IN THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

CITY OF BRANDON	PLAINTIFF
VS.	CAUSE NO. 18-142
GOLD COAST COMMODITIES, INC.; ROBERT DOUGLAS; THOMAS DOUGLAS; and JOHN DOES 1-5	DEFENDANTS

DEFENDANTS RESPONSE IN OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

The City of Brandon (Plaintiff or the "City") has filed an amended motion for summary judgment (the "Amended Motion") even though its original motion for summary judgment (the "Original Motion") is still pending (Dkt. 165), its new damage allegations are not included in its Complaint, and its new damage allegations are based upon improperly disclosed expert opinions. Further, Plaintiff's Amended Motion fails to reconcile the admitted outstanding issues regarding the existence and extent damages the City alleges Gold Coast Commodities ("Gold Coast") caused to its sewer system.

Damage or injury to the City is an essential element in its claims, making its attempt to separate the supposed liability of the Defendants, collectively, from the damage the City claims to have suffered too clever by half, and insufficient to succeed on its Original or Amended Motion. Four experts have opined regarding the myriad potential causes of the originally alleged damage observed to the City's sewer system more than a 1.5 miles downstream from Gold Coast's facility, with possible causes ranging from long-term discharges of industrial sulfuric-type acid to naturally occurring corrosion from acidic soils to microbially induced corrosion, an extremely common problem for municipal sewer systems. Two experts have opined regarding the different potential

causes of the newly alleged thermal damage observed in the City's sanitary sewer system between manholes 36 and 37 in December 2020, with possible causes ranging from discharge of boiler blow-down water by Reckitt Benckiser ("Reckitt") to improper installation to sink holes being opined by the dueling experts. Based solely on the contradictory expert opinions and evidence in the record, genuine disputes of material fact certainly exist.

Plaintiff further argues that the record precludes any factual dispute that Defendants "regularly discharged industrial wastewater into the City of Brandon's sewer system" from 2013-2016, but the evidence submitted by Plaintiff is wholly insufficient to establish the discharge of wastewater from Gold Coast at any time other than October 5-6, 2016, much less that Gold Coast caused the damage to the City's sewer system. (Dkt. 204, p. 17). Thus, genuine issues of material fact remain. As such, the City's Amended Motion should be denied.

BACKGROUND

In this lawsuit the City essentially seeks to have Defendants pay for damage it discovered to its sewer system approximately 1.5 miles downstream from Gold Coast's fat and oil recycling plant. (Dkt. 179-1, p. 5). Gold Coast began operations as a recycler of restaurant cooking oil from local restaurants in Brandon, Mississippi more than 35 years ago. (https://www.goldcoastcommodities.com/new-history, last accessed October 23, 2020). In 2000, Gold Coast began a new process called "acidulation," an automated process in which a vegetable-based material called soapstock is heated with sulfuric acid and steam to create a reaction which results in a mixture of oil and water in three layers. (Dkt. 179-2, pp. 6-7, 11). The top two layers are the sellable product that Gold Coast sells to animal feed manufacturers; those two layers are pumped in one direction while the remaining water in the bottom layer is pumped to a separate tank to be neutralized. (*Id.* at p. 3). The bottom layer of material is acidic due to the addition of sulfuric acid as part of the acidulation process, so it is neutralized – eliminating the acidity – and

then piped into a wastewater tank for shipment offsite. (*Id.* at pp. 3, 5). Plaintiff alleges that Gold Coast's soapstock process produces at least 6,000 gallons of neutralized wastewater per week, and that Gold Coast discharged that wastewater into the City's sewer system for years. (*See* Complaint, Dkt. 1, ¶¶ 8-9).

On October 5, 2016, the City discovered an unusually low pH discharge in their sewer system that it alleges was intentionally discharged by Gold Coast. (*Id.*, ¶11). The analytical testing of the samples of the low pH discharge taken on October 5-6, 2016 indicates the material was very different from Gold Coast's typical wastewater in terms of biological oxygen demand, oil and grease, pH, and temperature. (*Id.*, Ex. B). Moreover, the analytical testing from this unusual discharge only recorded temperatures between 114.6-125.8 degrees Fahrenheit, (*Id.*, ¶14), well within the "upper recommended limit" of 140 degrees Fahrenheit for the type of PVC pipe the City has recently alleged was thermally damaged. (Nathan Husman May 21, 2021 Dep. at 78:13-19).[1]

On February 4, 2021, the City sent Gold Coast a letter supplementing its discovery production which stated that the City replaced some PVC pipe between manholes 36 and 37 in December 2020. (Dkt. 204-4). At its deposition, the City estimated that the total amount of PVC pipe removed in December 2020 was approximately 20 of the 140-160 total feet of PVC pipe between manholes 36 and 37. (Dkt. 208-5, p. 2). The February Letter went on to state that the PVC pipe between manholes 36 and 37 had originally been installed in 2015 and, for the first time in this three-year litigation, alleged that PVC pipe had been warped or deformed by Gold Coast's wastewater "in the short period between their installation in March 2015 and the video taken in

[1] All cited pages of the May 21, 2021 deposition of Nathan Husman are attached here to as collective Exhibit "1."

November 2016." (Dkt. 204-4). The City supplied this same information to its expert, Husman, who repeatedly cited 'March 2015' as the installation date for the PVC pipes at issue in his February 2021 report supposedly analyzing the issue. (Husman February 2021 Report, pp. 2, 3, and 7).

On April 1, 2021, the City responded to an interrogatory from Robert Douglas and revealed the PVC pipe between manholes 36 and 37 had actually been installed two years earlier, in 2013, not 2015 as originally claimed. (Dkt. 206-6).

The City has couched its entire damage claims on the assumption that Gold Coast was routinely discharging such high volumes of wastewater like that identified on October 5-6, 2016 that it damaged the entirety of the sewer line, including between manholes 36 and 37. (Complaint, Dkt. 1, ¶¶ 9, 17). The City's claims are based on an extremely narrow set of facts and wholly ignore the facts that:

1. The City had discovered similar damage to their sewer system in areas totally separate from Gold Coast (Dkt. 179-1, p. 31);
2. There were other possible causes of the low pH discharge (Dkt. 179-3, pp. 2-4); and
3. There were other possible, if not probable causes of the thermal damage (Dkt. 208-7, pp. 27-28).

PROCEDURAL CONSIDERATIONS

Notably, the City has not amended its Complaint to include facts or allegations supporting the damage claims set out in the February Letter despite the passage of at least six months since the thermal damage was allegedly discovered. *Harris v. Mississippi Valley State University*, 873 So. 2d 970, 991 (Miss. 2004) ("Applications to amend the pleadings should be prompt and not the result of lack of diligence...the policy to freely grant amendments is not allowed to encourage

delay, laches and negligence.") (internal citations omitted). It is unclear if the City may even properly bring these new claims of thermal damage at this late date given the failure to request leave to amend the Complaint to include any allegations relating to thermal damage to pipes. (*See, e.g.*, Complaint, Dkt. 1 at ¶18 (describing the "all" damage as stemming from "corroded" pipes)). By responding to these new facts and allegations in the Amended Motion, Defendants do not agree that these new damage claims may be properly brought at this late juncture and, in fact, Defendants object to the assertion of these new claims and specifically reserve all of their rights and defenses. *Rasberry v. Blue Cross & Blue Shield of Mississippi*, 850 So. 2d 1194, 1198 (Miss. Ct. App. 2002) ("Certainly, if there is not adequate notice, summary judgment on the new ground should not be granted.")

The City has also not amended its expert designation or interrogatory responses to include Nathan Husman's February 2021 report or new opinions; his February 2021 report is provided in the record as an exhibit to the City's Amended Motion, a completely improper means for the City to disclose expert opinions under the Rules and the previous orders of this Court. Further, the City has not fulfilled its duty to adequately answer the interrogatories regarding Husman's expert opinions. *Douglas v. Burley*, 134 So. 3d 692, 698 (Miss. 2012) (a party has a "duty to seasonably supplement interrogatory responses regarding expert witnesses expected to testify at trial.") A Motion to Strike Husman's Expert Reports and Exclude Expert Testimony was filed contemporaneously with Gold Coast's *Daubert* Motion to exclude Husman's newest opinion testimony. (Dkts. 205, 207). Those motions are currently pending on the Court's docket.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Miss. R. Civ. P. 56(c). "A summary judgment motion is only properly granted when no genuine issue of material fact exists." *Jackson Clinic for Women, P.A. v. Henley*, 965 So. 2d 643, 649 (Miss. 2007) (citing *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 49 (Miss. 2005); *Miller v. Meeks*, 762 So. 2d 302, 304 (Miss. 2000)). In reviewing a motion for summary judgment, the Court must view the evidence "in the light most favorable to the party against whom the motion has been made." *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1160 (Miss. 2007). The party which moves for summary judgment "has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Id.* (quoting *Howard v. City of Biloxi*, 943 So. 2d 751, 754 (Miss. Ct. App. 2006)).

Disposing of a case at the summary judgment stage is disfavored and "only appropriate in the most extreme circumstances," circumstances which are not present here. *Downs v. Choo*, 656 So. 2d 84, 89 (Miss. 1995).

ARGUMENT

I. Most of the facts described as "undisputed" by Plaintiff are, in fact, directly disputed, and genuine issues of material fact remain as to whether Defendants regularly discharged noncompliant water into the City sewer system prior to October 2016.

As stated in the Amended Motion, the City seeks summary judgment as to the liability of Defendants based on theories of negligence, gross negligence, negligence *per se,* and/or violations of a City ordinance. (Dkt. 203). Setting aside, for the moment, that causation and damages are central elements of the claims, and that liability cannot be determined without also proving that Defendants caused the damage, the City's "Factual Background" is largely a rote regurgitation of its falsely claimed undisputed facts from its Original Motion. (*Compare* Dkt. 166, pp. 2-15 and Dkt. 204, pp. 2-16). Defendants have already responded to the vast majority Plaintiff's falsely

claimed undisputed facts in their Response to Plaintiff's Motion for Summary Judgment; in the spirit of judicial economy, Defendants explicitly incorporate by reference their briefing at Dkt. 179, pp. 4-12 into this response.

II. Plaintiff's "new" facts are disputed, objectively false, or unsupported in the record, making summary judgment inappropriate.

The only truly new "facts" the City recites in its Amended Motion concern a stretch of PVC pipe the City alleges it removed in December 2020 "immediately downstream from GCC." (Dkt. 204, p. 16). As described below, the Defendants directly dispute the City's allegation that these claims are event facts, let alone undisputed ones.

a. Many of the City's allegedly undisputed facts are unsupported by the record.

Many of the City's other allegedly undisputed facts are plainly not supported by any real evidence, but are instead just a continuation of the City's unsworn, unsupported allegations, insufficient to support a motion for summary judgment. Baseless assertions are wholly insufficient under Mississippi law to establish that there is no genuine issue of material fact. *Froemel v. Estate of Froemel*, 248 So. 3d 876, 880 (Miss. Ct. App. 2018) (noting that a fact is not material or uncontested "merely because one party proclaims it so.") Further, a party cannot "rely solely upon the unsworn allegations in the pleadings, or arguments and assertions in briefs or legal memoranda" at the summary judgment stage. *Id.* (internal citations omitted).

For example, the City proffers that "[t]hese pipes were installed in 2013 and were damaged, according to a review of CCTV video taken inside the pipes, by November 2016." (Dkt. 204, p. 16). The City provides **zero** supporting evidence for its assertion of the time of installation, the identity of who reviewed the CCTV video or who determined the pipes were damaged, and when the damage occurred. The City's omission is unsurprising considering its 30(b)(6) designee, Charles Smith, admitted the section of pipe removed in December 2020 could not be videoed in

2016, so the alleged damage was only observed after the pipes were removed from the ground. (Charles Smith May 20, 2021 30(b)(6) Dep. at 61:18-62:9, 73:3-10).[2]

The City also alleges, again without citation to any evidence, that Gold Coast's wastewater was "destructive … because of its high temperature." (Dkt. 204, p. 16). The particular claim is logically difficult to comprehend for three reasons. First, the City only has evidence of a single discharge with elevated temperatures which can plausibly be tied directly to Gold Coast (Smith May 20, 2021 30(b)(6) Dep., Ex. 2, at 90:3-91:13). As discussed in detail in Defendants' briefing at Dkt. 179, p. 5, the City's only allegation of the existence of a discharge sample going directly into the sanitary sewer from Gold Coast is made without **any** citation to the record. (Dkt. 166, p. 5; Dkt. 204, p. 6). The City's false claim that a "125-degree discharge from Gold Coast was observed in October 2016" is supported **only** by a notation in the sampling lab report where the sample ID is given as "Hwy 471 - Gold Coast Discharge." (Dkt. 204, p. 17; Dkt. 165-7). In reality, at the time the sample was taken by David Riley, the water level in Manhole 42 was so minimal that Mr. Cox wrote in his memorandum of the event that he was unable to get a sample "due to the low volume and a lack of flow." (Dkt. 165-11, p. 1). Mr. Riley did not give a deposition or provide an affidavit, so Plaintiff's claim is unsupported by the facts and contrary to the memorandum of Tony Cox and his deposition testimony. (*Id.*; Dkt. 179-4). Consequently, the source of the sample taken by Mr. Riley, including whether it contained the discharge of other, upstream users, is in dispute.

Second, the only samples the City have of an elevated temperature in the entire sewer line were taken during a limited, 48-hour window and even its own expert struggled to explain how

[2] All cited pages of the May 20, 2021 30(b)(6) deposition of Charles Smith are attached hereto as collective Exhibit "2."

damage could occur from a discharge that only lasted a maximum of 48 hours. (Husman May 21, 2021 Dep., Ex. 1, at 70:2-71:2).

Lastly, even assuming, *arguendo*, that any of the samples taken from the sanitary sewer pipes during that limited time period could be attributed solely to Gold Coast, no samples recorded temperature was so high that it would have been destructive to PVC pipe as alleged by Plaintiff. (Dkt. 204, p. 16). In fact, the City's own expert admitted the upper recommended temperature limit for PVC pipe is 15 degrees higher than the single highest reading the City can plausibly allege came from Gold Coast, there is no evidence of a discharge exceeding the recommended upper temperature limit for PVC pipe, there are other possible causes of a high temperature discharge, and that the PVC pipes at issue may have even been damaged during installation (Husman May 21, 2021 Dep., Ex. 1, at 81:18-21; Dkt. 208-7, p. 27). Even taking the City's expert testimony at face value, the City's claim that a discharge from Gold Coast was "destructive … because of its high temperature" is completely unsupported by the record. (Dkt. 204, p. 16).

b. Many of the City's allegedly undisputed facts are demonstrably false.

Most offensively, the City claims – again without citation to anything in the record – that "[t]here is no evidence any other sewer user ever discharged high-temperature wastewater into the affected section of pipe." (*Id.*, p. 17). This "fact" is demonstrably false based on multiple pieces of evidence, but as an initial matter, the damaged section of pipe is not "immediately downstream from GCC," but instead is approximately 650 feet from Gold Coast while being a mere 10 feet from one of Reckitt's multiple connections to the sewer line, making Plaintiff's claim not only disputed, but misleading. (Dkt. 208-7, pp. 5, 9-15).

This particular claim is disproven by multiple sources, including a MDEQ produced inspection report which noted that Reckitt was pumping industrial waste to the "sanitary sewer

line at the back of the plant" and discharging "boiler blow down water to the sewer." (Smith May 20, 2021 30(b)(6) Dep., Ex. 15, attached hereto as Exhibit "3"). According to Plaintiff's expert, he has seen boiler blow down water at temperatures of up to 180 degrees Fahrenheit, certainly qualifying as "high temperature." (Dkt. 208-3, p. 46). Additionally, Scott McDonald's inspection of Reckitt's connection points to the sanitary sewer revealed at least one connection was "deformed and [had] thermal damage (scorching and pitting)," further evidence of a high temperature discharge coming directly from Reckitt. (Dtk. 208-7, p. 10, 14-15). Taken together, the City's claim that **no other sewer user ever** "discharged high-temperature wastewater into the affected section of pipe" completely false.

Given the multiple claims made without citation to anything in the record, citations to plainly dubious evidence that often conflicts with other evidence and testimony, and claims which are easily proven false, summary judgment is inappropriate due to the many disputed material facts.

III. The City has not met its burden to demonstrate that no issue of material fact exists as to each element necessary for the City's claims to succeed.

Despite now having a second opportunity to meet its burden, the City's Amended Motion hardly improves on its faulty first motion, and instead is a near **verbatim** copy. Rather than merely pepper the record with a repeat of Defendants' previous responses to the City's baseless allegations and argument, Defendants explicitly incorporate their previous briefing at Dkt. 179 at 12-16 in response and instead, in the spirit of judicial economy, respond only to the new arguments put forth by the City.

a. The City's continued reliance on adverse inferences to conclusively establish the existence of alleged material facts is unsupported in Mississippi law.

The City goes through considerable mental acrobatics in its attempt to argue that the invocation of the Fifth Amendment by Thomas and Robert Douglas and two non-parties at their depositions is somehow conclusive of the liability of all Defendants, but this is absolutely contrary to Mississippi and United States law. "We have emphasized that one of the Fifth Amendment's basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 US 17, 21 (2001) (internal citations omitted). Ambiguous circumstances, like those resulting in disputed issues of material fact, necessarily preclude summary judgment on the basis of the invocation of the fifth-amendment.

Additionally, as is repeated throughout in summary judgment jurisprudence, at the summary judgment stage, the non-moving party is "given the benefit of every reasonable doubt." *Mercer v. Progressive Gulf Ins. Co.*, 885 So. 2d 61, 64 (Miss. 2004). "In a civil case, an adverse inference **may** be drawn from a defendant's assertion" of the fifth-amendment privilege, but **is not required**. *Matthews v. Whitney Bank*, 282 So. 3d 786, 795 (Miss. Ct. App. 2019) (emphasis supplied). And, of course, where such an inference may be drawn is by a jury, as the finder of fact, not at the summary judgment stage. Moreover, the rule permitting, but not requiring, an adverse inference to be drawn against a party has **only** been applied in Mississippi when the actual parties to a civil action invoke their fifth-amendment right, **not non-parties**. *Gibson v. Wright*, 870 So. 2d 1250, 1260 (Miss. Ct. App. 2004).

Addressing Thomas Douglas first, he testified in his individual capacity at his deposition and invoked his fifth-amendment right on the advice of his counsel. (Thomas Douglas, Jr. 30(b)(6)

Dep. at 6:8-14).[3] While the trier of fact may draw an adverse inference at trial with respect to the specific questions he declined to answer, the benefit of the doubt as to whether the trier of fact will, in fact, draw that inference should be given to Thomas Douglas at the summary judgment stage. *One South, Inc.*, 963 So. 2d, *supra.*

Turning to Robert Douglas, he too testified in his individual capacity at his deposition and invoked his fifth-amendment right on the advice of his counsel. (Robert Douglas Dep. at 4:1-11)[4]. Importantly, the City declined to ask Robert Douglas questions once he invoked his right. (*Id.* at 7:11-8:20). In order for an adverse inference to be drawn against Robert Douglas, the court has to be given the benefit of knowing the specific questions asked in order to determine if "answering the question would tend to incriminate the witness." *Hinds County Board of Supervisors v. Common Cause*, 551 So.2d 107, 112 (Miss. 1989). Consequently, because the City declined to ask Robert Douglas substantive questions, an adverse inference should not be drawn against him for those unasked, unanswered questions.

As to Gold Coast Commodities itself, Thomas Douglas, Jr. was the 30(b)(6) designee of the Company who testified under oath in response to the City's questions, never invoking his fifth amendment right. The City has not argued that the 30(b)(6) designee was insufficiently prepared or not knowledgeable, it has simply taken issue with the Company's testimony contradicting other evidence, unconvincing though it may be, in the record. (*See e.g.,* Dkt. 204, p. 13). At the summary judgment stage, the Company's sworn testimony contradicting other evidence in the record, not to mention the City's unsupported argument in its briefs, is a picture perfect example of disputed

[3] All cited pages of the 30(b)(6) Deposition of Thomas Douglas, Jr. are attached here to as collective Exhibit "4."

[4] All cited pages of the deposition of Robert Douglas are attached here to as collective Exhibit "5."

material facts preventing summary judgment. *See Froemel*, 248 So. 3d at 880 (noting that a fact is not material or uncontested "merely because one party proclaims it so.")

Finally, the invocation of the fifth-amendment by the various non-parties should have no bearing whatsoever on the Defendants at the summary judgment stage, if ever. The undersigned can find no precedent for the idea that a non-party's assertion of his fifth-amendment right can conclusively establish a material fact as to a party. *See Gibson*, 870 So. 2d, *supra*. The City's idea is also offensive to fundamental fairness in the case of Robert Douglas, who was not asked the questions from which the City seeks to draw an adverse inference, and the Company, who put forth a knowledgeable representative who testified under oath.

Because the fact finder has discretion in drawing an adverse inference against the Defendants at trial, at the summary judgment stage, the benefit of the doubt, the evidence, and inferences are viewed in favor of the non-moving party, here, the Defendants. *One South, Inc.*, 963 So. 2d, *supra.*

b. The City has not met its burden of showing no genuine issue of material fact exists as to its claim of negligence.

While the City largely copies its previous brief regarding its claim of negligence, it drops a new curious footnote into the section stating that, "to the extent that some degree of injury to the City is an element of negligence and is therefore necessary to show liability, Encyclopedia of Miss. Law § 52.2, this Motion seeks to establish that element is not subject to genuine dispute." (Dkt. 204, p. 23). However, the City's admission does not excuse its failure to prove that there is no genuine dispute as to each element of its negligence claim, specifically including causation and damage. *See Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 374 (Miss. 1992) (proving damages is necessary in negligence action).

In reprinting its previous argument regarding the element of causation, the City's only additional point is that the "only evidence in the record" of the cause to damage of the PVC pipes downstream from Gold Coast and Reckitt is the "high-temperature discharge" observed during the October 2016 investigation. (Dkt. 204, p. 24). Turning first to the location of the allegedly damaged PVC pipes, the City continues to exhibit a complete lack of comprehension or understanding of the installation, alleged damage, and replacement of the PVC pipes it claims "it was forced to replace … less than four years after its installation." (*Id.*, p. 23). As a reminder, the City first disclosed this alleged damage to Gold Coast in February 2021 at which point the City claimed the pipe segment had been installed in 2015, discovered as damaged in 2016, and replaced in December 2020. (Dkt. 204-4).[5] The City the corrected itself and in sworn responses to interrogatories claimed the pipe segment had been installed in 2013, discovered as damaged in 2016, and replaced in December 2020. (Dkt. 208-6). Now, the City claims, without citation to anything in the record, the pipes were installed less than four years before they were replaced in December 2020, meaning the pipes would have been installed sometime after December 2016. (Dkt. 204, pp. 16, 23). Considering the City can't even decide what the facts are with regard to the installation and replacement of the PVC pipe, it is incomprehensible for it to argue there is no genuine dispute with regard to these material facts.

Putting the location of the alleged damage aside, the City also has the burden of proving each element of its negligence claim at trial, and thus has the burden of producing evidence in support of its Amended Motion as well. *Karpinsky v. Am. Nat. Ins. Co.*, 109 So. 3d 84, 88-89 (Miss. 2013). However, the City does not argue that it has produced proof of Gold Coast causing

[5] The City's expert based his analysis and report on the City's claim that the pipes were installed in 2015, and has not amended or supplemented his report to correct the false information on which he relied. (Husman May 21, 2021 Dep., Ex. 1, at 17:25-18:21).

the allege damage to the PVC pipes, it simply says no other evidence has been found. (Dkt. 204, p. 24). The City's failure to fully investigate or locate evidence in support of its theory is evidence of a fatal defect in the City's case, not of the Defendants culpability. *Palmer v. Biloxi Reg'l Med. Ctr.*, Inc., 564 So. 2d 1346, 1355 (Miss. 1990) (the movant bears the burden of production if, at trial, he would bear the burden of proof on the issue raised.) (internal citations omitted).

Not only has the City failed to meet its burden of production of evidence, as explained above, there are multiple other pieces of evidence in the record which indicate other likely causes of the damage, making the City's claim objectively false and certainly insufficient to establish that there is no genuine dispute as to the cause of the damage. (*See* Ex. 3; Dkt. 208-7; Smith May 20, 2021 30(b)(6) Dep., Ex. 14, attached hereto as Exhibit "6"). Without eliminating all other potential causes of the damage, the City has not met its burden with regard to the element of causation of showing the factual cause of the damage was 'the result of' the Defendants' actions. *McGinty v. Grand Casinos of Mississippi, Inc.-Biloxi*, 245 So. 3d 444, 448–49 (Miss. 2018) (casino not liable for illness from allegedly contaminated pork chop absent proof that contamination was "the result of" the casino's action). Consequently, Plaintiff's claim that it is entitled to summary judgment on the issue of causation and damages is completely meritless.

IV. The unrelated "investigations" of federal and state agencies into Gold Coast's disposal of wastewater are hardly consistent or in any way sufficient to establish the "noncompliant nature of its wastewater."

The City bizarrely puts forth the argument – in its introduction, no less – that the "noncompliant nature" of Gold Coast's wastewater is "established by the consistent findings of federal and state agencies investigating its disposal in other contexts." (Dkt. 204, p. 1). However, the supposed connection the City strains to draw is in violation of Rule 404(a) of the Rules of Evidence, and is impossible to call anything other than an inadmissible red-herring.

a. The Commission Orders concern conduct years after that alleged in Plaintiff's Complaint and contain no evidence of Gold Coast disposing of corrosive or high temperature discharge.

Commission Order 6805 17, attached as an exhibit to Plaintiff's Amended Motion, concerns the disposal of Gold Coast's wastewater by Rebel High Velocity Sewer Services ("Rebel") at Rebel's own facility. Gold Coast specifically contacted Rebel for disposal of its wastewater in after the City ordered it to stop virtually all discharges, regardless of the whether the water met the City's ordinances or not. (Dkt. 203-1). Plaintiff also fails to draw a connection between this Order, which originated from an inspection of Rebel more than one year **after** the City last alleges Gold Coast discharged into its sewer system, and Gold Coast's alleged noncompliant discharges in 2013-2016. Not only does the Order contain **zero** analytical evidence of the supposed noncompliant nature of Gold Coast's wastewater at any time, the Order makes no mention of Gold Coast's wastewater being corrosive or discharged at an improper temperature. This complete lack of any mention of the allegations the City has lobbed at Gold Coast hardly makes the investigation described in the Order "consistent" with the City's baseless allegations.

Commission Order 7069 20, attached as an exhibit to Plaintiff's Amended Motion, concerns the construction, permitting, and use of a new treatment lagoon within Rankin County beginning in 2018, two years **after** the last alleged discharge from Gold Coast in the Complaint. Gold Coast initiated design and construction of the Rankin County treatment lagoon in April 2018 by submitting and Application for a State Operating Permit from MDEQ. (Dkt. 203-2, p. 3). The Operating Permit was issued in August 2019 and Gold Coast sent its wastewater to that lagoon until the Order was issued on September 11, 2020, at which point Gold Coast complied with the requirement to cease discharging its wastewater in the lagoon until certain improvements to the facility and treatment plan were made including a vector control plan and odor control plan. (*Id.*,

pp. 5-6). Not only does the Order contain **zero** analytical evidence of the supposed noncompliant nature of Gold Coast's wastewater at any time, the Order makes no mention of Gold Coast's wastewater being corrosive or discharged at an improper temperature. This complete lack of any mention of the allegations the City has lobbed at Gold Coast also hardly makes the investigation described in the Order "consistent" with the City's baseless allegations. Moreover, Order 7069 20 was partially rescinded by the Mississippi Commission on Environmental Quality after a formal evidentiary hearing on November 19, 2020.

b. The newspaper article is inadmissible and irrelevant.

Most surprisingly, the City attaches a newspaper article as an exhibit to its Amended Motion concerning the "MDEQ orders and federal charges against the owner of [Rebel]" for discharging Gold Coast wastewater in 2017. While Defendants could find no Mississippi precedent having dealt with the reliance by a party on a newspaper article to support a summary judgment motion, generally, newspaper articles are "classic, inadmissible hearsay" and are "unusable to defeat summary judgment."[6] It necessarily follows then that these unsworn or uncertified articles whose authors are not subject to cross-examination are completely incompetent summary judgment evidence. *Hicks*, 466 F. Supp. 2d at 805. Thus, any statements made or alluded to in newspaper articles ordinarily cannot be considered as evidence for summary judgment purposes.

[6] *Hicks v. Charles Pfizer & Co. Inc.*, 466 F. Supp. 2d 799, 804 (E.D. Tex. 2005) citing *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005); *see The Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 166 n. 8 (3d Cir. 2001); *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 146 (8th Cir. 1991); *Pennington v. Vistron Corp.*, 876 F.2d 414, 427 n. 15 (5th Cir. 1989); *Dallas County v. Commercial Union Assur. Co.*, 286 F. 2d 388, 392 (5th Cir. 1961); *Achee v. Port Drum Co.*, 197 F. Supp. 2d 723, 730 n. 5 (E.D. Tex. 2002); *Ladner v. City of N.Y.*, 20 F. Supp. 2d 509, 519 (E.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir.), cert. denied, 528 U.S. 1006 (1999); *Dowdell v. Chapman*, 930 F. Supp. 533, 541 (M.D. Ala. 1996); *Tilton v. Capital Cities/ABC, Inc.*, 905 F.Supp. 1514, 1544 (N.D. Okla.1995), *aff'd*, 95 F.3d 32 (10th Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997).

Id. (internal citations omitted). Plaintiff puts forth no explanation, much less evidence that an exception to the prohibition against hearsay set forth in Mississippi Rule 803 applies, and the newspaper article should not be considered as evidence in support of its summary judgment motion, and should be stricken.

CONCLUSION

The record presented by the City is insufficient to justify summary judgment as to each identified issue of liability on Plaintiff's claims of negligence, gross negligence, negligence per se, and/or violation of City ordinance.

Therefore, Defendants Robert Douglas, Thomas Douglas, and Gold Coast Commodities, Inc. respectfully request that Plaintiff's Motion for Summary Judgment be DENIED in its entirety.

Respectfully submitted, this, the 16th day of July, 2021.

GOLD COAST COMMODITIES, INC.; ROBERT DOUGLAS, and THOMAS DOUGLAS, Defendants

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day served, via the Court's Electronic Filing System, a true and correct copy of the above and foregoing document to all counsel of record.

This, the 16th day of July, 2021.

s/ *R. Andrew Taggart, Jr.*
R. ANDREW TAGGART, JR.