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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEBBIE K. BALTAZAR, Appellant

v.

**DONALD PARADISE and "JANE DOE" PARADISE,
husband and wife, Respondents**

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This case arises out of a boating incident where the defendant was piloting the boat and the plaintiff sustained injuries. After a lengthy trial, the jury returned a verdict for the defendant. Numerous errors occurred during trial including improper instruction on the emergency doctrine, piecemeal instruction on an “act of God” defense, and instruction on contributory negligence without evidence to support it.

First, the trial court instructed the jury on the emergency doctrine despite, (1) the defendant’s negligence being the sole claimed proximate cause of the emergency situation, (2) the absence of any claim of negligence at or immediately after the time of the emergency, and (3) despite no alternative courses of action being available to the defendant. Particularly, the trial court abused its discretion when it refused to even consider the first prong of this analysis.

Second, unlike Washington, Federal Maritime Law allows for an “act of God” defense. In this case, the trial court erroneously admitted a patchwork “act of God” instruction proposed by the defense which read in its entirety is a clear misstatement of law. This instruction allowed the defense to blur the lines between the technical definition of “rogue wave” and the legal standard of “act of God.” This is also opened the door for the

defendant to substitute a creative miscalculation of a technical definition as the legal standard. Reviewed de novo or through abuse of discretion, the law presumes this error prejudices the plaintiff.

Third, the trial court permitted the defendant to argue two theories, that the plaintiff was contributorily negligent (1) for riding in a boat when she had been diagnosed with early stages of osteoporosis and (2) when she wrapped a rope around her right wrist to help secure her to the boat. No substantial evidence exists to support either theory. Because the defendant was found not to be negligent the jury may not have reached the issue of contributory negligence, but the plaintiff seeks guidance from the Appellate Court should the case be remanded.

For the reasons stated above the plaintiff respectfully requests that the appellate court reverse and remand for a new trial with guidance on the above issues.

II. ASSIGNMENTS OF ERROR

1. The trial erred by giving an Emergency Doctrine jury instruction.
2. The trial court erred by giving a patchwork Act of God defense jury instruction.
3. The trial court erred in instructing the jury on contributory negligence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether jury instruction 16 on the Emergency Doctrine constitutes reversible error when:
 - a. The Emergency Doctrine is not available to a defendant who caused a perilous situation through his negligent failure to maintain a proper lookout for approaching waves.
 - b. The Emergency Doctrine is intended to protect the defendant from liability for a negligent act occurring after the perilous situation is created and the plaintiff did not allege that the defendant was negligent in reacting to the peril, only in creating it.
 - c. The Emergency Doctrine only applies in situations where there is a choice between two courses of action after the peril arises and here Mr. Paradise was afforded no choice but to collide with the wave.
2. Whether jury instruction 17 on the act of God defense constitutes reversible error when:
 - a. Jury instruction 17 was a misstatement of law regarding the Act of God defense because it improperly states the legal standard.

- b. Jury instruction 17 was misleading to the jury because it was taken out of context.
- 3. Whether the trial court erred when it instructed the jury on the issue of contributory negligence when no substantial evidence existed to support any negligence on the part of the plaintiff.

IV. STATEMENT OF THE CASE

This case arises out a collision between a boat piloted by defendant Donald Paradise and approximately a three foot wave that occurred during a boating outing on Saturday August 23, 2008 in the south Puget Sound. CP 33, CP 1051. Plaintiff Debbie Baltazar was a passenger seated in the bow of the boat at the time of the collision. Ms. Baltazar sustained injuries as a result of the incident and then filed a complaint on August 23, 2011 followed by an amended complaint on November 3, 2011 alleging those injuries were a result of Donald Paradise's negligent operation of the boat. CP 8-9.

The boat outing was organized by Donald Paradise as a get-together for staff members that worked at his dentistry and their spouses. RP 56. Dr. Paradise's plan was to rent a boat from Zittel's Marina and take his passengers on a trip around Harstine Island. RP 56. There was a total of nine people that took part in the outing. RP 56. August 23, 2008 was a nice summer day in the south sound the temperature was comfortable and there

was very light wind. RP 58. Plaintiff Debbie Baltazar was sitting in the bow of the boat during this time. RP 62. Sometime after the first 15 minutes of the cruise, the boat collided with a wave, or series of waves, from two to three feet tall. RP 283-284, CP 1051. When the boat hit the wave(s) everyone seated in the bow was tossed into the air and repeatedly struck the boat which resulted in numerous injuries. RP 285, 375-378, 715-718, 832-834.

1. **Emergency Doctrine**

The jury was instructed on the emergency doctrine in this case. RP 916, CP 1101. It was a defense proposed instruction.

THE COURT: Instruction 0/15 is a defense proposed instruction, and you're requesting that the Court give this instruction Ms. McGaughey?

MS. MCGAUGHEY: Yes, you Honor.

THE COURT: All right. Mr. Reich.

MR. REICH: I would object because a sudden emergency is through the negligence of the defendant.

RP 672.

The trial court expressed concern that this was unavoidable accident and therefore the defendant was not entitled to the emergency doctrine instruction.

THE COURT: Isn't it part of your theory that it was unavoidable?

MS. MCGAUGHEY: Yes, is is. That' my first – I mean, this is really more – this is not my – I guess you would call it an alternative argument. I've been very clear and transparent from the beginning that it is our position that this rogue wave which was unforeseeable as a matter of law. This is only if we get past that and then we're dealing with negligence, and then we're dealing with, you know, this was sudden and emergent and you might fault him for the angle that he took, but there was no time to react.

THE COURT: Then how does this – how does this instruction apply? Because this says that one who is compelled to decide instantly how to avoid injury. He didn't. His testimony - - my understanding his testimony's going to be "I couldn't do anything because it happened so fast." Both of the experts testified there's a two-second timeframe to respond. And so he did nothing. He hit the wave going at whatever speed he was going, 25-30, because he could do nothing. And so I don't see how this instruction applies at all because he took no action because he didn't have time to under that – under his theory.

MS. MCGAUGHEY: Your Honor, I think that under – this is WPI 12.02.

THE COURT: I have it in front of me.

MS. MCGAUGHEY: Right. And I think Dr. Paradise hasn't testified yet. I think his testimony or the evidence will be from him is that he saw it, that there was not time – I think he said that he shouted out a warning, and that he immediately, as soon as he could, let off of the accelerator, but it didn't have any impact or effect. It didn't decelerate. So it's not that he just went, you know, blindly. He tried to instantaneously react, but he did not or was not successful in changing his course or his speed when it impacted, but it's not that he didn't attempt to do so.

THE COURT: All right. I am going to wait until I hear Dr. Paradise's testimony to determine whether or not I would give this instruction. Currently under my understanding, and

certainly under the evidence presented thus far, I do not believe this is an appropriate instruction based on the wording of the instruction itself and the cases cited below in the comment, and this is WPI 12.02, evidence of unavoidable accident, is not sufficient to justify the emergency instruction, and emergency instruction is properly refused if there was no alternative course of action available to the actor, which is really my understanding of what happened. But if Dr. Paradise testified to something different, I will consider it after his testimony.

RP 672-674.

There was extensive testimony on reaction time prior to impact, or lack thereof. RP 338, 820-821. Defendant argued that “no one saw this wave in time to take any action in response to it.” RP 45. After Dr. Baltazar testified, the court found that he “did have a little bit of testimony about what he did when he saw the wave,” and allowed instruction on the emergency doctrine. RP 900. Plaintiff’s theory of the case rested on a failure of Dr. Paradise’s duty to see what was there to be seen. RP 38, 941.

2. Act of God

Defendant presented an argument characterized as a “rogue wave defense,” essentially that the three foot wave that struck the boat fell under the technical definition of “rogue wave,” and that this event constituted an “act of God” and therefore extinguished all of defendant’s liability. RP 45, 869-874. Defense counsel propounded the basis of this defense in her opening statement to the jury:

MS. MCGAUGHEY: So why is that important and what is the evidence going to be about? Well, there's a phenomenon known as a sneaker, freak, or rogue waves, and the testimony is actually as far as the wave at question – or the waves because some people say one, some people say three some people say that they remember approaching a wave and dropping. I mean, it isn't inconsistent one to the other. They vary somewhat. But the evidence will be that there was absolutely a wave or – a wave or waves that were encountered. The important thing about the evidence as far as this wave is it isn't the size of the wave – you'll hear testimony about it – that makes a rogue or a sneaker wave.

...

MS. MCGAUGHEY: The important aspect of a wave to qualify as a rogue or a sneaker or a freak wave is that it's unforeseeable and its unanticipated and unexpected. So if you are in the sound or in the Bering Strait – and we'll have an expert who testifies to this – and you encounter seas that are ten-foot waves, and you then encounter a 12-foot wave, that's not a freaker wave. That's not a sneak wave. It doesn't fall within that parameter. But if you are on the water, whatever body of water it is, as long as it it's an international waterway, not a lake, and you encounter a wave that is three to six times, two, three, four times the size of the other conditions, then you need to look and consider whether or not that was a freak wave.

RP 45-46.

Defendant also argued this defense based on “rogue waves” in her closing:

MS. MCGAUGHEY: The idea of what a rogue wave is is that regardless of the conditions it is – I think it was either one-third or two to 2.2 times larger than the prevailing waves in the area.

So we laugh sometimes when we misstate or have comments like I think I referred to open seas with 60-foot waves, and that's obviously an incredibly huge wave. But the point with

the expert witnesses at it relates to rogue waves is that it's not the height of the wave, but in order to meet the definition of a rogue wave it can't be the same size waves as in the other area. So if you have a calm, calm seas or even a slight ripple – we had Captain Shoemaker do that – and you encounter on those conditions and those circumstances something that is two or one-third or 33 percent higher than the countervailing area, that is a rogue wave. And that is -- as a matter of law makes it unforeseeable.

RP 952.

Defendant submitted proposed jury instructions on this “rogue wave” formulation of the “act of God” defense. Defendant actually proposed three different variations of the instruction, marked as defense proposed instructions 17, 18, and 19. RP 869-870. During the discussion of the jury instructions, plaintiff objected to proposed instruction 18:

MR. REICH: Your Honor, I would – I think 18 should have additional language from Wyler versus Holland America. And after that first sentence on 18 that ends in “ordinary care,” it should state, “The rogue wave defense is – is an alternative formation of the argument that the inordinate size of the wave was unforeseeable. And then you can go on with the “if you find from the evidence.” I think that clearly states what Wyler versus Holland America identified as the theory of the rogue wave defense. And I understand, Your Honor, that is the defense theory, and --- but the jury needs to be instructed about what the defense is. And that properly informs them based on Wyler v. Holland America.

RP 872.

Mr. Reich continued his argument asking for the instruction to include more language regarding the size of the wave:

THE COURT: Just a moment. Is it that you want to have in the instruction the issue of the fact that it was the argument that it was unforeseeable?

MR. REICH: Well, I think here the rogue wave defense is just saying that this wave that came about, the size of the wave is unforeseeable. And that's the point that Wyler versus Holland America is making, and that's what the defense needs to prove.

RP 873-874.

The court refused to add language regarding the size of the wave based on an apparent belief that it mattered whether the wave actually hit the plaintiff for the size of the wave to be included in the instruction.

THE COURT: I'm not going to add "inordinate size of the wave." It specifically was the inordinate size of the wave in that case because it says that struck that passenger, and that is not appropriate. If you want the Court to add some sort of language about foreseeability – because that is really what the defense is about, that it was unforeseeable.

RP 874.

The Court then decided to give an instruction on the “rogue wave/act of God” defense:

THE COURT: I am going to give instruction 18, and I am going to put it where I previously had in the drafts the definition of rogue wave, and instead of that this instruction will be in place, and as I indicated previously, I do believe that it is an appropriate instruction and it appropriately and accurately sets forth the law regarding this issue.

RP 875, 916. CP 1102.

3. Contributory Negligence

Before and during trial, the defendant claimed that the plaintiff was contributorily negligent. RP 7-9; RP 953-57; CP 1014-18; CP 1099. The first premise presented by the defendant was that Ms. Baltazar was negligent for getting on a boat when she carried a medical diagnosis of osteoporosis, and that some duty existed that required her to disclose that diagnosis to the driver of the boat. RP 954; CP 1014-18. The second premise was that Ms. Baltazar failed to exercise ordinary care for her safety when she wrapped a bow-line rope around her wrist. RP 47; RP 956; CP 1014-18.

The trial court struggled to find any indication that Ms. Baltazar was negligent for riding in a boat with osteoporosis based on the facts in existence at the time of the incident. RP 656-660. Yet, the defendant was allowed to argue the theory to the jury. RP 954.

THE COURT: I'm sorry for interrupting you, but what evidence is there that she had been advised? Regardless of whether or not she was diagnosed with osteoporosis, what evidence is there that she was . . . told to restrict her activities that would then make it—it appears to me you're actually—your argument is that she assumes the risk of going on a boat with osteoporosis, and that is not a defense that is available.

MS. MCGAUGHEY: I think to answer your question directly, because now I understand your question as far as what evidence do I have that she was told not to go out on the boat before the boating accident, I don't have any evidence of that, Your Honor.

RP 657-58.

Every witness other than the defendant who was present that day and could see the women in the front of the boat, testified that Ms. Baltazar flew into the air when the boat collided with the wave(s). RP 285; RP 340; RP 376-378. Mara Gordon believed it was the rope that saved Ms. Baltazar from being fatally thrown from the boat. RP 285. Susan Bunton testified to grabbing Ms. Baltazar to save her. RP 376-378. Ms. Baltazar credited both measures. RP 716-717.

The trial was held on June 23, 2014 through July 2, 2014. *See generally*, RP. The jury returned a verdict for the defense on July 2, 2014. CP 1108-1110. Plaintiff filed a notice of appeal on July 29, 2014. Judgment was entered on August 1, 2014. CP 1165-66. Plaintiff filed an amended notice of appeal on August 4, 2014.

V. ARGUMENT

CR 59(a) provides that the court may vacate and grant a new trial for any of the nine reasons listed in the rule as long as it materially affects the substantial rights of a party. Among the nine reasons listed in CR 59(a) is: “(8) Error in law occurring at the trial and objected to at the time by the party making the application.” “A new trial is the appropriate remedy for

prejudicial errors in jury instructions.” *Furfaro v. City of Seattle*, 144 Wn.2d 363, 382, 27 P.3d 1160 (2000).

“It is a well-established rule that jury instructions must be considered in their entirety.” *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 194, 688 P.2d 571 (1983). A trial court’s decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Bodin v. City of Stanwood*, 120 Wn.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281, P.3d 289 (2012). An erroneous instruction is reversible only if it prejudices a party. *Id.* Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-250, 44 P.3d 845 (2002).

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1. Jury Instruction 16 On The Emergency Doctrine Was Improperly Given And Therefore Constitutes Reversible Error.

The Supreme Court of Washington defined the proper standard of review for a trial court's decision to give or refuse an emergency instruction in *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.2d 286 (2009). The Court reasoned that, "the emergency doctrine has no objective component; the trial court is not required to draw any legal conclusions to determine whether the doctrine applies...[t]he trial court must merely decide whether the record contains the kind of facts to which the doctrine applies." *Id* at 6. The Court held, "therefore, we review the trial court's decision to give an emergency instruction for abuse of discretion." *Id*. Thus, the proper standard for reviewing the decision to give jury instruction 16 is abuse of discretion.

a. The Emergency Doctrine Is Not Available To One Who Created The Perilous Situation.

The Emergency Doctrine is appropriate only when the trier of fact is presented with evidence from which it could be concluded that the emergency arose through no fault of the party seeking to invoke the doctrine. *Zook v. Baier*, 9 Wn. App. 708, 714, 514 P.2d 923 (1973)). "An Instruction on sudden emergency is appropriate when the emergency is not brought about, in whole or in part, by the negligence of the party seeking to invoke the doctrine." *Id*. However, it is not sufficient for the party seeking

to invoke the emergency doctrine to merely allege that they may have been exercising due care leading up to the moment of peril. *Id.* In *Zook*, Division I of the Court of Appeals explained, “the position of the defendant is that this instruction on the emergency doctrine should have been given because the jury could have believed the defendant was confronted with an emergency resulting from no negligence of his own.” *Id.* In *Zook*, the Court reasoned that, “[p]ast decisions have taken a different approach than that suggested by the defendant. They hold that when there is evidence that indicates that the sudden emergency came about because of the party seeking to excuse his acts after the confrontation with the emergency, **that the party may not do so when his own failure to foresee the danger permitted the emergency to occur.**” *Id.* (emphasis added).

Here, the alleged emergency condition was the sudden onset of a three foot wave towards the boat. Similarly to *Zook*, the parties here argued over the violation of the duty to see what is there to be seen and thus the emergency arose, not whether there were negligent actions of the defendant after the emergency arose. If the defendant had been maintaining a proper lookout he would have seen the oncoming wave and would have been able to navigate it. This perilous condition was created by the defendant’s negligence therefore the defendant is barred from relying on the emergency doctrine.

The abuse of discretion occurred when the trial court refused to consider this basis or offer analysis on this issue when raised by the plaintiff at trial. RP 674. Regardless of the outcome of the determination of negligence of the defendant prior to encountering the emergency, the trial court should have made a determination on whether the defendant can invoke this doctrine when the claimed negligence of the defendant is the source of the emergency. The problems arising when such a refusal to consider the source of the emergency becomes even more apparent in the analysis of the second prong of this issue.

b. The Emergency Doctrine Does Not Apply Here Because Plaintiff Never Alleged That The Defendant Was Negligent In His Reaction To The Perilous Condition.

A defendant who is suddenly confronted by an emergency through no fault of his own **and chooses a damaging course of action in order to avoid the emergency** is not liable for negligence although the particular act might constitute negligence had no emergency been present. *Kappelman v. Lutz*, 167 Wn. 2d 1, 2, 217 P.3d 286 (2009). Specifically, “**the doctrine applies to the choice a party makes after he is confronted with sudden peril** through no fault of his own.” *Hinkel v. Weyerhaeuser Co.*, 6 Wn. App. 548, 554, 494 P.2d 1008 (1972) (emphasis added). On this aspect of the emergency doctrine, the Supreme Court of Washington stated: “[t]he benefit of the emergency doctrine rule is applicable only to conduct *after* a

person has been placed in a position of peril. It is not here contended that any act of the defendant's driver *after* he was in a position of peril constituted negligence." *Sandberg v. Spoelstra*, 46 Wn.2d 776, 783, 285 P.2d 564 (1955) (emphasis in original). Finally, evidence of unavoidable accident is not sufficient to justify an emergency instruction. *Stolz v. McKowen*, 14 Wn. App. 808, 811, 545 P.2d 584 (1976).

It was error for the trial court to allow an emergency doctrine instruction because it was completely inapplicable to the case at hand. The plaintiff did not allege that the defendant acted negligently *after* being confronted by the wave. Here, plaintiff's theory of the case is that the defendant was negligent in his actions leading up to and creating the confrontation with the perilous situation by failing to keep a proper lookout and travelling too fast for the conditions. Plaintiff consistently followed this line of argument from his opening statement through to his closing statement.

MR. REICH: Specifically a boat operator has a duty to keep a proper lookout to see where they're going and maintaining a safe speed so as to avoid oncoming peril.

RP 38.

MR. REICH: Was the defendant negligent? If you read through the instructions, the answer is yes. He had a duty to keep a lookout and a duty to see what was there to be seen.

RP 941.

Plaintiff did not, however, argue that the defendant was negligent once he was confronted with the sudden peril. There is no allegation of negligence of the type that the emergency doctrine is designed to alleviate, therefore the giving of an emergency doctrine instruction in this case was error.

c. **The Emergency Doctrine Requires That The Person Placed In The Perilous position has at least two possible courses of action.**

The Emergency doctrine only applies in limited circumstances and recognizes the necessity of quick choice between courses of actions when such peril arises. *Seholm v. Hamilton*, 69 Wn.2d 604, 605, 419 P.2d 328 (1966). Importantly, the doctrine “comprehends the availability of and a possible choice between courses of action after the peril arises. Otherwise, the doctrine blends into or merges with the theory of unavoidable accident.” *Id.* at 609. This distinction was illustrated in *Zook*, where the court found that, “there **were not alternatives available but only an instant of time on a slippery road for a single instinctive reaction, an emergency doctrine instruction was doubly improper.**” *Zook*, 9 Wn. App. 714 (1973) (emphasis added). The Supreme Court of Washington followed this line of reasoning in *Brown v. Spokane County Fire Prot. Dist. No. 1*, when it held:

Similarly, the sudden emergency presented to Mr. Holmes under these facts afforded him no alternative courses of action. He reacted instinctively by swerving to strike the fire

*engine a glancing blow rather than proceeding forward to strike the fire engine squarely. **Since there were no alternative courses of action available to Mr. Holmes other than to strike the fire engine, the emergency doctrine was inapplicable.***

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 198, 688 P.2d 571 (1983) (emphasis added).

Here, the defendant was presented with a similar scenario as in *Zook* in that there was only “an instant of time...for a single instinctive reaction.” *Zook*, at 714. The defendant testified regarding the timeframe of the collision:

MS. MCGAUGHEY: How have you described it before as far as how much time existed? What words would you use to describe how fast this happened?

DR. PARADISE: Well, I think that I remember that my final thought about it is it was instantaneous. That's about as much – it wasn't one thousand one, one thousand two, one thousand three. I'm saying this and it's instantaneous and I'm on the wave.

RP 820-821.

The defendant was also presented with a scenario similar to one encountered by the defendant in *Brown*, who had no alternative but to collide with the fire engine. The defendant herein had no option that would have allowed him to avoid striking the wave. The defendant only had time to pull back on the throttle as the boat collided with the wave, as described in his testimony:

MS. MCGAUGHEY: Did you have any time to react in any way other than the warning you recall being shouted?

DR. PARADISE: Just taking the throttle and throttling it back to bring it back to neutral. But unfortunately, boats don't have brakes so we slammed through that.

RP 820.

The defendant further explained that the throttling down did not allow him to avoid the wave or reduce the boat's speed by the time the boat hit the wave:

MS. MCGAUGHEY: ...from your perspective did it -- did that have any reduction in your speed when you actually made contact with the wave or was it just too fast?

DR. PARADISE: I think it was just too fast.

RP 821.

The defendant had no alternative courses of action that would have allowed him to avoid the collision, therefore the choice requirement of the emergency doctrine is not satisfied and it was error for the trial court to provide a jury instruction on the emergency doctrine.

d. Jury Instruction 16 Prejudiced The Plaintiff.

An erroneous instruction requires reversal only if it prejudices a party. *Anfinson*, 174 Wn.2d at 860. "An error is prejudicial if it presumably affects the outcome of trial." *Chunyl & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 255, 232 P.3d 564 (2010).

Here, the instruction on the Emergency Doctrine prejudiced the plaintiff because the jury was allowed to consider a defense that, if accepted by the jury, relieved the defendant of all liability. CP 1102. Because the defendant was found to be not negligent, the law presumes this error affected the outcome of the trial.

2. Jury Instruction 17 On The Act Of God Defense Is A Misstatement Of Law And Is Misleading To The Jury.

Jury instructions are reviewed for errors of law de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281, P.3d 289 (2012).

a. Jury Instruction 17 Is A Misstatement Of Law And Therefore Presumed To Be Prejudicial.

Jury instructions are sufficient if, “**when read as a whole**, properly inform the trier of fact of the applicable law.” *Anfinson*, 174 Wn.2d at 860 (emphasis added). In determining whether a jury instruction misstates a legal standard the Supreme Court of Washington has held: “this is a two part inquiry. First, we must determine the appropriate legal standard. Second, we must determine whether the jury instruction properly stated that standard and, if not, whether the error was prejudicial. *Anfinson*, 174 Wn.2d at 866. Additionally, “[t]he fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily

make it a proper jury instruction.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 45 244 P.3 32 (2010).

Jury instruction 17 is comprised of three sentences which when read together incorrectly state the law of the “act of God” defense. The first sentence erroneously states that a “rogue wave” is synonymous with “an act of God.” CP 1102. The second sentence of the instruction is a correct statement of the legal standard of the “act of God” defense. CP 1102. The third sentence establishes that if the jury finds from the evidence that an “an act of God was the sole proximate cause of the plaintiff’s injuries and damages, then the plaintiff cannot recover.” CP 1102. The instruction essentially states that rogue waves are *by definition* acts of God and if the jury finds that the act of God was the sole proximate cause of the injuries and damages then the plaintiff cannot recover. This is an incorrect statement of law because rogue waves are *not* events that automatically satisfy the legal definition of an “act of God.” The first sentence of the instruction, which states this erroneous premise, is an out-of-context quotation from *Wylor v. Holland Am. Line – United States, Inc.*, 348 F. Supp. 2d 1206 (2003), that should not be used to override the established case law governing the “act of God” defense. An accurate instruction would have omitted the first sentence and provided the jury with the appropriate factors with which they could determine whether the wave in this case had such

characteristics that it constituted an “act of God.” *Wylor v. Holland Am. Line – United States, Inc.*, 348 F. Supp. 2d 1206, 12011 (2003).

b. The Appropriate Legal Standard For The Act Of God Defense.

This case is governed by federal maritime law because it undisputed that the incident occurred on navigable waters. *Scudero v. Todd Shipyards Corp.*, 63 Wn.2d 46, 48, 385 P.2d 551 (1963). The United States District Court for the Western District of Washington in *Wylor v. Holland Am. Line – United States, Inc.*, 348 F. Supp. 2d 1206 (2003) defined, “[a]n ‘act of God’ [as] a natural phenomenon of “such **unanticipated force and severity** as would fairly preclude charging the carrier with responsibility for damage occasioned by its failure to guard against it.” *Wylor*, 348 F. Supp. 2d at 1211 (emphasis added). This is the source of the language used in the second sentence of the jury instruction and is an accurate statement of the legal standard for the “act of God” defense that follows the established jurisprudence.

Act of God jurisprudence has developed significantly in jurisdictions that are frequently affected by major natural disasters and powerful weather phenomena such as the 5th and 11th Circuits whos’ states border the Gulf of Mexico and are routinely subjected to hurricanes and their aftereffects. The preeminence of Gulf Coast jurisprudence in this area

of law is emphasized by the fact that the lone citation in the “rogue wave” portion of the *Wylter* decision, from which the jury instruction language is taken, is to *Compania de Vaporos Inasco, S A v. Missouri Pac Railroad Co.*, 232 F. 2d 657, 660, (5th Cir. 1956), a Fifth Circuit case. *Compania* is frequently cited to in “act of God” cases. The United States District Court for the Southern District of Alabama, Southern Division relied in part on *Compania* when explaining the elements of the act of God defense:

*The defense has been widely defined as “any accident, due directly and exclusively to natural causes without human intervention, **which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented;**” and/or “a disturbance...of such unanticipated force and severity as would fairly preclude charging...[Defendants] with responsibility for damage occasioned by the [Defendants’] failure to guard against it in the protection of property committed to its custody. See 1A C.J.S. Act of God at 757 (1985); and Compania De Vapores INSCO S.A. v. Missouri Pacific R.R. Co., 232 F.2d 657, 660 (5th Cir. 1956), cert denied., 352 U.S. 880, 1 L. Ed. 2d 80, 77 S. Ct. 102 (1956).*

Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1239 (S.D. Ala. 2001) (emphasis added). The Court in *Skandia* went on to emphasize the importance of the “extraordinary” nature required for an event to constitute an “act of God” by adding:

*However, the “Act of God” defense “**applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.** See Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550, 1553 (11th*

Cir. 1989) (Citing to Bradford v. Stanley, 355 So. 2d 328, 330 (Ala. 1978).

Skandia, 173 F. Supp. 2d at 1239 (emphasis added).

The United States Court of Appeals for the Fifth Circuit, found that “a catastrophe arising from the force of elements which human intelligence cannot predict nor the ingenuity of man foretell is an act of God,” furthermore, “an act of God is a casualty not due to nor contributed to by human agency,” and a “casualty preventable by the exercise of ordinary care is not an act of God.” *Uniroyal, Inc. v. Hood*. 588 F.2d 454, 460 (1979).

The United States District Court for the Northern District of Indiana, Hammond Division, summarized the elements of the defense as follows which are provided for illustrative purposes only:

An act of God is a term of art that does not include every natural occurrence. Rather, the defense is applicable in only a limited number of circumstances. A number of factors have been considered by various courts in determining whether an act of God defense applies. These factors include: 1) the severity of the natural occurrence causing the damage; 2) the reasonable predictability of this natural occurrence; 3) the lack of human agency in the damage to the property; and 4) the reasonableness of any precautions.

Ispat Inland, Inc. v. Am. Commer. Barge Line Co., 2002 U.S. Dist. LEXIS 26818 at *27, 2002 WL 32098290, at *8 (N.D. Ind. 2002) (unpublished opinion).

The Supreme Court of Washington was in accord with this line of thought when it approved a jury instruction on the act of God defense that read in part:

*One who is under a duty to protect others against injury cannot escape liability for injuries to the person or property of such others on the ground that it was caused by an act of God, unless the natural phenomenon which caused the injury was **so far outside the range of human experience** that ordinary care did not require that it should be anticipated or provided against, **and it is not sufficient that such phenomena are unusual or of rare occurrence.***

Wells v. Vancouver, 77 Wn.2d 800, 803, 467 P.2d 292 (1970).

The court in *Wylor* is in accord with this reasoning when, immediately after providing a correct formulation of the act of God defense, they state “the ‘rogue wave’ defense is simply an alternative formulation of the argument that the **inordinate size** of the wave that struck the ZAANDAM was **unforeseeable.**” *Wylor*, 348 F. Supp. 2d at 1211 (emphasis added). Act of God jurisprudence has clearly established elements that courts have taken into consideration in determining whether the act of God defense applies, such as severity of the event, foreseeability of the event, lack of human agency, and reasonableness of precautions. A jury instruction on the “act of God” defense should instruct the jury on these elements so that they can make a determination as to whether the factual situation presented to them constitutes an “act of God.”

c. **Jury Instruction 17 Does Not Properly State The Legal Standard.**

While the second sentence of the jury instruction is an accurate statement of the “act of God” legal standard, the first sentence of the instruction is taken out of context from *Wylter* and creates a misstatement of law when read together with the rest of the instruction. The first sentence of the jury instruction states: “phrases such as “rogue wave,” “freak wave,” “sneaker”, etc. are synonyms for an act of God.” *Wylter*, 348 F. Supp.2d at 1211. In stating that rogue waves are synonyms for “acts of God,” the court in *Wylter* provides **no citation to any legal precedent** nor any dictionary or encyclopedia definition to support this premise. *Anfinson*, 159 Wn. App. at 35. The only citation provided in the “rogue wave” section of the *Wylter* decision is to the Fifth Circuit’s decision in *Compania*. *Compania* was not a rogue wave case and does not stand for the holding that a rogue wave is synonymous with an act of God. *See Compania*, 232 F.2d at 657. Instead, speaking on acts of God, the court in *Compania* explains: “from a realistic standpoint, we think decision in this type of controversy **should not turn upon technical, meterological definitions**, but upon the issue of whether the disturbance causing the damage, by whatever term it is described, is of such **unanticipated force and severity** as would fairly preclude charging a carrier with responsibility.” *Compania*, 232 F. 2d at 660 (emphasis added).

The court in *Compania* clearly states that “technical, meteorological definitions,” are not where the decision in this type of controversy should turn, yet this jury instruction when read as a whole leads a reader to believe that “if an event is a ‘rogue wave’ then it *must* be an ‘act of God.’ CP 1102. This directly contradicts what the court in *Compania* intended and runs contrary to established act of God jurisprudence.

The first sentence of the jury instruction should be seen for what it is, an out of context quotation that is only applicable to the facts of the case from which it originates. The use of this language in a jury instruction is a perfect example of why Washington courts have held that, “[t]he fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury instruction.” *Anfinson*, 159 Wn. App. at 35. *Wylor*, the case from which the language originates, dealt with a cruise ship, the ZAANDAM, operating in gale force winds in the Pacific Ocean and encountering steady 25-40 foot waves and then confronting a larger wave with “an unusually deep trough” that was approximately 50%-70% larger than the prevailing seas.” *Wylor*, 348 F. Supp. 2d at 1208. This meant that the court was considering waves as high as 65 feet. On the contrary, the facts of the case at hand deal with a calm day on the Puget Sound wherein the defendant encountered a 3 foot wave. CP 33,CP 1052. Defense counsel argued to the jury during her closing

statement that the difference in factual circumstances is inconsequential by urging that they accept a technical definition, U.S. Navy's definition, of what constitutes a rogue wave¹:

MS. MCGAUGHEY: The idea of what a rogue was is that regardless of the conditions it is – I think it was either one-third or two to 2.2 times larger than the prevailing waves in the area.

RP 952, lines 3-6.

Defense counsel urged the technical definition of a rogue wave on the jury:

*MS. MCGAUGHEY: So if you have a calm, calm seas or even a slight ripple – and you encounter on those conditions and those circumstances **something that is two or two-third or 33 percent higher than the countervailing area, that is a rogue wave.** And that is – as a matter of law makes it unforeseeable.*

RP 952, lines 13-19 (emphasis added).

This is simply an inventive mathematical analysis with no support that contradicts the appropriate legal standard. The U.S. Navy's definition for what constitutes a "rogue wave" is not a legal standard for either establishing a wave as a "rogue wave" or for establishing a natural event as an "act of God." In fact, the court in *Wylor*, the case on which the defendant is relying for the out-of-context statement, dismisses the definition stating

¹ The U.S. Navy defines a "rogue wave" as 2.2 x the upper 33% height of the prevailing seas.

that “**there is no indication** in the record that the defendants relied on the Navy’s definition, or **that this definition is a predicate for invoking their act of God defense in reference to an unusually large wave.**” *Wylor*, 348 F. Supp 2d at 1211.

Ultimately, it is inconsequential whether the wave in question falls under the technical definition of a “rogue wave” in determining whether it was an “act of God.” The established jurisprudence states that “this type of controversy should not turn upon technical, meteorological definitions.” *Compania*, 348 F.2d at 660. Clearly a wave could fit the technical definition of a “rogue wave” and still not constitute an “act of God.” The wave presented in the case at hand is such a wave. The wave was reported to be approximately 3 feet tall on Puget Sound. CP 1052. It surpasses the realm of believability to say that confronting a 3 foot wave while piloting a boat on Puget Sound, no matter the conditions, is “so far outside the range of human experience,” that “no amount of foresight, pains, or care, reasonably to have been expected” could have prevented injury. *Skandia*, 173 F. Supp. 2d at 1239. Following the defense’s reasoning would lead to an absurd result; that a 3 inch tall wave on calm water would fall under the technical definition of a “rogue wave” and therefore constitute an “act of God.”

Wylor has since been cited in six decisions, once in the United States District Court of New Jersey and five times in the United States District

Court for the Western District of Washington, and not once was it cited for the proposition that rogue waves are synonymous with an act of God. In fact, case law from across many jurisdictions shows that natural events are not, without deeper analysis, synonymous with acts of God. The inclusion of the first sentence of the instruction that automatically established that a “rogue wave, freak wave, or sneaker” are “synonyms for an act of God” was an error by the trial court. The jury instruction did not provide the jury with the proper legal standard for determining whether an event was an “act of God” and therefore it was a misstatement of law.

d. If Not A Clear Misstatement Of Law, Instruction 17 Is At The Very Least Misleading To The Jury.

Instructions are sufficient “when they allow counsel to argue their theory of the case [and] are not misleading.” Anfinson, 174 Wn.2d at 860. . “As our Supreme Court observed in *State v. Meyer*, 95 Wn. 257, 263, 164 P. 926 (1917), an instruction that is correct in the abstract, or correct as applied to one set of facts, may become misleading when applied to another set of facts.” *State v. Irons*, 101 Wn. App. 544, 553, 4 P.3d 174 (2000).

Jury Instruction 17 is misleading because the first sentence of the instruction, that “rogue waves” are “synonyms for acts of God,” is taken, out of context, from *Wylter v. Holland America Line.*, 348 F. Supp. 2d 1206, 1211 (2003). The facts of *Wylter* dealt with a cruise ship in the Pacific

Ocean, the ZAANDAM, facing steady 25-40 foot waves and then confronting a wave 50% - 70% larger than the surrounding seas. *Wylter*, 348 F. Supp. 2d at 1208. However the facts of the case at hand present very different circumstances, a mere 3 foot wave occurring on the Puget Sound. CP 1052. The *Wylter* court might have correctly found that the 60+ foot wave confronted by the ZAANDAM was a “rogue wave” and in their opinion could constitute an “act of God” but that does not mean that all rogue waves should automatically be determined to be “synonymous” with an “act of god” based off that court’s holding. The *Wylter* court did not cite to any legal precedent in stating that a “rogue wave” is “synonymous to an act of God.” That assertion should be limited to the facts of that case.

By including a sentence in the instruction that automatically established that a “rogue wave, freak wave, or sneaker” are “synonyms for an act of God,” this instruction allowed the jury to ignore the correct standard of law regarding “act of Gods” and was therefore misleading.

e. Plaintiff Was Prejudiced By Jury Instruction 17.

An erroneous instruction requires reversal if it prejudices a party. *Anfinson*, 174 Wn.2d at 860. “If the instruction contains a clear misstatement of law, the reviewing court must presume prejudice, while the appellant must demonstrate prejudice if the instruction is merely misleading. *Anfinson*, 174 Wn.2d at 860.” “An error is prejudicial if it

presumably affects the outcome of trial.” *Chunyl & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 255, 232 P.3d 564 (2010). Also, where the court gives an incorrect jury instruction on an important issue and counsel actively urges the incorrect statement of the law upon the jury during closing argument, prejudice is established. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d at 874-877. “This is because jurors are presumed to follow the court’s instruction and the focus of arguments shows the issue was important.” *Anfinson*, 174 Wn.2d at 875.

Prejudice is presumed because the instruction contains a clear misstatement of law. *Anfinson*, 174 Wn.2d at 860. Prejudice is further established by defense counsel actively urging the instruction on the jury during her closing statement:

*MS. MCGAUGHEY: Let’s talk about this idea of the rogue wave. Mr. Reich mentioned it, and it is juror Instruction No. 17. And you know what the rogue wave instruction – I’ll talk while I walk – **but the rogue wave instruction, that’s the law.** It’s not me making it up. It’s not Mr. Shoemaker or Captain Shoemaker talking about it. **It’s the law. The rogue wave is a defense in maritime law.** The rogue wave is what you’re instructed on.*

RP 950, lines 17-22 (emphasis added). Defense counsel further urged her formulation of the rogue wave defense on the jury during closing:

MS. MCGAUGHEY: The idea of what a rogue was is is that regardless of the conditions it is – I think it was either one-third or two to 2.2 times larger than the prevailing waves in the area.

RP 952, lines 3-6. Defense counsel urges the technical definition of rogue wave on the jury:

*MS. MCGAUGHEY: So if you have a calm, calm seas or even a slight ripple – and you encounter on those conditions and those circumstances something that is two or two-third or 33 percent higher than the countervailing area, **that is a rogue wave. And that is – as a matter of law makes it unforeseeable.***

RP 952, lines 13-19 (emphasis added). Defense counsel concluded her summary of the “rogue wave” defense by stating:

MS. MCGAUGHEY: ...but yet to go out on the water of Puget Sound and in glass-like conditions put a burden or a duty on a boat driver that requires them to anticipate two-, three-, five-foot waves when the conditions do not support that, that’s the sum and substance of the rogue wave defense.

RP 953, lines 3-8.

Defense counsel’s closing argument concluded with the statement that, “we think the over whelming evidence is that this was an accident without fault, an accident without any negligence, an accident due to either a rogue wave or a wave that was unforeseeable.” RP 966, lines 12-14. Jury instruction 17 clearly had a prejudicial effect on the outcome of the trial considering how important the “rogue wave” defense was to defendant’s theory of the case and that it was actively urged upon the jury during closing statements.

3. The Trial Court Erred By Instructing The Jury On The Issue Of Contributory Negligence Without A Factual Basis To Put That Issue To The Jury.

Negligence has four elements: (1) existence of a duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate causation. *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). A comparison of fault for any purpose under RCW 4.22.005 through RCW 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.” RCW 4.22.015. “Contributory negligence is an affirmative defense and the burden of proving it rests on the defendant.” *Hughey v. Winthrop Motor Co.*, 61 Wn.2d 227, 229, 377 P.2d 640 (1963).

The issue of whether contributory negligence should be put to the jury, in the circumstances presented in this case, may be considered harmless error. However, the plaintiff respectfully requests the Court provide guidance on the appropriateness of contributory negligence in this instance should this case be remanded. See *Madill v. L.A. Seattle Motor Express*, 64 Wn.2d 548, 553, 392 P.2d 821 (1964) (“The plaintiffs made further assignments of error which we will consider for the guidance of the trial court and counsel at the new trial.”); *Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 230 P.3d

625 (2010); see also, *Jenkins v. Snohomish County Public Util. Dist. No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986) (clarifying that the primary function of the appellate court is to provide guidance on legal issues).

a. **Contributory negligence must be supported by substantial evidence.**

Each party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Substantial evidence is evidence “sufficient. . . to persuade a fair-minded, rational person of the truth of a declared premise.” *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963). Substantial evidence is a higher bar than a “mere scintilla” of evidence. *Id.*

The Washington Supreme Court has consistently ruled on the requirement of substantial evidence in order to give a contributory negligence instruction. The early cases outlined a need of **some** showing of evidence to support the defendant’s theory of the case. *Cote v. Allen*, 50 Wn.2d 584, 313 P.2d 693 (1957) (“While every party is entitled to have the jury instructed upon his theory of the case, that rule presupposes evidence to support such theory.”). In a later case, the Court found that, although there was some evidence of drinking and the plaintiff’s knew the driver had a significant limp, this knowledge did not amount to **substantial evidence**

of the passenger's knowledge of the driver's inability to control his vehicle. *White v. Peters*, 52 Wn.2d 824, 827, 329 P.2d 471 (1958) ("It is prejudicial error for the trial court to submit an issue to the jury when there is no substantial evidence concerning it.").

When reviewing the facts and evidence of contributory negligence, the Court must consider the facts as they existed at the time of the event. In determining whether a person was contributorily negligent, the "inquiry is whether or not the [person] exercised that reasonable care for his [or her] own safety which **a reasonable [person] would have used under the existing facts or circumstances**, and, if not, whether such conduct was a legally contributing cause of the injury." *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182, 412 P.2d 109 (1966) (emphasis added); *Huston v. First Church of God, of Vancouver*, 46 Wn.App. 740, 747, 732 P.2d 173 (1987).

Here, the defendant asserted two theories of contributory negligence without substantial supporting evidence. First, the defendant asserted that the plaintiff was contributorily negligent for riding in a boat when she had been diagnosed with early stages of osteoporosis, and/or that she failed in a duty to inform the defendant of her diagnosis. Second, that the plaintiff was contributorily negligent when she wrapped a rope around her right wrist to

help secure her to the boat and keep track of the line. No substantial evidence exists to support either theory.

Ms. Baltazar Did Not Violate The Duty To Use Due Care When She Did Not Know, And Could Not Have Known, Of The Potential For Injury At The Time Of The Incident.

Ms. Baltazar had no limitations placed on her activities and no medical professional ever cautioned her against boating. RP 668-9. Evidence showed that Ms. Baltazar continued to seek medical care and tracking of her condition right up until the accident. RP 699-700. Finally, Ms. Baltazar even testified that the only person she knew with the same condition (her mother), had never broken a bone. RP 699.

The defendant was admittedly unable to produce **any** evidence that Ms. Baltazar had knowledge, or should have had knowledge, at the time of the incident, that she should not be on a boat. RP 657-58. Further, although alleged, the defendant was unable to produce any evidence that Ms. Baltazar had a duty to inform her employer of her medical diagnosis when the diagnosis does not require accommodation, and she has no reason to believe that the activity she was engaged in could increase her chance of injury.

This lack of evidence of an initial negligent act means that regardless of the resulting injury, no contributory negligence can be found. Absent substantial evidence that Ms. Baltazar somehow failed to use the care a

reasonable person would have used under the existing facts or circumstances, the defendant should not have been permitted to argue contributory negligence.

4. The Trial Court Should Not Engage In Speculation On The Effectiveness Of Safety Measures.

The defendant must prove both negligence and proximate cause. In examining whether to allow the contributory negligence instruction to go in front of the jury in a remanded case, the Washington Supreme Court analyzed all claims of contributory negligence under two prongs, “(1) whether there is evidence upon which reasonable minds could differ on the question of whether [plaintiff] exercised reasonable care; and (2) whether there is substantial evidence that such negligence, if it existed or could be found to have existed, proximately contributed to causing the accident.” *Bohnsack v. Kirkham*, 72 Wn.2d 183, 191, 432 P.2d 554 (1967).

The defendant’s own theory of the case—that this was an unavoidable or unforeseeable accident—precludes any argument that holding on to the rope was in any way a violation of the plaintiff’s duty to exercise due care. “The defendant should not diminish the consequences of his negligence by the failure of the plaintiff to anticipate the defendant’s negligence in causing the accident itself. Only if plaintiff should have so anticipated the accident can it be said that plaintiff had a duty to fasten the

seat belt prior to the accident.” *Amend v. Bell*, 89 Wn.2d 124, 132-33, 570 P.2d 138 (1977); see also, *Derheim v. N. Fiorito Co.*, 80 Wash.2d 161, 171, 492 P.2d 1030 (1972). This Court positively cited both cases when it determined that no actionable duty existed when a parent failed to restrain their child. *Patterson v. Horton*, 84 Wn.App. 531, 540, 929 P.2d 1125 (1997).

The trial court inappropriately entertained analysis of whether or not Ms. Baltazar holding the rope prior to the alleged negligence of the defendant contributed to her injuries. (CITE). The court in *Derheim* articulated the myriad problems—both practical and policy related issues—with speculation of safety measures taken prior to the negligence of the defendant as a source of contributory negligence.

The practical implications of allowing seat belt evidence, has also given the courts pause. For example, most automobiles are now manufactured with shoulder straps in addition to seat belts, and medical evidence could be anticipated in certain cases that particular injuries would not have resulted if both shoulder belts and seat belts had been used. Additionally, many automobiles are now equipped with headrests which are designed to protect one from the so-called whiplash type of injury. But to be effective, its height must be adjusted by the occupant. Should the injured victim of a defendant's negligence be penalized in ascertainment of damages for failure to adjust his headrest? Furthermore, the courts are aware that other protective devices and measures are undergoing testing in governmental and private laboratories, or are on the drawing boards. The concern is, of course, that if the seat belt defense is allowed, would not the same analysis require

the use of all safety devices with which one's automobile is equipped. A further problem bothers the courts, and that is the effect of injecting the seat belt issue into the trial of automobile personal injury cases. The courts are concerned about unduly lengthening trials and if each automobile accident trial is to provide an arena for a battle of safety experts, as well as medical experts, time and expense of litigation might well be increased.

Derheim, 80 Wn.2d 161, 168-9.

Testimony at trial demonstrated that the rope around Ms. Baltazar's wrist may have saved her life. RP 285 (“...Deb was halfway out of the boat hanging on to the rope.”); RP 368 (“She just took it. It was up front, and she just wrapped it around her arm. She was just saying, well, may be precautionary purposes because we didn't have life jackets on.”); RP 376-378 (“We were like rag dolls, and we came up in the air and we came back. Well, actually, the second time we went flying out like we were going to go off the boat, and I grabbed her because I thought we were going to go off...); RP 712 (“It wasn't until Mara got on board that I kind of was like, you know, the railing wasn't as available to me because of the way Sue had her legs positioned. . . . So I just thought, ‘Oh, I'll just hold on to the rope.’”). Specifically, when asked if she thought she would have been thrown overboard if she hadn't been holding on to the rope, Ms. Baltazar testified, “I had it on my arm, but I—oh, I would have gone out off the boat. I would be dead.” RP 716-717.

The defendant was unable to provide **any evidence** that the act of holding the rope itself was a negligent act. This discrepancy of proof is the precise reason that the courts do not speculate on safety measures. *Derheim*, 80 Wn.2d 161, 168-9. Plaintiff respectfully requests that, on remand, the trial court be directed to not create a duty that does not exist in law by saying Ms. Baltazar cannot hold on to the bow rope for her own safety.

VI. CONCLUSION

The trial court abused its discretion in giving the emergency doctrine instruction because (1) Plaintiff claimed that the defendant's negligence caused the emergency, (2) Plaintiff did not claim negligence following the emergency event, and (3) there was no alternative course of action available to the defendant. It was an error of law when the trial court gave a patchwork instruction on the "act of God" defense. This instruction prejudiced the plaintiff because it (1) conflated a natural phenomenon with an "act of God," and, (2) allowed the defendant to argue to the point of absurdity that a two to three foot wave should be considered in the same light as a 65 foot wave. Either error is enough for this case to be reversed and remanded for a new trial.

///

Finally, should this case be reversed and remanded for a new trial, Plaintiff respectfully requests guidance for the lower court on the issue of contributory negligence.

Respectfully Submitted on this 19th day of December, 2014.

JACOBS & JACOBS



ANNE R. VANKIRK, WSBA #47321
G. PARKER REICH, WSBA #35500
Attorneys for the Appellant

DECLARATION OF SERVICE

I, Marilyn Zimmerman, hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

That on December 19, 2014, I filed and served true and correct copies of the BRIEF OF APPELLANT as follows:

Original and one copy via legal messenger to:

**Court of Appeals II
950 Broadway, Suite 300
Tacoma, WA 98402**

One copy via legal messenger to:

**Shellie McGaughey, Esq.
McGaughey Bridges Dunlap
3131 Western Ave, Suite 410
Seattle, WA 98212**

FILED
COURT OF APPEALS
DIVISION II
2014 DEC 19 AM 11:33
STATE OF WASHINGTON
BY DEPUTY

Dated this 19th day of December, 2014.



Marilyn Zimmerman
Legal Assistant

APPENDIX 1

355 So.2d 328 (Ala. 1978), SC 2430, Bradford v. Stanley

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355 So.2d 328 (Ala. 1978)

Jack E. BRADFORD

v.

Sam S. STANLEY and Frances Stanley.

SC 2430.

Supreme Court of Alabama.

January 27, 1978

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T. M. Brantley, Bay Minette, for appellant.

Fred W. Killion, Jr., Mobile, for appellees.

BEATTY, Justice.

This is an appeal from a jury verdict in favor of defendants, the Stanleys, in a suit brought by plaintiff, Jack E. Bradford, to recover damages for physical injury done to his real property when defendants' dam broke flooding plaintiff's land. We affirm.

A highway separates the property of plaintiff and defendants which is located in Baldwin County, and a natural stream flows through defendants' property, goes under the highway, and drains into plaintiff's pond. An unprecedented rainfall occurred in November, 1975 during which plaintiff's property was damaged by flood waters from the breakage of defendants' dam. Mud and debris were deposited in plaintiff's pond and several objects such as a bench, a fence, and some shrubbery were washed away.

The main question for review is whether the jury wrongfully decided the issue of liability.

Plaintiff contends that

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defendants are liable for the damage to his land because of negligent construction and maintenance of the dam. He urges that it is our duty to reverse because it is clear from the evidence that the jury verdict is wrong.

The record reveals extensive evidence on both sides which contested the construction and maintenance of the defendants' dam, the cause of its failure, and the cause of the damage to the plaintiff's property. The jury returned a general verdict for the defendants, and the evidence supports this finding. Moreover, it is well-settled in this state that a jury verdict is presumed correct and the jury's determination of factual issues will not be disturbed unless it appears plainly and palpably wrong. *Kilcrease v. Harris*, 288 Ala. 245, 259 So.2d 797 (1972).

We believe that the rule of *Dekle v. Vann*, 279 Ala. 153, 182 So.2d 885 (1966) applies to the facts of this case. As to lands outside a municipality, the lower land bears a servitude to the higher surface and must receive water that flows from the higher land. Under the evidence the jury could have found that plaintiff's property was located downstream from defendants' land, and the natural flow of water was toward the plaintiff's pond. In *Law v. Gulf States Steel*, 229 Ala. 305, 156 So. 835 (1934) we held that landowners cannot recover for damage to property due to an overflow caused by excessive rainfall if the injury would have occurred regardless of the existence of the

dam. Testimony was given in the present case establishing an extremely heavy rainfall about the time and place in question and to flooding and washout conditions elsewhere in the vicinity. Water marks on trees, and debris on defendants' property surrounding the dam, indicated that flood waters could have come from upstream and in height that exceeded the Stanleys' dam itself.

In *Alabama Fuel & Iron Co. v. Vaughan*, 205 Ala. 589, 88 So. 857 (1921), we held that a defendant was not liable to plaintiff for an overflow of his lands from waters of a creek caused, not by defendant's negligence, but entirely by natural causes in the form of extraordinarily heavy rains. So in this case, the jury could have found that the rains were so extraordinary and unprecedented as to be acts of God. In its legal sense an "act of God" applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374 (1902). There is testimony in the record to establish that the rainfall in this vicinity in November of 1975 was a record one. It was a jury question to determine whether or not the rainfall was so unprecedented as to be deemed an act of God, *Nashville, C. & St. L. Ry. v. Yarbrough*, 194 Ala. 162, 69 So. 582 (1915), and that determination here will not be disturbed.

Plaintiff also contends that the trial court committed reversible error in allowing defense counsel to ask a leading question on direct examination:

Q All right. Let's talk just a minute, if we may You say you were doing some repair work throughout the county. Do you have any knowledge of any unusual rain that fell around that period of time, please, sir?

A Yes, sir. There was quite a rain.

Q All right. And would this have been somewhere around November of '75, give or take

MR. BRANTLEY:

I object to him leading the witness.

THE COURT:

I think he is just trying to point out the time.

MR. BRANTLEY:

And I'm objecting

THE COURT:

Overrule.

MR. BRANTLEY:

We except.

MR. KILLION:

Q All right. Go ahead.

A I don't remember any specific dates. But it was a record breaking rain as far as my knowledge of

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Whether to allow or disallow a leading question is within the discretion of the trial court and except for a flagrant violation there will not be reversible error. *Jones v. State*, 292 Ala. 126, 290 So.2d 165 (1974); *Baldwin v. McClendon*, 292 Ala. 43, 288 So.2d 761 (1974); *Anderson v. State*, 104 Ala. 83, 16 So. 108 (1894). We fail to appreciate any prejudice to plaintiff's case resulting from

this question, therefore we cannot hold that the trial court abused his discretion in allowing this question, if it was leading. As the trial court noted, apparently counsel was attempting to fix the time of the occurrence. Besides, the witness did not answer the question, but replied that he could not remember any specific dates.

The plaintiff also maintains that the trial court erred in overruling his objection to a question directed to a defense witness on direct examination:

A All right. Did Mr. Bradford make any statements to you at that time about his pond filling in with dirt or anything? This is before the rain.

MR. BRANTLEY:

Object to the question as leading the witness.

THE COURT:

Overrule the objection.

MR. BRANTLEY:

We except.

MR. KILLION:

You may answer.

MR. BRANTLEY:

He has, in fact, may it please the Court, told the witness what to say.

THE COURT:

Overrule the objection.

MR. BRANTLEY:

We except.

It will be observed that the specific objections to the question were that it was "leading the witness," and "told the witness what to say." It is true that a leading question is one which suggests the answer sought; such a question also has been described as one which assumes a material fact not therefore testified to. *Williams v. State*, 34 Ala.App. 603, 42 So.2d 500 (1949). Applying each test to the question asked, we perceive that the question was not leading as that term is used to describe impermissible questions. As Justice Stone stated in *Blunt v. Strong*, 60 Ala. 572 (1877): "All the authorities agree, that direct and leading questions may be propounded to any witness, to lead his mind and attention up to any subject, upon which he is called to testify; . . ." That appears to have been the purpose of this question, rather than to suggest any particular answer. And contrary to the plaintiff's claim on appeal that the question assumes a fact to which the witness has not testified, the question does not assume the existence of any fact. The reference to the Bradford pond describes the statements inquired about, but as the question was asked, does not assume that the pond was filled. Accordingly, the trial court's ruling, based upon the objection made, was correct.

The final question for review is whether the trial court erred in not allowing a witness to state the reaction of certain potential buyers of plaintiff's property who viewed it after the flood:

BY MR. BRANTLEY:

Q But in your judgment the difference in value of the two times was fifteen thousand dollars, is that correct?

A I quoted the people the price before I got out there. I didn't know the damage was there until I got there.

Q You quoted it before you went there?

A Yes.

Q And after the people you showed it to saw the property, what was their reaction to it?

MR. KILLION:

Object to that.

THE COURT:

Sustain.

MR. BRANTLEY:

I think it's relevant. He's gone into it.

THE COURT:

Sustain the objection.

MR. BRANTLEY:

We except. That's all.

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Plaintiff contends now that this evidence was admissible as a "spontaneous exclamation," but when objection to "his reaction" was sustained, plaintiff did not make any offer to show what response would have been made. When the question does not on its face show the expected answer, for purposes of appeal the questioning party must make an offer of proof. *Greer v. Eye Foundation, Inc.*, 286 Ala. 63, 237 So.2d 456 (1970). The trial court is vested with a reasonable discretion in determining whether a particular declaration falls within the "spontaneous exclamation" exception to the hearsay rule, *Jones v. State*, 53 Ala.App. 690, 304 So.2d 34 (1974). We fail to see how that discretion could have been abused here when that court was not apprised of either the statement itself or the circumstances under which it was made. *Harrison v. Baker*, 260 Ala. 488, 71 So.2d 284 (1954).

Let the judgment of the trial court be affirmed.

AFFIRMED.

TORBERT, C. J., and MADDOX, JONES and SHORES, JJ., concur.

APPENDIX 2

232 F.2d 657 (5th Cir. 1956), 15770, Compania De Vapores Inesco, S.A. v. Missouri Pac. R. Co.
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232 F.2d 657 (5th Cir. 1956)

COMPANIA DE VAPORES INESCO, S.A., The Baloise Marine Insurance Co., Ltd., The Chrysler Corporation, Compania Importadora de Autos y Camiones, S.A., and Compania de Autos y Transportes, S.A., Appellants,

v.

MISSOURI PACIFIC RAILROAD COMPANY, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, Appellees.

No. 15770.

United States Court of Appeals, Fifth Circuit.

April 20, 1956

Rehearing Denied May 28, 1956.

Benjamin W. Yancey, New Orleans, La., Terriberry, Young, Rault, & Carroll, Edward S. Bagley, New Orleans, La., of counsel, for appellants.

C. Ellis Henican, Leonard B. Levy, Kalford K. Miazza, New Orleans, La., Dufour, St. Paul, Levy & Marx, Miazza & Drury, Henican, James & Cleveland, New Orleans, La., of counsel, for appellee.

Before HUTCHESON, Chief Judge, and RIVES and CAMERON, Circuit Judges.

RIVES, Circuit Judge.

This appeal is taken from the district court's judgment exonerating appellees, as common carriers, from any liability for damage to 150 Chrysler Corporation

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automobiles, owned and insured by appellants, which had been shipped from Detroit, Michigan, to Westwego, Louisiana, and were being stored 'on free time' in appellees' 'Westwego warehouses awaiting export by ocean carrier to Cuba on April 4, 1952, when a severe windstorm struck the area, causing very extensive damage to the warehouses and the cars stored within.

The ultimate factual issue of whether the damage to the shipment was caused by an 'act of God', within the provision of the bill of lading exempting appellee-carriers from liability, ^[1] was tried to the district court, sitting without a jury, and the court relieved appellees from liability upon subsidiary findings that (1) the April 4, 1952 weather disturbance was either 'a small tornado' or a 'line squall with tornadic characteristics', and was not the type disturbance which builders and architects 'usually anticipate' in the design and construction of buildings in this area, and (2) the warehouses were in 'reasonably good condition' prior to the storm and a 'reasonably prudent inspection' revealed no 'apparent deterioration', so that there was no negligent maintenance of the warehouse facilities by appellees contributing to the damage which would justify the recovery sought.' ^[2]

Appellants have invoked our duty of an extensive and laborious factual review by candid assertions that any 'fair reading' of this voluminous record will reveal the trial court's findings as 'clearly erroneous', and will prompt our reversal upon a 'definite and firm conviction that a mistake

has been committed', within the rule of *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, and *United States v. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746. In effect, they insist that the trial court,

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while acknowledging the guiding principles, has failed in their application to the instant proof to exact that high obligation from common carriers to safeguard property entrusted to their care which the authorities require.

Appellees insist, however, that any disturbance of the judgment would be inapropos, because appellants admittedly do not attack the rule relied upon; ^[3] and the contested findings, making due allowance for the trial court's credibility advantage in resolving conflicting testimony, are amply supported by the proof.

We agree with appellants and the district court that appellees, in order to exonerate themselves from liability for the damage, were required to prove not only that the 'line squall' constituted an 'act of God' within the exemption from liability provision of their bill of lading, but also that they were guilty of no negligence in the construction and maintenance of the warehouses which contributed to causing the damage. ^[4] For by its very definition, an 'act of God' implies 'an entire exclusion of all human agency' from causing the loss or damage. ^[5] Both parties rely mainly upon Louisiana decisions as controlling, appellants as supporting their contention that appellees had the burden of proof throughout, while appellees interpret them as requiring exoneration upon proof of an 'act of God' within the exemptive proviso of their bill of lading. ^[6] We think it unnecessary, however, for us to resolve this asserted conflict in local law, for notwithstanding any contrary language in the Supreme Court of Louisiana's opinion in the *National Rice Milling Co.* case, *supra*, it seems to us that the issue of which party properly has the burden of proof to sustain a recovery under this federal statute, Carmack Amendment, Title 49 U.S.C.A. § 20(11), is governed by federal law, rather than by any state rule purporting to fix the onus of proof. ^[7]

As heretofore stated, however, we think appellees were properly charged with the burden of proof throughout, ^[8]

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but in any event we regard this inquiry as purely academic upon this record, for decision here does not turn upon the burden of proof, but upon whether the record as a whole supports the district court's finding that appellees were free from negligence contributing to cause the damage, or whether that finding should be reversed as 'clearly erroneous.'

Almost any inclemency of weather causing property damage is an 'act of God,' in a limited sense, so that the problem is not solved by simply relying upon the conflicting testimony of experts as to whether this particular disturbance should technically be characterized as a 'line squall', or 'line squall with tornadic characteristics.' From a realistic standpoint, we think decision in this type controversy should turn not upon technical, meteorological definitions, but upon the issue of whether the disturbance causing the damage, by whatever term it is described, is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it in the protection of property committed to its custody.

Thus far, this Court is substantially in agreement with the district court as to the controlling principles involved. The majority, however, are convinced that this record presents for review only a routine factual dispute, in which the district court's acceptance of that portion of the proof tending to support its conclusion that the damage resulted solely from an act of God, within the exemption from liability provision of the bill of lading, and without contributing fault upon appellees' part, is not reversible as 'clearly erroneous.' Rule 52(a), Fed. Rules Civ. Proc., 28 U.S.C.A. Judge Rives is convinced that the more credible and convincing proof fails to show this weather disturbance was of such unanticipated and uncommon force and severity for the New Orleans area as would justify exonerating appellees, with their high obligation as common carriers toward protection of property in their custody, from liability based upon their contributing fault through the inadequate construction and negligent maintenance of these warehouse facilities prior to the storm, which he thinks is revealed by the testimony and particularly by the photographic proof. He would, therefore, reverse the district court's findings exonerating appellees from liability in this instance as 'clearly erroneous.' [9]

In view of the majority conclusion, the judgment is

Affirmed.

APPENDIX

Appellees' weather expert, Nash C. Roberts, Jr., testified, in part, that there was a definite relationship between the formation of line squalls, thunderstorms, and tornadoes, all these weather disturbances being precipitated by unstable atmospheric conditions; that tornadoes or cyclones are generally considered extreme low pressure systems with a counterclockwise rotation, and often reach a velocity of 300 or 400 miles per hour; that 'line squalls' are composed of a series of thunderstorms of severe velocity and often have tornadic potential, though a 'line squall' and 'a tornado', meteorologically speaking, are not the same; the 'line squalls' usually have wind velocity of less than 75 miles per hour, though occasionally a severe line squall will get up to from 90 to 120 miles per hour, whereas tornadic velocity

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has been recorded as high as 500 or 600 miles per hour; that he recalled the weather disturbance on April 4, 1952, and had heard at that time the 'characteristic roar that is associated with tornadoes'; that he inspected the damage the following morning near the Huey Long Bridge and considered it 'devastating', and characteristically similar to that caused by a tornado, leaving a path 'roughly a mile wide * * * that was terribly damaged'; that he considered the line squall as displaying 'tornadic characteristics' because there was evidence of counterclockwise rotation from the fact that the Gretna radio station tower was somewhat twisted and bent, and the debris from the Huey Long Bridge was also 'rolled' to some degree; and in addition there was evidence of 'skipping' along its path; that taking all factors into consideration, he had reached the conclusion that the maximum velocity of the wind in the direct path of damage actually exceeded 100 miles per hour; that (on cross-examination) he understood the Weather Bureau of New Orleans had 'officially classified this ('52 disturbance) as a (line) squall and not * * * a tornado', and that its report stated that it did not cut a path 'in the sense a tornado cuts a path', but that he did not agree with the report for the reasons previously stated, viz.: because of the extensive damage within a

well defined one mile area, with some evidence of counterclockwise rotation, explosive damage, sharp dips and rapid rises on barographs not even in direct path of damage, etc.; that he knew that the weather report was made by a climatologist after making an investigation, but that he entertained a different professional opinion from that weather bureau employee (Mr. Ralph Sanders) as to the severity of the storm, which he considered as exhibiting 'tornadic characteristics', as evidenced by 'skipping' and other indicia previously summarized.

Appellants, meteorologist, Alfred, H. Glenn, gave contrary testimony to the effect that the damage was caused by 'a severe line squall' with velocity 'in the vicinity of 90 to 100 miles per hour', and he saw no evidence whatsoever of tornadic winds; that wind velocity in a tornado exceeds that in a line squall considerably, a tornado's velocity ranging between 300 and 800 miles per hour and the velocity of a 'line squall' only infrequently attaining 100 miles per hour; that the maximum wind velocity of the April, 1952, disturbance, as recorded on the Huey Long Bridge anemometer was 91 miles per hour, which might vary 'plus or minus 20%' from the wind velocity at the damaged area on the Westwego wharf; that he neither saw, nor do the weather bureau reports show, any reliable evidence of tornadic rotation, 'skipping', or explosive damage which would justify characterizing the storm as a tornado, and in his opinion the photographic exhibit did not justify any such conclusion; that this April, 1952, storm was of approximately the same velocity and severity of previous hurricane winds experienced in the New Orleans area of from 92-100 miles per hour, and he felt the weather bureau had properly characterized this disturbance officially as a 'line squall'; that at about 100 M.P.H. velocity any wind would have a 'roar' or hum to it, not necessarily identifying it as a tornado; and that the path of damage was not any conclusive evidence that a tornado occurred, since tornadoes describe various paths, some of which are erratic, and a 'line squall' itself will exhibit strong gusts of wind, successive increases and decreases in wind velocity, etc., and he felt the weather bureau report, stating that the path of damage 'was not indicative of a tornado', was justified.

Typical of the defensive testimony, offered by appellees to negative appellants' contentions as to the faulty construction and deterioration of these warehouses, is that introduced through their witnesses, Huey, Lytle and Pennybaker. Huey testified that the warehouses were of a type construction frequently encountered in the New Orleans area, and though he found the usual evidences of decay therein (such as some dry rot,

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etc.), such partial deterioration was not uncommon in that locality for that class and type structure, and did not prohibit its adequacy to withstand the usual 'heavy windstorms' normally experienced in that area; that (on cross-examination) the warehouse buildings did provide some rigidity of resistance to west winds, the direction from which the storm came, in that they had 'knee braces' for each vertical post, i.e. 4 x 4 'knee braces' to each post; that the vertical reinforcing posts in the warehouses were 'toenailed to the flooring' and were not secured with bolts or in any other way except for the diagonal 'knee braces'; that the uprights and studs, etc. were also 'toenailed', and the sills were nailed to the floor, with the walls of the warehouses constructed from corrugated iron.

Lytle testified that he could not remember how long before the storm he had made a wharf

inspection, but his maintenance crew had been on the wharf the day before; that, in his opinion, the wharf was in 'good condition' before the storm, and he did not know of any 'dry rot' or 'termite damage' to the 'superstructure', though there was always some deterioration to the substructure, i.e. beneath the floor, which caused a 'continuous maintenance problem', but this portion of the warehouses was not damaged by this storm; that some additional anchorages and fastenings have been added in the reconstruction of the wharf since the April, 1952, storm, in that the two rows of posts on both sides have been bolted to the caps in the substructure, and Teco fasteners have been added at the top of the column, which changes should make it more secure and improve it considerably, but that its construction at the time of the storm did not render it 'weak and insecure', it then being 'in good shape to stand a fairly severe windstorm' of about '90 miles an hour'; that 'as much as 80%' of the \$8, 000 per month average allotment for wharf and warehouse maintenance was expended for repairs to the wharf's substructure, rather than for maintenance of the roof and shed where the actual damage occurred.

Pennybaker testified that, from his one or two inspections for a period of from six months to a year before the storm, he found the wharf 'generally in good condition'; that some posts showed evidences of decay, but they were generally spliced or replaced, and there was some deterioration to the substructure which was corrected as it developed and the decking (flooring) had failed from time to time due to decay or excess loading, at which time it was replaced, so that he would say that about the time of the storm the wharf was in a state of 'about 75%' good condition or repair. On cross-examination, the witness refused to acknowledge that he knew of any instances where the warehouse posts actually came loose and hung free without fastening, but admitted that occasionally they were hit by trailers or stevedoring tractors, and some of them did show partial dry rot or decay at the bottom, but these were very few and were being replaced 'as rapidly as possible'; that all the warehouses were typically 'light mill type construction.'

Among appellants' main witnesses were the elder McKee and Blessey. McKee testified that he had had some previous experience observing the decayed condition of these same warehouses from having been employed to survey great quantities of flour which had become badly infested by weevils and moths there in 1947 and 1951, and had then checked the wharves for evidences of infestation which might have originated in them and caused the damage to the flour shipments; that deterioration (i.e. dry rot, decayed timber, holes in the walls, etc.) was 'very prevalent' and many of the posts which were supposed to hold the roof of the wharf up were either not straight or had been knocked out of line; and that the color slides and photographs taken by his son, showing misalignment of posts, holes in the walls, rotted and decayed conditions, etc., in his opinion, were 'representative of the condition of the wharf before the storm.'

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Blessey testified that he had made a study of the structure and the design of the Westwego warehouses, with particular reference to their ability to withstand this sever type west-to-east wind at the time of the April, 1952, storm; that the warehouse type structure was normally considered a 'temporary structure' with its corrugated walls, inadequate nailing, etc.; and that he considered the warehouses designed as exhibiting a 'temporary structure' because 'toenailing' was considered inadequate design for 'permanent type structures', and with holes in the walls and dry, rotted

timber its resistance to winds of 'significant' velocity was further reduced, especially its resistance to crosswise winds; that (on cross-examination) his computations were based on the assumption that the warehouses were new structures, i.e. in good state of repair, and with that assumption he applied a 100 M.P.H. wind stress to it, which would pull out the nails and knee braces, the critical spots in its design; and, in fact, at that wind velocity the nails would be loaded up to three or four times their normal stress resistance.

Rehearing denied: RIVES, Circuit Judge, dissenting.

Notes:

[1] That provision reads:

'No carrier * * * shall be liable for any loss * * * or damage * * * or delay caused by the act of God, ' etc.

[2] Specifically, the court concluded from these and other subsidiary findings in pertinent part as follows:

'Where damage to a shipment is caused by an Act of God, the carrier is excused thereby from liability for the loss, unless the carrier is concurrently negligent. *Memphis & C.R. Co. v. Reeves*, 10 Wall. 176, 77 U.S. 176, 19 L.Ed. 909.

'A tornado or a line squall with tornadic characteristics (such as the weather disturbance, the proof of which was established in this case) is to be classed among the Acts of God which no human power can prevent or avert. *Mistrot-Callahan Co. v. Missouri, K. & T. Railroad Co. of Texas*, Tex.Civ.App., 209 S.W. 775; *Western Millers Mut. Fire Ins. Co. v. Thompson*, D.C., 95 F.Supp. 993, 997.

'Where a carrier proves, by a preponderance of evidence, than an alleged loss resulted from an Act of God (such as the weather disturbance that occurred in this case) and the evidence further shows that the carrier was in no way negligent, the carrier is not liable for the said loss. *Memphis & Charleston Railroad Co. v. Reeves*, 10 Wall. 176, 19 L.Ed. 909; *Morrison v. Davis*, 20 Pa. 171; *Denny Co. v. New York Cent. R. Co.*, 13 Gray 481.

'After the establishment of the defense of an Act of God, the carrier has the burden of proceeding by establishing by a preponderance of the evidence the absence of any negligence on its part which might have contributed to the occurrence of the loss or damage. *East Tennessee, V. & G.R. Co. v. Johnston*, 75 Ala. 596; *Agnew v. The Contra Costa*, 27 Cal. 425; *McGrath v. Northern P.R. Co.*, 121 Minn. 258, 141 N.W. 164, L.R.A.1915D, 644.

'The defendants in this case have proved to the satisfaction of this Court that at the time of the aforementioned weather disturbance the warehouses of the TP-MP Terminal were sound, and that the condition of the warehouses did not in any wise contribute to the damage to or destruction of the said warehouses by the severe wind which struck them on the morning of April 4, 1952. Accordingly, the defense of an Act of God, namely, the wind disturbance that defendants proved to have occurred was the proximate and sole cause of the damage to or destruction of plaintiffs' automobiles, trucks and accessories.

'Consequently, the defendants are excused from their failure to have delivered the said automobiles, trucks and accessories in the same good order in which they were received at the

point of shipment.'

[3] Indeed, appellees insist that the trial court's conclusions of law, heretofore quoted in footnote (2), were more favorable to appellants than they should have been, in that they actually placed a greater burden upon them than they were required to discharge under the law. Specifically, they contend that, after making their prima facie showing below that the weather disturbance causing the damage constituted an 'act of God' within the exemptive provision of their bill of lading, the burden should then have been placed upon appellants to establish that the warehouses were inadequate and negligently maintained, which proof appellees assert appellants failed to introduce.

[4] See *Texas & Gulf S.S. Co. v. Parker*, 5 Cir., 263 F. 864, 868; *Chicago & E.I.R. Co. v. Collins Produce Co.*, 7 Cir., 235 F. 857, 863; *The Schickshinny*, D.C., 45 F.Supp. 813, 817-818; Cf. *American Sugar Ref. Co. v. Illinois C.R. Co.*, D.C., 103 F.Supp. 280, 286.

[5] 9 Am.Jur., Carriers, § 708, p. 850 et seq.; 13 C.J.S., Carriers, § 80, p. 159.

[6] Appellants cite Article 2754 of the LSA-Revised Civil Code, *National Rice Milling Co. v. New Orleans & N.E.R. Co.*, 132 La. 615, 652, 61 So. 708; and *Lehman Stern & Co. v. Morgan's L. & T.R. & S.S. Co.*, 115 La. 1, 8, 38 So. 873, 70 L.R.A. 562.

Appellees seek to distinguish the *National Rice Milling Co.* case, supra, as inapplicable on the question of burden of proof, and rely upon *American Cotton Co-operative Ass'n v. New Orleans & Vicksburg Packet Co.*, 180 La. 836, 157 So. 733; *E. Borneman & Co. v. New Orleans M. & C.R. Co.*, 145 La. 150, 81 So. 882.

[7] *Southern Express Co. v. Byers*, 240 U.S. 612, 614, 36 S.Ct. 410, 60 L.Ed. 852; *Southern Ry. Co. v. Prescott*, 240 U.S. 632, 640, 36 S.Ct. 469, 60 L.Ed. 836; *Chicago & Northwestern Ry. Co. v. Davenport*, 5 Cir., 205 F.2d 589; *Thompson v. James G. McCarrick Co.*, 5 Cir., 205 F.2d 897, 900; *Delphi Frosted Foods Corp. v. Illinois Cent. R. Co.*, 6 Cir., 188 F.2d 343.

[8] Possibly the district court was correct in stating to counsel during a colloquy upon this issue below that the conflicting and inconsistent language of the decisions stems from the use by many court of the phrase, 'burden of proof', in lieu of the more precise phrase, 'burden of going forward with the evidence.'

[9] We consider it unnecessary to amplify this divergency in the Court's view by any extended analysis of the expert testimony as to the technical difference between line squalls, tornadoes, hurricanes, and the definition within which this particular disturbance is more appropriately embraced, from the conflicting testimony as to the damage and aftermath indicia recounted at such length at the trial. Excerpts of the material testimony, both as to the severity of the disturbance and the construction and maintenance of appellees' warehouses, are hereinafter separately abstracted as an appendix to this opinion.

APPENDIX 3

173 F.Supp.2d 1228 (S.D.Ala. 2001), Civ.A. 99-0284, Skandia Ins. Co., Ltd. v. Star Shipping AS
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173 F.Supp.2d 1228 (S.D.Ala. 2001)

SKANDIA INSURANCE CO., LTD., et al., Plaintiffs,

v.

STAR SHIPPING AS, d/b/a AtlantiCargo, et al., Defendants.

No. Civ.A. 99-0284-CB-L.

United States District Court, S.D. Alabama, Southern Division.

April 5, 2001

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Ray M. Thompson, Mobile, AL, for Haindl GMBH & Co., Parenco B.V. and Interot Speditions, GMBH.

Joseph M. Allen, Jr., E. Erich Bergdolt, Johnstone, Adams, Bailey, Gordon & Harris, Mobile, AL, for Star Shipping Co.

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Iliaura Hands, Miller & Williamson, New Orleans, LA, Ray M. Thompson, Mobile, AL, for Perkins-Goodwin Co., Inc.

ORDER

BUTLER, Chief Judge.

This admiralty action consists of two consolidated actions.^[1] Plaintiffs seek recovery from the Defendants of the value of containerized cargo (reels of paper), which were damaged at container yards located at the Alabama State Docks, ("State Docks"), in Mobile, Alabama, ("Mobile"), by tidal surge flooding associated with Hurricane Georges, which struck Biloxi/Ocean Springs, Mississippi, on September 28, 1998. Generally, Plaintiffs allege, notwithstanding that this hurricane was an Act of God,^[2] that the Defendants are liable because they failed to take reasonable precautions to secure the safety of, and avoid damage to, the cargo in question, by failing to move the containers out of harm's way. Accordingly, "[a] case spawned by the ill winds"^[3] and tidal surges of Hurricane Georges made landfall in this Court for a bifurcated^[4] bench trial on January 8, 2001, and continued through January 12, 2001. As the waters of this legal tide have now since receded, this Court enters its findings of fact and conclusions of law as follows.

I. FINDINGS OF FACT

A. Background

In June of 1998, SCA, Graphic Sundsvall AB ("SCA") contracted through its selling agent, Weyerhaeuser, to sell 2,130 reels of printing paper to be manufactured in Sweden and shipped to the United States, to consignee, World Color Press ("WCP"), to be delivered to its facility in Dyersburg, Tennessee ("Dyersburg").^[5] The terms of the sale were "DDP," which is an INCOTERM for "Delivered Duty Paid," and means that title to the paper and risk for its loss or damage transferred when the goods are put at the disposal of the buyer at the named place (seller bears all risks of the goods during the whole transport)--so that the risk would not transfer from SCA

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to WCP until the paper was actually delivered to the WCP warehouse in Dyersburg. See Plf's Tr. Ex. 83, 84, 85. The containerized cargo in question contained Swedish and German manufactured LWC offset magazine quality paper which was stored at the container yards at the State Docks when Hurricane Georges struck the Gulf Coast on September 28, 1998, causing the flooding which damaged the cargo carried by the M/V STAR FRASER^[6] and the M/V STAR GRINDANGER vessels.^[7]

B. Parties

Plaintiff, Skandia Insurance Co., Ltd., ("Skandia"), is the subrogee to the rights of the consignee of the cargo in question and insured the cargo shipped by its assured SCA, Graphic Sundsvall AB ("SCA"), from Europe to Mobile, aboard the STAR FRASER. Plaintiffs, Haindl GMBH & Co. K.G., Parenco B.V., and Interot Speditions, GMBH, are the owners, consignees and/or successors in title to the cargo described herein. Plaintiff, Perkins-Goodwin Co., Inc., ("Perkins"), was the owner, consignee and/or successor entitled to the cargo which was carried by the M/V STAR GRINDANGER from Germany and The Netherlands, for final delivery to Nashville, Tennessee, Corinth, Mississippi, and Metarie, Louisiana, via Mobile, Alabama, pursuant to one or more bills of lading issued by and on behalf of Star Shipping AS d/b/a AtlantiCargo. See Plf's Tr. Ex. 48, 49, 50.

Defendant, Star Shipping AS d/b/a AtlantiCargo ("Star"), was the ocean carrier of the cargo, under a through bill of lading. Defendant, Strachan Shipping Co., ("Strachan"), was engaged in the business of providing agency, terminal handling, and stevedoring services for Star, as Star's local agent in Mobile. SCA Graphic Sundsvall AB ("SCA") was the shipper of the cargo. SCA contracted through its selling agent, Weyerhaeuser Paper Co. ("Weyerhaeuser"), to sell 2,130 reels of printing paper to be manufactured in Sweden and shipped to the U.S., to WCP, to be delivered to its Dyersburg facility.

C. Combined Bills Of Lading & Harter Act Applicability

The controlling agreements between the shippers and carriers involved here, which govern the intermodal movement of the cargo, is the Combined Transport Bills of Lading drafted by Star. See Plf's Tr. Ex. 1, 2, 48, 49, 50. The Clause Paramount in the bills of lading, which were involved with both the STAR FRASER and STAR GRINDANGER cargo, reads in relevant part:

.... this bill of lading insofar as it relates to sea carriage by any vessel ... shall have effect subject to ... COGSA [which] shall apply to the carriage of goods by inland waterways and reference to

carriage by sea in such Rules or legislation shall be deemed to include reference to inland waterways if and to the extent that the provisions of the Harter Act ... would otherwise be compulsorily applicable to regulate the carrier's responsibility for the goods during

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any period prior to loading on or after discharge from the vessel the carrier's responsibility shall instead be determined by the provisions of 4(2) below, but if such provisions are found to be invalid such responsibility shall be subject to COGSA.

See Plf's Tr. Ex. 2.

This Clause Paramount, for purposes of the carriage at issue here, incorporates the COGSA rules to "sea carriage by any vessel" and to "the carriage of goods by inland waterways" and for other periods during the intermodal carriage, "[t]he carrier's responsibility shall instead be determined by the provisions of 4(2) below, but if such provisions are found to be invalid such responsibility shall be subject to COGSA." *Id.*

Paragraph 4(2), entitled "Responsibility, Combined Transport," also states that "[s]ave as otherwise provided in this bill of lading, the carrier shall be liable for loss of or damage to the goods occurring from the time that the goods are taken into charge until the time of delivery to the extent set out below." *Id.* Subparagraph (A)^[8] does not at first glance appear to have direct application to the claims at issue because there is no dispute as to where or when the flooding damaged the STAR FRASER and STAR GRINDANGER cargo. Subparagraph (B)(i), however, addresses where the loss or damage occurred shall be proved, and imposes Harter Act obligations on the carrier Star and its agent Strachan, because by its own language, the only national law of the United States which "would have applied if the merchant had made a separate and direct contract with the carrier" for terminal operation services at the State Docks would be the Harter Act. This is so because at the stage of the carriage when the losses involved in this action occurred, the cargo was in terminal storage at container yards at the State Docks and the provisions of COGSA would not have been compulsorily applicable.^[9] As such, if SCA had made a separate direct contract with Star or Strachan, for terminal operation services at the State Docks in connection with the subject cargo, COGSA would not have applied to any such contract. Accordingly, an essential prerequisite to the application of paragraph 4(2)(B)(i) fails; namely in that COGSA would not have applied to a direct terminal operation services contract between the shipper SCA and Star or Strachan.

Paragraph 4(2)(B)(ii) is ambiguous as to whether or not it has application to the terminal operation services phase of the carriage as by its own language, it qualifies its application to "transportation in the United States of America" and does not address any application to intermediate points of rest such as those here with the cargo's point of rest at the container yards at the State Docks before carriage on to final inland destinations, nor does it mention specific applicability to any other intermediate points of rest (rail yard or inland trucking terminal somewhere between Mobile and the final point of destination for delivery). To the extent this paragraph applies here, the Harter Act is the only U . S. statute that could have compulsory application given the language of the Combined Transport Bills of Lading at issue. Of course, analysis of this bill of lading language is made against the backdrop

of the "strong policy reasons motivating strict construction of the [bill of lading] clause against those who drafted it."^[10]

This Court's analysis does not stop with the conclusion that the Harter Act applies to the stage of carriage involved when the loss occurred in this case. Further review of the agreement under 4(2)(B)(iii) reveals that where neither (i) nor (ii) apply, "any liability of the Carrier shall be determined by 4(2)(A)...." Because this is the case, paragraph 4(2)(B)(iii) reroutes this Court to paragraph 4(2)(A), to determine liability, and provides in relevant part under paragraph 4(2)(A)(i), that "[t]he carrier shall be entitled to rely upon all exclusions of liability under the Rules or Legislation that would have applied under 2(A) above [clause paramount] had the loss or damage occurred at sea...."^[11] As such, this directs this Court back to the general liability provisions set forth in the Clause Paramount in assessing Plaintiffs' claims.

D. The Cargo

The STAR FRASER and STAR GRINDANGER cargo arrived at the Port of Mobile, respectively, in August and September of 1998. Containers from the Star's two vessels were removed by an independent contract stevedore (Stevedoring Services of America known as "SSA") and placed at a location dictated by Strachan's checker, Mike Bru ("Bru"), in an area of the State Docks referred to as the Strachan container yards ("container yards").^[12] The cargo was grouped at the container yards according to a discharge plan Bru prepared and delivered to SSA. The bills of lading for both the vessels had no exceptions to the condition of the containerized cargo or their contents noted therein so that they constituted "clean bills of lading." See Plf's Tr. Ex. 1, 48, 49, 50.

Strachan's James Jones ("Jones"), sent delivery notices to the consignee for the STAR FRASER cargo (71 containers) shortly before it arrived in the Port of Mobile. In a conversation with Dave Riley ("Riley"), an employee of consignee WCP, Jones was told that WCP was unable to take delivery of the cargo at that time because its warehouses were full. Jones contacted his supervisor in Houston, Texas, Intermodal Manager for Star, Mike Williams ("Williams"), and informed him of the situation. Williams directed Jones to request a 60 day extension of free time for these containers from the State Docks, beyond the standard 10 day free time afforded to containerized cargo under the State Docks Tariff.^[13] Jones then wrote a

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letter on August 21, 1998, requesting such. This request was approved by the State Docks Manager of Wharves and Warehouses, Mike Parker ("Parker"), except, that only 20 additional days of free time were granted. As a result, Strachan, on behalf of Star and pursuant to the instructions of Williams, obtained additional free time for the STAR FRASER cargo. However, the State Docks only afforded the cargo a total of 30 days free time so that free time for the STAR FRASER cargo expired on September 14, 1998.

Thus, the STAR FRASER cargo remained at the container yards at the State Docks for several weeks after being discharged: according to survey reports, 21 containers were located at the No. 2 container yard while 38 containers were located at the No. 5 container yard. See Plf's Tr. Ex. 20. The STAR GRINDANGER cargo were located as follows: 7 of the containers were located

at the No. 5 container yard; and, 3 containers had been removed from the State Docks and were located on chassis at the Choctaw truck terminal. Accordingly, on September 28, 1998, at the time Hurricane Georges struck, approximately 1,770 reels of STAR FRASER cargo, stowed in 59 ocean containers remained on the ground in the container yards at the State Docks when this area flooded, causing water damage to the cargo. See Plf's Tr. Ex. 110 (Joseph Dayyeh's photographs of the area taken on September 28, 1998, showing the severity of the flooding).

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II. CONCLUSIONS OF LAW: "ACT OF GOD" NEGLIGENCE

A. Background

Plaintiffs seek to recover for the damage to the cargo, from Star, the ocean carrier, and Star's General Agent and Terminal Operator, Strachan, under 5 separate theories. Generally, Plaintiffs claim that even if this hurricane was an "Act of God," Star or Strachan, or both, should have still moved the containers out of harm's way. Specifically, Plaintiffs, in Count One, allege a breach of contract action against Star for failure to deliver 1,770 reels of paper in the same good order and condition as when received by it for shipment. Count Two alleges negligence against both Star and Strachan, for their failure to protect the cargo and move it to a place of safety before the hurricane struck, claiming that both Defendants had more than adequate warning to enable them, or either of them, to do so. Count Three alleges breach of warranty of workmanlike performance against both Star and Strachan, for their failure to protect the cargo and move it to a place of safety before the hurricane struck, again claiming that both Defendants had more than adequate warning to enable them, or either of them, to do so. Count Four alleges a common law bailment theory of recovery against both Star and Strachan. Count Five alleges that the Plaintiffs are entitled to recover against the Defendants as a third-party beneficiary to their contract, whereby Star contracted with Strachan for Strachan to provide for the care, custody, safety, and control of the paper while the cargo remained at the Port of Mobile before their overland shipment to Dyersburg.

Defendants contend, however, that the Plaintiffs are not entitled to recover because the cargo damage resulted from an "Act of God" and could not have been prevented by reasonable care and foresight. Specifically, Star claims that it would not have been reasonable for it to have attempted to remove the containers which were at the State Docks at the time of the hurricane, and that even when viewing the case in a light most favorable for the Plaintiffs, it simply would not have been possible to have moved these and other containers out of harm's way in the hours before the surge of Hurricane Georges. Additionally, Star argues that the Plaintiffs cannot recover because at the time of the loss, constructive delivery of the containers to the receivers had occurred and thus Star had no responsibility to them.^[14] As such, Star asserts that if the Plaintiffs are entitled to recover, the recovery must be against Strachan alone.^[15]

Moreover, Strachan similarly contends that the damage to the cargo for which the Plaintiffs seek recovery was caused by an "Act of God" for which it is not responsible. Notably, Strachan argues that it has no liability to the Plaintiffs because all of their actions were undertaken merely as agents for Star or as sub-agents to ACS--so that Strachan had no authority to undertake any actions other than those for which it had contracted, which did not include the acts alleged by the

Plaintiffs to have been required in this event.^[16] Strachan

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also claims that constructive delivery of the cargo had occurred prior to the events giving rise to this litigation so that any alleged action or inaction was the responsibility of entities other than Strachan, and for whom Strachan is in no way responsible.

B. "Act Of God" Negligence^[17]

In response to the Plaintiffs' allegations of negligence, both Star and Strachan raise the shield of the "Act of God" defense to support their assertion that liability does not fall upon their shoulders. Plaintiffs, however, contend that the response of Star and Strachan to the flooding predictions for coastal Alabama and the State Docks was to do nothing: "the defendants' position in this case can best be summarized as a request for complete exoneration from liability by this Court on the basis of their 'Do Nothing Defense' which they masquerade as an 'Act of God' defense. Such a defense is wrecked on the rocks of the defendants' own negligence...." See Plf's Proposed Factual Findings ("PFF") at 26. As such, this Court must first address whether the "Act of God" defense is applicable in this case, and if so, whether the Defendants were negligent in light of that determination, as to their actions regarding the containerized cargo in question.

1. Standard Of Review

Defendants have pleaded the defense of "Act of God" as a *complete* bar to *any* liability, to rebut the Plaintiffs' allegations of negligence. In admiralty law, such overwhelming forces as those characteristic of Hurricane Georges are generally considered "heavy weather" and may be sufficient to successfully invoke the defense of "Act of God." The U.S. Supreme Court, in *The Majestic*, 166 U.S. 375, 17 S.Ct. 597, 41 L.Ed. 1039 (1897), defined "Act of God" as a "loss happening in spite of all human effort and sagacity." This defense has been widely defined as "[a]ny accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented;"^[18] and/or "a disturbance ... of such unanticipated force and severity as would fairly preclude charging ... [Defendants] with responsibility for damage occasion[ed] by the [Defendants'] failure to guard against it in the protection of property committed to its custody." See 1A C.J.S. Act of God at 757 (1985); and, *Compania De Vapores Inesco S.A. v. Missouri Pacific R.R. Co.*, 232 F.2d 657, 660 (5th Cir. 1956), *cert. den.*, 352 U.S. 880, 77 S.Ct. 102, 1 L.Ed.2d 80 (1956). However, the "Act of God" defense "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." See *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir. 1989) (citing to *Bradford v. Stanley*, 355 So.2d 328, 330 (Ala.1978)) (citing *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374 (1902)).

Notably, hurricanes, such as Hurricane Georges, are considered in law
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to be an "Act of God."^[19] Even though storms that are usual for waters and the time of year are not "Acts of God,"^[20] a hurricane that causes unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge, is a classic case of an "Act of God."^[21] However, forecasting the tracks, speeds and tidal surges of a hurricane is one of the

most challenging and difficult tasks encountered by meteorologists, and despite aircraft, land, and shipboard reconnaissance, weather satellites, and other data sources, exact hurricane paths and associated flooding are rarely predicted with precision. See WILLIAM J. KOTSCH, *WEATHER FOR THE MARINER* 151 (2d ed.1977). Instead, hurricane tracks exhibit "humps, loops, staggering motions, abrupt course and/or speed changes, and so forth[,]" which in turn, alter flood predictions. *Id.* As a result, determining liability for losses resulting from "Acts of God" are *highly fact-specific* and *the court's ultimate conclusions should turn on whether the weather conditions were foreseeable* as "U.S. courts do not find foreseeable risks to be perils of the sea." See *Thyssen, Inc. v. S.S. Eurounity*, 21 F.3d 533, 539 (2d Cir. 1994).

Moreover, in applying "Act of God" to the respective rights and responsibilities of shippers, carriers, and the like, vessel owners are traditionally exempted by statutes, from liability for losses or damage to cargo from an "Act of God." See *e.g.*, 46 U.S.C.A. §§ 192 and 1304(2)(d). A defendant may be found negligent but still be exonerated from liability of the "Act of God" if it would have produced the same damage, regardless of that negligence, because the defendant's negligence was not the proximate cause. See *Warrior*, 864 F.2d at 1553 (citing to *Glisson v. City of Mobile*, 505 So.2d 315, 319 (Ala.1987)). Accordingly, regardless of the type of "heavy weather," "it is certain that human negligence as a contributing cause defeats any claim to the 'Act of God' immunity[,]" because an "Act of God" is not only one which causes damage, but one as to which reasonable precautions and/or the exercise of reasonable care by the defendant, could not have prevented the damage from the natural event. See GILMORE AND BLACK, *THE LAW OF ADMIRALTY* at 163-64.^[22] Indeed, an "Act of God" will insulate a defendant from liability *only* if there is *no* contributing human negligence^[23] and the defendant has the burden of establishing that weather conditions encountered

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constituted an uncontrollable and unforeseeable cause by "Act of God." See *Freedman & Slater, Inc. v. M.V. Tofevo*, 222 F.Supp. 964 (S.D.N.Y.1963).

Thus, an essential element of this defense is that "the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier or bailee [defendant]"^[24] so that the Defendants are not relieved from their liability by the damage/loss of the cargo through "Act of God" until it is determined whether the damage arose through want of proper foresight and prudence.^[25] To relieve a defendant from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the damage and that it was unavoidable.^[26] Indeed, the federal courts' "weathered" experience with this defense has produced one crucial principle: if a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane but fails to do so, then the defendant is responsible for the loss; however, *if there were insufficient warnings or insufficient means available to the defendant to protect the cargo from the "Act of God," then they are not responsible for the loss.*^[27] In sum, the burden of proving

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an "Act of God" defense rests upon the party asserting it--here, the Defendants--in that they must not only assert "Act of God," but they must also establish lack of fault in order to be exonerated

from liability.^[28]

2. Application

Bearing the foregoing in mind, this Court now turns to the evidence to determine whether, in fact, the Defendants have met their requisite burden.^[29] As noted herein, it is not enough for the Defendants to merely cite "Act of God" to sidestep liability and prove that the damage was caused by hurricane flooding; instead, the Defendants must prove that they acted with due diligence, to prevent damage to the cargo at issue.^[30] Key to this determination and guiding this Court's negligence assessment is that *where notices of a storm/flooding threat* to a defendant were *inadequate*, the consequences of the calamity are accordingly unforeseen and unavoidable.^[31]

Liability in admiralty is based on fault--the mere fact of damage having occurred has no legal consequence,^[32] as: "[a]n accident is said to be 'inevitable' not merely when caused by vis major or the act of God but also when all precautions reasonably to be required have been taken, and the accident has occurred notwithstanding. That there is no liability in such a case seems only one aspect of the proposition

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that liability must be based on fault." See GRANT GILMORE & CHARLES BLACK, JR., *THE LAW OF ADMIRALTY* 486-87 (2d ed.1975). Here, however, even though Hurricane Georges was an "Act of God," evidence in the record and before this Court reveals that Hurricane Georges was not of such "catastrophic" proportions to overcome all reasonable preparations on the part of the Defendants and to preclude any negligence assessment. As such, even in the face of a hurricane befitting the "Act of God" category, the Defendants still bear the burden of establishing their lack of fault, to be properly exonerated from liability for the cargo damage.

Indeed, to avoid liability, the Defendants must show that the force of the storm was truly irresistible and unforeseeable and that all precautions had been taken. In *Mamiye*, in which the court stated that the "Act of God" defense turned on whether the loss could have been prevented by "reasonable care and foresight[.]" 241 F.Supp. at 108, the court found that the damage was due to "Act of God" because "could not have been 'guarded against by the ordinary exertions of human skill and prudence.'" *Id.* at 116. Both reasonable foresight and care were emphasized by the court in *Mamiye* as aspects of the "Act of God" defense, so that given the timing and vague content of the advisories upon which Plaintiffs rely, there was never a likelihood of such type of foreseeable harm which would *have justified* movement of these containers. In addressing the negligence claim against the Defendants, this Court finds particularly persuasive the inadequacy of notice of flooding to the area where the cargo was stored--not only in the lack of prior notice of any flooding occurring in the yards in question, but also regarding the numerous weather reports tracking the hurricane's path and predicting, as best as possible, potentially high water levels for areas other than the State Docks. As noted by Defendants, the changing nature of the notices issued by various weather reporting services, governmental and private, in the days leading to the landfall of Hurricane Georges, created a feeling of "wondering just whom God would favor with the ravages of this storm?" (Doc. 91 at 7-8).

Here, Plaintiffs argue that the "lack of adequate notice" rationale is distinguishable from the facts of this case due to an alleged "ample warning of flooding" the Defendants had before

Hurricane Georges made landfall, notice of previous flooding at the State Docks during Hurricane Frederick in 1979, and the reasonable actions available to them to avoid or mitigate the damages. In support thereof, Plaintiffs claim that the Defendants were warned by the National Weather Service ("NWS"), Coastal Weather Research Center ("CWRC"), State Docks, the U.S. Coast Guard Captain of the Port, and other local printed and visual news sources, and that these warnings were received not later than mid-day Friday, September 25, 1998, some 3 days before the flooding occurred. Moreover, Plaintiffs argue that there is evidence in the record that the container yards had flooded before and the Defendants were given 2 1/2-3 days notice of the flooding expected, so that the Defendants had time to take reasonable precautions to protect the cargo in their care (including moving containers to the 11 foot pier level at Pier 2 and Pier 5; moving containers to covered warehouse storage at the State Docks; double stacking the containers; and/or, moving the containers outside warehouse doors at the State Docks). For these reasons, Plaintiffs contend that the Defendants breached their duty of reasonable care to the cargo by doing nothing to protect it from the avoidable consequences of the flooding associated with Hurricane Georges. As such, this

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Court finds a need to answer two questions: 1) whether the Defendants had any notice any prior flooding in the area where the containers were stored; and, 2) whether the Defendants could have been made aware of a danger of flooding in enough time to trigger a duty to protect the containerized cargo?

At the outset, regarding notice of prior flooding, this Court turns to the actual testimony of the parties involved in this case which is central to this Court's determination of liability and "Act of God" negligence. The trial record before this Court reveals that the Defendants were unaware of any flooding at the yards due to hurricane tidal surges and/or high water levels. Indeed, this Court notes that the Plaintiffs admit and concede "*not a single Star or Strachan testified that they knew anything about the prior hurricane flooding which had occurred at the container yard at the Alabama State Docks during Hurricanes Frederick or Camille.*" See PFF at 18. Based on this, the Plaintiffs summarily and to this Court's bewilderment, state in conclusory fashion "[e]ven so, Star and Strachan both knew of the tendency of the container yard to flood." *Id.* However, in actuality, the testimony upon which the Plaintiffs rely has been mischaracterized as noted below. *Id.* at 42-45.

First, of particular interest, the only testimony which even hints at any flooding in the container yards is that of Bru, the Strachan checker, who testified that *only the lower end* of the container yard flooded when there was a big "downpour." See Deposition of Bru at 46-47 and PFF at 17. However, here, the cargo in question was stored and located at various locations of the container yards--not merely, or in their entirety, at the specific lower end of the yard. Also, Bru specifically stated that prior rain flooding occurred only at the lower end "where we store our empties;" this is distinguishable because his statement only applies to one specific and small area of the container yards and not their entirety. More importantly, Bru testified that he believed that "*the yard is a safe place to store containers*" and that in the past, *he was always told to place containers in the yard and that he thought it provided reasonable protection.*

Second, Mike Parker, State Docks Operation Manager, testified at trial that although they regularly assume flooding with hurricanes, *they do not worry about the container yards because the container yards were long considered to be safe, because there had not been any prior water damage or flooding in that area.* Third, Mike Lee, Strachan's top lift operator and expert, testified that he was not aware of any flooding or flood damage occurring at the container yards and that he believed the container yard was a safe place to store cargo. Fourth, Mickey Matthews ("Matthews"), the local Star Port Captain, testified that he went home on Friday, entirely unaware of any flooding threat posed to the cargo by the approaching hurricane.

Additionally, Plaintiffs reference and rely upon the National Geological Survey Map of 1980 of the Mobile Area, prepared after Hurricane Frederick hit in 1979, which allegedly shows flooding at the container yards when the tidal surge was recorded at 8.95 feet above the mean low watermark.^[33] However, again, trial testimony reveals that the Defendants were completely unaware of the existence of this Survey Map and that they were not aware

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of any hurricane flooding in this area. *There is nothing in the record demonstrating to the contrary, and there is no evidence suggesting that the Defendants either had, or would have had, any knowledge of such a map or such an occurrence.* This Court finds particularly persuasive and significant the fact that this Survey Map has been neutralized by the trial testimony of the Plaintiff's very own only so-called hurricane preparation expert, Mr. Gordon Solatta ("Solatta"), who was working at the container yards at the State Docks during Hurricane Frederick and up to the present time. *It is extremely notable that Mr. Solatta did not testify to any flooding in the yards; to the contrary, Solatta testified that even though he moved certain containers during Hurricane Frederick from those areas, he had no prior notice whatsoever of any flooding ever occurring at the container yards. Thus, not a single witness for the Plaintiffs testified to having ever seen flooding from hurricane storm surges in that area.*

Moreover, Captain Carey, who was in charge of monitoring weather conditions for the State Docks, *concluded*, based on all available information including the weather reports upon which Plaintiffs rely, *that the storm was bound for a point far distant from Mobile--perhaps New Orleans.* See Deposition of Carey at 32-33. Carey, a seasoned captain, in forming his conclusion as an experienced mariner, used all available sources to obtain information--including that of the CWRC (and Aaron Williams).

Further, the Plaintiffs cite numerous portions of trial and deposition testimony of Ted Mattingly, Strachan's Stevedoring and Terminal Manager, and Doug Stallings, Strachan's Docks Superintendent, to make various claims.^[34] First, the Plaintiffs use this testimony to allege that because Strachan began to single stack some containers and move some of its own gear and equipment at the State Docks they were aware of flooding in the container yards. See PFF 42-48. However, this action shows not that Strachan thought the container yards were unsafe, but instead and much more distinctly, that Strachan believed there was no need to move the containers in question and thus left them alone where they were already resting, and only moved other property, because it believed the containers were already safely stored.

Second, Plaintiffs claim that Stallings' testimony, that he knew about the 12:11 p.m. NWS

Mobile report on September 25, 1998, creates instant liability on the Defendants. However, this testimony was refuted in that every Star and Strachan witness, except Stallings, testified at trial that they did not know about the 12:11 p.m. report, nor did they know about the 5:07 report which contained virtually identical hurricane information for Mobile. Even if Stallings did know about this specific report, it does not necessarily translate that he knew by early Friday afternoon that extensive flooding would occur at the container yards. Indeed, Plaintiffs' allegation that Stalling "testified at trial that he knew ... that extensive flooding would occur at the ... Yard" is not supported by the record. See PFF at 26. In fact, and to the contrary, *Stallings testified at trial that there had been no prior flooding or flood damage in the container yards* (including during Hurricane Frederick) and that *he believed the yards were a safe place to store cargo and that indeed, he has never considered evacuating cargo from the container yards because there is "no precedent" giving any reason to do so.*

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As such, Plaintiffs' characterization of Stallings is yet again, distinguishable.

Third, Plaintiffs also cite to Mattingly's testimony to claim that he knew a few days before the storm hit that it was coming in this direction and that there would be high tides and flooding in Mobile as a result. See Deposition of Mattingly at 124, 139-40. However, Mattingly's testimony, in fact, reveals only and quite narrowly, that he knew *just* that--that tidal surges of 8 feet above normal were predicted for Mobile County--not anything about specific flooding at the State Docks or that tidal surges would affect the container yards. Mattingly's testimony does not support the assumption that he translated such knowledge into knowing a "flooding threat" existed to the container yards as Plaintiffs so desire. In fact, *Mattingly testified at trial that in all the time he has worked at the State Docks, he had not known of any prior flooding ever occurring at the container yards.* As such, this Court again, finds that Mattingly, in actuality, did not know of a "significant flooding threat to the cargoes." See PFF at 32.

Finally, this Court notes that the Plaintiffs claim that the storm surge predictions on Friday, September 25, 1998, were "very similar to the flooding ... experienced in September 1979 with Hurricane Frederick."^[35] However, as previously stated, in contrast to what Plaintiffs claim, there is direct testimony on record that the container yards did not flood in Frederick, so that if the tidal surge predictions for Hurricane Georges were so very "similar," yet again, there would be no notice of potential flooding to those same yards.

As such, in balancing the respective testimony, a clear picture presents itself to this Court: the Defendants did not have any actual knowledge and/or notice of any flooding from hurricanes ever occurring in the area, in order to take the precautions Plaintiffs assert. The information and "notice" evidence upon which Plaintiffs rely were not even known to the Defendants. To the contrary, trial testimony reveals distinctly that the Defendants had no knowledge whatsoever of any prior flooding in the container yards in question. Thus, in light of the fact that there was no history of flooding at the container yards, Plaintiffs' sweeping assertions that the yards had flooded before, that the Defendants knew this, *and* that they were aware of the level and location of flooding expected with Hurricane Georges, are not persuasive.

With the foregoing testimonial results in mind, this Court now turns to the second question of

whether the Defendants could have been made aware of a flooding danger, upon review of the sequence of reports issued by various weather monitoring entities to determine whether any such duty could have arisen.^[36] The National Weather Service ("NWS") in Miami, Florida, began issuing warnings that Hurricane Georges posed a significant threat to marine interests in the Gulf of Mexico on Tuesday, September 22, 1998. At that time, some 9 bulletins were issued. However, *Mobile was not in even one of these or listed in the warning area*; the storm surge flooding of 4-7 feet were predicted *only* for the warning areas. See Plf's Tr. Ex. 111.

Subsequently, Hurricane Advisory 38 noted that the hurricane warning area was confined to south Florida "from Deerfield beach southward on the east coast and from Bonita beach southward on the west coast" and that "storm surge flooding of 3 to 5 feet above normal tide levels" are to

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be expected in the warning area in south Florida. See Plf's Tr. Ex. 111. As to Hurricane Advisory No. 38, because it only advised that "interests" should "monitor," that [n]o one is advised to do anything other than watch and wait[,] this is distinct from other advisories relating to the Florida Keys which directed that precaution to protect life and property should be rushed to completion in the hurricane warning area. See Ad. No. 38. Here, this Court finds that the operative word is *monitor*.

On Thursday, September 24, 1998, at 7:00 a.m., the U.S. Coast Guard's Mobile office issued a Condition IV Hurricane Warning for the Port of Mobile which meant that hurricane force winds were anticipated within 72 hours. See Plf's Tr. Ex. 64.

The NWS in Miami also placed interests on notice of flooding dangers posed by the hurricane in its Warning No. 38A, which provided in part:

All interests in the Gulf of Mexico from Louisiana eastward should monitor the progress of this potentially dangerous hurricane.... Do not focus on the precise location and track of the center. The hurricane's destructive winds and rain cover a wide swath.... Hurricane force winds extend outward up to 45 miles from the center and tropical storm force winds extend outward up to 175 miles. Storm surge flooding of four to seven feet above normal tide level ... accompanied by large and dangerous battering waves are expected *along the coast in the warning area*.

See Plf's Tr. Ex. 111.

An identical warning to 38 was repeated in Hurricane Advisory No. 39, at 10:00 a.m. *Id.* Similar hurricane advisories were issued by the NWS Miami office at 2:00 a.m., 4:00 a.m., 6:00 a.m., and 8:00 a.m., except that the later advisories noted the hurricane force winds extended "mainly to the east of the center." *Id.*

At 4:00 p.m., the Coastal Weather Research Center ("CWRC") at the University of South Alabama issued a Storm Check Report which forecasted that: Georges is expected to cross the Keys in the next 12-24 hours and move into the Eastern Gulf. Rapid intensification is expected with Georges following a track that will threaten the Central Gulf Coast from Pensacola, Florida to Pass Christian, Mississippi on Sunday. If the storm takes this path north-easterly gales would reach the *Alabama* -Mississippi coast around midnight Saturday night with hurricane conditions on Sunday.

See Plf's Tr. Ex. 61.

As such, on Thursday, September 24, 1998, the CWRC was predicting hurricane conditions *for the Alabama coast*, for the following Sunday.

Notably, Advisory 40 issued at 6:00 a.m., only stated that the *hurricane was "approaching the Florida Keys" but that it was then 85 miles "southeast of Key West."* See Adv. 40 (emphasis added). At 8:00 a.m., the NHC *merely* stated that "*all interests in the Gulf of Mexico from Louisiana eastward should monitor* the progress of this potentially dangerous hurricane." See Adv. 40B (emphasis added). Moreover, the NWS Miami office issued a hurricane watch at 10:00 a.m., for the "Gulf Coast from Morgan City, Louisiana to St. Marks, Florida. A hurricane watch means that hurricane conditions are possible in the watch area within 36 hours." See Plf's Tr. Ex. 111. This report also upgraded the size and intensity of the hurricane as maximum sustained winds increased to 105 mph and hurricane force winds extend outward up to 80 miles from the center--mainly to the east. *Id.*

On Friday, September 25, 1998, at 8:00 a.m., the U.S. Coast Guard's Mobile office upgraded its hurricane warning for the Port of Mobile to a Condition III warning

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which meant that hurricane force winds were anticipated within 48 hours. Also, *it was not until midmorning Friday that Mobile was even placed in the watch area* as Advisory No. 40B was issued at 11:00 a.m., stating that "a hurricane watch is issued for the Gulf Coast from Morgan city, Louisiana to St. Marks, Florida."^[37] See Plf's Tr. Ex. 111.

The NWS Miami office repeated this advisory report at 12:00 noon, 2:00 p.m., and 4:00 p.m., although the 4:00 p.m. warning stated that hurricane force winds extend outward up to 85 miles--mainly to the east. See Plf's Tr. Ex. 64. At the 12:11 p.m. report, the NWS Mobile office issued its *first* hurricane advisory for Hurricane Georges which read in part:

This statement recommends specific actions be taken in the following coastal counties of Southwest Alabama and Northwest Florida ... Mobile ... Baldwin ... Escambia ... Santa Rosa ... and Okaloosa.... If Hurricane Georges progresses along its forecast track toward the north central Gulf Coast ... *water levels along the Alabama and Northwest Florida coast will begin to increase Saturday and Saturday night before peaking Sunday morning. If Georges maintains its current strength ... water levels 10 feet or more above normal could inundate the immediate coastal areas by Sunday morning. People living along the coast should begin preparing for such a possibility. People living in flood prone areas should therefore be prepared for flash flooding.*

See Plf's Tr. Ex. 112.

Dr. Williams testified that this report from the NWS Mobile office was available shortly after its issuance over local NOAA weather radio, the Weather Channel, and other radio and television broadcast media outlets on September 25, 1998.

When the watch was issued for the area from Morgan City to St. Marks, the NWS Mobile office began issuing advisories which are revealing. The Mobile statement issued at 12:11 p.m. on Friday September 25, 1998, indicated the possibility, by Sunday morning, of water levels 10 feet or more along only "*immediate coastal areas*" and that "*people living along the coast should begin preparing for such a possibility*" and monitor local media for specific advise as to mandatory or

recommended evacuation actions. *This did not suggest movement of people from immediate coastal areas much less intimate problems with the State Docks.* This advisory gives meaning to Coastal Weather forecasts of possible flooding for 'coastal Alabama' and that NWS' concern (upon which CWRC based its 4 o'clock fax) was for people living at or near sea level along the coast who are frequently victims of such storms.

Interestingly, Plaintiffs drop their liability--negligence anchor mainly upon Williams' testimony and the CWRC "Stormcheck" bulletins. Specifically, the CWRC's Stormcheck bulletin faxed to its customers at 4:00 p.m. ("4 o'clock fax"), on September 25, 1998, Friday, the evening before Plaintiffs claim that the Defendants should have moved the containers. However, this fax contains a somewhat cryptic statement only that a storm surge of 9-10 feet over *coastal Alabama* is anticipated. See Plf's Tr. Ex. 61. *The 4 o'clock fax did not say what areas were encompassed by "coastal Alabama" or when the surge might be expected and that this fax did not contain other discussion of storm surges.* However, it appears that on the strength of this statement in this fax, and nothing more, the Plaintiffs claim that the Defendants should have undertaken to move

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over 100 containers from the container yards at the State Docks, beginning the very next morning, Saturday, September 26, 1998. Surprisingly and also in evidence before this Court, *this particular CWRC pronouncement is at odds with the National Hurricane Center's ("NHC")*^[38] own advisories in Miami. Moreover, NWS Mobile did not begin to issue advisories until noon on Friday September 25, 1998, when Mobile was first placed under hurricane watch.^[39] *Id.*

For Friday, September 25, 1998, there was still no call to action in Mobile and the Defendants acted accordingly. Notably, Mike Parker testified that Captain Carey^[40] was the person at the State Docks charged with the responsibility to monitor weather predictions and prognostications in advance of an approaching hurricane; *Captain Carey left on Friday believing and communicating to others that the hurricane was headed to a point far west of Mobile --New Orleans.*^[41] See Plf's Tr. Ex. 64. Every Star and/or Strachan witness, questioned at trial and in deposition, denied that they knew anything about this 12:11 p.m. NWS Mobile office report, with the exception of Stallings, Strachan's Dock Superintendent. However, Stallings testified at trial that although he knew about

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this report and he took no action based on this knowledge and that he did not pass this information on to his Star or Strachan supervisors. Additionally, every Star and Strachan witness questioned at trial and in deposition also denied that they knew anything about the 5:07 p.m. report from the NWS Mobile office which contained a virtually identical hurricane warning for the Mobile area. See Plf's Tr. Ex. 111. Indeed, such reports addressing directions to people in "flood prone areas" was not interpreted by the Defendants to be applicable to the container yards because they had never known these yards to flood so they were not encompassed as a "flood prone area."

Regarding the 4:00 warning issued on Friday, September 25, 1998, by CWRC, it issued its vague surge warning for "coastal Alabama." However, the Miami Advisory No. 42 issued at the same time does indeed mention possible storm surges of 4-7 feet, *but only for the warning area, not for Mobile.* At that time, however, *Mobile was simply a point on a 400 miles stretch of land under a hurricane watch, not a warning, so that the surge prediction did not apply to Mobile.* Thus,

even at the time of CWRC's 4 o'clock fax, there was an inconsistency, actually a significant discrepancy, between Coastal Weather's predictions and the NHC's advisories so that it would not have been commercially reasonable for the Defendants to begin preparations for container movement. Indeed, with Mobile under only a watch, not a warning, and with no prediction of flooding at the State Docks, the circumstances simply did not warrant it. Notably, *the possibility of a flooding actually diminished thereafter because the hurricane "wobbled" to the west* and the 11:10 p.m. NWS Mobile report stated it was 115 miles west northwest of Key West and that "the storm has slowed its forward movement and has wobbled and shifted more to the west." See Plf's Tr. Ex. 112. For dangers of high water, this bulletin simply cautioned "people living near the coasts" to monitor local media for advice concerning possible evacuation. *Id.*

At 10:00 p.m. the NWS Miami office upgraded its prediction of the size of the hurricane force wind field in Advisory No. 43 which stated in part that the hurricane force winds extend outward up to 115 miles from the center--mainly to the east. *Id.* Notably, at 11:10 p.m. on September 25, 1998, the NWS Mobile office *downgraded* its storm surge flooding for Mobile County to 8 feet above normal and warned only that those people living in flood prone areas should be prepared for flash flooding and predicted that some increase in intensity of the storm was still possible Saturday and Sunday. See Plf's Tr. Ex. 112. Additionally, at 5:00 a.m., that Saturday, the day Plaintiffs claim that the Defendants should have moved the containers to a "safer" place, the NWS Mobile office stated the height of the water "will be highly dependent upon the exact track that Georges takes[,]," and thus, *no one knew at that time what the hurricane's track or respective water levels would be.* See Plf's Tr. Ex. 111-112.

On Saturday, September 26, 1998, the prior NWS Miami office's increase in the predicted size of the hurricane force wind field, extending mainly to the east, was repeated in the 1:00 a.m., 4:00 a.m., and 7:00 a.m. advisories. See Plf's Tr. Ex. 111. As of Saturday night at 8:20 p.m. *the Mobile office could make no unequivocal prediction as to the storm surges* and repeated only that it depended on where the hurricane would make landfall: "... tides along the Alabama ... coasts will begin to increase during the day Sunday ... with the highest water levels expected to occur *along the Alabama coast.... The height of the water levels will be highly dependent on the exact track that Georges takes.*" See Plf's Tr. Ex. 112 (emphasis added).

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These warnings were repeated by the NWS Miami office in its 1:00 p.m., 4:00 p.m., 7:00 p.m., and, 10:00 p.m. September 26, 1998, hurricane advisories. *Id.* It was not until 10:00 a.m. that the NHC issued Advisory No. 45 for a hurricane warning that finally and for the first time included Mobile and extended from Morgan City, Louisiana to Panama City, Florida (over 340 miles). See Plf's Tr. Ex. 111. The NWS Miami office issued its first hurricane warning for the Gulf Coast at 10:00 a.m., and this Advisory No. 45 stated in part that "[a] hurricane warning is issued from Morgan City, Louisiana to Panama City, Florida. A hurricane warning means that hurricane conditions are expected in the warned area within 24 hours. Preparations to protect life and property should be rushed to completion." *Id.* At that same time, the NWS Miami office also upgraded the size of the hurricane force wind field stating that hurricane force winds extend outward up to 125 miles northeast of the center and tropical storm force winds extend outward up

to 175 miles--mainly to the east. *Id.* Moreover, Advisory No. 45 provided an upgrade in anticipated storm surge flooding in the warned area as it provided in part that "[s]torm surge flooding of 8-12 feet ... locally to 15 feet in the bays ... above normal tide levels is possible in the warned area and will be accompanied by large and dangerous battering waves. Flooding rains are likely in association with Georges and will come [sic] particularly severe if Georges [sic] forward motion decreases near landfall as is now forecast." *Id.* Further, in its 10:00 p.m. Advisory No. 47, the NWS Miami office increased the wind speed to 110 mph but *downgraded* the hurricane force wind field to 115 miles from the center--mainly to the east. *Id.*

Also, on Saturday, Captain Carey observed "on the ground" and stated that when he left his office on Saturday, it was his understanding, based on all his maritime experience, that *Hurricane Georges was headed for a point far west of Mobile* --perhaps New Orleans. This opinion is consistent with the Defendants' weather expert David Barnes ("Barnes") who stated that from 4 a.m. Saturday through 10:00 a.m. Sunday, the center of Georges was *projected to move over New Orleans* some 120 miles west-southwest of Mobile.

On Sunday, September 27, 1998, the NWS Miami office Advisory No. 47 was repeated at 1:00 a.m., 4:00 a.m., and at 7:00 a.m. See Plf's Tr. Ex. 111. In the NWS Miami office Advisory No. 49, it stated that the dangerous hurricane is closing on the Central Gulf Coast and that preparations to protect life and property should be rushed to completion. *Id.* This warning was repeated at 12:00 noon, 4:00 p.m., 6:00 p.m, 8:00 p.m, and 10:00 p.m. *Id.* Indeed, Miami was estimating the probability of landfall in Mobile at only 20-29% on Saturday, and even as late as Sunday, September 27, at 10:00 a.m.--so that at that time there was a 71-80% chance that the hurricane *would not hit Mobile*, presumably not subjecting this Port to dangerously high water. Even 2 hours after the warning for Mobile was issued, the NWS Mobile office was still *emphasizing that any potential storm surge and the height of water levels was highly dependent on the hurricane's course/track*, noting only that "levels around 10 ft. or more above sea level are possible near the point where Georges' center makes landfall." *Id.* *This meant storm surges were simply possible, yet it was not known or foreseeable, even by the NWS, where these surges might actually occur.*

The eye-wall of Hurricane Georges made landfall in the Biloxi/Ocean Springs, Mississippi, area, in the early morning hours of Monday, September 28, 1998.

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Not a single Star or Strachan witness, with the exception of Stallings, in either deposition testimony or at trial, stated that they were aware of the weather predictions issued by either NWS Miami or NWS Mobile, about the anticipated flooding at the State Docks from the hurricane. Both Defendants testified through their witnesses that they had no knowledge on Thursday, Friday, or Saturday, that Hurricane Georges posed a significant flooding threat to Mobile and/or the State Docks. Although both Defendants have offices and employees in Mobile, in light of the varying path of the hurricane and continually changing content of the weather reports and predictions, even if the Defendants had been aware of these reports in total, they would not have had adequate notice of a flooding threat which the hurricane posed to the Port of Mobile due to its unpredictable nature, and because the container yards had not ever flooded at the State Docks

during any hurricane. Thus, the Defendants did not know of this flooding threat before it actually happened and believed the container yards to be a safe and secure location to store the cargo to avoid any harm or damage.

As this Court has answered the two questions set forth in this negligence determination, a simple conclusion follows. Defendants cannot be held liable because what was known and/or predicted of this hurricane simply did not warrant a decision to move the containers from the State Docks. Given the timing and content of the predictions and the logistical realities involved, the damage which was sustained simply could not have been prevented by reasonable foresight and care. The Defendants were not negligent in their protection of and/or handling of the cargo by failing to move the cargo because they did not have sufficient notice of the specific weather conditions which could be expected in this particular area in Mobile. Indeed, no reasonable person in the Defendants' position, just prior to the hurricane's landfall, would have undertaken the actions suggested by the Plaintiffs because there was simply not sufficient notice of flooding and thus no way for the Defendants to know that a storm surge of such severity would occur at the State Docks and inundate the container yards. Defendants had no notice of any need to take extraordinary action to guard against/prevent/mitigate the danger posed by the hurricane because there was insufficient warning of any flooding in these specific container yards, and as such, the Defendants acted with due diligence to protect the cargo because they had never encountered any flooding damage in those areas before. See *Mamiye*, 241 F.Supp. 99.

Thus, in light of the evidence before this Court, the Defendants acted reasonably and with due diligence, in storing the containerized cargo in a location where they had never known it to flood and/or receive hurricane damage in the past. Defendants did not take any extraordinary precautions to move or otherwise protect the containers from the unforeseeable flooding which occurred because they had no notice or knowledge that such flooding would take place and reasonably believed that the cargo in question was, in fact, already and at that time, safe and secure at their discharged location in the yards.

III. CONCLUSION

Plaintiffs are not entitled to recovery because the damage was caused by Hurricane Georges, an "Act of God," and not due to any negligence on the part of the Defendants. After a review of the record, it is evident that the Defendants could not have prevented the loss caused by the hurricane with the application of reasonable foresight, because the timing and substance of weather advisories in addition to the fact that there is no evidence in the record that the Defendants had notice of

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any prior flooding in the container yards, make clear that the Plaintiffs cannot recover. Accordingly, the Plaintiffs' negligence claim sinks under its own weight as the evidence shows that Defendants have not only carried their burden of proof, but have established that reasonable care would not have foreseen and/or prevented the water damage to the cargo.

As in *Mamiye*, in appraising the Defendants' conduct, "it is necessary to resist the strong human temptation to review action by looking backward 'with the wisdom born of the event[,]' " as: [l]ooking back at the mishap with the wisdom born of the event, we can see that the ...

[Defendants] would have done better if ... [they] had [been] given [adequate and sufficient] warning of the change of pose. Extraordinary prevision might have whispered to ... [them] at the moment that the warning would be helpful. What the law exacted of ... [them], however, was only the ordinary prevision to be looked for in a busy world.

See *Mamiye*, 360 F.2d at 780 (citing to *Greene v. Sibley, Lindsay & Curr Co.*, 257 N.Y. 190, 192, 177 N.E. 416, 417 (1931)).

Indeed, "hurricanes are erratic phenomena of nature; no two are alike or follow the same track; they cross, recross and recurve without seeming to obey any physical law; it is difficult to predict the course of a hurricane, the first part of September is the climax of the hurricane season. All these things are true." See *Mamiye*, 241 F.Supp. 99, 118 (S.D.N.Y.1965).

Thus, because of the unpredictable nature of Hurricane Georges and the inability of even weather forecasting to "tame" that inherent nature, coupled with the fact that the Defendants had no prior notice of any flooding in the container yards in question or that the cargo would be in any danger whatsoever, reveals that the Defendants took all reasonable precautions, under the circumstances, to care for the cargo. Indeed, instead of eyes locked on hindsight, this Court must stand with eyes directed towards what the Defendants knew at the time, to understand that the flooding which subsequently occurred and the hurricane's path was not sufficiently appreciable or foreseeable, to call for extraordinary precautions entailing substantial expenses.

In light of the foregoing and after careful consideration of the record and complex evidence presented at this non-jury trial, it is hereby ORDERED and this Court finds in favor of the Defendants and against the Plaintiffs.^[42]

Notes:

[1] Consolidation of CV 99-0880 and CV 99-0690. This Court has jurisdiction over this matter because: the case arises in admiralty and maritime jurisdiction under RULE 9(h) of the FEDERAL RULES OF CIVIL PROCEDURE; 28 U.S.C. § 1333; the existence of federal questions arising under COGSA, 46 U.S.C.App. § 1300 *et seq.*, and the Harter Act, 46 U.S.C.App. § 190-195 (1988); and, due to diversity of citizenship pursuant to 28 U.S.C. § 1332 inasmuch as the Plaintiffs and Defendants are citizens of a foreign country and states of the United States, and the amount in controversy exceeds \$75,000.00.

[2] The parties do not dispute the "Act of God" status of Hurricane Georges.

[3] See *Black v. Fidelity Guaranty Ins. Underwriters, Inc.*, 582 F.2d 984, 986 (5th Cir. 1978).

[4] This trial was bifurcated: issues regarding liability were tried first and are the only subject of this Order. This Order does not address any issue as to damages and/or indemnification.

[5] Each reel of paper was loaded into 71 ocean shipping containers for through shipment from Sweden to consignee, WCP. See Plf's Tr. Ex. 5.

[6] This paper was to be delivered to WCP in Dyersburg. On July 25, 1998, Star issued its Bill of Lading which was on a Combined Transport Bill of Lading Form. See Plf's Tr. Ex. 1. The STAR FRASER arrived in Mobile on August 14, 1998. The containers were discharged and placed into container yards at the State Docks, where 59 of them remained some 7 weeks later, awaiting delivery instructions from the receiver WCP, when Hurricane Georges struck the region.

[7] Perkins shipped containers containing paper products to Mobile aboard the STAR GRINDANGER which were discharged in Mobile on or about September 19, 1998, and were also placed into the container yards at the State Docks where some of the paper was damaged by flood waters associated with Hurricane Georges' landfall.

[8] Addresses where the loss or damage occurred cannot be proved.

[9] COGSA is limited in application to "the period from the time when the goods are loaded on to the time when they are discharged from the ship." See 46 U.S.C.App. § 1301(e). So, COGSA compulsorily applies by force of law while the goods are within the reach of the ship's tackle or while aboard the ship, after loading and before discharge, or as referenced, "tackle to tackle."

[10] See *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F.Supp. 1065, 1075 and 1078-79 (S.D.Ga.1995) (finding that COGSA covers a carrier's legal responsibilities only through discharge, and the Harter Act, therefore, "fills a potential gap between discharge and inland transit in those situations where goods, though on the dock, are still within the control and responsibility of the sea carrier.").

[11] Of significance in paragraph 4(2)(A)'s application is that paragraph 4(2)(A)(iii) provides other limitations which state that "... where the Hague Rules or any Legislation apply such Rules Visby (*i.e.*, COGSA) is not compulsorily applicable" and sets forth damage limitations.

[12] Prior to September 27, 1998, 12 of the containers had been released by Strachan into the custody of overland truck lines and rail carriers and transported from the yard to Dyersburg.

[13] Although the arrival notices contain disclaimer of liability language, the arrival notices do not constitute a contract between the parties, as the shipper SCA was not a signator of the document and neither was any other party. Indeed, the document was not even sent to SCA according to Jones' trial testimony. Additionally, § 2 of the Harter Act, 46 U.S.C.App. § 190 *et seq.*, provides that a carrier may not insert any contractual provisions under which the carrier is "relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, storage, custody, care or proper delivery of [its cargo]." The exculpatory language in the arrival notices ignores and violates the express language of the Harter Act and as such, the arrival notice language cannot defeat Plaintiffs' claims.

Moreover, COGSA only covers the period from the time the goods are loaded until they are discharged from the vessel, while the Harter Act covers the time from when the carrier receives or takes custody of the argo until the time the cargo is delivered. Unless the parties stipulated for the application of COGSA, the Harter Act will control prior to the time the goods are loaded and between the time they are discharged and the time they are delivered. Because the Harter Act does not place affirmative duties on the carrier, the carrier's liability will be as that of an insurer as at common law, and it can avoid liability only by bringing the loss within an exception under the Harter Act or a permissible exception in its bill of lading. See *e.g.*, *Morris v. Lamport & Holt, Ltd.*, 54 F.2d 925 (S.D.N.Y.1931), *aff'd.*, 57 F.2d 1081 (2d Cir. 1932). The common carrier's liability generally commences at the time the goods are received and in order for the common carrier's duties to attach before loading, the goods must be delivered into the carrier's custody and be accepted by someone authorized to accept them on behalf of the carrier. See *Luckenbach S.S. Co. v. American Mills Co.*, 24 F.2d 704 (5th Cir. 1928); and, *The Olga S*, 10 F.2d 801

(E.D.La.1925), *aff'd.*, 25 F.2d 229 (5th Cir. 1928). Under both Harter and COGSA, the carrier's liability as a carrier remains in effect until delivery and general maritime law requires a carrier unload cargo onto a fit and customary wharf, segregate the cargo by bill of lading and count, place the cargo on the pier so it is accessible to the consignee, and afford the consignee a reasonable opportunity to take delivery. See *Caterpillar Overseas S.A. v. S.S. Expedito*, 318 F.2d 720, 723 (2d Cir. 1963), *cert. den.*, 375 U.S. 942, 84 S.Ct. 347, 11 L.Ed.2d 272 (1963); *Philip Morris v. American Shipping Co.*, 748 F.2d 563, 567 (11th Cir. 1984), *reh'g den.*, 753 F.2d 1087 (1985); and, *Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1252, 1255 (5th Cir. 1983). Generally, the common law requirements of proper delivery are modified by the custom, regulations or law of the port of destination. See e.g., *All Commodities Supplies Co. Ltd. v. M/V Acritas*, 702 F.2d 1260 (5th Cir. 1983). After the carrier has made "constructive" delivery of the goods, the carrier's responsibility is that of an ordinary bailee, and his duty is to exercise ordinary care: the carrier has a duty to store the goods safely and it may not leave the goods where they may be damaged or stolen. See *The Italia*, 187 F. 113 (2d Cir. 1911); *Standard Brands, Inc. v. Nippon Yusen Kaisha*, 42 F.Supp. 43 (D.Mass.1941); and, *The Eddy*, (5 Wall.) 481, 72 U.S. 481, 489, 18 L.Ed. 486 (1866).

[14] Star claims this is especially true of the STAR FRASER containers because the receivers had unreasonably delayed for some 7 weeks in calling for their delivery--unduly prolonging the time Star arguable had responsibility for them so that at the time the hurricane made landfall, Strachan was still waiting for the receiver's to accept the cargo. (Doc. 91 at 6).

[15] Star argues that because by virtue of its contracts with Star, Strachan was the party on whom all concerned relief for care and safety of their containers fell--Strachan was a bailee for the benefit of the recovery so that recovery, if any, should be against Strachan; however, if Plaintiffs prevail, Star contends it is entitled to full indemnity from Strachan.

[16] Strachan contends it acted as an agent at all material times for Star but only at the instruction of either Star or ACS, and neither Star nor ACS gave Strachan instructions to conduct extraordinary actions and incur extraordinary expenses which the Plaintiffs claim were required in this situation.

[17] Assuming, *arguendo*, that the Defendants did have care, custody, and control of the cargo. Defendants appear to have had the legal or actual possession as well as care, custody, and control of the STAR FRASER and STAR GRINDANGER cargo pursuant to the State Docks Tariff, Item 248 and under the framework of contracts between the parties. See Plf's Tr. Ex. 1, 2, 32, 35, 37, 48, 49, 50, 81, 82, 113.

[18] See 1 BOUVIER'S LAW DICTIONARY RAWLE'S THIRD REVISION 116 (8th Rawle ed.)

[19] See 1 Am.Jur.2d Act of God § 5 (1962). "Hurricanes are precisely the sort of natural disaster for which the Act of God exception from liability is afforded." See 2 BENEDICT ON ADMIRALTY § 152 (7th ed.1990).

[20] See *New Rotterdam Ins. Co. v. S.S. Loppersum*, 215 F.Supp. 563 (S.D.N.Y.1963).

[21] See *Petition of United States*, 300 F.Supp. 358 (E.D.La.1969), *aff'd.*, 425 F.2d 991 (5th Cir. 1970). *But see Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 925-27 (11th Cir. 2001), *appeal after remand* 248 F.3d 1183 (11th Cir. 2001) (holding that Hurricane Opal was not

an "Act of God" so that the hurricane did not absolve the defendant from fault).

[22] See *Moran Transportation Corp. v. New York Trap Rock Corp.*, 194 F.Supp. 599, 602 (S.D.N.Y.1961); and, *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 241 F.Supp. 99 (S.D.N.Y.1965), *affd.*, 360 F.2d 774 (2d Cir. 1966), *cert. den.*, 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed.2d 70 (1966).

[23] See *British West Indies Produce, Inc. v. S/S Atlantic Clipper*, 353 F.Supp. 548 (S.D.N.Y.1973) (holding defendant with sufficient information that a hurricane was rapidly approaching rendered carrier liable for loss of cargo notwithstanding that hurricane was "Act of God."). See also generally *Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co.*, 139 F.2d 288 (2d Cir. 1943), *cert. den.*, 321 U.S. 795, 64 S.Ct. 848, 88 L.Ed. 1084 (1944). However, in *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980), exemption allowed for cargo damage caused by *unforeseeable and unpredictable severe localized flash flooding* where the weather bureau had predicted only a small chance of rain that day and the port area received 13 inches of rain within a few hours.

[24] See *Mamiye*, 241 F.Supp. at 107. However, the "Act of God" defense may be sustained without this additional proof, if, the force of nature is of such "catastrophic" proportions sufficient to overcome all reasonable preparations. See *e.g.*, *Petition of United States*, 300 F.Supp. at 366, *aff'd on remand*, 425 F.2d at 995 (finding that the damage was caused by "unprecedented and catastrophic phenomenon of Hurricane Betsy, rather than negligence," noting *unforeseeable and unprecedented wind velocity, tidal rise, and up-river tidal surge as to be a classic case of "Act of God" to overcome all reasonable preparations.*). However, as weather forecasting improves and attains sophistication and greater accuracy, defenses of "Act of God" may be more difficult to establish. See *e.g.*, *Dion's Yacht Yard, Inc. v. Hyrdo-Dredge Corp.*, 1982 AMC 1657, 1661 (D.Ma.1981).

[25] See *The Vallescura*, 293 U.S. 296, 303-04, 55 S.Ct. 194, 79 L.Ed. 373 (1934) (finding that "... the law casts upon him [the defendant] the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.").

[26] See 7 F. Cas. 648, 649-50 (E.D.Tex.1873) (noting that any act of omission or carelessness contributing to the loss, takes away the defense). Indeed, "[a]n act of God must be caused exclusively and directly by natural causes" because when "the cause ... is found to be in part the result of the participation of man, whether it be from active intervention or neglect, the whole occurrence is thereby humanized and removed from ... acts of God." See *Shea-S & M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1249 (D.C.Cir. 1979). Additionally, where carrier's agents, "aware of ... weather and its ... effect on cargo ... took no steps to protect the cargo carrier could not avoid liability since it was carrier's act, or its failure to act ... it was not an act of God." See *British West Indies Produce*, 353 F.Supp. at 553 (emphasis added).

[27] See *Mamiye*, 241 F.Supp. 99, 108 (emphasizing the importance of reasonable care and foresight, noted that "[w]e find the rule in [flood cases] to be that a warehouseman is not responsible for loss resulting from an Act of God ... [unless] he is warned of the approaching calamity and fails to use ordinary care to protect the goods or remove them to a place of safety."). In applying *Mamiye* and showing how the present action is distinguishable from other "Act of God" cases, in *ABI KALIMAN v. Phoenix Insurance Co.*, 1956 AMC 2236 (S.D.N.Y.1956), the court held

a carrier liable for damages for cargo which was damaged by flooding at a dock in Hoboken, New York, because the storm and high tide were not an "Act of God," as *the pier that flooded had flooded before and there had been a sufficient warning* of the threatening storm and a *flooding threat*. Additionally, in *Grover-Ferguson Co., Inc. v. A/S Ivarans Rederi*, 171 F.Supp. 766 (E.D.Pa.1959), the court held, in connection with Philadelphia's Hurricane Connie, the defendant caused the cargo damage *because* although he *had been warned* of the *specific dangers*, he failed to take action after *receiving these warnings*.

[28] See e.g., *Compania de Navigacion Porto Ronco, S.A. v. S.S. American Oriole*, 474 F.Supp. 22 (E.D.La.1976), *aff'd*, 585 F.2d 1326 (5th Cir. 1978); and, *United States v. The Barge CBC 603*, 233 F.Supp. 85, 87-88 (E.D.La.1964).

[29] Defendants' burden to prove the "Act of God" defense is the same whether COGSA, the Harter Act, or common law applies. However, the COGSA "excepted cause" upon which the Defendants cite is § 1304(2)(d) for an "Act of God." To rebut the Plaintiffs' *prima facie* case (that the cargo was delivered to the carrier in good condition through a clean bill of lading which is established here), the burden shifts to the Defendants to come forward with evidence to explain the loss of cargo and to obtain complete exoneration from liability through some "exception" such as "Act of God," that the Defendants acted with due diligence to care for the cargo and prevent damage. See *United States v. Ultramar Shipping Co.*, 685 F.Supp. 887 (S.D.N.Y.1987), *aff'd*, 854 F.2d 1315 (2d Cir. 1988). If the carrier is unable to rebut the cargo interest's position, it will be liable for the entire damage cargo unless it can prove that a portion was not actually damaged or was damaged under this exception. As under the common law and the Harter Act, any doubt or question in regard to the cause of damage or loss to cargo will be resolved against the carrier. *Id.* at 242; and, *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238 (5th Cir.), *reh'g denied*, 739 F.2d 633 (1984), *cert. den.*, 469 U.S. 1189, 105 S.Ct. 959, 83 L.Ed.2d 965 (1985); and, *Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A. v. Mondial United Corp.*, 316 F.2d 163, 170 (5th Cir. 1963). If, however, the carrier is able to rebut the cargo interest's *prima facie* case by establishing that the loss or damage lies under "Act of God," one of the exceptions, the burden of proof returns to the cargo interest who must then show that the carrier's fault or negligence constituted a concurring cause of the loss. See *Blasser Bros., Inc. v. Northern Pan-Am. Line*, 628 F.2d 376, 382 (5th Cir. 1980).

[30] See e.g., *Ultramar*, 685 F.Supp. 887, *aff'd*, 854 F.2d 1315; *The Vallescura*, 293 U.S. 296, 55 S.Ct. 194, 79 L.Ed. 373; *Vana Trading Co. v. S.S. "Mette Skou"*, 556 F.2d 100 (2d Cir. 1977), *cert. den.*, 434 U.S. 892, 98 S.Ct. 267, 54 L.Ed.2d 177 (1977); and, *C. Itoh & Co. (America) Inc. v. M/V Hans Leonhardt*, 719 F.Supp. 479, 502 (E.D.La.1989).

[31] See e.g., *Mamiye*, 241 F.Supp. 99; and, *Joseph Resnick Co. v. Nippon Yusen Kaisha*, 1963 AMC 2002 (Civ. Ct City of N.Y.1963).

[32] See *The Java*, (14 Wall.) 189, 81 U.S. 189, 20 L.Ed. 834 (1871).

[33] See Plf's Tr. Ex. 65. Plaintiffs noted the trial testimony of meteorologist Dr. Bill Williams ("Dr.Williams"), who described the container yards as a "flood prone area." However, Williams' testimony was based on his interpretation of the Map which was again neutralized by Solatta's testimony.

[34] Both Mattingly and Stalling testified that Captain Carey shared his weather information with them--namely that the hurricane was headed for a place far away from Mobile.

[35] See PFF at 42 and 42 n. 11.

[36] All times referred to in this Order are central standard time.

[37] This declaration of a watch simply says that hurricane conditions are possible, not likely, within 36 hours over a 400 mile stretch of coast land.

[38] National Hurricane Center ("NHC") in Miami is an arm of the National Weather Service ("NWS") which itself is a division of the National Oceanic and Atmospheric Administration ("NOAA").

[39] Specifically, CWRC cited a storm surge over coastal Alabama, while the NHC on Friday and Saturday expressed possible dangers for people living along the coast and for immediate coastal areas--telling people that the height of water levels would be highly dependent on the exact track of the hurricane which was unknown and that it was wobbling to the west. See Plf's Tr. Ex. 111. The information NHC provided could not be ignored as the hurricane approached and indeed it would not have been "commercially reasonable" to expect Defendants such as Star, acting through its Houston division of Atlanticargo which did not know of the 4 o'clock fax, to have ordered movement of the containers under these circumstances.

However, it is not enough even that a warning of a flood or flooding had been made. For the Plaintiffs to prevail on the strength of CWRC's 4 o'clock fax, they must prove Star and Star's Atlanticargo division in Houston, should have been a Coastal Weather customer and that inherent in this argument is a corollary argument that an organization like Star is not entitled to rely on the NHC advisories but instead must subscribe to a private source and if there is more than one then the most reliable. Plaintiffs have failed to meet that burden to show that one weather service provider should have been used over another and that failure to do so demonstrated a lapse in Defendants' duty or standard of care. Plaintiffs' argument appears to hang on this Delphic pronouncement from CWRC, with no regard to the other/additional advisories and reports, such as those from the NHC. Defendants were not obligated to subscribe to a particular commercial service (CWRC) and even if they had been, this bulletin was in fact inconsistent with advisories of the NHC, which they had monitored. Additionally, the CRWC fax did not apprise commercial interests what abnormal conditions might be anticipated at the State Docks and was also not consistent with NHC in Miami or NWS Mobile office advisories

[40] Stallings testified on cross-examination that he maintained "close contact with Captain Carey each of the several days before Hurricane George made landfall." However, due to the unpredictable nature of the hurricane, it's path was predicted elsewhere.

[41] A review of Captain Carey's file shows the extensive efforts he made, beginning the week before the hurricane struck, to obtain information about its predicted path, wind velocities and storm surge flooding. Information included in Captain Carey's file represent his actions--namely that he: monitored and received copies of the NWS bulletins issued from both the Miami and Mobile offices; received reports (verbal and in writing) from the CWRC, which was tracking and monitoring the storm; and, he obtained predicted tracking plots of the course of the hurricane over the internet. See Plf's Tr. Ex. 64.

[42] Precluding any need for further assessment of Plaintiffs' remaining claims, including breach of contract and workmanlike performance, bailment, third-party recovery, and indemnification.

APPENDIX 4

588 F.2d 454 (5th Cir. 1979), 76-2997, Uniroyal, Inc. v. Hood

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588 F.2d 454 (5th Cir. 1979)

UNIROYAL, INC., Plaintiff-Appellant,

v.

George K. HOOD et al., Defendants-Third Party Plaintiffs-Appellees,

USCO Services, Inc., Third Party Defendant.

No. 76-2997.

United States Court of Appeals, Fifth Circuit

January 25, 1979

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Hugh E. Wright, W. Lyman Dillon, Philip S. Coe, Atlanta, Ga., for George K. Hood, William B. Hood, & James B. Hood.

Sidney F. Wheeler, John M. Hudgins, IV, Ben S. Williams, Atlanta, Ga., for Sam Hodges Co. Appeal from the United States District Court for the Northern District of Georgia.

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge:

In this Georgia diversity case, Uniroyal, Inc., a New Jersey corporation with its principal place of business in Connecticut, appeals from a judgment denying recovery from Hood Brothers, a Georgia partnership, and Sam Hodges Company, a Georgia corporation, for damage to shoes stored in a warehouse owned by Hood Brothers and leased to Uniroyal. The damage occurred, consequent to a severe storm, when rainwater flowed into the warehouse after running off an adjacent construction site, also owned by Hood Brothers, upon which Sam Hodges Company, a general contractor, was constructing additional warehouse space. The district court entered judgment in favor of Hood Brothers upon a directed verdict and in favor of Sam Hodges Company upon a jury verdict in response to a special interrogatory. We affirm as to both defendants.

I.

In 1968, Hood Brothers purchased a tract of land in Forest Park, Georgia, near the Atlanta airport. At the time of purchase, a warehouse was located on the western portion of the tract. The warehouse had been occupied since 1961 by Uniroyal pursuant to a long term lease. The original lessors assigned the lease to Hood Brothers as part of the purchase. Uniroyal has used the warehouse for storage of shoes, sandals, and other merchandise. USCO Services, Inc. has operated the warehouse for Uniroyal.

In October of 1972, Hood Brothers agreed with Uniroyal to construct and lease to it an addition to the existing warehouse to be situated on the vacant eastern portion of the tract. On

October 1, 1972, Hood Brothers and Uniroyal executed a written lease covering the proposed new addition, to become effective one month following the completion of construction. On November 17, 1972, Hood Brothers, as owner, and Sam Hodges Company, as general contractor, signed a construction contract for the new warehouse facility. Previously, USCO Services and Uniroyal had supplied specifications for the project to Sam Hodges Company, thereby inviting submission of a bid for the construction contract. Subsequently, Hood Brothers selected Sam Hodges Company from a list of four contractors submitting bids.

Sam Hodges Company began construction of the new warehouse in the last week of November of 1972 with the grading and leveling of the vacant lot. Subsequently, during the three-month period from February to April of 1973, two concrete floor slabs, measuring approximately 225,000 square feet, were poured. A 4-foot gap, 6 to 8 inches deep, running north and south, separated the two slabs from the east wall of the existing warehouse. The gap was intended to accommodate either footings

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for a firewall or pillars. It also served as a drainage ditch protecting the existing warehouse from water running off the concrete floor slabs. Another similar gap or ditch, approximately 16 feet wide, ran east and west, separating the two floor slabs and intersecting the other to form a T.

Prior to the commencement of construction, the vacant lot was generally sloped from northeast down to southwest. A ditch capable of carrying accumulated surface water ran across the lot from north to south. With the leveling and grading of the site and the pouring of the concrete floor slabs, the flow of surface water on the site was altered. The presence of the concrete slabs caused a general increase in flow due to the elimination of absorption into the earth. Furthermore, the direction of the flow was altered by the configuration of the slabs. Evidently the portion of the slabs closest to the existing warehouse sloped gradually from east to west, with a total drop, imperceptible to the naked eye, of about $2\frac{3}{4}$ inches. The slope was necessary in order to bring the floor of the new addition flush with that of the existing warehouse. The sloped portion constituted, approximately, the western one-fifth of the total floor area. The remaining floor area was flat. Surface water flowed off the flat part of the slabs in all directions and off the sloped part in an east to west direction into the 4-foot ditch or gap separating the slabs from the existing warehouse. Preformed concrete walls, poured during late April and early May of 1973, lay flat on the slabs, prior to being tilted up into position. These walls diverted further surface water in a westward direction toward the existing warehouse. In sum, essentially uncontradicted testimony indicates that by mid-May of 1973, the slope of the slabs and the presence of the preformed walls, compounded by the nonabsorbent character of concrete, had altered the natural flow of surface water on the construction site in such a way that greater quantities flowed in a westward direction toward the eastern wall of the existing warehouse.

One of the doors located on the east wall of the existing warehouse was a fire door beneath which there was an opening of about 1 inch. Testimony indicates that both Sam Hodges Company and USCO Services knew of this opening but that Hood Brothers did not. Through that opening, on the weekend of May 19-20, 1973, rainwater entered the warehouse after collecting in and overflowing the 4-foot gap or ditch between the warehouse and the concrete floor slabs. According

to the testimony of a USCO employee, the water accumulated to a depth of almost 7 inches, primarily in the southeast portion of the warehouse where cardboard boxes containing shoes and sandals were stacked on the floor. The flooding allegedly damaged 62,410 pairs of footwear.

Meteorological data recorded at the Atlanta airport, nearby the construction site, indicate that 2.6 inches of rain fell between 9 a. m. on May 19 and 6 a. m. on May 20. Of that total, approximately 2.1 inches fell in the nine-hour period from 9 p. m. on May 19 to 6 a. m. on May 20. In addition, gusts of wind reached 42 m. p. h., the highest velocity recorded in the first five months of 1973. The meteorological evidence indicates that several rainstorms of comparable severity in precipitation occurred in the first five months of 1973 (one in January, with almost 4 inches falling in a 19-hour period and 3 inches in a 5-hour period; one in February; two in March; one in April; and one in May, subsequent to the storm of May 19-20). No flooding of the warehouse resulted from any storm except that of May 19-20.

The evidence indicates that the flooding occurred because an obstruction in the 4-foot gap or ditch separating the concrete floor slabs from the warehouse prevented accumulated surface water from flowing off the site. The testimony as to the nature of the obstruction was conflicting. The warehouse manager, a USCO Services employee, testified that the ditch was dammed up by dirt. Two Sam Hodges Company

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employees, the building superintendent and the project manager, testified that the flow of water in the ditch was impeded by construction material and debris either blown or washed into the ditch during the storm. Both testified that the wind was strong enough to blow a lamp stand weighing over 100 pounds across the slab.

In the aftermath of the flooding, Uniroyal sued both Hood Brothers, the property owner (and Uniroyal's landlord), and Sam Hodges Company, the contractor. Uniroyal primarily contended that Sam Hodges Company and, derivatively, Hood Brothers were liable for damage caused to Uniroyal's goods on account of having negligently altered the flow of surface water on the construction site so that it entered the warehouse. Uniroyal also attempted to support its claim against Sam Hodges Company on theories of trespass and nuisance. In addition, Uniroyal sought recovery from Hood Brothers, as owner and lessor of the warehouse and the construction site, under various theories of tort, contract, and property law, without regard to liability on the part of Sam Hodges Company. Both Hood Brothers and Sam Hodges Company filed a third party claim against USCO Services, Inc., the warehouse operator, seeking contribution or indemnity should either defendant be held liable to Uniroyal.

At the close of all the evidence, the trial judge granted Hood Brothers' motion for a directed verdict and, as a result, also granted USCO Services' motion for a directed verdict in regard to Hood Brothers' third party complaint. In addition, on defendant Sam Hodges Company's motion, the court refused to present Uniroyal's trespass and nuisance theories to the jury. As a result, the judge submitted to the jury only the claim of negligence on the part of Sam Hodges Company and the complementary third party claim by Sam Hodges against USCO Services. The court outlined Uniroyal's allegations of negligence and instructed the jury on the general law of negligence and on the defendant's affirmative defense of an act of God.

The court submitted eight special interrogatories to the jury. The first interrogatory asked: "Were the damages in this case caused by an act of God?" If the answer to that question was "no," the jury was instructed to continue and answer the remaining interrogatories. In fact, however, the jury answered the first question in the affirmative, concluding that the damages were indeed caused by an act of God. Consequently, the court entered judgment in favor of Hood Brothers and Sam Hodges Company from which Uniroyal has appealed.

We deal first with Uniroyal's contentions relating to its claim against the contractor, Sam Hodges Company. Then we treat Uniroyal's objections to the directed verdict in favor of the property owner, Hood Brothers.

II.

Uniroyal's principal objections to the disposition of its claim against Sam Hodges Company center on the act of God defense, which was the basis of the jury verdict in response to the first special interrogatory. Uniroyal argues that the facts of this case cannot support an act of God defense and that the court therefore should not have instructed the jury on it. Furthermore, Uniroyal argues that the instruction was in any event erroneous and that the court improperly emphasized the act of God defense by presenting it to the jury in the first special interrogatory as a threshold question which might (and indeed did) prove dispositive of the entire claim. In addition, Uniroyal objects to the court's refusal to instruct the jury on the specific duty of the contractor to refrain from altering the flow of surface water so as to cause damage to an adjoining lot. ^[1]

Finally, Uniroyal

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contends that the court erroneously refused to instruct the jury on its trespass and nuisance theories.

Under Georgia substantive law, which is applicable in this federal diversity action, an act of God, from which no tort liability can arise, is an accident caused by physical causes which are irresistible or inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness. Ga.Code Ann. § 102-103 (1968). The term applies only to those events in nature which are so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. *Sampson v. General Electric Supply Corp.*, 78 Ga.App. 2, 50 S.E.2d 169 (1948). A catastrophe arising from the force of the elements which human intelligence cannot predict nor the ingenuity of man foretell is an act of God. *Western & Atlantic R. R. v. Hassler*, 92 Ga.App. 278, 88 S.E.2d 559 (1955). Furthermore, the concept of act of God excludes all idea of human agency. Ga.Code Ann. § 102-103 (1968). Thus, an act of God is a casualty not due to nor contributed to by human agency, *Ohlen v. Atlanta & West Point Railroad Company*, 2 Ga.App. 323, 58 S.E. 511 (1907), and a casualty preventable by the exercise of ordinary care is not an act of God. *Central Georgia Electric Corp. v. Heath*, 60 Ga.App. 649, 4 S.E.2d 700 (1939).

Whether a particular casualty is an act of God is a mixed question of law and fact. "The defining and limitation of the term, its several characteristics, its possibilities as establishing and controlling exemption from liability, are questions of law for the court; but the existence or non-existence of the facts on which it is predicated is a question for the jury." *Goble v. Louisville &*

Nashville Railroad Company, 187 Ga. 243, 200 S.E. 259, 264 (1938). Thus, the court must define, as a matter of law, the legal concept of an act of God and instruct the jury as to the legal elements and effects of the defense. It is then the responsibility of the jury to determine whether the facts of the case at hand fulfill the legal criteria for recognition of the defense. Specifically, it is for the jury to determine, as a matter of fact, whether the casualty resulted from an irresistible and unforeseeable natural event to which human agency did not contribute. See, e. g., Tek-Aid, Inc. v. Eisenberg, 137 Ga.App. 99, 223 S.E.2d 29 (1975); Joyce v. City of Dayton, 73 Ga.App. 209, 36 S.E.2d 104 (1945).

In this case, Uniroyal contends that there was insufficient evidence to support the submission to the jury of the act of God defense. Specifically, Uniroyal argues that there was not substantial evidence (as required to create a jury question, See Boeing Company v. Shipman, 5 Cir., 1969, 411 F.2d 365, 374-75) from which a jury could have concluded that the storm of May 19-20 was so extraordinary and unforeseeable as to constitute an act of God and that human agency in no way contributed to the casualty.

In regard to the nature of the storm, we have no difficulty finding substantial evidence of extraordinary and unforeseeable climatic conditions in the Atlanta area over the weekend of May 19-20. In addition to the heavy rainfall, gusts of wind up to 42 m. p. h. were recorded near the construction site at the Atlanta airport. No wind of greater velocity was recorded in the first five months of 1973. Moreover, two witnesses testified that the wind was strong enough to topple a lamp stand weighing over 100 pounds and blow it across the concrete slab.

Although Uniroyal in its brief discusses only the matter of rainfall, the additional wind factor, in combination with the rain, is the critical element. The warehouse flooded

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not simply because it rained, but because the accumulated rainwater overflowed the drainage ditch between the warehouse and the concrete slabs. Two witnesses testified that the ditch was clogged, and drainage obstructed, by construction material blown into it during the storm. Thus, the record supports the conclusion that the flooding resulted from the combination of wind and rain and not from the rain alone. Therefore, even though the precipitation alone may not have been extraordinary, we have no trouble upholding the submission of the act of God question to the jury in light of the additional wind factor and the effect thereof.

In regard to the question of contributing human agency, we find substantial evidence to support the jury's evident conclusion that human agency, as that legal term must be defined in this context, played no role in the casualty. We reject Uniroyal's argument that various physical characteristics of the warehouse and the adjacent construction site were the product of human agency and contributed to the casualty, thereby requiring rejection of the act of God defense. The slope of the construction site, the impermeability of the concrete slabs, the presence on the slabs of the preformed concrete walls and other construction material, and the opening under the warehouse door were all the product of human effort; and each of those conditions, we may assume, contributed in some part to the casualty. It does not follow, however, that the mere existence of such conditions compels a conclusion that human agency contributed to the casualty in the legal sense with which we are concerned. If the party responsible for the conditions in

question was not at fault in allowing them to exist, then his conduct is not the type of contributory human agency which in these circumstances makes unavailable the act of God defense. Disallowance of the act of God defense would be appropriate here only if the conditions which facilitated the casualty were the result of continuing tortious malfeasance.

In this case, the record contains substantial evidence from which the jury could have concluded, as it apparently did, that the casualty occurred without any negligence on the part of Sam Hodges Company or any other party. Substantial evidence supports the hypothesis that high winds blew construction material into the otherwise adequate drainage ditch, causing accumulated rainwater to overflow and invade the warehouse. In that regard, no human agency contributed to the casualty in the legal sense with which we are concerned in this case. Submission to the jury of the act of God defense was, therefore, appropriate in the circumstances of this case. [2]

In submitting the act of God defense to the jury, the trial judge fully and accurately instructed the jury as to the elements of the defense, the defendant's burden of proof, and the competing contentions of the opposing parties. We find no merit in Uniroyal's contention that the judge unfairly presented its case by failing to mention in specific connection with the act of God defense the numerous acts of human agency which, according to Uniroyal, contributed to the casualty. The trial judge mentioned those acts earlier in his charge when he outlined in considerable detail the overall contentions of the plaintiff. In relation to the subsequent instructions on the act of God defense, it was sufficient that the court

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mentioned Uniroyal's most significant contention: that Sam Hodges Company negligently allowed dirt and other materials to dam up the drainage ditch. As discussed above, the other supposed acts of human agency were not in themselves sufficient to undermine the act of God defense. The judge's focus on the damming of the drainage ditch was thus reasonable and helpful to the jury.

The trial judge also acted properly and logically in presenting the act of God issue to the jury in the first special interrogatory. The fact that the jury's answer to that interrogatory proved dispositive of Uniroyal's claim was the unavoidable result of the nature of the issue. The court carefully instructed the jury that it could not consider the casualty an act of God if it was caused, in whole or in part, by the defendant's negligence or, using different language, if it could have been prevented by the exercise of ordinary care. The conclusion that Sam Hodges Company had not acted negligently was thus inherent in the conclusion that the casualty was caused by an act of God. The jury plainly needed to go no further to dispense with Uniroyal's negligence claim. Thus, the special interrogatory concerning the act of God defense adequately and fairly presented the contested issue of the defendant's negligence to the jury. [3]

We also reject Uniroyal's contention that the court erred in not instructing the jury that the contractor had a specific duty under Georgia law to refrain from diverting the flow of surface water and causing damage to adjoining property. Georgia law does not impose strict liability on any party for damage caused by surface water runoff. Liability must be based upon some element of intentional or negligent conduct which proximately causes the water damage. See *Brand v. Montega Corp.*, 233 Ga. 32, 209 S.E.2d 581 (1974). In that regard, several Georgia cases cited by Uniroyal hold that a landowner (or an independent contractor) has no right incidental to ownership

(or control) of property to cause surface water to flow on to a lower estate differently than gravity would normally dictate. *First Kingston Corp. v. Thompson*, 223 Ga. 6, 152 S.E.2d 837 (1967); *Gill v. First Christian Church*, 216 Ga. 454, 117 S.E.2d 164 (1960); *Southern Mutual Investment Corp. v. Langston*, 128 Ga.App. 671, 197 S.E.2d 775 (1973). If applicable in this context involving adjoining lots under common ownership, that rule of law serves only to limit the assertion of property rights; it creates no new duty beyond the ever-present responsibility to exercise reasonable care in all matters. Its clear import is that in a case involving surface water runoff the responsible party can claim no right founded in property law which can displace standard principles of tort liability. In this case, the court left no doubt in its instructions to the jury that Sam Hodges Company should be liable for any damage proximately caused by its negligence. Georgia law requires no more.

Finally, we reject Uniroyal's contention that the trial court acted erroneously in refusing to instruct the jury on plaintiff's nuisance and trespass theories.

In regard to the nuisance theory, under Georgia law a single, isolated occurrence cannot constitute a nuisance. "The whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience

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or injury." *Southeastern Liquid Fertilizer Co. v. Chapman*, 103 Ga.App. 773, 775, 120 S.E.2d 651 (1961). See also *City of Atlanta v. Roberts*, 133 Ga.App. 585, 211 S.E.2d 615 (1974). In this case, the evidence conclusively reveals that water entered the warehouse on only one occasion despite a record of persistent rain over a five-month period. Clearly, therefore, the construction site was not continuously maintained in a condition creating a nuisance causing damage to the plaintiff, and, as a matter of law, Uniroyal could not have recovered under a nuisance theory.

In regard to the trespass theory, Uniroyal clearly contended, as revealed in a colloquy between the court and plaintiff's counsel, that the flooding constituted an intentional trespass. Reliance on a theory of negligent trespass would have added nothing to the plaintiff's general allegation of negligence which the court submitted to the jury. There was not substantial evidence, however, from which a jury could have concluded that Sam Hodges intentionally caused the flooding of Uniroyal's warehouse. Thus, the court properly refused to instruct the jury on Uniroyal's trespass theory.

To summarize, in respect to Uniroyal's claim against Sam Hodges Company, the court properly submitted the act of God defense to the jury under adequate instructions. The jury verdict, in response to the first special interrogatory, is supported by substantial evidence. It effectively and fairly disposes of Uniroyal's negligence claim. Additionally, the court properly dismissed Uniroyal's nuisance and trespass claims. Hence, the judgment in favor of Sam Hodges Company must be affirmed.

III.

In respect to its claim against Hood Brothers, the owner of the entire property encompassing both the existing warehouse and the construction site, Uniroyal contends on appeal that the trial court erred in directing a verdict in favor of the defendant. In support of that contention, Uniroyal proposes several theories of liability, discussed individually below, upon which a jury verdict in its

favor might have been based. We conclude, however, in agreement with the district court, that no substantial evidence appears in the record on the basis of which a jury could have found Hood Brothers liable under any theory.

Uniroyal's contentions may be fairly condensed into five suggested theories of liability. First, Uniroyal argues that Hood Brothers is responsible under Georgia landlord-tenant law, as owner and lessor of the existing warehouse, for damage suffered by Uniroyal as a result of the opening under the warehouse door which permitted surface water to enter the building. Second, Uniroyal contends that Hood Brothers is liable on the basis of contractual obligations imposed by the agreement of October 1972 for construction and subsequent leasing of the new warehouse facilities. Third, Uniroyal argues that Hood Brothers was negligent in employing an incompetent contractor. Fourth, Uniroyal argues that Hood Brothers is vicariously liable for negligence on the part of the contractor, Sam Hodges Company. Fifth, and finally, Uniroyal proposes that Hood Brothers was itself negligent in allowing the construction site to be maintained in a manner permitting the flooding of the adjacent warehouse. We dispense, seriatim, with each of those contentions.

In 1968, concurrent with its purchase of the property involved in this case, Hood Brothers assumed the 1961 lease between the seller and Uniroyal. The lease was for a 25-year term, with option to renew. It governed the landlord-tenant relationship between Uniroyal and Hood Brothers in May of 1973 at the time of the flooding which precipitated this litigation. No language in the lease agreement can be construed to impose an obligation on Hood Brothers to seal the opening under the warehouse door through which water entered on the weekend of May 19-20, 1973. Furthermore, and contrary to Uniroyal's contention, no rule of Georgia law imposes such an obligation in the absence of contractual agreement.

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We reject Uniroyal's argument that the opening under the door constituted a structural defect (or, to use more appropriate terminology, a defect in original construction) for which Hood Brothers, the landlord, was responsible if it actually knew of the defect or by due diligence could have discovered it. First, we doubt that, as a matter of law, the opening under the door could qualify as a defect in original construction or, for that matter, as a defect at all. ^[4] In any event, assuming that the opening was indeed a defect in original construction, the landlord was not responsible for it under Georgia law in the circumstances of this case. Where, as here, a structure has been built by a predecessor in title of the landlord, the landlord can be held responsible to his tenant for a defect in original construction only if he knew or by the exercise of reasonable care should have known of the defect before the tenancy was created. *National Distributing Co. v. Georgia Industrial Realty Co.*, 106 Ga.App. 475, 127 S.E.2d 303 (1962); *Sutton v. Murray*, 49 Ga.App. 130, 174 S.E. 174 (1934). In this case, it is undisputed that Uniroyal's tenancy was created in 1961 and that Hood Brothers did not know and could not have known of the opening under the door at that time. Uncontradicted testimony at trial indicates that Hood Brothers was not aware of the opening before the events of May 1973 and was not even aware of the warehouse's existence until 1966 or 1967. Thus, we find no basis in Georgia law for holding Hood Brothers liable, as owner and lessor of the existing warehouse, on account of the opening under the door.

In an agreement of October 1, 1972, Hood Brothers agreed to erect additional warehouse space for Uniroyal "in accordance with the plans and specifications captioned Exhibit C and which plans and specifications have been initialed by the parties hereto and are by reference hereby made a part of this lease agreement." Those specifications provided, inter alia, that all ditches be kept free of accumulated water, that construction debris be removed from the site on a daily basis, and that necessary precautions be taken to secure adjoining structures from damage. Uniroyal now argues, in essence, that Hood Brothers guaranteed compliance with those specifications, thereby leaving itself liable as a matter of contract law for any lack of compliance occurring during the construction process. We disagree.

The clear purpose of the agreement to build in accordance with the initialed specifications was to assure that Uniroyal ended up with the warehouse space for which it bargained. The agreement does not constitute substantial evidence of an intent on the part of Hood Brothers to guarantee an independent contractor's strict, day-to-day compliance with detailed construction procedures. To view it as such, we would have to assume that Hood Brothers intended to bargain away a great part of the protection afforded an employer under Georgia law from liability for the collateral torts of an independent contractor. See Ga.Code Ann. § 105-501. ^[5] Without a more definite expression of intent such an assumption is patently unreasonable. Hence, we find no basis in the lease agreement of October 1972 for imposing liability on Hood Brothers in this case.

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Uniroyal's contention that Hood Brothers was negligent in employing an incompetent contractor is totally unsupported by the record. No evidence indicates that Hood Brothers had any reason to question Sam Hodges Company's competence at the time its bid was submitted and accepted or at any other time prior to the weekend of May 19-20. Indeed, the record reveals that Uniroyal itself solicited the bid from Sam Hodges and that USCO Services employed Sam Hodges Company in 1974, well after the flooding of May 1973, to repair tornado damage to the roof of the old warehouse. At best, Uniroyal produced sufficient evidence to create a jury question regarding Sam Hodges Company's negligence in this case. Such evidence is not sufficient, however, to support a determination that Sam Hodges was from the start incompetent for the job or that Hood Brothers acted negligently in failing to select a competent contractor.

As mentioned above, under Georgia law an employer is generally not responsible for torts committed by an independent contractor. Ga.Code Ann. § 105-501. In that regard, an independent contractor is an employee who exercises an independent business in which it is not subject to the immediate direction and control of the employer. *Id.* The employer is liable, however, for the negligence of an independent contractor in six specific situations which stand as exceptions to the general rule: 1) when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance; 2) when the work to be done is in its nature dangerous to others, however carefully performed; 3) when the wrongful act is the violation of a duty imposed by express contract upon the employer; 4) when the wrongful act is the violation of a duty imposed by statute; 5) when the employer retains the right to direct or control the time and manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; and 6) when the employer ratifies the wrong of

the independent contractor. Ga.Code Ann. § 105-502.

In this case, Sam Hodges Company is clearly an independent contractor. Hence, Hood Brothers is not, as a matter of Georgia law, liable for any tort committed by Sam Hodges Company, unless the record contains evidence to bring the case within one of the six exceptions to the general rule of the employer's nonliability. We conclude that the record contains no such evidence.

Plainly, the record contains no evidence from which a jury might have concluded that this ordinary construction project was in itself wrongful, so as to constitute a nuisance if done in the ordinary manner, or was in its nature dangerous to others, however carefully performed. Similarly, there is no evidence that Hood Brothers in any way ratified the alleged negligence of Sam Hodges Company or in any way retained control over the construction process or interfered in that process so as to create a master-servant relationship or so as to cause any injury traceable to the interference.

We concluded above that the lease agreement of October 1972 may not be construed to require Hood Brothers to guarantee compliance by Sam Hodges Company with the work rules outlined in the specifications for the project. The record contains no other evidence of violation of duty imposed by express contract upon Hood Brothers.

Finally, Uniroyal can point to no duty imposed upon Hood Brothers by statute which has been violated. At oral argument, Uniroyal claimed that a Georgia statute regarding ownership of running water imposed a duty on Hood Brothers as a property owner to prevent surface water runoff from damaging adjoining property. The statute in question, however, deals not with surface water but with "running water." Ga.Code Ann. § 85-1301. Because Georgia law imposes liability on an employer for the torts of an independent contractor only when a duty imposed by statute has been violated, Uniroyal cannot advance its theory of vicarious liability by citing cases establishing, As a matter of common law, that a property owner has no right to cause surface

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water to run off his land and cause damage to the property of a lower proprietor, See, e. g., Gill v. First Christian Church, 216 Ga. 454, 117 S.E.2d 164 (1960). Furthermore, as discussed briefly above and further below, we cannot fairly construe these cases as imposing any new duty on a property owner and certainly not as imposing a duty which may not in the ordinary course of events be delegated to an independent contractor.

In sum, therefore, in light of the record below and the requirements of Georgia law, a jury could not have found Hood Brothers liable for any tort committed by its independent contractor, Sam Hodges Company, under any of the exceptions to the general rule of an employer's nonliability.

Uniroyal's final contention is that Hood Brothers was liable for negligence of its own in failing to take action to prevent the flooding of the warehouse. In support of that contention, Uniroyal cites testimony to the effect that each of the Hood Brothers partners occasionally visited the construction site and was aware of the progress of construction, its effect on surface water flow, and the existence of the drainage ditch along the wall of the existing warehouse. Such evidence, however, of occasional visits to observe construction progress, without more, is insufficient to

support a jury determination that Hood Brothers knew or should have known of any danger of flooding the existing warehouse.

Uniroyal attempts to avoid that problem by arguing that under Georgia law a property owner has a nondelegable duty to prevent any alteration in the flow of surface water which would cause damage to adjoining property. If that were indeed the case, then Hood Brothers could be liable for the wrongful acts of Sam Hodges Company, regardless of whether it was aware of them or should have been aware of them. Such a result, of course, would nullify the Georgia statute protecting an employer from liability for the torts of an independent contractor except in specified, carefully limited situations. We do not, however, interpret Georgia law to work at such cross-purposes. As pointed out above, the Georgia cases dealing with surface water runoff cited by Uniroyal^[6] impose no strict vicarious liability or nondelegable duty on a property owner. They merely establish, as a matter of property law, that a landowner has no right incident to his ownership of land to divert surface water runoff so as to damage an adjoining proprietor. They do not impose upon a landlord any form of strict liability to his tenant. Indeed, they do not even speak to the landlord-tenant relationship, but instead to the relations between adjoining proprietors.

In sum, we do not find in the cases cited by Uniroyal any novel principle of tort law or landlord-tenant law which permits imposition of liability on a property owner for the wrongful act of an independent contractor during the construction process. Given the uncontradicted evidence of the contractor's complete control over the construction process and the minimal involvement of the property owner (occasional visits to the site to observe progress), we cannot under Georgia law find any basis for imposing liability on Hood Brothers for the damage incurred as a result of the storm of May 19-20, 1973.

Thus, to summarize, we find no basis in any of Uniroyal's proposed theories for imposing liability in this case on Hood Brothers, the property owner. The record simply does not contain sufficient evidence, in light of the governing requirements of Georgia law, from which a jury could have reasonably concluded that Hood Brothers was liable for Uniroyal's loss, either as owner of the flooded warehouse or as owner of the construction site, under any theory of tort, contract, or landlord-tenant law.

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Hence, the judgment below is affirmed as to both defendants, Sam Hodges Company and Hood Brothers.

AFFIRMED.

CHARLES CLARK, Circuit Judge, specially concurring:

I concur in all of Judge Ainsworth's opinion for the majority except his conclusion that under Georgia law an assignee landlord may never be held responsible to his tenant for defects in original construction unless they are known, or should have been known, to the assignee before the original tenancy was created. Certainly the assignee should not have a superior defense to that which would be accorded the original lessor in his dealings with the lessee. Cf. *Algernon Blair, Inc. v. National Surety Corporation*, 222 Ga. 672, 151 S.E.2d 724 (1966). Yet the rule announced today would absolve any assignee who takes subsequent to construction even where the original lessor may have had full knowledge of a defect. I do not agree that Georgia has or will hold this to

be the rule. However, in the absence of proof that the door in question was constructed to be watertight, I agree that the opening at its bottom would not qualify as a defect in original construction.

Notes:

[1]Uniroyal also objects to one clause in the court's lengthy instructions in which the judge explained that the plaintiff had the burden of proving by a preponderance of the evidence that "all material claims made in the suit are true." Without further discussion, we note that this objection is without merit. Even if we accept, arguendo, that those few words were indeed ill-chosen, we nevertheless cannot find them confusing, misleading, or prejudicial in the context of the entire charge.

[2]See Tek-Aid, Inc. v. Eisenberg, 137 Ga.App. 99, 223 S.E.2d 29 (1975). In Tek-Aid, in a situation quite similar to that involved here, a Georgia court of appeals stated:

Also it was a jury question whether the proximate cause of the accumulation of water on the roof was inadequate drains or the severe wind and rainstorm which deposited leaves and debris on the roof and which clogged the drain; and, if the latter, it was a question for the jury as to whether the storm which occurred on the occasion under investigation and which resulted in the roof drain being clogged with debris of tree leaves and small branches was an act of God, relieving the landlord of liability.

Id. at 100, 223 S.E.2d at 30.

[3]At best, Uniroyal can argue that the court could have more directly presented the negligence issue if it had given merely a simple negligence charge without mention of the act of God defense and without use of a special interrogatory relating to it. While such a charge may have been sufficient, we cannot properly say that the court erred in giving more pointed attention to the act of God question. The defendant was entitled, as a matter of Georgia law, to an instruction on the affirmative defense of act of God, whether or not one might consider that instruction superfluous and a simple negligence instruction sufficient. In any event, it bears remarking, as the court instructed the jury, that the defendant bore the burden of proof in establishing the affirmative defense. It is difficult to see how Uniroyal could have been prejudiced by an instruction and an interrogatory which, as a threshold matter, effectively transferred the burden of proof on the critical negligence issue to the defendant.

[4]We find no inconsistency between Hood Brothers' contention that the opening under the door did not constitute a defect and Sam Hodges Company's third party complaint against USCO Services, the warehouseman. A jury might have properly found USCO Services, with its supposed expertise in the storage field, negligent in storing goods on the warehouse floor within the reach of surface water invasion and in failing to seal the door in question. Such findings, however, would not have affected the entirely separate issue of whether the gap under the door constituted some form of a defect, as a matter of property law, for which Hood Brothers, the landlord, was responsible.

[5]An employer may be liable for the collateral torts of an independent contractor under an exception to the general rule of nonliability when "the wrongful act is the violation of a duty

imposed By express contract upon the employer." Ga.Code Ann. § 105-502(3). This exception, and the general question of an employer's vicarious liability, are discussed further below.

[6] Associated Lerner Shops of America v. Thibodeau, 5 Cir., 1968, 396 F.2d 768; Gill v. First Christian Church, 216 Ga. 454, 117 S.E.2d 164 (1961); First Kingston Corp. v. Thompson, 223 Ga. 6, 152 S.E.2d 837 (1967). Uniroyal cites these cases in its brief in relation to its claim against Sam Hodges Company and the question, discussed above, of whether the court should have instructed the jury specifically on the claimed duty to refrain from altering the flow of surface water. In oral argument, however, Uniroyal made clear that it relied upon these cases to establish a nondelegable duty on the part of Hood Brothers, the property owner.

APPENDIX 5

Ispat Inland, Inc. v. Am. Commer. Barge Line Co.

United States District Court for the Northern District of Indiana, Hammond Division

September 30, 2002, Decided

CAUSE NO. 2:99 cv 58

Reporter

2002 U.S. Dist. LEXIS 26818; 2003 AMC 370

ISPAT INLAND, INC. fka Inland Steel Company; DEAD SEA PERICLASE LTD, Plaintiffs v. AMERICAN COMMERCIAL BARGE LINE COMPANY; JACK GRAY TRANSPORT, INC. dba Lakes and Rivers Terminals, Defendants; AMERICAN COMMERCIAL BARGE LINE COMPANY, Third-party plaintiff v. JACK GRAY TRANSPORT, INC. dba Lakes and Rivers Terminals, Third-party defendant; JACK GRAY TRANSPORT, INC. dba Lakes and Rivers Terminals, Third-party plaintiff v. KINDRA LAKE TOWING LP, Third-party defendant; KINDRA LAKE TOWING LP, Cross-claimant v. JACK GRAY TRANSPORT, INC. dba Lakes and Rivers Terminals, Cross-defendant

Subsequent History: Motion granted by, in part, Motion denied by, in part Dead Sea Periclase, Ltd. v. Am. Commer. Barge Line Co., 2002 U.S. Dist. LEXIS 26816 (N.D. Ind., 2002)

Disposition: [*1] Motion for Partial Summary Judgment filed by the plaintiff, Dead Sea Periclase Ltd., on February 28, 2002 GRANTED; Motion for Summary Judgment filed by the third-party defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals (Lakes and Rivers), on February 28, 2002 DENIED; Motion for Summary Judgment Against Defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals filed by the defendant, American Commercial Barge Line (ACBL), on February 28, 2002 DENIED; Motion for Summary Judgment Against Plaintiffs filed by the defendant, ACBL, on February 28, 2002 GRANTED; Motion for Summary Judgment filed by the third-party defendant, Kindra Lake Towing, on February 28, 2002 GRANTED. Ispat Inland's claim and Dead Sea Periclase's claim against ACBL DISMISSED. Kindra Lake Towing also DISMISSED from this lawsuit.

Case Summary

Procedural Posture

Plaintiffs, cargo owners, sued defendants, barge operator and bailee, under the Harter Act, 46 U.S.C.S. app. § 190 et seq., for damages to their cargo. Defendants brought

third-party claims against each other and against third-party defendant tug boat. The tug boat cross-claimed against the bailee. One of the cargo owners moved for partial summary judgment on the issue of damages. Defendants and the tug boat filed motions for summary judgment.

Overview

The cargo owners contracted with the barge operator to transport cargo consisting of magnesium oxide and coke to Burns Harbor, Indiana. The barge operator transported the cargo on seven barges and delivered the cargo to the bailee's dock located at Burns Harbor. The tug boat helped to moor the barges at the dock. Unfortunately for all of the parties, a significant late winter storm swept through northwest Indiana and all of the seven barges containing the magnesium oxide and coke sank into Lake Michigan or collided with the dock. The court found that the Harter Act did not apply to the barge operator because it was a private carrier. This conclusion necessarily meant that summary judgment had to be granted in favor of the barge operator because the only claims asserted against it by the cargo owners were based solely on a violation of the Harter Act. There was a question of fact as to whether the storm was an act of God that would relieve the bailee of liability. The tug boat did not owe a duty of care after the barges were delivered. Defendants did not refute the cargo owner's invoice price as an indication of its damages.

Outcome

Motion for partial summary judgment filed by one of the cargo owners was granted. The motion for summary judgment filed by the bailee was denied. The motion for summary judgment against the bailee filed by the barge operator was denied. The motion for summary judgment against the cargo owners filed by the barge operator was granted. The motion for summary judgment filed by the tug boat was granted.

Counsel: For Ispat Inland Inc, PLAINTIFF: Michael D Sears, Singleton Crist Austgen and Sears, Munster, IN USA.

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For Kindra Lake Towing LP, CROSS-CLAIMANT: Eric L Kirschner, Beckman Kelly and Smith, Carol M Green-Fraley, Enslin Green and Kuchel PC, Hammond, IN USA.

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For Jack Gray Transport Inc DBA Lakes and Rivers Terminals, CROSS-DEFENDANT: Steven B Belgrade, John A O'Donnell, James Kent Minnette, Belgrade and O'Donnell, Chicago, IL USA.

Judges: Andrew P. Rodovich, United States Magistrate Judge.

Opinion by: Andrew P. Rodovich

Opinion

ORDER

This matter is before the court on the Motion for Partial Summary Judgment filed by the plaintiff, Dead Sea Periclase Ltd., on February 28, 2002; the Motion for Summary Judgment filed by the third-party defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals (Lakes and Rivers), on February 28, 2002; the Motion for Summary Judgment Against Defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals filed by the defendant,

American Commercial Barge Line (ACBL), on February 28, 2002; the Motion for Summary Judgment Against Plaintiffs filed by the defendant, ACBL, on February 28, 2002; and the Motion for Summary Judgment filed by the third-party defendant, Kindra Lake Towing, on February 28, 2002.

For the reasons set forth below, the Motion for Partial Summary Judgment filed by Dead Sea Periclase [*5] is **GRANTED**; the Motion for Summary Judgment filed by Lakes and Rivers is **DENIED**; the Motion for Summary Judgment Against Defendant Lakes and Rivers filed by ACBL is **DENIED**; the Motion for Summary Judgment Against Plaintiffs filed by ACBL is **GRANTED**; and the Motion for Summary Judgment filed by Kindra Lake is **GRANTED**.

Background

Dead Sea Periclase and Ispat Inland, the Plaintiffs, owned cargo consisting of magnesium oxide and coke, respectively. They had entered into a contract with the defendant, ACBL, whereby ACBL would transport the magnesium oxide and coke on seven barges to Burns Harbor, Indiana. ACBL successfully delivered the cargo to Burns Harbor, Indiana around March 6, 1998 and enlisted the help of Kindra Lake, a third party defendant, to tow and moor the barges to the Lakes and Rivers' dock, another third party defendant, located within the harbor. Kindra used the tugboats M/V Morgan and M/V Buckley to accomplish this task. Unfortunately for all of the parties, a significant late winter storm swept through northwest Indiana on March 7-9, 1998. As a result of the storm, all of the seven barges containing the magnesium oxide and coke sank [*6] into Lake Michigan or collided with the dock. The barges and the cargo either were damaged or destroyed.

Dead Sea and Ispat Inland brought separate suits on April 1, 1999 and March 5, 1999, respectively, under the Harter Act, 46 U.S.C. §§ 190-195. (Cause Nos. 2:99 cv 106 JM and 2:99 cv 58 JM) Dead Sea's sole allegation is that ACBL breached its duty under the Harter Act and caused damage in the amount of \$ 675,284.80. On June 1, 1999, ACBL filed a third party complaint in both cases pursuant to Federal Rule of Civil Procedure 14(c) against Lakes and Rivers. ACBL alleges that Lakes and Rivers breached its duty of reasonable care as a wharfinger and bailee with respect to the barges and the cargo of both the plaintiffs. ACBL also seeks indemnification from Lakes and Rivers. On July 29, 1999, Ispat Inland filed an amended complaint in which it alleged damages in the amount of \$ 998,040.86 plus interests and costs, against ACBL and Lakes and Rivers.

Count I of the amended complaint alleges that ACBL violated its duty under the Harter Act, and Count II of the amended complaint alleges that Lakes and Rivers violated its duty [*7] of reasonable

care as a wharfinger and bailee of Ispat Inland. The cases were consolidated on August 10, 1999 by Magistrate Judge Theresa Springmann. Finally, on September 3, 1999, Lakes and Rivers filed a third party complaint against Kindra Lake Towing pursuant to Rule 14(c). Lakes and Rivers alleges that Kindra Lake Towing breached its duty of care as a tower and seeks indemnification from Kindra.

Discussion

The pending motions are an attempt to determine which of the three defendants, if any, are responsible for the plaintiffs' losses. As the claims of both Ispat Inland and Dead Sea are virtually identical, any arguments made by each of these plaintiffs shall be treated as if made by both of the plaintiffs. In addition, as the defendants have used Federal Rule of Civil Procedure 14(c) in order to assert third-party complaints against the other defendants, this suit shall continue as if the plain-tiffs had brought suit against the third-party defendants.

Greenwell v. Aztar Indiana Gaming Corporation, 268 F.3d 486, 493 (7th Cir. 2001) ("In an admiralty suit, once a defendant impleads a third party in an effort [*8] to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party." (internal quotation marks and citations omitted)); *Riverway Company v. Trumbull River Services, Inc.*, 674 F.2d 1146, 1154-55 (7th Cir. 1982) (finding that third-party defendants are designated as defendants in the plaintiffs' complaint).

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 701 (7th Cir. 2001); *Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 497 (7th Cir. 1999); *Dempsey v. Atchison, Topeka and Santa Fe Railway Company*, 16 F.3d 832, 836 (7th Cir. 1994). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt [*9] as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S. Ct. 1598, 1610, 26 L. Ed. 2d 142, 155 (1970); *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir. 1999); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir. 1997). A fact is material if it is outcome determinative under applicable law. *Borcky v. Maytag Corporation*, 248

F.3d 691, 695 (7th Cir. 2001); *Oest v. Illinois Department of Corrections*, 240 F.3d 605, 610 (7th Cir. 2001); *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344 (7th Cir. 1999). Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Thomsen v. Romeis*, 198 F.3d 1022, 1026-27 (7th Cir. 2000); *Plair v. E.J. Brach & Sons, Incorporated*, 105 F.3d 343, 346 (7th Cir. 1997); *Dempsey*, 16 F.3d at 836. Finally, summary judgment "will not be defeated simply because [*10] motive or intent are involved." *Roger v. Yellow Freight Systems, Inc.*, 21 F.3d 146, 148 (7th Cir. 1994). *See also Miller*, 168 F.3d at 312; *Plair*, 105 F.3d at 347; *United Association of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1268 (7th Cir. 1990). *Cf. Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1261 (7th Cir. 1993); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993).

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

The inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) [*11], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)

See also: Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 273 (1986); *Snider v. Belvidere Township*, 216 F.3d 616, 618 (7th Cir. 2000); *Haefling*, 169 F.3d at 497-98.

ACBL's Motion for Summary Judgment Against the Plaintiffs

ACBL has based its motion on the argument that the Harter Act does not apply to the contracts between itself and the plaintiffs. The Harter Act was designed to limit the availability of exculpatory clauses in shipping contracts.

See Federal Insurance Company v. Transconex, 430 F. Supp. 290, 295 (D.C. P.R. 1976). Thus, the Act provides:

It shall not be lawful for the manager, agent, master, or owner of any [*12] vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

46 U.S.C. § 190

ACBL argues that the Harter Act does not apply because the contracts were of affreightment and because ACBL is a private carrier and not subject to the limitations of the Harter Act. In response, the plaintiffs argue that ACBL is a public carrier and subject to the limitations of the Harter Act, or in the alternative, that the contracts in question specifically invoke the applicability of the Harter Act.

The Harter Act does not apply to private carriers if not specifically incorporated into the contract. *J. Aron & Company v. Cargill Marine Terminal, Inc.*, 998 F. Supp. 700, 703 (E.D. La. 1998); [*13] *United States v. Ultramar Shipping Co., Inc.*, 685 F. Supp. 887, 900-01 (S.D.N.Y. 1987). *See also FTC v. Verity Int'l, Ltd.*, 194 F. Supp. 2d 270, 274-75 (S.D.N.Y. 2002), *citing Computer and Communications Industry Association v. Federal Communications Commission*, 224 U.S. App. D.C. 83, 693 F.2d 198, 209-210 n.59 (C.A.D.C. 1982) (finding that "whether an entity is a common carrier for regulatory purposes depends on the particular activity at issue" and not on whether the entity itself had been considered a common carrier for other purposes). "A common [i.e. public] carrier is one that holds itself out to the public as ready to carry for anyone who requests its services, while a private carrier reserves the right to accept or reject employment as carrier." *J. Aron & Company*, 998 F. Supp. at 704. *See also Nichols v. Pabtex, Inc.*, 151 F. Supp.2d 772, 777 (E.D. Tex. 2001) (finding that "a common carrier has been defined as 'one

who holds himself out to the public as engaged in the business of transportation of person or property from place to [*14] place for compensation, offering his services to the public generally." (quoting *Kelly v. General Electric*, 110 F. Supp. 4, 6 (E.D. Pa. 1953)); *Close v. Anderson*, 442 F. Supp. 14, 16 (D.C. Wash. 1977) ("The primary characteristic of a common carrier is that he holds himself out to the public as one who is ready and willing to undertake the transportation of goods generally."). If one of the carrier's vessels is dedicated to the cargo of one shipper, there is a rebuttable presumption that a carrier is private. *J. Aron & Company*, 998 F. Supp. at 704. See also *Metal Processing, Inc. v. Humm*, 56 F. Supp.2d 455, 464 (D.N.J. 1999) (finding that "cargo carried under the COA [contract of affreightment] was one of private, not common, carriage since the carriage was an entire vessel load for a single shipper"). If the Harter Act does not apply, the rights and liabilities of the parties are determined by the contracts between the parties.

In *Ultramar Shipping*, the defendant argued that the Harter Act did not apply to its contract with the plaintiffs because the contract was for private [*15] carriage and not public carriage. The district court, after acknowledging that the Harter Act does not apply to contracts for private carriage, reasoned that a vessel is a common (i.e. public) carrier if it allows for more than one shippers' cargo on one vessel

during one voyage. *Ultramar Shipping*, 685 F. Supp. at 901. Because a vessel may not be a private carrier if the vessel has the ability to carry the cargo of more than one shipper, even though it may contain cargo from only one shipper, the district court looked to the contract between the parties and found that the contract anticipated that cargo of more than one shipper may be placed on the vessel. In *J. Aron & Company*, ACBL, a defendant in that case, argued that the barges in question contained cargo only from the shipper-plaintiff, that the cargo was transported in accordance with private contracts of affreightment which were "referenced on the reverse side of each bill of lading," that ACBL reserved the right to accept or reject cargo, and that it did not hold itself out as a shipper that would accept any cargo. 988 F. Supp. at 704. The district court rejected the plaintiffs' [*16] argument that the carrier was public because it filed tariffs and found that ACBL "acted as a

private carrier."

Dead Sea asserts that "a carrier holds itself out to the public if, by a course of conduct, it would accept goods from whomever offered to the extent of its ability to carry them" and cites to *United States v. Stephen Brothers Line*, 384 F.2d 118 (5th Cir. 1967), which in turn states that "carriers are held to be common if they have held out, by a course of conduct, that they would accept goods from whomever offered to the extent of their ability to carry." 384 F.2d at n.14 (internal quotation marks and citations omitted) (Dead Sea Response at p. 8) Thus, Dead Sea argues, because ACBL has advertised itself as a barge company, it has held itself out to the public as a shipper that would accept goods from any source. To support this, Dead Sea points to ACBL's March 20, 2002 website in which ACBL asserts that it operates "the nation's largest fleet of inland towboats and barges" and handles "a wide variety of commodities." (See Craig T. English Affidavit at P 2 and Exhibit A) Dead Sea also points to ACBL's prospectus which was filed with the Securities [*17] and Exchange Commission on November 13, 1998. (English Aff. at P 3) In this prospectus, ACBL describes the size and profitability of its extremely large barge line. (English Aff. at Exh. B) However, the fact that ACBL has a large fleet that is capable of transporting many commodities and goods does not necessarily mean that ACBL is a common carrier.

Dead Sea's argument is further belied by the contracts between the parties. The ACBL/Dead Sea and ACBL/Ispat Inland contracts of affreightment make no mention that the cargo of other shippers may be included in the barges that would carry the plaintiffs' cargo, unlike the contract

in *Ultramar Shipping*. Indeed, it is undisputed that six barges carried only coke belonging to Ispat Inland and the other barge carried only magnesium oxide belonging to Dead Sea. That is, barge ASG 958 carried only Dead Sea cargo and barges ACBL 2070, ACBL 4062, ACBL 4136, CCT 184, NOMA 240, and VLB 9174 carried only Ispat Inland cargo. ¹ In addition, the contracts specifically were tailored to the needs of each plaintiff. From the contracts, it is clear that ACBL retained the ability to accept or reject cargo if it found the contract terms unacceptable. [*18] There is simply no indication that ACBL would accept the

¹ Dead Sea makes the interesting argument that multiple shippers were involved because a number of different barges were maneuvered by one tugboat. Dead Sea argues that the combination of the tug and barges constituted a "vessel" and that because this "vessel" contained the cargo of more than one shipper, ACBL is a common carrier. In *Sacramento Nav. Co. v. Salzw*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927), the Supreme Court interpreted the term "vessel" in section 3 of the Harter Act to include the tug and the barge. 273 U.S. at 330, 47 S. Ct. at 369-70. There is no indication, however, that the tug-barge combination is a vessel when determining whether a carrier is private or public. The cases cited above appear to imply that the term "vessel" references individual barges and not a flotilla of barges. See also *Alamo Barge Lines, Inc. v. Rim Maritime Co., Ltd.*, 596 F. Supp. 1026, 1034-35 (E.D. La. 1984).

cargo of any shipper. Therefore, for the purposes of the Harter Act, ACBL is a private carrier.

[*19] As the Harter Act is not applicable to the parties' relationship, the inquiry now turns to whether the contracts of affreightment specifically invoked the protections of the Act. Ispat Inland asserts that the Harter Act applies to the parties' relationships because of a liability clause in the contracts. This clause, which is present in both the ACBL/Ispat Inland and ACBL/Dead Sea contracts, states: "17. LIABILITY: Carrier shall be liable to the extent provided by the common law modified by the statutes of the United States for any loss of or damage to the shipment herein described." (ACBL Stmt of Mat. Facts Exh. 4 at p. 2 and

Exh. 1 at attachment 1, p. 2) In *C. Itoh & Co. (America), Inc. v. M/V Hans Leonhardt*, 719 F. Supp. 479 (E.D. La. 1989), another case involving ACBL, the district court interpreted language identical to the liability clause in the present contracts. The district court concluded, without citing to any precedent, that this clause meant that the Harter

Act would apply to the parties' relationship. *C. Itoh & Co. (America), Inc.*, 719 F. Supp. at 501. ACBL urges this court to disregard this case because other precedent [*20] establishes that in order for the Harter Act to apply to

private carriers it must be specifically invoked. *See Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*, 89 F.2d 865, 866 (2nd Cir. 1937) ("By express reference section 3 [of the Harter Act] may be incorporated

into a contract of private carriage."); *Caribe Tugboat Corporation v. J.D. Barter Construction Company, Inc.*, 509 F. Supp. 312, 322 (M.D. Fla. 1981) quoting

Kerr-McGee Corp. v. Law, 479 F.2d 61, 64 (4th Cir. 1973).

See also Brown & Root, Inc. v. American Home Assurance Company, 353 F.2d 113, 118 (5th Cir. 1965) (stating that the Harter Act "is not self-executing. For private carriage it must be invoked ...").

ACBL's argument is well-taken. Ispat Inland asserts that this clause in the contract means that the Harter Act will apply because it is the common law that is associated with the parties' relationship. However, as stated above, the Harter Act does not apply to private carriers and is not within the common law or statutory umbrella that covers private carriers. That is to say, the clause incorporates [*21] the common law and statutes that are related to private carriers - carriers that, by law, are distinct and separate from common carriers. Thus, Ispat Inland's quotation from

Mississippi Valley Barge Line Company v. Inland Waterways Shippers Association, Inc., 289 F.2d 374 (8th Cir. 1961), is inapplicable because it specifically refers to common carriers and not private carriers. 289 F.2d at 378-79. Ispat Inland's reading of the clause would make it

a catch-all for all maritime and admiralty law. Such a reading cannot be accepted especially in light of Ispat Inland's failure even to make an *argument* that the clause in a private contract of affreightment would include the common law associated with common carriers. *See generally*

Local 75, International Brotherhood of Teamsters/ Chauffeurs, Warehousemen & Helpers v. Schreiber Foods, Inc., 213 F.3d 376, 380 (7th Cir. 2000) (stating that "a proposed contractual interpretation that would read out of a contract language obviously important to one of the parties faces and ought to face a distinctly uphill struggle for judicial acceptance." (quoting *In re Kazmierczak*, 24 F.3d 1020, 1022 (7th Cir. 1994))). [*22]

In addition to this, the very terms of the contract are in contradiction to the provisions of the Harter Act, thus making it more likely that the parties bargained for the exclusion of the dictates of the Act. The parties are experienced businesses that bargained for the terms of the contracts. If Ispat Inland and Dead Sea wanted the provision of the Harter Act to apply to the contracts of affreightment, they should have inserted a clause specifically stating either that the Harter Act applied or that the common law applicable to common carriers applied. Barring such a clause, this court cannot find that the Harter Act specifically was incorporated into the contracts of affreightment.

Thus, the parties' obligations and liabilities arise from the contracts of affreightment. This conclusion necessarily means that summary judgment must be granted in favor of ACBL. Ispat Inland's and Dead Sea's claims against ACBL are based solely on a violation of the Harter Act. As the Harter Act does not apply to the relationship between the parties, Dead Sea's and Ispat Inland's claim against ACBL are without merit.

Lakes and Rivers' Motion for Summary Judgment and ACBL's Motion for Summary Judgment [*23] Against Lakes and Rivers

Lakes and Rivers is seeking summary judgment on the premise that the storm that resulted in the damage to the barges and cargo was the result of an unpredictable and unexpected act of God. Lakes and Rivers does not appear to be arguing that it does not owe any duty as a wharfinger and bailee, but rather that it did not owe a duty because the storm causing the damage was unforeseeable. Whether a duty exists is a question of law for the court to determine.

Holtz v. J.J.B. Hilliard W.L. Lyons, Inc., 185 F.3d 732, 740 (7th Cir. 1999). Under Indiana law, the following factors are balanced to determine whether a duty of care exists:

- (1) the relationship between the parties;

(2) the reasonably foreseeability of harm to the person [or thing] injured, and

(3) public policy concerns.

Holtz, 185 F.3d at 741 (internal quotation marks and citations omitted)

See also *Blake v. Calumet Construction Corp.*, 674 N.E.2d 167, 170 (Ind. 1996); *Palmer & Sons Paving, Inc. v.*

Northern Indiana Public Service Company, 758 N.E.2d 550, 553 (Ind. App. 2001). [*24] The test for foreseeability is similar to the test for determining proximate cause: whether the injury and the actual harm was reasonably

foreseeable. *Holtz*, 185 F.3d at 742; *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp.2d 730, 741 (N.D. Ind. 2002);

Palmer & Sons Paving, Inc., 758 N.E.2d at 555 (quoting *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991)). Despite the general rule that a court must determine whether a duty exists, there are certain situations where the existence of a duty is a mixed question of law and fact such that preliminary factual issues must be determined by the fact finder. *Peters*

v. Forster, 770 N.E.2d 414, 417 (Ind. App. 2002); *Spears v. Blackwell*, 666 N.E.2d 974, 977 (Ind. App. 1996). Lakes and Rivers argues that the harm here, the sinking of the vessels, was not reasonably foreseeable because the onset, intensity, and duration of the storm that swept through the area was so unforeseeable that it constituted an act of God.

As an initial matter, Lakes and Rivers' liability depends on whether it was negligent in its care [*25] of the barges. The Seventh Circuit has approved the following test in determining whether a defendant is negligent:

... a defendant is negligent if the burden (cost) of the precautions that he could have taken to avoid the accident (B in [Judge Learned] Hand's formula) is less than the loss that the accident could reasonably be anticipated to cause (L), discounted (i.e. multiplied) by the probability that the accident would occur unless the precautions were taken. So: $B < PL$. The cost-justified level of precaution (B) - the level that the defendant must come up to on penalty of being found to have violated his duty of due care if he does not - is thus higher, the likelier the accident that the precaution would have prevented was to occur (P) and the greater the loss that the accident was likely to inflict if it did occur (L). Looked at from a different direction, the formula shows that the cheaper it is to prevent the accident (low B), the more likely prevention is to be cost-justified and the failure to prevent therefore

negligent. Negligence is especially likely to be found if B is low and both P and L (and therefore PL, the expected accident cost) are high.

Brotherhood Shipping Co., LTD v. St. Paul Fire & Marine Insurance Company, 985 F.2d 323, 327 (7th Cir. 1993) [*26]

In *Brotherhood Shipping*, the *Capetan Yiannis* was damaged in the Port of Milwaukee, where it was moored, when a common northeast gale resulted in waves that pushed the ship against the wharf. The Court of Appeals noted that a 1951 study indicated that the area where the ship sunk was unsafe, that a number of recent studies indicated that the harbor conditions were unsafe, and that these studies suggested additional safety measures. Additionally, the Court of Appeals noted that similar accidents had occurred to nine ships over a 15 year period, including one accident where a ship had sunk. At the time of the accident, the harbor master informed the ship that a significant and dangerous storm was brewing and heading in the direction of the harbor, however, the ship was unable to leave the harbor because the pilot and the tug were not available. Thus, the ship was unable to take precautionary measures because the harbor breached its duty of reasonable care:

... here the city's harbor master knew by 3 p.m. and probably earlier that a northeaster was approaching, and when he received the Coast Guard report at 4 p.m. he knew everything a reasonable person would have [*27] had to know to have a duty to warn the master of the *Capetan Yiannis* immediately that he must make arrangements to clear the slip at short notice.

Brotherhood Shipping, 985 F.2d at 329

The Seventh Circuit concluded that the magnitude of the loss was great, that precautions would have averted the loss, and that the likelihood of the accident was great because of the history of the harbor. *Brotherhood Shipping*, 985 F.2d at 329. However, the Court of Appeals did not discuss whether an act of God defense could relieve the harbor. An act of God defense does have significance here in terms of the probability that an accident would occur and the foreseeability of the particular harm.

An act of God is a term of art that does not include every natural occurrence. Rather, the defense is applicable in only a limited number of circumstances. A number of factors have been considered by various courts in determining whether an act of God defense applies. These factors

include: 1) the severity of the natural occurrence causing the damage; 2) the reasonable predictability of this natural occurrence; 3) the lack of human agency in the damage to [*28] the property; and 4) the reasonableness of any precautions. *See Brown v. Sandals Resorts International*, 284 F.3d 949, 954 (8th Cir. 2002) ("Under South Dakota law, an act of God is defined as any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." (internal quotation marks and citations omitted));

Bunge Corporation v. Freeport Marine Repair, Inc., 240 F.3d 919, 926 (11th Cir. 2001) (approving a district court finding that winds ranging between 85 mph and 103.5 mph were not "of such force that no reasonable preparations would have prevented [the ship] from breaking free from

her moorings"); *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 460 (5th Cir. 1979) (holding that under Georgia law, "an act of God, from which no tort liability can arise, is an accident caused by physical causes which are irresistible or inevitable, such as lightening, storms, perils of the sea, earthquakes,

inundations, sudden death or illness."); *Farr Co. v. Union Pac. R. Co.*, 106 F.2d 437, 439 (10th Cir. 1939) [*29] (finding that an act of God can be "a sudden and extraordinary flood" and that a defendant is liable if it reasonably could have anticipated damage by such an act);

Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257, 262 (W.D. Okla. 1992) (holding that a defendant cannot be liable in negligence for an act of God unless there is concurrent

negligence on the defendant's part); *Frederick v. Union Carbide Corporation*, 168 F. Supp. 808, 810-11 (N.D. W.Va. 1959) ("That which reasonable human foresight, pains, and care should have prevented can not [sic] be called an act of God." (internal quotation marks and citation omitted)). "The burden of proving an inevitable accident or an Act of God rests heavily upon the vessel asserting such

[a] defense." *Bunge Corporation*, 240 F.3d at 929.

Here, there is a question of fact as to whether the storm was an act of God that would relieve Lakes and Rivers of liability. Lakes and Rivers has gone to great lengths to argue that the particular components of the storm were unforeseeable and thus constituted an act of God. Pamela Knox, Lakes and Rivers' expert, reports that only three other [*30] storms during 1957-1985 followed the same course as the one at issue here. (Lakes and Rivers Exh. F, p. 1) Knox contends that the sustained direction of the winds and strength of the winds were more than expected, that the storm produced more than expected precipitation, that the winds caused a "seiche" which increased the mean level of the lake in the area

surrounding the harbor, and that the north winds which caused the seiche occurred 15 hours

prior to the predicted time. (Lakes and Rivers Exh. F, pp. 4-5) Specifically, Knox has stated:

The strong and persistent north winds caused a seiche that raised the level of Lake Michigan by approximately 2.7 feet in the hours leading up to the barge sinking. This rise in lake level, combined with the action of the high waves, contributed to damage in lakeshore areas along the south shore of Lake Michigan, and may have reduced the ability of the breakwater at Burns Harbor to protect again [sic] the high waves.

(Lakes and Rivers Exh. F, p. 4)

She further has noted:

Since the harbor lies directly south of the maximum northward expanse of Lake Michigan, it is located in the geographical region that would be expected [*31] to experience the maximum wave height caused by a wind from the north. It is not possible to determine what the exact wave heights at Burns Harbor were from the available data.

(Lakes and Rivers Exh. F, pp. 4-5)

Knox also has testified that the 13 inch snow fall (which fell over March 9-10, 1998) was significant because it showed persistent winds over Burns Harbor. (Pamela Knox Dep., Lakes and Rivers Exh. G, pp. 22-25) These north winds ranged from 10 to 30 knots, began in the mid-afternoon on Sunday, and lasted 15 hours - a duration which was unusual. (Knox Dep. pp. 57-58) The high winds had the effect of raising the mean lake level of the southern end of Lake Michigan and increasing the size of waves. (Knox Dep. pp. 34-35, 59) Knox notes that north winds have a more severe effect on Burns Harbor than winds from the northeast. (Knox Dep. p. 60) Knox concludes that the storm was "worse than a typical storm would be" but that it was "within the realm of possibility." (Knox Dep. p. 23) Also, she agrees that Burns Harbor was particularly susceptible to storms from the north. (Knox Dep. p. 59)

From this testimony, Lakes and Rivers argues that the north winds, which are more [*32] devastating than the predicted northeast winds, came earlier than predicted, were of longer duration than predicted, and were more intense than predicted. Thus, while the storm itself was foreseeable, the particular components of the storm, components that were most relevant to the lake conditions that caused the sinking of the barges (i.e. the high waves and increased mean lake

level), were unforeseeable. In addition, Lakes and Rivers contends that it did all that was possible to prevent damage by placing additional mooring lines on the barges after 10:00 A.M. on Sunday. (Carl Cox Dep. pp. 68-71)

A jury could find, however, that Lakes and Rivers was on sufficient notice to expect a major storm from the northerly direction. In addition, a jury could find that Lakes and Rivers was aware of a certain amount of unpredictability in the weather and developed safeguards to protect the barges. During the weekend of the incident, weather reports indicated that a major storm would be approaching the south half of Lake Michigan. On Thursday, March 5, 1998 at 9:00 P.M. CST, the National Weather Service of Chicago issued a Lake Michigan Forecast (MAFOR) for Friday, March 6, 1998. (Ispat Inland [*33] Exh. 8, p. 1) This forecast predicted 5-10 knot southeast winds, a snow likelihood, and waves at 2 feet or less for the south half of Lake Michigan on Friday. At 3:00 A.M. CST on Friday, a MAFOR advised 5-10 knot east winds increasing to 15-25 knot winds and waves 1-2 feet building to 3-5 feet for Saturday, March 7, 1998 and 15-25 knot east winds which would increase to 35 knot "gales" and waves building from 3-5 feet to 6-8 feet for Saturday evening. (Ispat Inland Exh. 8, p. 2) The MAFOR also indicated that "a gale warning will likely be issued tonight for gales Saturday night" for southern Lake Michigan (Ispat Inland Exh. 8, p. 2) At 3:00 P.M. and 9:00 P.M. on Friday, two MAFORs were issued which stated the same predictions for Saturday as the earlier, 3:00 A.M. MAFOR. (Ispat Inland Exh. 8, pp. 2-4) These subsequent MAFORs also repeated that a gale warning would be issued for Saturday night.

At 3:00 A.M. on Saturday, March 7, 1998, a MAFOR was issued that indicated that a gale warning was in effect and likely would be issued for Sunday, March 8, 1998. (Ispat Inland Exh. 8, p. 5) The MAFOR stated that on Saturday east winds would increase from 5-10 knots to 10-20 knots, that waves [*34] would build from 1-2 feet to 2-4 feet during the day, and that in the evening, winds would increase to 35 knot gales and waves would build to 5-7 feet. (Ispat Inland Exh. 8, p. 5) The MAFOR predicted that on Sunday there would be 35 knot northeast gales and waves that would build to 7-10 feet. At 9:00 A.M. on Saturday, the MAFOR repeated its earlier predictions for Saturday and Sunday. (Ispat Inland Exh. 8, p. 5) At 9:00 P.M. on Saturday, a MAFOR was issued which predicted 35 knot northeast gales, snow or rain, and waves of 7-10 feet for Sunday and

northeast winds of 30 knots becoming north gales of 40 knots late in the evening and waves of 7-10 feet for Sunday night. The gale warning also remained in effect. (ACBL Stmt. of Mat. Facts Exh. 15, p. 6)

At 3:00 A.M. on Sunday, March 8, 1998, the MAFOR issued indicated a "storm warning in effect" with east winds of 30 knots increasing to 35 knot northeast gales, snow or rain, and waves building to 6-9 feet for Sunday and northeast gales of 35 knots increasing to 50 knot "storm force North winds" in the early morning hours and waves building to 8-12 feet for Sunday evening. The MAFOR also predicted "50 knot storm force North winds diminishing [*35] to 40 knot North gales" with 10-14 foot waves for Monday. (ACBL Stmt. of Mat. Facts Exh. 15, p. 7) The 9:00 A.M. MAFOR issued on Sunday repeated the storm warning and the wind and wave predictions for both Sunday and Monday. (ACBL Stmt. of Mat. Facts Exh. 15, p. 7) Finally, at 3:00 P.M. on Sunday, the MAFOR repeated its storm warning and indicated 35 knot gales increasing to 50 knot storm force north winds and waves of 8-12 feet for Sunday night. The MAFOR also predicted 50 knot storm force winds reducing to 40 knot gales with waves of 12-15 feet for Monday and gales of 40 knots reducing to 30 knot winds and waves of 12-15 feet for Monday night. (ACBL Stmt. of Mat. Facts Exh. 15, p. 8)

ACBL and Ispat Inland argue that Knox herself testified that the amount of snowfall during this storm was "within the realm of possibility" for Burns Harbor. (Knox Dep. p. 23) They also note that Knox stated that there were six similar snow events for this geographic area during the winter months since 1974. (Knox Dep. pp. 26-28) She also stated that because there was no data, she could not give an opinion as to whether the wave height at Burns Harbor during this storm was typical. (Knox Dep. pp. 28-29) [*36] It should be noted that Knox based her conclusions not on data obtained from Burns Harbor itself, but based on the precipitation, wind, and wave action observed at other reporting stations including Valparaiso (which she indicated had "similar" weather to Burns Harbor), Midway Airport, O'Hare Airport and others (Knox Dep. pp. 26, 29; *see generally* Lakes and Rivers Exh. F)

ACBL and Ispat Inland also point to the testimony of Carl Cox in order to show that the storm was foreseeable.² Cox has worked for Lakes and Rivers since 1975 and is currently the superintendent for the dock. As the dock superintendent,

² Both Ispat Inland and ACBL rely on *Rose Marine Transportation, Inc. v. Indiana Port Commission*, 1990 U.S. Dist. LEXIS 3534, 1990 WL 129485 (N.D. Ind. 1990) for the proposition that the storm here was foreseeable and thus not an act of God. In *Rose Marine*, Judge Rudy Lozano made a number of findings of fact which could be relevant here. The court noted, among other things:

part of Cox's job is to coordinate the arrival of barges. (Carl Cox Dep. p. 10) When the weather is "bad," Cox makes sure that the barges are tied up well. (Cox Dep. pp. 10-11) With respect to the relationship between the weather and the arrival of barges, Cox testified as follows:

Q. Now, when they [i.e. a towing company] would call and say they had these barges, would they tell you what they expected the weather to be?

A. I have had them to say that the weather is going to get bad. And I would say, Well, Let's just keep them over there. If they know it's going [*37] to get too bad, I don't want them. [sic]

Q. Now I want to delve into that a bit. What is too bad in your judgment?

A. When you get it out of the north and northeast and then sometimes it can get, it can get bad then.

Q. And how many miles per hour or does the wind have to be before in your judgment it gets so bad that you would tell Kind-ra to keep the barges over there?

A. Really, if they are going to say the wind is 30, 40 miles an hour, no, I don't want them, but like I said, most of the time, it's usually not that bad.

Q. Had you had, before March of 1998, had you had the occasion to observe what effect a northeasterly wind of 30 miles an hour had on a loaded barge on the east arm?

A. I don't know. Just like I said, when it comes out of the northeast, it can get bad. And like I said, it's usually not real bad. But if it gets, you know, if it gets real storms, yes, it can get bad.

Q. Had you had barges break away from the east arm before March of 1998?

A. Nothing very bad but I have had, over the years I have had a few to get loose.

Q. Can you tell me whether it was more or less than five?

A. Yeah, It's more than five, [*38] I would say. I am going to guess a dozen. I am just - that's guessing at it. I don't really know for sure.

(Cox Dep. pp. 15-16)

Despite Knox's opinion, Cox not only is aware of the severity of storms that arrive from the northeast, but also is aware of other harbors in the vicinity that have had break-aways during storms and high winds. (Cox Dep. p. 17) During this particular storm, however, Cox stated that he had "no idea it was going to be that bad." (Cox Dep. p. 31) Cox stated that the weather did not get bad until Sunday night. (Cox Dep. pp. 32-33, 34) Cox saw the barges "bounding all over" when he arrived at the harbor on Monday morning around 3:00 or 4:00 A.M. (Cox Dep. p. 34) At that time, he saw water entering the cargo boxes. (Cox Dep. p. 35) Cox said that he called the longshoremen on Sunday night, but by the time they arrived at 4:00 A.M. on Monday, there was nothing they could do to save the barges or the cargo. (Cox Dep. p. 35) In describing the conditions on Monday morning, Cox stated that the lake was "very rough" and that

[the wind] felt like it was coming from every direction. But like [*39] I said, it was coming out of the north and the east. Waves were terrible.

10. From the beginning of the operation of the [Burns Harbor] Port in 1970, the Port experienced problems with wave action inside the Port during northerly storms on Lake Michigan

16. Between 1978 and 1984, there were numerous storms on Lake Michigan of varying intensity which caused significant, and at times hazardous wave action within Burns Harbor

However, the findings of fact in *Rose Marine* are not binding here, and the parties have not offered any authority as to how this unreported case could be binding. In addition, the parties have not used the data, presumably relied on by *Rose Marine*, in this case. While this court is bound by precedent, it is not bound by the decision of a district court. *See Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998) ("[A] district court's decision does not have precedential authority."); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority"). This applies with greater force to an *unreported* decision of a district court.

Water was coming plumb up on the dock. And like, I think it was like 13 or 14 foot to the dock. There would be water and waves at times come plumb up on the dock.

(Cox Dep. pp. 36-37)

Cox noted that between 4:00 A.M. and 10:00 A.M. on Monday, the barges either sank or ran aground. (Cox Dep. pp. 37-38) Cox had scheduled them for unloading on Monday. (Cox Dep. pp. 129-130)

[*40] A jury could conclude that, notwithstanding Knox's testimony that storms from the north are worse than storms from the north-east and that such storms are rare, it was within the experience of Cox, a person who would have knowledge of such matters, that storms from the north and northeast were "bad", and that he would have told the towing company, Kindra Lake, not to tow the barges to the dock in the event of "bad" weather. A jury further could conclude that regardless of the actual weather conditions, Cox should have rejected the barges based on the weather predictions that indicated the approach of a "bad" storm. There is no indication that Kindra Lake would have delivered the barges before the storm hit without the approval of Cox. With the predicted 12-15 foot waves and 40 knot north gales predicted for Monday, there is no indication that Lakes and Rivers even would have been able to unload the barges on Monday as they had scheduled. A jury reasonably could find that Lakes and Rivers could have unloaded the barges sooner, thus at least saving the cargo from damage, or could have told Kindra Lake not to tow the barges to the dock until after the storm had passed. A jury also could [*41] find that there is no indication that had the storm acted as predicted that this damage would not have occurred anyway. In addition, Lakes and Rivers' own expert testified that the snow-fall amount was not entirely unforeseeable and that she had no opinion as to whether the wave height in this storm was unusual.

Conversely, a jury could find that such a storm in March was highly unusual and that it was not reasonably predictable. The jury could conclude that the amount of snowfall, the rise in the mean lake level, and the sustained winds were such an unusual occurrence for the month of March for lower Lake Michigan that this weather event constituted an act of God for which Lakes and Rivers is not responsible. The jury reasonably could find that while the storm itself was foreseeable, the particular components of the storm arrived earlier than predicted and caused the damage to the barges and the cargo. Moreover, a jury could find that adding extra mooring lines was a sufficient safeguard to the predicted danger. Simply put, there is a question of fact as to the severity of this storm for this geographic area,

whether it was reasonably foreseeable, and whether there were reasonable [*42] safeguards that Lakes and Rivers could pursue. For these reasons, summary judgment cannot be granted with respect to Lakes and Rivers' motion for summary judgment.

In ACBL's motion for summary judgment against Lakes and Rivers, ACBL asserts that it is entitled to indemnity for the plaintiff's losses, and also that it is entitled to compensation from Lakes and Rivers for damage to the barges because Lakes and Rivers was the bailee of the barges at the time of the incident. First, ACBL has cited to no case authority which would suggest that it is entitled to indemnification from Lakes and Rivers. This alone would be fatal to its request for summary judgment on that point. In any event, as the court has held above, ACBL cannot be liable for the plaintiff's damages under the Harter Act.

Second, ACBL argues that Lakes and Rivers was a bailee of the barges and that its negligence caused damage to the barges. However, as stated above, there is a question of fact as to whether Lakes and Rivers had a duty of care (because of the Act of God defense) and whether Lakes and Rivers acted negligently in its care of the barges. For these reasons, ACBL's motion for summary judgment against Lakes [*43] and Rivers must be denied.

Kindra Lake's Motion for Summary Judgment

A contract to move a barge is one for towage, and the tug is not the bailee or the insurer of the tow. *Agrico Chemical Company v. M/V Ben W. Martin*, 664 F.2d 85, 90 (C.A. Miss. 1981), citing *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 418 n.6, 79 S. Ct. 1210, 1215 n.6, 3 L. Ed. 2d 1134 (1959). Lakes and Rivers' Rule 14(c) claim against Kindra Lake sounds in tort and not contract. *Stevens v. The White City*, 285 U.S. 195, 52 S. Ct. 347, 349, 76 L. Ed. 699 (1932). Tug vessel owners owe "a duty 'to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. [sic]" *In re Lewis & Clark Marine, Inc.*, 50 F. Supp.2d 925, 929 (E.D. Mo. 1999) quoting *Stevens*, 285 U.S. at 202, 52 S. Ct. at 350; *Transamerica Premier Insurance Company v. Ober*, 107 F.3d 925, 929 (1st Cir. 1997). As part of this duty,

the captain of the tug is charged with knowledge of weather forecasts, [*44] whether or not he had actual knowledge of the forecasts. A breach of the duty of care thus can be found when a tug captain

makes a decision that is unsafe in light of the weather conditions and the particular circumstances of the tow that could reasonably have been known. It is negligent, for example, to knowingly brave weather conditions that may imperil a flotilla.

Under certain circumstances, the duty of reasonable care and maritime skill may require that a tug captain delay a tow, or otherwise make ad hoc adjustments to the course or schedule that was initially planned by its client.

Transamerica Premier Insurance, 107 F.3d at 930-31

There is no dispute that Kindra Lake towed the barges to the Lakes and Rivers terminal without causing damage to the barges. From the evidence, it appears that two of the barges were delivered in the afternoon on Friday, March 6, 1998, and the remaining barges were delivered in the morning on Saturday, March 7, 1998. (Cox Dep. pp. 26, 134-35; Michael Szczudlo Dep. p. 43)³ As noted above, the first forecast of gale force winds was at 3:00 A.M. on Friday and it predicted that the winds would occur on Saturday [*45] evening, after the barges had been delivered. The question is whether Kindra Lake's duty of care extends to situations, as here, where a tower delivers barges to a dock with the knowledge that a severe storm will affect the dock after the barges have been delivered.

Kindra Lake argues that its duty ended when it successfully and without incident moored the barges to the Lakes and Rivers dock. After delivery of the barges to the custody of Lakes and Rivers, Kindra Lake argues that it no longer had a duty to protect the barges from the subsequent inclement weather. Ispat Inland argues that Kindra Lake breached its duty of care by delivering the barges to an unsafe harbor and by delivering the barges when it knew or should have known that the dock would be experiencing inclement weather that could affect the barges. Lakes [*46] and Rivers argues that because Kindra Lake was "an active partner in a joint enterprise whose goal was to provide for successful delivery and unloading of the barges and cargo" it also was responsible for any damage that occurred to the barges and cargo.

Lakes and Rivers' brief in response to this motion is devoid of any citation to authority that would indicate liability on

the part of Kindra Lake. Lakes and Rivers appears to be arguing that because it coordinated the towing and mooring of particular barges with Kindra Lake and because Kindra Lake informed Lakes and Rivers about weather conditions that they became partners in the towing, mooring, and unloading business. In addition, Lakes and Rivers argues that it relied on the assurances of Kindra Lake personnel that the barges would be safe as moored, despite the weather, until they were unloaded on Monday. Lakes and Rivers' arguments are without merit. Lakes and Rivers has pointed to no authority that would make a tower responsible for the actions of a dock subsequent to the safe delivery of barges, even if they had a history of cooperative towing and mooring. If this were the case, Kindra Lake would be responsible for any number [*47] of barges days, weeks, even months after the barges had been delivered. Lakes and Rivers has presented no authority to support such a proposition.

Ispat Inland's arguments, however, require slightly more analysis. Ispat Inland first refers to 46 C.F.R. § 45.187(a) which states that "tows on the Burns Harbor route must operate during fair weather conditions only." The code section further states that "if weather conditions are expected to exceed these limits at any time during the voyage, the tow must not leave harbor or, if already underway, must proceed to the nearest appropriate harbor of safe refuge." 46 C.F.R. § 45.187(c). Michael Szczudlo, who began working for Kindra Lake in February 1998 as a captain and was the captain of the tug *Buckley* during the relevant time period, testified that he would begin to determine if there was "fair weather" when the wave heights would reach four to six feet. (Szczudlo Dep. p. 13) Despite citing to this code section, Ispat Inland has provided no argument of what constitutes "fair weather" or how this section relates to the incident at issue. For example, Ispat Inland has not argued that [*48] Kindra Lake towed the barges to the Lakes and Rivers dock in weather that could not be termed "fair." As Ispat Inland has failed to bolster this suggestion with argument or case authority, this objection is without merit.

Second, Ispat Inland argues that Kindra Lake had a continuing duty to protect the barges. In *Lancaster v. Ohio River Company*, 446 F. Supp. 199 (N.D. Ill. 1978), a towing company towed a barge to a dock and moored it there. Five days later, the barge broke free of its moorings and struck other vessels in the dock during a storm with 50 mile per hour winds. The district court found that "while ... a towing company's responsibility for its tow ceases upon the proper

³ Ispat Inland also cites to the affidavits of Long and Szczudlo. While this point does not appear to be disputed, the court cannot find these two affidavits in the parties' voluminous filings.

mooring of the tow at the final destination of the tow pursuant to the towage agreement ... this court is of the opinion that a genuine issue of material fact exists as to whether [the towing company] properly moored Barge ORG 2525 to the [] docks" *Lancaster*, 446 F. Supp. at 202-03. The court then cited to *Pasco Marketing, Inc. v. Taylor Towing Service, Inc.*, 554 F.2d 808 (8th Cir. 1977) which stated:

The recognized rule [*49] has long been that a tug is bound to properly moor and make fast an unmanned barge it delivers, and that drifting which occurs within a short time thereafter presumptively established fault on the part of the mooring vessel.

554 F.2d at 811

The district court then concluded that while five days was not a "relatively short period of time, and weather conditions changed from the time of initial mooring to breakaway, the presumption raises enough of an inference to require this court to find controverted and disputed the propriety of [the towing company's] mooring." *Lancaster*, 446 F. Supp. at 203. While this case may appear to be on point, the factual background of the case offers no insight as to whether the barge was improperly moored in the first instance during presumably good weather. For example, it is conceivable that the barge at issue in *Lancaster* was not moored properly when it was first secured to the dock and that it subsequently broke free. There also is no indication that the weather in *Lancaster* was particularly harsh or severe.

In addition, cases cited by the plaintiffs support the proposition that [*50] a tug's duty to the barges exists while the tug is towing the barges and until the barges are securely tied to a safe dock. *See DiMillo v. Sheepscoot Pilots, Inc.*, 870 F.2d 746, 748-49 (1st Cir. 1989) (finding that a tug was liable for damage to a barge when it was damaged while in transit in severe weather); *The Eastchester*, 20 F.2d 357, 358 (2nd Cir. 1927) ("The tug having fulfilled her towage contract by delivering the barge to the consignee, without objection to the berth by consignee or by bargee, the risk in allowing the barge to remain in the position she was in when the tug departed was not the tug's."). *But see The Britannia*, 213 F. 22 (2nd Cir. 1914) (finding a tug liable for mooring a barge to a dock that became unsafe during the low tide after the tug had secured the barge to the dock). There is case authority which suggests that if a tug is unable to deliver a barge to the agreed dock and delivers it instead to another dock, the tug has a continuing obligation to protect that barge from any foreseeable weather conditions. *See The B.B. No. 21 v. Cornell Steamboat Co.*, 54 F.2d 532, 533

(2nd Cir. 1931). [*51] A tug also can be liable if it inadequately secures the barge. *Pasco Marketing, Inc.*, 554 F.2d at 811. However, a tug's responsibility for the barges ends when the barges are "safely anchored at the completion of the voyage." *Naviera Tabago S.A. v. Sprigg Carroll*, 394 F. Supp. 1354, 1359 (S.D. Fla. 1975) (internal quotation marks and citation omitted).

Here, Kindra Lake delivered the barges to the Lakes and Rivers dock at Burns Harbor without incident. Kindra Lake knew or should have known that inclement weather was threatening the harbor. Specifically, by Friday, March 6, 2998 at 3:00 A.M., Kindra Lake knew that on Saturday 35 knot gales and 6-8 foot waves were predicted. By the time that the remaining barges were delivered on Saturday, Kindra Lake knew that a gale warning was in effect and would be issued for Sunday. In addition, Szczudlo discussed the "east/northeast gales" on Friday with Don Campbell and was aware that Burns Harbor had a reputation of being unsafe during a northerly storm. (Szczudlo Dep. pp. 8, 113-14) On Saturday, Szczudlo recommended that the barges be spaced 50 feet apart in light of the weather predicted for that [*52] evening. (Szczudlo Dep. pp. 111-12, 115-16) Szczudlo also indicated that he tied off the barges at the direction of Cox and according to where Cox wanted them to be on the dock. (Szczudlo Dep. pp. 115-117) Kindra Lake also knew that Lakes and Rivers did not plan to unload the barges until Monday. (Don Campbell Dep. p. 61) And Don Campbell, who was the manager of Kindra Lake, indicated that "I spoke to Mike S[zczudlo] ... and Carl [Cox]. The three of us agreed that if spread the barges [sic] would probably be okay until Monday unload." (Campbell Dep. pp. 10-11, 61-62) Campbell noted that "we had good weather to move the barges." (Campbell Dep. p. 63)

And yet, despite what Kindra Lake knew or should have known, Lakes and Rivers was in the business of housing and unloading the barges, and there is no evidence that it was Kindra Lake's responsibility to make sure that the barges were unloaded in a timely manner or to ensure that, after they had been delivered, the barges remained safe. Once Kindra Lake delivered the barges without damage and secured them to the Lakes and Rivers' dock without incident, Kindra Lake's duty ended. Kindra Lake did not have the ongoing duty to protect [*53] the barges after delivery and certainly was under no obligation to direct and control in what manner Lakes and Rivers stored the barges and unloaded the cargo. *See Gulf Oil Corporation v. Tug Gulf Explorer*, 337 F. Supp. 709, 717 (E.D. La. 1971) ("Although, generally speaking, a tug captain impliedly represents that the berth is a safe one under existing and reasonably expected conditions, he does not represent its

remaining safe for an indefinite period."). At the very most, Kindra Lake was responsible for tying off the barges in a manner that would secure them in light of the forecasted gale for Saturday night. However, Kindra Lake cannot be held liable for the storm that caused damage to the barges on Monday morning. There is no indication that the barges would not have been damaged if the barges had been tied to the dock in any manner other than what was done here. There also is no indication that Lakes and Rivers did not have the right to tell Kindra Lake to postpone delivery of the barges until the bad weather had passed. From the evidence, it appears that Lakes and Rivers could have told Kindra Lake not to deliver the barges until Monday or possibly later. There [*54] is no indication that Kindra Lake would have refused such a request or that it would have delivered the barges anyway.

Finally, Kindra Lake argues that as soon as it delivered the barges and moored them to the dock, Lakes and Rivers assumed responsibility over the barges and assumed the duty to exercise reasonable care over them. Lakes and Rivers, the party most affected by this argument, argues in response that Kindra Lake took an active role in protecting the barges after the delivery and thus retained culpability over the damage. Whether Kindra Lake actively advised Lakes and Rivers about the weather forecasts does not translate into a duty of care. The relationship between Lakes and Rivers and Kindra Lake was such that Kindra Lake would tow barges to the Lakes and Rivers dock, secure them there, and then leave. At this point, Lakes and Rivers either unloaded the barges or held them there for a period of time before unloading them. There is no indication that Lakes and Rivers ever sought the permission or advice of Kindra Lake as to when it should unload the barges. Indeed, there is no evidence that Kindra Lake had any involvement in the unloading of any barges it delivered. Their [*55] relationship was such that Kindra Lake did not owe a duty of care after these barges were delivered. For these reasons, summary judgment must be granted with respect to Kindra Lake's motion for summary judgment.

Dead Sea Periclast's Motion for Partial Summary Judgment

In the motion, Dead Sea seeks a ruling that would establish its damages regardless of which of the defendants (if any) will be found liable. It follows for the above rulings that the only party that could be found liable for Dead Sea's damages is Lakes and Rivers. Each of the defendants, however, has responded to this motion and all of the arguments will be considered.

Dead Sea argues that its damages amount to \$ 667,448.90 which includes the invoice price of magnesium oxide cargo minus the amount received in a salvage sale of the oxide. Dead Sea argues that while it has the burden of establishing the amount

of loss, it is the defendants' burden to establish the failure of mitigation. Dead Sea also argues that while damages are established from the fair market value of the goods destroyed, in the absence of such a value, the invoice price can be used. ACBL argues that the invoice price cannot be used as the benchmark [*56] of damages as Dead Sea has not established that this price is the fair market value of the goods or that such a value cannot be determined. Kindra Lake similarly argues that the invoice price cannot establish the fair market value and that damages must be measured by tort principles and not by the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 (COGSA). All parties agree that it is Dead Sea's burden to establish the amount of damages it has incurred.

The following facts are undisputed: 1) Dead Sea sold 1,584.58 short tons (1,437.52 metric tons, 1,437,520 kilograms) of magnesium oxide to North American Refractories and made plans to ship the substance on board the ACBL barge AGS 958 (Yonatan Ben Yehuda Aff. at PP 3, 5); 2) the barge Bank in Burns Harbor, Indiana, causing damage to the magnesium oxide; 3) North American Refractories refused to accept the magnesium oxide as it was damaged as a result of the sinking (Yehuda Aff. at P 7); 4) the magnesium oxide was invoiced at a price of \$ 0.49 per kilogram (Dead Sea's Motion, Exh. A); 5) the total invoice price of the magnesium oxide on barge ASG 958 was \$ 704,385.80; 6) G&T Commodities paid Dead Sea \$ 36,935.90 [*57] for the salvaged magnesium oxide (M.J. Rossi Aff. at P 2); and 7) no party has established the fair market value of the magnesium oxide.

All of the cases cited to in Dead Sea's motion deal with damages in cases brought under COGSA. It is undisputed here that Dead Sea's claims against the defendants are not brought under this Act. Under the Act, however, damages are measured by ascertaining the fair market value of the undamaged cargo at the destination less the fair market value of the cargo in the damaged condition. *Minerais U.S. Inc., Exalmet Division v. M/V Moslavina*, 46 F.3d 501, 502 (5th Cir. 1995); *Terman Foods, Inc. v. Omega Lines*, 707 F.2d 1225, 1228 (11th Cir. 1983); *Armco Chile Prodein, S.A. v. M/V Norlandia*, 880 F. Supp. 781, 796 (M.D. Fla. 1995). See also *BP North American Petroleum v. Solar ST*, 250 F.3d 307, 312 (5th Cir. 2001) (finding that damage to cargo as a result of the negligence of the defendant is measured by the market value of the cargo). Under COGSA, in the absence of evidence regarding the fair market value, the invoice price may be substituted in order to calculate [*58] damages. *Mitsui Marine Fire and Insurance*

Company, LTD v. Direct Container Line, Inc., 119 F. Supp.2d 412, 417 (S.D.N.Y. 2000); *Sogem-Afrimet, Inc. v. M/V Ikan Selayang*, 951 F. Supp. 429, 443 (S.D.N.Y. 1996) ("Where a contract exists, the proper measure of a plaintiff's damage is the price plaintiff was to receive under the contract minus the amount of money plaintiff received by selling the damaged goods."). Under Indiana law, the measure of damages is the fair market value of the property damaged less any mitigation. See generally *Warrick County v. Waste Management of Evansville*, 732 N.E.2d 1255, 1258 (Ind. App. 2000); *Wiese-GMC, Inc. v. Wells*, 626 N.E.2d 595, 597-98 n.1 (Ind. App. 1993); *Ridenour v. Furness*, 546 N.E.2d 322, 325 (Ind. App. 1989). While the two measures of damages may be worded differently, the principal is the same: damages are measured by the fair market value of the damaged goods minus any mitigation.

Here, Dead Sea has provided only the invoice price as an indication of its damages. Despite arguing that such a proffer is not evidence of the fair [*59] market value of the magnesium oxide, the defendants have not offered any evidence, or refuted any of Dead Sea's evidence, as to what the fair market value should be or how it should be calculated. In addition, there is no indication that the agreement between Dead Sea and North American Refractories was anything but an arms length transaction. This alone would indicate that the invoice price is in fact a fair market value. While it is Dead Sea's burden to establish its damages, once it has asserted an amount of damages, it is up to the defendants to refute such an amount. See *Consolidated Grain and Barge Company v. Flowers Transportation, Inc.*, 538 F. Supp. 65, 73 (E.D. Mo. 1982) (reducing the damages based on the invoice price by \$ 10.00 per unit based on *evidence* that the value of the cargo could

fluctuate by that amount). It also should be noted that the purpose of an award of compensatory damages is to make the plaintiff whole and damages which would include the invoice price minus the salvage amount of this shipment of magnesium oxide would make Dead Sea whole. There is no indication that such a damage demand is unreasonable or inflated.

For [*60] the foregoing reasons, the Motion for Partial Summary Judgment filed by the plaintiff, Dead Sea Periclase Ltd., on February 28, 2002 is **GRANTED**; the Motion for Summary Judgment filed by the third-party defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals (Lakes and Rivers), on February 28, 2002 is **DENIED**; the Motion for Summary Judgment Against Defendant, Jack Gray Transport, Inc. d/b/a Lakes and Rivers Terminals filed by the defendant, American Commercial Barge Line (ACBL), on February 28, 2002 is **DENIED**; the Motion for Summary Judgment Against Plaintiffs filed by the defendant, ACBL, on February 28, 2002 is **GRANTED**; and the Motion for Summary Judgment filed by the third-party defendant, Kindra Lake Towing, on February 28, 2002 is **GRANTED**. Ispat Inland's claim and Dead Sea Periclase's claim against ACBL are hereby **DISMISSED**. Kindra Lake Towing is also **DISMISSED** from this lawsuit. This lawsuit will proceed with respect to the plaintiffs' and ACBL's claims against Jack Gray Transport (Lakes and Rivers).

ENTERED this 30 day of September, 2002

Andrew P. Rodovich

United States Magistrate Judge

APPENDIX 6

864 F.2d 1550 (11th Cir. 1989), 87-7442, Warrior & Gulf Navigation Co. v. United States

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864 F.2d 1550 (11th Cir. 1989)

WARRIOR & GULF NAVIGATION COMPANY, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

WARRIOR & GULF NAVIGATION COMPANY, etc., Plaintiff,

Hunt Oil Company, Insurance Company of North America,

Defendants-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

PARKER TOWING COMPANY, Plaintiff-Appellee, Cross-Appellant,

v.

WARRIOR & GULF NAVIGATION COMPANY, Defendant,

United States of America, Plaintiff-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,

v.

PARKER TOWING COMPANY, Defendant-Appellee, Cross-Appellant.

SOUTHERN NATURAL GAS COMPANY, Plaintiff-Appellee,

v.

WARRIOR & GULF NAVIGATION COMPANY, et al., Defendants,

United States of America, Defendant-Appellant.

No. 87-7442.

United States Court of Appeals, Eleventh Circuit

February 6, 1989

Edward J. Vulevich, Jr., Mobile, Ala., Thomas L. Jones, Charles R. Gross, U.S. Dept. of Justice, Civ. Div., Washington, D.C., Robert S. Greenspan, J.B. Sessions, U.S. Atty., Mobile, Ala., for U.S.

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G. Hamp Uzelle, III, Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, Ala., for Parker Towing Co.

James B. Newman, Coale, Helmsing, Lyons & Sims, Mobile, Ala., David L. Carroll, Rosen, Arwood, Cook & Sledge, P.A., Tuscaloosa, Ala., for Hunt Oil.

R. Boyd Miller, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, Ala., for Sonat, Inc.

James P. Green, Brown, Hudgens, Richardson, P.C., Mobile, Ala., for Ins. Co. of No. America.

Donald C. Radcliff, Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, Broox G. Holmes, Mobile, Ala., for Warrior & Gulf.

Michael L. Minsker, Cozen & O'Connor, Philadelphia, Pa., for Southern Natural Gas and Sonat.

Appeal from the United States District Court for the Southern District of Alabama.

Before RONEY, Chief Judge, JOHNSON and SMITH ^[*], Circuit Judges.

SMITH, Circuit Judge:

In this maritime tort case, ^[1] the United States District Court for the Southern District of Alabama found that the actions of the United States (Government) on December 2-3, 1983, by and through the United States Army Corps of Engineers, were the proximate cause of the damages sustained by Warrior & Gulf Navigation Company, Parker Towing Company, Hunt Oil Company, and Southern Natural Gas Company (collectively referred to as appellees) on the Black Warrior River and, on that basis, that the Government is liable to the appellees as a matter of law. ^[2] We reverse and remand.

Issue

The principal issue on appeal is whether the district court clearly erred by finding that the Army Corps of Engineers' operation of the lock and dam facilities on the Black Warrior River on the night of December 2, 1983, and in the morning of December 3d, was the proximate cause of the damages incurred by appellees.

Background

A. The Black Warrior River and Its Lock and Dam System

The Black Warrior River flows in a southwesterly direction from an area generally north of Tuscaloosa and west of Birmingham to Demopolis, Alabama. At Demopolis, the Black Warrior River joins the Alabama River to form the Mobile River, which empties into Mobile Bay and eventually into the Gulf of Mexico.

In order to improve the navigability of the Black Warrior River, there exists a system of four lock and dam facilities constructed and operated by the Army Corps of Engineers. ^[3] Proceeding upstream from Demopolis, this system is comprised of the following facilities: the Warrior lock and dam located at river mile marker (RMM) 261, the William Bacon Oliver lock and dam at RMM 338 (located within the southern part of the city of Tuscaloosa), the Holt lock and dam at RMM 347, and the John Hollis Bankhead lock and dam at RMM 365. The Highway 82 Bypass Bridge crosses the Black Warrior River in Oliver Lake at RMM 341.5, or 5.5 miles below the Holt facility and 3.5 miles upstream of the Oliver facility. This system of lock and dam facilities provides the Black Warrior River with a navigable channel that is 200

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feet wide and 9 feet deep. The Black Warrior River lock and dam system is comprised of "run-of-the-river" facilities and not "flood control" facilities within the meaning of 33 U.S.C. Sec. 702c et seq.

B. The Unprecedented Rain

As found by the district court, during the evening of December 2d and in the early morning of December 3, 1983, there was an "unprecedented rainfall" in the area of Birmingham and Tuscaloosa, Alabama. The district court cited testimony of a towboat captain, not employed by any of the parties to this proceeding, that it was raining so hard that, at one point during this period, the river was rising at the rate of approximately 1 foot every 5 minutes. In the area just below the Bankhead facility, 10.3 inches of rain fell during the 12-hour period from 7 p.m. on December 2d to 7 a.m. on December 3d.

C. The Critical Events

On the night of December 2d, three Warrior & Gulf Navigation Company (Warrior & Gulf) towboats, the MUSKOGEE, the APALACHE, and the CADDO, were proceeding downstream from above the Holt facility to ultimate destinations south of the Oliver facility. At this same time, the Warrior & Gulf towboat, TAHOME, with two empty barges in tow, was proceeding upstream above the Oliver facility. The MUSKOGEE, the APALACHE, and the CADDO, each pushing a tow consisting of six loaded coal barges, arrived at the Holt facility between 10 p.m. and midnight on December 2d and all three proceeded through the lock. The CADDO was the third of the Warrior & Gulf towboats to proceed through the Holt lock. The district court found that the CADDO departed the lock prior to 1:50 a.m. and that the CADDO was locked through the Holt facility sometime between 12:58 a.m. and 1:50 a.m. At approximately 2:30 a.m., as the CADDO proceeded down the river from the Holt facility, she collided with the Highway 82 Bypass Bridge and her tow broke up. The CADDO put out a call for assistance over the VHF radio and the APALACHE and the TAHOME, both of which were above the Oliver facility at that time, proceeded upstream to assist the MUSKOGEE in aiding the CADDO. The APALACHE left her six loaded barges, the MUSKOGEE left her two loaded barges, and the TAHOME left her two empty barges moored to mooring cells above the Oliver facility. Four more of the MUSKOGEE's loaded barges were moored below the Oliver facility. Eventually, five of the CADDO's barges were retrieved, but one loaded barge sank.

While the three tugs were working to retrieve the CADDO's tow, the six loaded barges from the APALACHE's tow and the two loaded barges from the MUSKOGEE's tow broke loose from their moorings above the Oliver facility and drifted downstream, going over the top of Oliver Dam, which was underwater at that time as a result of the rapidly rising river. These barges struck and broke loose the four loaded barges of the MUSKOGEE's tow located below the Oliver facility and also hit the tow of the THELMA PARKER. As a result of this collision, two empty Parker Towing Company (Parker) barges, the PTC 216 and the PTC 235, were broken out of the tow and damaged.

The drifting Warrior & Gulf barges proceeded downstream, and one or more of them collided with and damaged the Hunt Oil Company (Hunt) dock and one or more also ruptured, severed, and separated the Southern Natural Gas Company (SoNat) submarine pipelines Nos. 1 and 4 located downstream of the Hunt dock at RMM 336.9.

Subsequently, the 12 loaded Warrior & Gulf barges all sank, but the 2 empty Parker barges which were broken loose and the 2 empty barges of the TAHOME, which had also broken loose, did not sink and were rescued. At some undetermined time, a Parker barge, the PTC 135, broke loose from her moorings at the Brookwood (Drummond) facility at RMM 354 and drifted into the spillway gates at Holt Dam at 6 a.m. on December 3d. The PTC 135 did not do any damage to the Holt Dam, but her presence prevented the closing of three

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spillway gates. On December 3d, Parker abandoned the PTC 135 to the United States.

Approximately 1 week after the PTC 135 drifted into the Holt Dam, the level of Holt Lake was substantially lowered by the Army Corps of Engineers in order to remove the PTC 135. As a result

of the lowering of the lake, a Parker barge, the PTC 107, which was moored at Drummond, grounded on the bottom of the lake, fractured in the middle, and was a constructive total loss as a result thereof. The district court found that Parker knew the lake was being lowered to remove the PTC 135 but that Parker did not realize that the PTC 107 would be damaged.

D. The District Court's Decision

The district court determined that the damages claimed by the appellees all stemmed from the domino effect of the CADDO's tow colliding with the Highway 82 Bypass Bridge and the tow's resulting break-up. The district court concluded that the CADDO casualty was the sole responsibility of the United States. Had this casualty not occurred, the district court found, the various towboat captains in question would not have left their tows unattended. The district court reasoned that leaving their tows unattended under the circumstances that then existed was not negligence on the part of the captains.

In reaching its conclusion, the district court found that the Army Corps of Engineers erred in operating the Holt facility. The district court, relying in part on the Army Corps of Engineers' own records, found that the lock operator at the Holt facility violated the undisputed Army Corps of Engineers' requirements for the operation of the Black Warrior River lock and dam system. The district court determined that this wrongful operation was the proximate cause of the damage sustained by appellees.

For the reasons set forth below, we hold that the district court clearly erred by concluding that the actions of the United States were the proximate cause of the CADDO casualty and, thus, of all the damages suffered by Warrior & Gulf, Parker, Hunt, and SoNat. To the contrary, it was an act of God, in the form of unprecedented rainfall, that proximately caused the domino effect that led to the damages experienced by the parties in this case.

Analysis

A. The Government's Appeal

Our review of the district court's finding on the issue of proximate cause is limited to determining whether that finding is clearly erroneous.^[4] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."^[5]

The act of God principle "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."^[6] A party may be deemed negligent yet still be exonerated from liability of the act of God would have produced the same damage irrespective of the party's negligence. In that case, the party's negligence would not be deemed the proximate cause of the injury.^[7]

The record clearly establishes, and the district court found, that the excessive rain on the night of December 2d and in the morning of December 3, 1983, was unprecedented. In light of the weather conditions

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existing on the night of December 2d and in the morning of the 3d, we must conclude that the district court clearly erred by finding that the Army Corps of Engineers' operation of the lock and dam facilities on the Black Warrior River was the proximate cause of the damages sustained by

the parties. The Black Warrior River lock and dam system is not a flood control project; rather, this system is comprised of run-of-the-river facilities. As such, the lock and dam facilities are not designed to accommodate flood waters or to alleviate flooding. The function of run-of-the-river dams simply is to pass downstream all inflow in excess of that necessary to provide the advertised navigational depth in each dam's upper pool. During the critical period, as more water moved down the river as a result of the unprecedented rain, more water was released by the dam, i.e., the flow out of the dam was matching the flow into the lake above the dam. After a thorough review of the record, we are left with the definite and firm conviction that the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case.

B. Parker's Cross-Appeal

Parker contends it is entitled to recover from the United States that portion of the loss to the PTC 107 caused by the negligence of the United States in lowering Holt Lake, despite Parker's own contributory negligence. Parker contends that the district court erred by denying Parker any recovery for the damage to the PTC 107 caused by the Army Corps of Engineers' negligence because of Parker's contributory negligence. This argument is without merit.

It is well established that comparative fault generally governs recovery in admiralty. [8] However, contrary to Parker's contentions, the district court did not conclude that the Government was contributorily negligent in lowering Holt Lake. Rather, as the district court found, there was advanced warning that Holt Lake was going to be drawn down to facilitate the salvage of the PTC 135.

In addition, Parker seeks remand of this case so that the district court may adjudicate Parker's claims against Warrior & Gulf for damage sustained by the PTC 216 and the PTC 235. Originally, Parker brought a claim against both the United States and Warrior & Gulf for this damage. The district court did not adjudicate Parker's claim against Warrior & Gulf and, instead, determined that the Government was liable to Parker for this damage. In light of our decision on the liability of the United States, we remand this case for further proceedings on Parker's claim against Warrior & Gulf. [9]

Conclusion

In view of the foregoing, we hold that the district court clearly erred by determining that the actions of the United States were the proximate cause of the damages incurred by appellants on the Warrior River on the night of December 2d and in the morning of December 3, 1983. Accordingly, on this issue, we reverse the district court's judgment. In light of our holding absolving the Government of liability, we remand this proceeding to the district court for further proceedings on Parker's claim against Warrior & Gulf for damages incurred to the PTC 216 and the PTC 235. [10]

REVERSED AND REMANDED

Notes:

[*] Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

[1] The jurisdiction of the district court was based on 28 U.S.C. Sec. 1333 (1982) and on the Suits

in Admiralty Act, 46 U.S.C. Secs. 741-752 (1982).

[2] *Warrior & Gulf Navigation Co. v. United States*, Civil Action Nos. 84-0632-T, 84-0672-T, 84-1341-T, 85-0574-T, 85-0983-T (S.D.Ala. May 18, 1987). This case was tried on liability only.

[3] The Rivers and Harbors Act, 33 U.S.C. Secs. 401 et seq. (1982), provides the Army Corps of Engineers with authority to construct and operate the facilities comprising the Black Warrior River lock and dam system.

[4] *Fireman's Fund Ins. Co. v. M/V Vignes*, 794 F.2d 1552, 1555 (11th Cir.1986) (citing *Marcona Corp. v. Oil Screw Shifty III*, 615 F.2d 206, 208 (5th Cir.1980)).

[5] *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), quoted in *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

[6] *Bradford v. Stanley*, 355 So.2d 328, 330 (Ala.1978) (citing *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374 (1902)).

[7] *Glisson v. City of Mobile*, 505 So.2d 315, 319 (Ala.1987).

[8] See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

[9] The district court's opinion states that "[a]ll parties, save the United States, have settled with Warrior & Gulf." This is not accurate. Parker has not settled its claim against Warrior & Gulf.

[10] We note that, in the district court, the United States asserted a claim against Parker for salvage costs of the PTC 135. The district court denied that claim on grounds that the damage to the PTC 135 was proximately caused by the negligence of the Government. Although on appeal we reverse the district court's finding of proximate cause, we do not reach the Government's claim in light of the Government's choice not to pursue it on appeal.

APPENDIX 7


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RCW 4.22.005

Effect of contributory fault.

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

[1981 c 27 § 8.]



APPENDIX 8



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RCW 4.22.060

Effect of settlement agreement.

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

[1987 c 212 § 1901; 1981 c 27 § 14.]

APPENDIX 9



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RCW 4.22.015

"Fault" defined.

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW [4.22.005](#) through [4.22.060](#) shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

[1981 c 27 § 9.]

