

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT  
ESCAMBIA COUNTY  
CIVIL DIVISION**

IN RE: *SKANSKA HURRICANE SALLY CASES*

Case No. 2023-CA-11000

Pertains to: *All Economic Loss Only Cases*

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**FINAL JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT AND MOTION TO DISMISS**

Pending before the Court are the Motions for Summary Judgment and to Dismiss of Defendants Skanska USA Civil Southeast Inc., Skanska USA Inc., and Skanska USA Civil Inc. (collectively "Skanska"). For the reasons stated herein, these motions are granted.

**FACTUAL AND PROCEDURAL BACKGROUND**

"At the time of Hurricane Sally in September 2020, the fleet consisted of 55 barges. Twenty-seven of these barges broke away in Hurricane Sally, and four allided with and damaged the Pensacola Bay Bridge, forcing closure of the bridge for a number of months."<sup>1</sup> Plaintiffs are businesses and individuals who claim they suffered economic loss because of the damage to the bridge.

In their Complaints, Plaintiffs alleged negligence, gross negligence, intentional misconduct, private nuisance, and public nuisance. None of Plaintiffs alleged a proprietary interest in the bridge, and the Court dismissed Plaintiffs' negligence and gross negligence claims with prejudice as being barred by the decision in *Robins Dry Dock v. Flint*, 275 U.S. 303 (1927) and

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<sup>1</sup> Order on Defendants' Motion to Dismiss Based on *Robins Dry Dock & Repair Co. v. Flint* Per This Court's Order Entered July 10, 2023 at 1, *In Re: Skanska Hurricane Sally Cases*, No. 2023-CA-011000 (Fla. 1<sup>st</sup> Cir. Ct. Feb. 21., 2024).

cases following that decision. The Court also dismissed Plaintiffs' claims for intentional misconduct, private nuisance, and public nuisance without prejudice, and gave Plaintiffs leave to amend these complaints to attempt to state claims for intentional torts.

Plaintiffs then filed their First Amended Complaint ("FAC"). The FAC alleged the following counts:

1. Intentional misconduct;
2. Negligence;
3. Gross negligence;
4. Negligence *per se* pursuant to Section 376.041 and 376.313, Florida Statutes;
5. Private claim for public nuisance; and
6. Private nuisance.

Count 5, a private claim for public nuisance, and Count 6, private nuisance, allege intentional conduct.

#### **SKANSKA'S MOTION TO DISMISS**

As noted above, this Court's Order, dated February 21, 2024, dismissed Counts 2 and 3 with prejudice. Plaintiffs have not filed any opposition to Skanska's Motion to Dismiss Count 4. Accordingly, Count 4 is dismissed with prejudice. Skanska's Motion to Dismiss as to the remaining counts in the FAC is moot based upon the decision on Defendants' Motion for Summary Judgment addressed below.

#### **SKANSKA'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs' FAC alleges that Skanska's conduct that led to the bridge damage constituted an intentional tort. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm ("Restatement") § 1 defines "intent" as follows: "A person acts with the intent to produce a

consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.” To succeed, Plaintiffs must plead that Skanska believed or should have believed such economic damages to Plaintiffs were substantially certain to result from their actions. *See Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972) (“Where a reasonable man would believe that a particular result was [s]ubstantially certain to follow, he will be held in the eyes of the law as though he had intended it.”) (citing Restatement (Second) of Torts, § 8A (1965)). Plaintiffs do not allege that Skanska acted with the purpose of damaging the Pensacola Bay Bridge. Accordingly, for Skanska’s actions to have constituted an intentional tort, it must have been substantially certain that Plaintiffs’ damages would result from Skanska’s actions.

There are no disputed issues of material fact, and Plaintiff has failed to prove substantial certainty as a matter of law. In connection with its Motion for Summary Judgment, Skanska filed Defendants’ Amended Statement of Undisputed Material Facts (“Statement of Material Facts”). Plaintiffs in turn filed their Response in Opposition to Defendants’ Statement of Material Facts and Statement of Additional Facts (“Response in Opposition”). In this Response in Opposition, Plaintiffs admitted that certain paragraphs in the Statement of Material Facts were undisputed. These admissions and the applicable law establish Skanska’s entitlement to summary judgment.

**1. All barges that damaged the Pensacola Bay Bridge only broke away once tropical storm conditions were encountered.**

Plaintiffs make the following admissions in their Response in Opposition:

27. At approximately 7:30 a.m. [on Tuesday, September 15], a barge breaks loose and strikes the bridge.

**ANSWER:** Undisputed.

28. At approximately 6:00 p.m. [on Tuesday, September 15], wind speed is 52 mph and significant wave height is 5.3 feet. A second barge breaks loose and hits the bridge.

**ANSWER:** Undisputed.

These admissions are consistent with the findings of fact in the underlying limitation of liability case that was tried in the United States District Court for the Northern District of Florida in October 2021, where Judge Collier made the following findings of fact:

At 3:00 AM on Tuesday morning, the first of several barges broke free from its moorings, prompting a rescue effort by Skanska. One of the other barges that broke free struck a section of the old Pensacola Bay Bridge that had been converted into a fishing pier, while at 7:00 AM yet another barge broke free and became lodged underneath the bridge, causing visible damage to the bridge supports such that the bridge had to be closed to traffic as a precautionary measure. Another barge broke free at 6:00 PM and also became lodged under the bridge.

*In re Skanska USA Civil Southeast Inc.*, 577 F. Supp. 3d 1302, 1312 (N.D. Fla. 2021).

Plaintiffs make the following admissions regarding weather conditions at the time these barges broke away and struck the bridge:

23. At approximately 12:00 p.m. [on Monday, September 14], significant wave heights are 3.5 feet, and wind speed is 30 to 34 mph and it is now impossible to move barges.

**ANSWER:** Undisputed.

24. At approximately 6:00 a.m.<sup>2</sup> on Tuesday, September 15, wind speed is 41 mph, exceeding threshold for tropical storm of 39 mph. Significant wave heights are 4.5 feet.

**ANSWER:** Plaintiff disputes Defendants' Paragraph 24. When the first barge broke free on Tuesday, September 15, at 3:00 a.m., wind gusts near the bridge were reported as reaching only 18 knots with sustained winds from 8 to 11 knots. The first barge to break free and impact the bridge did so later the same morning at approximately 6:30 a.m., when the wind gusts reached only 14 knots and sustained winds were 7 knots.

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<sup>2</sup> Skanska admitted in its Reply Brief that the first barge broke away at 3:00 a.m. on Tuesday, September 15. This barge did not hit the bridge.

The Court does not accept Plaintiffs' position that the sustained wind speed at 6:30 a.m. on Tuesday, September 15 was only 7 knots with gusts of 14 knots when Plaintiffs admit in their response to Paragraph 23 of Skanska's Statement of Material Facts, that at noon the previous day, the wind speeds were 30 to 34 mph, or 26 to 29.5 knots. The Court rejects the notion that the wind speeds in Pensacola Bay would have significantly lessened as the storm grew closer.

Additionally, Plaintiffs do not contest that the significant wave heights at 6:30 a.m. were 4.5 feet, and did not dispute Paragraph 17 of the Statement of Material Facts that the National Weather Service had predicted that "unless Sally impacts Pensacola Bay bringing tropical storm force winds, the prediction is for sustained winds of no more than 20 knots with gusts up to 25 knots and seas of no more than two feet." Accordingly, the summary judgment evidence establishes that the 4.5-foot wave heights that existed when the first barge that hit the bridge broke away were the result of tropical storm conditions in Pensacola Bay, and that the barges that struck the bridge only broke away after tropical storm conditions were encountered in Pensacola Bay.

**2. At the time Skanska decided how to secure its fleet of barges and secured its fleet, it was not "substantially certain" that Hurricane Sally would generate tropical storm conditions in Pensacola Bay.**

Plaintiffs do not contest that Skanska made the decision of how and where to moor most of its barges at a meeting held at 7 a.m. on Sunday morning, September 13. They do not contest that Skanska began moving and securing barges at approximately noon on that day, nor do they contest that all but a few barges had been demobilized by 6:30 p.m. They do not contest that Skanska completed securing its barges on the morning of Monday, September 14. This is consistent with Judge Collier's findings. *See* 577 F. Supp. 3d at 1310-1312.

Plaintiffs do not contest that at approximately 4 a.m. on Sunday, September 13, approximately three hours before Skanska met to decide how it was going to secure its barges, the

National Hurricane Center (“NHC”) issued its “Tropical Cyclone Surface Wind Speed Probabilities” (“SWSP”) that showed that the 120-hour cumulative probability of tropical storm force winds at the Naval Air Station was only 53%.

Plaintiffs also do not contest that at 10:00 a.m. on Sunday, September 13, just before Skanska started demobilizing its fleet, the NHC issued an updated SWSP showing that the probability of tropical storm force winds in Pensacola Bay had decreased to 49%. Accordingly, at the time that Skanska took the actions that Plaintiffs claim constituted an intentional tort, the possibility of damage to the bridge was not “substantially certain.”

Plaintiffs make other admissions that confirm that it was never substantially certain that Hurricane Sally would have an impact on Pensacola Bay. Plaintiffs do not contest that at 4:00 a.m. on Sunday, September 13, the NHC issued Advisory 7, which contained a graphical depiction of the projected path of Hurricane Sally that showed the hurricane making landfall in south Louisiana. This is also consistent with Judge Collier’s findings. *See* 577 F. Supp. 3d at 1310-1311. Plaintiffs admit that there is a 102-mile statistical error where two-thirds of tropical systems are likely to fall within 102 miles of their forecast track line. Accordingly, there was a two-thirds probability that Hurricane Sally would make landfall more than 100 miles from Pensacola Bay. But even if the hurricane had been predicted to make landfall in Pensacola, it would not have been “substantially certain” that Hurricane Sally would have an impact in Pensacola, because there was a one-third possibility that it would have made landfall more than 102 miles away.

This Court’s conclusion that it was not substantially certain that Hurricane Sally would have an impact on Pensacola Bay is consistent with Judge Collier’s findings of fact in the limitation of liability case. Judge Collier addressed the SWSP referred to above, and pointed out that:

in the two probability reports cited above, numerous locations along the Gulf Coast were evaluated, including cities such as Mobile, Gulfport,

Stennis, New Orleans, Cameron, and Keesler Airbase, many of which were more centrally located within Sally's cone of uncertainty, but *none* of which were listed as more than 50% likely to receive 58 MPH winds.

577 F. Supp. 3d at 1319. All of the summary judgment evidence presented to this Court indicates that tropical weather systems do not behave in a “substantially certain” manner, and Plaintiffs have not presented any summary judgment evidence that would suggest otherwise.

Effective May 1, 2021, the summary judgment standard applicable to cases in Florida’s state courts is the standard “articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (together, the “federal summary judgment standard”).” *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 2020 WL 7778179, 46 Fla. L. Weekly S6 (Fla. Dec. 31, 2020). The United States Supreme Court has “described the federal test as whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Id.* at 193 (citing *Anderson*, 477 U.S. at 248). “If the evidence is merely colorable, or it is not significantly probative, summary judgment may be granted.” *Id.* A party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* (citing *Matsushita*, 475 U.S. at 586).

Here, the undisputed facts show that the barges that struck the bridge broke free when subjected to tropical storm force conditions, and that at the time when Skanska made the decision of how and where to secure its barges, it was not substantially certain that damage to the bridge would result from Skanska’s actions. There being no genuine issue of material fact, Skanska’s motion for summary judgment is GRANTED, and judgment is entered in Skanska’s favor on Counts 1, 5 and 6 of the FAC.

Lastly, the Court finds the request by both parties to set policy unpersuasive. “Policy goals are not within the proper purview of our courts.” *Federal Ins. Co. v. Perlmutter*, 376 So.3d 24, 39 (Fla. 4th DCA 2023) (Artau, J., concurring specially). Article III of the Constitution extends the federal judicial power to “all cases of admiralty and maritime jurisdiction,” and gives Congress the authority to regulate that jurisdiction. Congress has allowed state courts to supplement the administration of federal maritime law by exercising concurrent jurisdiction over some admiralty cases. 28 U.S.C. § 1333 (“Savings to Suitors Clause”). Congress may, consistent with the Constitution, revise federal maritime law. *See Crowell v. Benson*, 285 U.S. 22, 55 (1932); *In re: Garnett*, 141 U.S. 1, 14 (1891). “Principles of judicial restraint require courts to defer to the broad power of the legislative branch to enact substantive law, in conformity with our State and Federal Constitutions.” *Gall v. Phillip Morris USA Inc.*, 314 So.3d 359, 360 (Fla. 3rd DCA 2020). Although the Court is cognizant of the unique nature of this incident and claims, its role is always to say what the law is not what it should be.

Accordingly, it is hereby **ORDERED and ADJUDGED**:

1. Skanska’s Motion for Summary Judgment is **GRANTED** and Plaintiffs’ intentional tort claims, Counts 1, 5, and 6 of the First Amended Complaint, are dismissed with prejudice.

2. Skanska’s Motion to Dismiss is **GRANTED** as to Count 4 of the First Amended Complaint and that claim is dismissed with prejudice. The remainder of Skanska’s Motion to Dismiss is moot based on the Court’s decision granting Skanska’s Motion for Summary Judgment as to Counts 1, 5, and 6.

3. Counts 2 and 3 of the First Amended Complaint remain dismissed with prejudice pursuant to the Court’s prior Order dated February 21, 2024 granting in-part Skanska’s original motion to dismiss.



4. Final Judgment is hereby entered in favor of Skanska. Plaintiffs shall take nothing from this action against Skanska, and Skanska shall go hence without day.

5. This Order and Judgment applies to every case asserting economic loss only, all of which were represented by the First Amended Complaint, which served as the operative pleading for all such cases pursuant to the Parties' agreement and Case Management Order No. 2 entered on March 15, 2024.

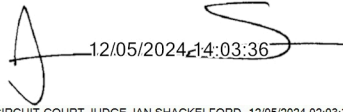
6. The Parties are directed to prepare and file an agreed list of economic loss only cases to be filed on the Master Docket in the next thirty (30) days.

7. The entry of this Order shall constitute the entry of judgment in all identified cases, as of the date of this Order. Defense is required to file a copy of this order in all identified cases within ten (10) days thereafter.

8. If any party discovers that a case was mistakenly omitted or included in the agreed list of economic loss only cases, such party may move for entry of an order modifying the list.

9. The Court retains jurisdiction to entertain any timely post-judgment motion to tax costs.

**DONE AND ORDERED** in Chambers in Pensacola, Escambia County, Florida.

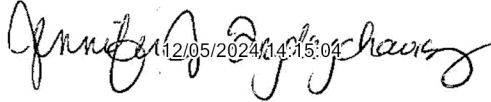


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**HON. JAN SHACKELFORD**  
**CIRCUIT JUDGE**

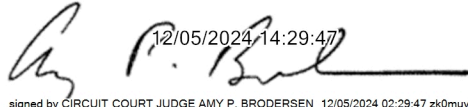


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**HON. JENNIFER J. FRYDRYCHOWICZ**  
**CIRCUIT JUDGE**



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**HON. AMY P. BRODERSEN**  
**CIRCUIT JUDGE**