusal to give a requested instruction is not error where the substance of the proposed instruction was covered by another instruction, which was given. *Pesaplastic, C.A. v. Cincinnati Milacron Co*., 750 F.2d 1516, 1525 (11th Cir. 1985). Here, the Court found Plaintiffs' theory that Defendant failed to properly abandon the Kingsfield Road dam structure was encompassed in the jury instruction given, which explained that for Plaintiffs to

succeed on their claim, they first must prove that Defendant "was negligent in its design, maintenance, and/or continued operation of the Kingsfield Road dam structure." *See* Tr., ECF No. 230-5 at 4; Jury Instructions, ECF No. 225 at 11. On review, the Court finds that this instruction was clear, provided a correct statement of the law, and addressed the substance of Plaintiffs' theories of negligence. Because the jury was properly guided in its deliberations, Plaintiffs' "hairsplitting" of the style and wording employed is not grounds for a new trial. *See Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002); *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984) (stating that "calling a proposed instruction a 'theory of defense' does not automatically require that [the instruction] be given in" the precise language proposed).

Plaintiffs also argue that the Court's failure to instruct the jury on the "Act of God" affirmative defense constitutes harmful, reversible error. This is incorrect. Defendant withdrew its Act of God affirmative defense before the case was submitted to the jury, *see* Trial Transcript, ECF No. 230-5 at 5, which Defendant, as the master of its answer, was entitled to do under Eleventh Circuit precedent. *See Goulah v. Ford Motor Co*., 118 F.3d 1478 (11th Cir. 1997); *see also Bauer v. J.B. Hunt Transport, Inc.*, 150 F.3d 759 (7th Cir. 1998). Once the affirmative defense was withdrawn, it no longer presented an issue to be decided by the jury. *See id*. Because a defendant always may "resist liability on the theory that the plaintiff

cannot, or has not, carried her own burden of proof," withdrawal of the affirmative defense did not preclude Defendant from arguing that Plaintiffs failed to carry their burden of proof on causation and from showing that some other circumstance, including the weather, was the proximate cause of the flooding in Plaintiffs' homes. *See Bauer*, 150 F.3d at 763; *see also Goulah*, 118 F.3d at 1485. For these reasons, the Court's failure to instruct the jury on the "Act of God" affirmative defense was proper and, therefore, is not grounds for a new trial.

D. Weight of the Evidence

Finally, Plaintiffs argue that the jury's verdict on negligence is against the clear weight of the evidence, thus mandating a new trial. The Court disagrees. The negligence issue in this case was hard fought and hotly contested. Both sides presented substantial evidence on Defendant's duty of care with respect to the Kingsfield Road dam structure, as well as the extent to which Defendant fulfilled its duties. The jury evaluated the conflicting evidence, assessed the witnesses' credibility, and decided whose version of the facts—Plaintiffs' or Defendant's—it believed. It was well within the jury's province to do so, *see Jarmon v. Vinson Guard Servs*., 488 F. App'x 454, 457 (11th Cir. 2012) (quoting *Cleveland v. Home Shopping Network, Inc*., 369 F.3d 1189, 1193 (11th Cir. 2004)) ("Credibility determinations and the weighing of evidence are jury functions, and the jury should [be] allowed to decide whether it believe[s] [a party's] version of events."), and there

was more than sufficient evidence to support the jury's conclusion that Defendant was not negligent. Thus, the Court finds that the verdict is not against the clear or great weight of the evidence and, if left undisturbed, will not result in a miscarriage of justice. *See McGinnis*, 817 F.3d at 1254. While Plaintiffs may disagree with the verdict, on this record, the Court may not second-guess the jury and substitute its own judgment, or Plaintiffs', for that of the jury. *See Browning-Ferris Indus. Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("It is not [the court's] role to . . . substitute [its] judgment for that of the jury."); *Skye v. Maersk Line, Ltd. Corp.*, 751 F.3d 1262, 1265 (11th Cir. 2014) (same). Therefore, Plaintiffs' motion for a new trial based on the weight of the evidence is due to be denied.

Accordingly, it is **ORDERED** that Plaintiffs' Motion for New Trial Pursuant to Federal Rule of Civil Procedure 59, ECF No. 231, is **DENIED**.

DONE and **ORDERED**, on this 16th day of May 2018.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE