STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of the "Addison Natural Gas Project" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of New distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont	))))))))))

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER BY NATHAN AND JANE PALMER

Introduction

Nathan and Jane Palmer (Palmers) submit the following proposed findings of fact, conclusions of law, and order with respect to the pending remand of Docket No. 7970 and the Board's consideration of whether to reopen this docket under V.R.C.P. 60(b)(2) or (3). In summary, the Palmers request that the Board reopen Docket No. 7970:

I. Under Rule 60(b)(3) so that the Palmers may fully and fairly litigate the cost and necessity issues under the Section 248 criteria due to VGS' misrepresentation as to the Project's cost on September 26, 2014. Specifically, the Palmers were prejudiced by VGS' failure to disclose between September 26, 2014 and October 24, 2014 (which was the deadline for a motion to alter or amend under V.R.C.P. 59(e)), and thereafter until December 19, 2014:

i. that the Project's cost would exceed $121.6 million dollars by a range of $30-$35 million dollars and that the actual cost was in the range of $151 to $156 million dollars based upon the "A-ha" moment and the extensive work that PwC had been doing for VGS since *February, 2014*;

ii. that for purposes of the September 26, 2014 hearing, the cost increase that should have been considered under Rule 60(b) was a Project cost of between $151 and $156 million, not $121.6 million, but for VGS' decision to remain silent on this issue;

iii. that even if VGS would not know the final number until completion of the QRA in December, 2014, VGS knew that the $121.6 million Project cost was wrong because VGS already knew that it had used a second-rate methodology to initially forecast the Project's cost, and that to rectify this mistake, VGS brought in PwC and "upped its game" to perform a re-estimate of the project using "the best industry standards for estimating a project of this nature;"

iv. that the failure by VGS to disclose what it knew on or before October 24, 2014, and thereafter, was a misrepresentation that has denied the Palmers the right to fully and fairly litigate the issues of cost and necessity under the Section 248 criteria; and

v. that VGS' misrepresentation includes its failure to file a Rule 59(e) motion by October 24, 2014, to correct the erroneous testimony of former VGS

president Gilbert and the Board's conclusion that there was a reasonable basis to conclude that the revised cost projections were reliable.

A detailed analysis of the Rule 60(b)(3) issues is set forth below at pages 4-28.

II. Under Rule 60(b)(2) because the outcome in this proceeding would be different now that the Project's true and actual cost is known:

i. The cost increase from $121.6 million to $153.6 million demonstrates that VGS did not, and has not, reasonably estimated the Addison County market, planned the Project for that present market, as well as future markets to be served in subsequent expansions, and or, in a reasonable manner, shown the need could not be met by efficiency measures or demand-side management; and

ii. the change in market conditions affecting the price of natural gas and other heating fuels today and for the immediately foreseeable future, and the availability of lower-cost alternatives, if proved, would alter the Board's conclusions that the project is needed to meet present and future demand for service.

A detailed analysis of the Rule 60(b)(2) issues is set forth below at pages 29-48.

RULE 60(b)(3) FINDINGS OF FACT

The Palmers' Testimony and Filings are Evidence of the Palmers' Litigation Choices

1. The Palmers have made difficult choices based on how to raise and advocate all of their concerns and questions regarding the Project. This has included how to raise and advocate concerns regarding the issues of the Project's cost and necessity under the Section 248 criteria. Rebuttal Testimony of Nathan Palmer, May 28, 2015 ("RTNP, 5/28/2015") at p. 5, line 6 – p. 6, line 12.

2. The Palmers have balanced their concerns regarding the Project's cost and necessity against other concerns including potential adverse impacts on the environment, natural resources, agriculture, health and safety. Id.

3. The Palmers have concerns regarding soil, run off, pipe failure and accidents in addition to the Project's cost. The Palmers had to allocate their limited resources among these competing concerns as they decided how to advocate during the course of the proceedings. Id.

4. The Palmers had deep suspicions about VGS' cost predictions. If VGS had told the truth with respect to the Project's cost, the Palmers would have more vigorously pursued the cost and necessity issues. The Palmers would have been able to tell the experts they consulted, and the funding sources they relied upon, that the VGS costs could not justify necessity under the Section 248 criteria. The Palmers limited their scope of participation throughout these proceedings because they concluded that they had no choice but to believe that VGS was telling the truth. Id.

5. As a result, the Palmers limited their pursuit of the cost and necessity issues under the Section 248 criteria in a highly circumscribed manner, as demonstrated by their October 25, 2013, Reply Brief. *Reply Brief Submitted on Behalf of Nathan and Jane Palmer*, October 25, 2013 at 14-16.

6. The Board's December 23, 2013 Order (the "December 23rd Order") confirmed that the Palmers litigated the cost and necessity issues under the Section 248 criteria in a highly circumscribed manner, and that instead they pursued litigation theories directly related to impacts to their land. December 23rd Order at 22-23 ("The Palmers oppose the Project both because they contend it will not serve the public good of the state and because the Project will have undue adverse impacts to the aesthetics, soil health, water content of the soil, and future development of their land.").

7. When VGS triggered the first remand with the July 2, 2014 filing identifying that the Project's cost had risen to $121.6 million (the "VGS Cost Update"), the Palmers, in a highly circumscribed manner, continued to express their concerns regarding the cost and necessity issues under the Section 248 criteria as part of the first remand proceeding, as set forth in the Pre-filed Testimony of Nathan Palmer on Behalf of Nathan and Jane Palmer, September 22, 2014 ("PFNP, 9/22/2014").

8. For example, Mr. Palmer testified: "From what I can tell, (and I am just a lowly mechanic), the cost estimates for the entire project are based on vague and arbitrary figures. Looking at the original cost estimate spread sheet for the entire project provided by John Heintz (EXH.PET.SUPP.JH-11 (2/28/3 (sic)) there are only five

categories the costs are broken down into. This seems overly simplistic and causes the analyst to rely heavily on trust." PFNP, 9/22/2014, at p. 4, lines 62-66.

9. The Palmers again were forced to address the cost and necessity issues under the Section 248 criteria in a highly circumscribed manner. Comments of Nathan Palmer Regarding Reopening of Proceedings and Proposed Findings of Fact, October 2, 2014.

10. The Board's October 10, 2014 *Order Re: Rule 60(B) Reconsideration* confirms that the Palmers litigated the cost and necessity issues under the Section 248 criteria in a highly circumscribed manner, as the Board stated at p. 9: "The Palmers request a reopening of the proceedings under rules 60(b)(2) and 60(b)(3), or alternatively under Rule 60(b)(6) in light of the updated estimated capital costs reported in the VGS Cost Update."

Cross-Examination Testimony of Donald Rendall

11. Mr. Rendall understands that the Palmers are concerned about the Project. Mr. Rendall appreciates the depth of the Palmers' concerns. Transcript (Tr) 6/22/2015 at 40:5-11.

12. Mr. Rendall "would be delighted and surprised if the Palmers were relying on what we [VGS] are telling them in any respect." Tr 6/22/2015 at 40:21-24.

13. Mr. Rendall agrees that, when VGS represented what the Project would cost, the Palmers had to review the cost as represented by VGS "for their own purposes, whatever they may have been." Tr 6/22/2015 at 41:3-7.

14. Mr. Rendall agrees that it was reasonable for the Palmers to believe that VGS was truthful each time VGS represented the Project's cost. Tr 6/22/2015 at 41:8-13.

15. Mr. Rendall agrees that the Palmers were reasonable to believe VGS when VGS said the Project cost was $86.6 million dollars, and then $121 million dollars, and then $153.6 million dollars. Tr 6/22/2015 at 41:16-25.

16. Mr. Rendall "would be very surprised" if the cost of the Project "was an important part" of the Palmers' "decision making about how to proceed" in this matter and what would be the scope of their intervention. Tr 6/22/2015 at 42:13-19.

17. Mr. Rendall agrees that the basis for his surprise would not be because the Palmers are incompetent to raise the cost issue, but rather, "It would surprise me because of the issues that Mr. and Mrs. Palmer have raised over the course of this proceeding and the – and the nature of those – of their concerns." Tr 6/22/2015 at 42:20-25.

18. Mr. Rendall concedes that it may have been possible "that cost of the project was a driving ingredient in their – in Mr. and Mrs. Palmers' intervention calculus." Tr 6/22/2015 at 43:5-9.

19. VGS objected when Mr. Rendall was asked, "If there is ultimately evidence admitted that they [the Palmers] made a comparison of issues relevant to their property as well as consideration of the cost of the project, isn't it possible that the litigation choices, the strategic choices they made were directly influenced by the project cost representations made by VGS?" Tr 6/22/2015 at 43:10-18,

20. After the Board overruled the objection, Mr. Rendall conceded that, as an experienced attorney, as president of VGS, the Palmers had to make strategic litigation decisions, but that he "can't answer" whether the Palmers' litigation decision making process was influenced by the Project's cost estimates. Tr 6/22/2015 at 45:6-9.

21. Ultimately Mr. Rendall conceded as follows (Tr 6/22/2015 at 45:10-20):

> Q. Okay. Assuming that it was influenced, isn't it fair to say that at this point they were reasonable to believe in the estimates – project cost estimates which VGS provided?
>
> A. They were reasonable to believe in the testimony that – and submissions that the company made at each stage of the case. Yes.
>
> Q. And there was – you're not suggesting that they should have known that ultimately the projection of 84 million would eventually become 153.6 million; correct?
>
> A. Of course not.

22. Mr. Rendall also testified that the filing of the $153.6 million dollar budget resulted from "a disciplined quantitative risk assessment using a set of standards – industry standards for estimating our infrastructure projects. We call it ACE[.] . . That is the methodology that the team used to construct the 153.6 million dollar estimate." Tr 6/22/2015 at 80:10-18.

23. The ACE methodology was new to the Project, but not the industry. Tr 6/22/2015 at 80:22.

24. Mr. Rendall agrees the ACE methodology is a complex methodology "to his simple mind;" and that it is "detailed" and "disciplined." Tr 6/22/2015 at 80:23-81:8.

Response to Questions by Board Member Cheney

25. Mr. Rendall admitted in answer to a question by Board Member Cheney that the previous cost estimate of $121.6 represented as accurate by VGS "did not go through the industry standard methodology that Mr. Roam and his team used to re-baseline the project in December." Tr 6/22/2015 at 62:20-22. VGS did not use the ACE methodology originally even though it was well known in Vermont, and had been

used in at least three other PSB proceedings: the Northwest Reliability Project, the Southern Loop, and the Kingdom Wind project. Tr 6/22/2015 at 60:3-6.

26. VGS brought-in Mr. Roam because, as Mr. Rendall testified, "[VGS] upped its game by bringing this team in to perform a reestimate of the project using the best industry standards for estimating a project of this nature." Tr 6/22/2015 at 63:1-4.

Cross-Examination Testimony of Ralph Roam

27. Mr. Roam agrees that, for those people who do not use the ACE methodology every day, "it may be complicated. For those who are familiar, not so much." Tr 6/22/2015 at 85:3-9.

28. Mr. Roam was first asked to apply the new methodology for the Project in October of 2014. Tr 6/22/2015 at 85:20-22.

29. In response to the question, "could you just provide as simple as possible an explanation as to what the methodology is and its basis," Mr. Roam testified (Tr 6/22/2015 at 86:2-87:8):

> A. Sure. The methodology follows standards issued by – Mr. Rendall alluded to ACE – which is the Association for the Advancement of Cost Engineering. From a process perspective ACE lies out a number of steps that you use to arrive at a cost estimate. There's a number of different guidances that walk you through that process. But ultimately as noted in my testimony, there is really four main steps to that we applied in this case consistent with that methodology to develop the estimate.
>
> They are, develop a base estimate which is basically looking at the scope of the project, ensuring you've captured all of the tasks associated with it. And assigning costs to those – cost without contingency. That serves as your basis to measure the project costs off of.
>
> The second step is to determine the maturity of the project at the point in time when the estimate is being developed. And there are standards that are established for doing so, and we have applied those standards here.

The third step is then to determine what should your contingency be based upon maturity of the project at that point in time, scope definition, deliverables, information available. And that's the process where to understand what your contingencies should be you apply QRA, quantitative risk analysis.

Finally the fourth step in the process is to understand are the outputs of that process to establish contingencies reasonable, and in doing so you do a comparison of what the output of the analysis looks like compared to what industry standards might suggest it should be.

30. Professionals who apply the ACE methodology can disagree over appropriate inputs relative to a particular project. The use of the ACE methodology is based on the exercise of professional judgment. Professionals who apply the ACE methodology can disagree over appropriate inputs relative to a particular project. Professionals who apply the ACE methodology could reach different conclusions and yet be reasonable in their differences. Tr 6/22/2015 at 87:9-88:5.

31. Because professionals who regularly apply the ACE methodology can reasonably disagree over appropriate inputs and the exercise of professional judgment, Mr. Roam, as an expert of the ACE methodology, believes that "it's important that it's a collaborative process, that you have many opinions, you have many experts involved in the course of the evolution of the estimate so that those differences of opinion can be vetted out and there is consensus that conclusion is the best one to be made at that point in time." Tr 6/22/2015 at 88:6-11.

The "A-ha" Moment

32. During September, 2014, Mr. Roam had concluded that the previous cost estimate of $121.6 which VGS has represented to the Board and parties was wrong. Tr 6/22/2015 at 110:24-111:1.

33. Mr. Roam testified that, in September, 2014, he knew that the Project costs were going to increase "quite a bit more" and that the range of the increase was in a range of $30-$35 million dollars. Tr 6/22/2015 at 109:23-111:1.

34. Mr. Roam could not say when the "a-ha" moment exactly occurred, except to testify that the "a-ha" moment occurred in September, but after September 26, 2014. Tr 2/22/2015 at 112:14-24.

35. The month of September, 2014 had thirty days.

36. Because the "a-ha" moment occurred after September 26, 2014, VGS could have told the Board and the parties that, notwithstanding the hearing held on September 26, 2014, the Project cost estimate represented to the Board and parties on September 26, 2014 was wrong by $30-$35 million dollars. Tr 6/22/2015 at 110:4-111:1. Mr. Roam confirmed in his testimony that the "a-ha" moment was in September, 2014. Tr 6/22/2015 at 113:4.

The VGS and PricewaterhouseCoopers LLP Contract

37. VGS and PricewaterhouseCoopers LLP (PwC) entered into a contract on February 25, 2014 (AARP Cross Exhibit 48), a full seven months prior to the "a-ha" moment. The contract between VGS and PwC is a detailed contract for services, with "Services" defined under the heading "Scope of Our Services." AARP Cross Exhibit 48.

38. The Services were being provided in response to the request by VGS for "project support to develop a baseline schedule and budget for VGS's Addison County Expansion Project ("Project")." AARP Cross Exhibit 48.

39. Based on this request by VGS, PwC would render the Services with the following approach: "The approach will consist of leveraging existing project knowledge and data and conducting working sessions with project stakeholders to establish an integrated schedule and budget baseline. This will allow the project team to measure the Project's progress, evaluate decisions based on performance data, and develop performance metrics and reports." AARP Cross Exhibit 48.

40. The contract also states: "PwC will work with VGS's Project Sponsor Eileen Simollardes and VGS' existing project team." AARP Cross Exhibit 48.

41. As part of the Services, PwC would "Analyze variances and impacts from baseline schedule and budget," and as part of the "Deliverables" under the contract, PwC would provide "a]n updated baseline Project Budget with actual and projected costs." AARP Cross Exhibit 48.

42. A reasonable inference is that the "a-ha" moment resulted from PwC's retention in February and the work done through September, 2014, not from the work and services done after October 24, 2014, and that both PwC and VGS knew that the Project costs represented on September 26, 2014 were going to be quite a bit more, in the range of $30-$35 million dollars, and that VGS could have told the Board this fact on October 24, 2014, but opted to remain silent.

RULE 60(b)(3) CONCLUSIONS OF LAW

Under Board Rule 2.221, Vermont Rule of Civil Procedure 60(b) applies to proceedings before the Board. Rule 60(b)(3) states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order,

> or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

The Reporter's Notes to Rule 60 establish that Rule 60, including Rule 60(b)(3), "is substantially identical to Federal Rule 60." While there is Vermont Supreme Court precedent with respect to Rule 60(b)(3)[1], there is federal precedent which the Board should apply in this proceeding.[2] Specifically, the Board should consider *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978) because it analyzes Rule 60(b)(3) in the context of a plaintiff's litigation strategy choices where a defendant improperly withheld information in breach of an obligation to disclose such that the plaintiff was denied a full and fair opportunity to litigate.[3]

I. THE PLAINTIFF IN *ROZIER* WAS DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE BECAUSE THE DEFENDANT WITHHELD INFORMATION IN BREACH OF A DUTY TO DISCLOSE.

The decision by the Fifth Circuit Court of Appeals in *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978) should be considered and applied by the Board. *Rozier* is

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[1] See October 10, 2014 *Order Re: Rule 60(B) Reconsideration* at 7, footnote 14. See also *Bardill Land & Lumber, Inc. v. Davis*, 135 Vt. 81, 370 A. 2d 211, 213 (1977) where the Vermont Supreme Court ruled that, under Rule 60(b)(3), where the allegation is fraud, "fraud can never be presumed, but must be proved. . . The trial court found no fraud, despite the fact that the defendant, in answering the pre-trial interrogatories, filed a false answer to a specific inquiry as to his involvement with fires at other demolition site." On this basis the Court reversed the trial court and granted the Rule 60(b)(3) motion based on fraud. *Bardill* did not involve an allegation of misrepresentation or other misconduct, nor whether a party must file a Rule 59(e) motion to correct evidence which the party provided but which the party later learned, after the evidentiary hearing but before the deadline for a Rule 59(e) motion, was erroneous, and which was relied upon to rule in the party's favor. In addition, the Board's Rule 60(b)(2) and (3) analyses must also apply the Vermont Supreme Court's holding that Rule 60(b)'s application, in part, depends upon the sub-section at issue and whether the motion is made in conjunction with the application of interrelated rules of civil procedures. See *LaFrance Architect d/b/a Lake Architectural, LLC v. Point Five Development South Burlington*, LLC, 2013 VT 115 ¶¶ 9 and 14 ("As noted above, we have held that our Rule 60(b) analysis in the context of a Rule 55(c) motion to set aside a default judgment requires consideration of a different set of factors than the ordinary Rule 60(b) analysis.").

[2] The Board itself has relied upon federal case law as well. See October 10, 2014 *Order Re: Rule 60(B) Reconsideration* at 7, footnote 11.

[3] A copy of *Rozier* is attached as Appendix A.

applicable because the facts and legal issues in this matter with respect to Rule 60(b)(3) are highly analogous to *Rozier*.

In *Rozier*, the Fifth Circuit granted the plaintiff's Rule 60(b)(3) motion because the defendant failed to comply with its discovery obligations such that the plaintiff was denied a full and fair opportunity to litigate its negligence cause of action. The Board should apply the analysis and holding of *Rozier* because VGS' failure to disclose between September 26, 2014 and October 24, 2014, and thereafter until December 19, 2014, that the Project's actual cost was going to be in the range of $151 to $156 million dollars, was a misrepresentation that has denied the Palmers the right to fully and fairly litigate the issues of cost and necessity under the Section 248 criteria.

A. The analysis of Misrepresentation or other misconduct in *Rozier*.

In *Rozier*, the plaintiff filed a timely Rule 60(b)(3) motion in response to a defendant's verdict. After the verdict the plaintiff obtained evidence that the defendant had failed to comply with its discovery obligations under the federal rules regarding the faulty design of gas tanks on Ford automobiles. The specific piece of evidence which Ford improperly withheld was a "Trend Cost Estimate."[4] The Fifth Circuit determined that the defendant was obligated under the federal discovery rules to have provided the information to the plaintiff, and that the defendant failed to fulfill its discovery obligations. In doing so the defendant deprived the plaintiff of her right to fully and fairly litigate the negligence cause of action. On this basis the Fifth Circuit granted the Rule 60(b)(3) motions.

[4] The Fifth Circuit stated: "[T]his Trend Cost Estimate was prepared in anticipation of a revised National Highway Traffic Safety Administration safety standard of 30 m.p.h. for rear end collisions. It compares the costs of parts and labor associated with two proposed alternate fuel tank designs based on the design of a 1971 full-sized Ford." Id. at 1340.

The Fifth Circuit stated the basic principles of Rule 60(b)(3), and distinguished the rule from Rule 60(b)(2):

> One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense. Although Rule 60(b)(3) applies to misconduct in withholding information called for by discovery, it does not require that the information withheld be of such nature as to alter the result in the case. This subsection of the Rule is aimed at judgments which were unfairly obtained, not factually incorrect. [FN4]. (Internal citations omitted.)
>
> > FN4. Factually incorrect judgments are the subject of Rule 60(b)(2), which provides for relief from judgment on grounds of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". We have held that under Rule 60(b)(2), the newly discovered evidence must be "such that a new trial would probably product a new result."

Rozier, 573 F.2d at 1339. (Internal citations omitted.)

The Fifth Circuit applied these principles to the withheld Trend Cost Estimate. The Fifth Circuit began its analysis by noting that Ford discovered the Trend Cost Estimate one week before the trial started, but did not disclose the information to the plaintiff. Id. at 1341. The Fifth Circuit continued:

> By any fair reading, the district court's January 6, 1976, discovery order called for production of this Trend Cost Estimate. Ford, in response to the motion to vacate and in this appeal, has urged that, as a term of art, a "trend cost estimate" is not a "cost/benefit analysis". Whether the document in question technically is or is not a cost/benefit analysis to our non-expert eyes, the terms are synonymous, as alike as "Tweedledum and Tweedledee" is largely

> irrelevant in this case because plaintiff's interrogatories were not limited to "cost/benefit analyses".

Id. at 1341.

The Fifth Circuit then easily concluded that the first element of Rule 60(b)(3) was met, that is, the plaintiff had established by clear and convincing evidence that Ford engaged in misrepresentation and other misconduct. In part, the Fifth Circuit reached this conclusion because Ford's explanation as to why it failed to disclose the Trend Cost Estimate was not credible:

> If Ford in good faith believed that the district court's order was not intended to compel production of this document, the appropriate remedy was to seek a ruling by the district court at that point and not a year after the trial and then only when, by chance, the plaintiff learned of it.

Id. at 1342.

The Fifth Circuit's rejection of Ford's explanation upholds the policy that judgments are final, except where a litigant brings the Rule 60(b)(3) motion upon itself by failing to timely disclose information in breach of a disclosure duty. In evaluating whether, for purposes of Rule 60(b)(3), the breach is a misrepresentation or other misconduct, the analysis includes whether the party failing to disclose could have negated the Rule 60(b)(3) motion if it had voluntarily raised the issue with the trial court *before* final judgment was entered, but chose not to as part of its own litigation decision making process. Because Ford breached its duty to disclose, and because it could have disclosed before the jury's verdict, the Fifth Circuit held there was a misrepresentation and other misconduct which necessitated proceeding with step-two of the Rule 60(b)(3) analysis.

B. The analysis of fully and fairly presenting the case in *Rozier*.

In evaluating the plaintiff's Rule 60(b)(3) motion, after finding the requisite misrepresentation or other misconduct, the Fifth Circuit admitted that the "more vexing question is whether nondisclosure of the Trend Cost Estimate prevented Mrs. Rozier from fully and fairly presenting her case." Id. at 1343. The Fifth Circuit's analysis on this issue is crucial. It goes to the fundamental policy that litigants make strategic litigation choices based upon the information provided by the opposition. The Fifth Circuit stated:

> At trial, Mrs. Rozier contended that Ford was negligent in designing a fuel tank that could not withstand an impact such as that involved in the accident which took her husband's life. Prior to trial, she expressed an intention to rely on 14 theories to explain how Ford deviated from the appropriate standard of care. Inevitably, information developed in the discovery stages of the case influenced the decision as to which theories would be emphasized at trial. We are left with the firm conclusion that disclosure of the Trend Cost Estimate would "have made a difference in the way plaintiff's counsel approached the case or prepared for trial" and that Mrs. Rozier was prejudiced by Ford's nondisclosure. (Internal citations omitted.)

Id. at 1342.

All litigants make fundamental strategic choices based upon the information received from the adverse party. Litigants are entitled to believe in the truth of the adverse party's representations. Even if they were suspicious, the Palmers were entitled to believe that VGS was proceeding in good faith with Project cost information properly developed based upon reliable, proven methods. The Palmers were reasonable to make a litigation decision to not vigorously pursue the cost and necessity issues based upon VGS's representation as to the Project's cost.

In contrast, VGS, as the applicant in furtherance of its burden of proof (Docket No. 7508, *In re: Petition of Georgia Mountain Community Wind, LLC*, Order of 9/1/2011 at 3-4), was

obligated to immediately correct any material mistakes regarding the Project's costs. In violation of this obligation, VGS made a litigation decision to not disclose key information before judgment was final on October 24, 2014. VGS did this notwithstanding that this was a key moment when the Palmers would have used the information in the course of their own litigation decisions. By acting in this way VGS deprived the Palmers of their right to a "fair contest," and VGS' conduct is exactly the conduct which Rule 60(b)(3) both prohibits and remedies.[5]

II. THE CLEAR AND CONVINCING EVIDENCE SHOWS THAT VGS OBTAINED THE CPG THROUGH FRAUD MISREPRESENTATION OR OTHER MISCONDUCT

Once VGS filed its petition for a CPG on December 20, 2012, VGS was under an affirmative obligation imposed by Rule 5.409 to disclose price increases of 20 percent where such increase is at least $25,000. VGS had every opportunity as of October 24, 2014, to bring forward the Project cost increases as required by Rule 5.409. VGS had every opportunity to tell the Board and the parties what it knew based upon the work done by PwC prior to October 24, 2014. VGS had every opportunity to tell the Board and parties in a motion on October 24, 2014 exactly what work PwC was going to do now that PwC and VGS knew that the final Project cost would not be $121.6 million, but rather would increase by another $30 to $35 million dollars.

Even if VGS was not obligated by Rule 5.409, it was obligated to correct factual errors stated in the Board's October 10, 2014 Order, and to move to amend any conclusion of law based on erroneous factual information. Indeed, because VGS bears the burden of proof, it was obligated to inform the Board what it knew as of October 24, 2014 by motion made under Rule 59(e), and Mr. Roam's testimony establishes that VGS knew on October 24, 2014 that the

[5] *See State Street Bank and Trust Company v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004) ("To prevail on a Rule 60(b)(3) motion, a movant must show that the conduct complained of prevented the moving party from fully and fairly presenting his case.") (Internal citations omitted).

Project cost was rising between $30-$35 million dollars above the reported cost of $121.6 million dollars. Yet, instead of opting for transparency about the spiraling Project costs, VGS remained silent, despite that, under Mr. Rendall's leadership, VGS had "upped its game." Tr 6/22/2015 at 63:1-2.

A. VGS controlled the course of events to further the misrepresentation.

VGS undertook in October "to literally reestimate the entire project,"[6] yet VGS did not tell the Board or the parties on September 26 (or October 24) that this is what was to occur. While the "a-ha" moment occurred in September, by Mr. Roam's testimony it occurred in the four day period of September 27-30, 2014 (and September 27th and 28th were a Saturday and Sunday). Yet VGS did not disclose the "a-ha" moment even though it occurred in the four days *after* the hearing on Friday, September 26, 2014.

To avoid the inescapable conclusion that VGS knew by October 1, or October 10, or October 24, 2014, that it misrepresented the Project cost by $30-$35 million dollars on September 26, 2014, VGS maintains that its obligation under Rule 5.409 was not operative until the "QRA" was done in December of 2014. This justification is without merit.

VGS had every opportunity to put the Board and parties on notice, a mere four days after the September 26, 2014 hearing, and certainly by October 24, 2014, that the Project's cost estimate of $121.6 million dollars was wrong. VGS could have told the Board and parties that the foreseeable increase of $30-$35 million dollars was the range of the "new capital cost estimates" (Rule 5.409), and that the "final number" would not be known until the "QRA" was done in December, 2014. Tr 6/22/2015 at 114:13. But VGS kept silent.

[6] Mr. Roam's response to a question by Board Member Cheney, Tr 6/22/2015 at 105:20-21.

B. The VGS excuse conflicts with Mr. Roam's testimony and the Board's October 10, 2014 decision regarding the first remand.

Mr. Roam's testimony is that VGS knew as of October 1, 2014, that the Project cost estimate of $121.6 million was off by $30-$35 million dollars, and that the prior cost estimates were wrong. Mr. Roam's testimony now, in June of 2015, contradicts the testimony heard by the Board on September 26, 2014 and as stated in the October 10 decision:

> Though VGS has indicated that the updated cost projections in July were prepared by the previous firm, CHA, whose performance in managing cost projections proved unsatisfactory to the Company over time, VGS's president testified under oath at the September 26th hearing that the Project is now under new management that is capable and is producing reasonable cost projections.

October 10, 2014 *Order Re: Rule 60(B) Reconsideration* at 21.

As a result of sworn testimony by the then-president of VGS, the Board found and concluded that the VGS management *is producing* reasonable cost projections. This finding of fact supported the Board's conclusion that "there is a reasonable basis to conclude that the revised cost projections are reliable." October 10, 2014 *Order Re: Rule 60(B) Reconsideration* at 20. In fact, the cost projection of $121.6 million was not accurate, and VGS knew it was not accurate by October 24, 2014 in the range of $30-$35 million dollars.

VGS disputes that it knew on October 24, 2014 that the Project costs were continuing to rise above $121.6 million in the range of $30-$35 million. However, it is not credible to believe that PwC was, between September 26 and October 24, actively producing reasonable cost projections but that somehow VGS did not know until the QRA was done in December that the estimated cost of $121.6 million was off by a range of $30-$35 million dollars. It is not plausible especially now that VGS has testified that hiring PwC was how VGS had "upped its game" and

that PwC was hired seven months prior to the September 26, 2014 hearing, and eight months prior to the Rule 59(e) deadline of October 24, 2014. Rather, the reasonable inference based on the evidence is that if VGS had fully disclosed on September 26, or October 10, or October 24, 2014, that the Project cost was going to rise an additional $30-$35 million, then the Project cost for the September 26 hearing would have been between $151 and $156 million, not $121.6 million. Consequently, the issue before the Board would have been whether to re-open the CPG based upon a cost increase from $86 million to $151-$156 million dollars. But this did not happen.

C. Failing to Disclose as Required by Board Rule 5.409 was a misrepresentation.

Under Board Rule 5.409, VGS was required to state the new capital cost estimates for the Project "and the reasons for the increase." VGS now says that the "reasons for increase" clause precluded it from disclosing the known and anticipated cost increase until December, 2014, because "the final number is not established until the QRA is done, contingency is established, and you understand what the final cost estimate is." Tr 6/22/2015 at 114:10-16. VGS' justification for failing to disclose under Rule 5.409 has no credibility for three reasons.

First, Mr. Roam admitted in cross-examination that, in September, 2014, he knew that the Project costs were going to be "quite a bit more," and that he understood the increase to be in the range of $30-$35 million dollars. Tr 6/22/2015 at 109:23-111:1. Even if this understanding somehow managed to come about only on September 27, 28, 29, or 30, 2014, VGS could have made the Board aware of this knowledge before the issuance of the Board's Order on October 10, 2014, or in any event by October 24, 2014.

Second, and as a follow-up to the "a-ha" moment, VGS knew in October, 2014, through "monitoring and controls," that there were "some performance trends that were of concern," and that these concerns necessitated VGS to "look at the estimate" "in a ground-up fashion." (Tr 6/22/2015 at 89:21-90:4). If VGS had told the Board and the parties this before October 10, 2014, or if it had filed a motion on October 24, 2014, then this second remand would not have been necessary nor would it have ever happened.

Third, VGS had the obligation to correct the sworn testimony provided by former VGS president Gilbert following the Board's issuance of the October 10, 2014 Order. Mr. Gilbert testified under oath at the September 26th hearing that the Project is now under new management that is capable and *is* producing reasonable cost projections. The Board's conclusion was that "there is a reasonable basis to conclude that the revised cost projections are reliable." October 10, 2014 *Order Re: Rule 60(B) Reconsideration* at 20. VGS, once it received the Board's October 10 Order, had until October 24 to file a Rule 59(e) motion. VGS was obligated to file a Rule 59(e) motion which requested that the October 10, 2014 Order be set aside, and that VGS be given the opportunity to provide new cost information.

Rule 5.409 did not preclude VGS from filing such a motion. Under Rule 5.409 VGS could have included in the motion that it would take approximately 3 months to fully understand why the costs were rising between $30-$35 million dollars *in addition* to the already reported increase to $121.6 million. Indeed, VGS could have told the Board and parties that it had "upped its game," was using the ACE methodology--"the best industry standards for estimating a project of this nature"[7]—and that as a matter of full disclosure and transparency, VGS wanted to allow

[7] Tr 6/22/2015 at 63:1-4.

the parties and the Board a full and fair opportunity to judge the Project's merits in relation to its known costs. But VGS remained silent.

D. VGS' failure to file the Rule 59(e) motion is evidence that there was a misrepresentation.

The failure by VGS to file the Rule 59(e) motion is evidence that there was a misrepresentation regarding the Project's cost increases. If VGS had disclosed the Project cost information known to it as of October 24, 2014, then the Palmers would have had the opportunity to challenge the veracity of the VGS cost estimates. *See In re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 352-53, 618 A.2d 1295, 1303 (1992) (post-judgment motion would have allowed intervenors to raise their objection with the Board and "the Board could have responded to it in a way that gave intervenors an opportunity to cross-examine and rebut, and which would place all relevant information on the record."). But by remaining silent, VGS has compelled the Palmers to meet the clear and convincing standard of Rule 60(b)(3).

Like Rule 60, Rule 59 "is substantially similar to Federal Rule 59[.]" Reporter's Notes V.R.C.P. 59. The Reporter's Notes explain that Vermont courts previously exercised the power at any time to amend, alter, or vacate judgments on grounds similar to those embraced in Rule 60 (citing to *Haven v. Ward Estate*, 118 Vt. 499, 114 A.2d 413 (1955)(error in the record) and *Haskins v. Haskins Estate*, 113 Vt. 466, 35 A.2d 662 (1944)(fraud or mistake)), but that Rule 59(e) permits a broader range of grounds for correction during the ten-day period after entry of judgment. *See In re Robinson/Keir Partnership*, 154 Vt. 50, 54, 573 A.2d 1188 (1990).

Rule 59(e) was available to correct the Board's first remand decision and avoid the necessity for this second proceeding, and VGS' decision to not use Rule 59(e) is evidence of the misrepresentation of the Project's cost on September 26, October 10, and October 24, 2014. *See*

Virgin Atlantic Airways, Ltd v. National Mediation Board, 956 F.2d 1245, 1255 (2d Cir.1992)(court may grant a Rule 59(e) motion only if the movant satisfies the heavy burden of demonstrating an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice); *see also Munafo v. Metro. Tranp. Auth.*, 381 F.3d 99, 105 (2d Cir.2004). Mr. Roam's testimony (with support by Mr. Rendall's testimony and the PwC contract) confirms there was (a) new evidence as of October 24, 2014; (b) that the Board's October 10, 2014 Order that "there is a reasonable basis to conclude that the revised cost projections are reliable" was clear error; and (c) that there would be manifest injustice if VGS remained silent.

Accordingly, because VGS violated Rule 5.409 when it failed to disclose by October 24, 2014 that the Project's cost would be in the range of $151 to $156 million dollars, and chose to remain silent as if mandated by Rule 5.409, VGS committed a misrepresentation as to the Project's cost. As a result, under the Rule 60(b)(3) analysis, the next step is to determine whether the misrepresentation denied the Palmers the full and fair opportunity to litigate the cost and necessity issues under the Section 248 criteria.

III. THE PALMERS WERE DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES OF COST AND NECESSITY UNDER THE SECTION 248 CRITERIA DUE VGS' MISREPRESNTATION OF THE PROJECT'S COST

The Palmers have been denied a full and fair opportunity to litigate the issues of cost and necessity under the Section 248 criteria because they concluded that they had no choice but to believe that VGS was being truthful with respect to the Project's cost. Whereas Mr. Rendall "would be very surprised" if the cost of the Project "was an important part" of the Palmers' "decision making about how to proceed," (Tr 6/22/2015 at 42:13-19), in fact the Palmers have,

from the outset, made difficult choices on how to raise and advocate all of their concerns and questions regarding the Project, including the Project's cost and necessity under the Section 248 criteria.

The Palmers had deep suspicions about VGS' cost predictions, and if VGS had been truthful, the Palmers would have more vigorously pursued the cost and necessity issues. The Palmers concluded that they had no choice but to believe VGS was telling the truth. While Mr. Rendall agrees the Palmers were "reasonable to believe in the testimony that – and submissions that the company made at each stage of the case," (Tr 6/22/2015 at 45:10-20), the Palmers are compelled to show by clear and convincing evidence that VGS' misrepresentations deprived them of the right to make fully informed, strategic litigation decisions. The evidence and filings of the Palmers establishes that VGS' misconduct deprived the Palmers of their right to make fully informed strategic litigation choices. As Mr. Palmer testified, "If VGS had told the truth, we would have more vigorously pursued the cost and necessity issues." RTNP at p. 5, lines 20-21.

Just like Ford in *Rozier*, VGS could have opted for transparency if it had admitted by October 24, 2014 that it knew that the Project's cost would range from between $151-$156 million dollars. And just like Ford in *Rozier*, VGS remained silent when it could have obviated the need for the pending Rule 60(b)(3) review if it had voluntarily come forward on October 24, 2014. But instead VGS seeks to benefit from its own misrepresentation by denying the Palmers their opportunity to make strategic litigation choices. Yet, VGS made the strategic litigation choice to remain silent about the Project's costs on September 26, October 10, and October 24, 2014, and it trivializes the Palmers' concerns such that VGS "would be delighted and surprised if

the Palmers were relying on what we [VGS] are telling them in any respect." Tr 6/22/2015 at 40:21-24. It is inequitable to deny the Palmers' of their right to make fully informed, strategic litigation decisions, and allow VGS to benefit from its own silence and misconduct.

The Vermont Supreme Court has said that, with respect to the movant under V.R.C.P. 60(b), Rule 60(b) "does not operate to protect a party from freely made tactical decisions which in retrospect may seem ill advised." *Wild v. Brooks*, 2004 VT 74 ¶ 20, citing to *Okemo Mountain Inc., v. Okemo Trailside Condos., Inc.*, 139 Vt. 433, 436, 431 A.2d 457, 459 (1981). In this case, however, the issue is whether the party subject to the Rule 60(b) motion is immunized against a Rule 60(b) motion necessitated by its freely made tactical decisions. VGS made the conscious, voluntary decision to remain silent on October 24, 2014. VGS cannot rely on its silence as an unintentional misrepresentation, nor are the Palmers required to show that VGS intentionally lied for misrepresentation or other misconduct to have occurred.

The Vermont Supreme Court has held, "Where there is no intent to mislead or defraud, but the other elements of fraud are met, a [party] may be liable for constructive fraud." *Sugarline Assocs. v. Alpen Assocs.*, 155 Vt. 437, 444, 586 A.2d 1115, 1120 (1990). Constructive fraud "may be found in cases involving misrepresentations that do not rise to the level of deceit, or actual fraud," "and in cases where a party in a position of superior knowledge or influence intentionally gains an unfair advantage at the expense of another person." *Hardwick-Morrison Co. v. Albertsson*, 158 Vt. 145, 149, 605 A.2d 529, 531 (1992)(internal citations omitted). It was constructive fraud when VGS did nothing to advise the Board and parties by October 24, 2014 that the cost estimate of $121.6 was wrong by $30-$35 million dollars. The constructive fraud was aided by the superior knowledge VGS had on this issue. VGS used this knowledge to gain

an advantage with respect to litigation strategy by waiting until December 19, 2014 to disclose the cost increase. By waiting, VGS has shifted the burden to the Palmers to prevail under a clear and convincing standard under Rule 60(b)(3), and avoided meeting its own burden of proof in a Rule 59(e) motion on October 24, 2014. This is an obvious advantage for VGS to the Palmers' detriment.

The Vermont Supreme Court also has held, "Under Vermont law, `[l]iability for fraud may be premised on the failure to disclose material facts as well as on an affirmative misrepresentation.'" *Sugarline*, 155 Vt. at 444, 586 A.2d at 1120. Where there is a duty to disclose, "the failure to disclose [] material fact[s] coupled with an intention to mislead or defraud rises to the level of material misrepresentation." Id. (quoting *White v. Pepin*, 151 Vt. 413, 416, 561 A.2d 94, 96 (1989)). A duty to disclose may arise out of superior knowledge or means of knowledge. *See Silva v. Stevens*, 156 Vt. 94, 103, 589 A.2d 852, 857 (1991). Where material facts are accessible to one party only, and that party "`knows them not to be within the reach of the diligent attention, observation and judgment'" of the other party, that party has a duty to disclose such facts. Id., 156 Vt. at 103, 589 A.2d at 857-58 (quoting *Cushman v. Kirby*, 148 Vt. 571, 576, 536 A.2d 550, 553 (1987)). Again, VGS had a duty to disclose on October 24, 2014, but remained silent. This was Rule 60(b)(3) fraud, misrepresentation, and other misconduct.

Lastly, under the Restatement (Second) of Torts § 552 (1977), a claim of negligent misrepresentation may be made against one who, in the course of his business, profession or employment supplies false information for the guidance of others in their business transactions, where there is justifiable reliance on the information provided and where that reliance results in

pecuniary loss. *Glassford v. Dufresne & Associates*, 2015 VT 77 ¶¶ 12-13 citing *Limoge v. People's Trust Co.*, 168 Vt. 265, 269, 719 A.2d 888, 890 (1998). The Palmers have suffered the loss that comes with having to litigate a second remand proceeding whereas VGS could have simply told the whole truth about what it knew, and what it was doing, on October 24, 2014.

The Palmers have shown how VGS' conduct caused them to alter their litigation strategy to their detriment. The only evidence regarding the Palmers' strategic litigation choices is from the Palmers. Even Mr. Rendall conceded that, as an experienced attorney, as president of VGS, the Palmers had to make strategic litigation decisions, but that he "can't answer" whether the Palmers' litigation decision making process was influenced by the Project's cost estimates. Tr 6/22/2015 at 45:6-9. In fact, the Palmers altered their litigation strategy to their detriment, and to the benefit of VGS.

As a consequence, the Board should stay the CPG and order the hearings re-opened under a schedule which allows the Palmers a reasonable amount of time to assemble a team of expert witnesses qualified by education, training, and experience under Vermont Rule of Evidence 703. While the Board has attempted to truncate the Rule 60(b)(3) process by conducting the hearings on June 22 and 23, 2015, those hearings were solely for the purpose to determine whether to re-open the hearings. The Board cannot assume that, even if the Palmers prevailed under Rule 60(b)(3), they have been given a full and fair opportunity to litigate the issues during the June 22 and 23 hearings.

Accordingly, VGS' misrepresentation has denied the Palmers a full and fair opportunity to litigate the cost and necessity issues under the Section 248 criteria and therefore this matter should be re-opened in accordance with Rule 60(b)(3).

RULE 60(b)(2) FINDINGS OF FACT

43. On December 19, 2014, VGS reported another increase in estimated capital costs of $33 million, which brought the total project cost to $153.6 million exclusive of distribution and service lines necessary to serve customers in Middlebury and Vergennes.

44. On January 15, 2015, VGS submitted a detailed budget summary, which was then corrected on January 21, 2015. (Roam PFT, Exhibit Petitioner RR-2)

45. Included in VGS's January 15, 2015 filing, a projected levelized rate impact of 19.7%[8] was reported in the "Financial Analysis" worksheet, an increase from 15.2%[9] reported during the First Remand. Franklin and Chittenden Rate Payers would now pay $276.16 million (or 57%) of the required $478.28 million revenue for the project through 2032 and the Middlebury and Vergennes new residential rate payers would pay an additional 13%. (Wilson PFT at 19:1-2 and 20:4-9)

46. If the Board were to approve the latest cost increase to $153.6 million then this would substantially increase the rate base. According to the VGS's initial January 15, 2015 financial assessment of the cost increase impact, the project would result in a $377.5 million revenue shortfall[10] up from the previous $274.2 million shortfall for the First Remand cost update of $121.6 million, through the year 2049.

47. After updating the Project financial analysis spreadsheet to reflect 2015 EIA AEO data and averaged 2014 monthly fuel prices, the potential ratepayer rate impact only decreased

[8] PSB Docket 7970, Attachment_Sup._1.15.15_PSB.VGS_1-1.xls, January 15th 2015. This analysis was based on 2014 EIA AEO trend data.
[9] Simollardes First Remand PFT, Updated Financial Spreadsheets, PSB VGS1-1, "Financial Analysis Sheet" at B68.
[10] PSB Docket 7970, Attachment_Sup._1.15.15_PSB.VGS_1-1.xls, January 15th 2015.

by less than 2%[11] . If the estimated residential target market size were to increase by 40%, the Project would still result in a $350M revenue short fall with 19.1% Levelized Rate Impact.[12]

48. Any substantial market change such as increased competition, decreased natural gas supply, or increased exports would increase current customers' rates even further. (Wilson PFT, p. 31, A44).

49. UTC Aerospace Systems ("UTC") in Vergennes uses CNG supplied directly by NG Advantage. (Wilson PFT at 22:11-14).

50. Since UTC is already replacing their fuel oil with natural gas, it can no longer be attributed to the Phase 1 pipeline project fuel savings. (Wilson PFT, p. 26, A34).

51. VGS's alternate fuel savings analysis overstates the savings for large industrial customers by approximately 8%, such as Agrimark/Cabot, who use No 6 Fuel Oil. (Wilson PFT, p. 27 A37).

52. The current price advantage of natural gas over fuel oil, exclusive of conversion or leasing of equipment, is currently only about 25%. (Tr 6/22/2015 at 65:24-25).

53. According to the EIA 2015 Annual Energy Outlook fuel price projections, the average price per MM-BTU advantage of natural gas over fuel oil is expected to decline over the next decade.[13]

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[11] PSB Docket 7970, Wilson PFT Exhibit BJW_A_Attachment A.DPS.VGS. 1-1.2 No IP $153.6 December 2014 2014 EIA to 2049.xls, "Financial Analysis" worksheet Line 65 "Revenues in Excess of COS", May 6th 2015.
[12] Wilson PFT Exhibit BJW_A_Attachment A.DPS.VGS. 1-1.2 No IP $153.6 December 2014 2014 EIA to 2049.xls, "Financial Analysis" worksheet Line 65 "Revenues in Excess of COS" by increasing the residential customers from 2,580 to 3,612.
[13] The average annual 2015 EU AEO growth rates, from 2016 through 2025, for residential fuel oil is 2.3%, for propane is 1.2% and for natural gas is 3.2%. (Neme PFT Exhibits, at p. 2, Table 2).

54. VGS estimates that about 75% of residential customers lease equipment at a rate of about $22 per month.[14] This additional cost to natural gas customers reduces the current price advantage of natural gas over fuel oil to an average of about 11.9% over a ten-year period, and results in no improvement in appliance efficiency.[15] (Wilson PFT, Exhibit NP_2R_WILSON-7-2).

55. With an anticipated VGS gas rate increase of 15.3%, the price advantage of natural gas over fuel oil including leased conversion equipment costs would currently be 1%, and according to EIA 2015 Annual Energy Outlook trend data, the average growth over the next 10 years would be only 0.1%. The EIA predicts that in 2022, fuel oil users will enjoy a 4.5% price advantage over natural gas.[16]

56. Price volatility (a rate increase of more than 10%) would disrupt demand for natural gas in Addison County. (Docket 7712 THT at p.29)

57. VGS' assumed customer counts were provided by the Vermont Gas Marketing Department in 2012 and were based on the 911 database. Residential and commercial usage was based on the marketing department's professional judgment while industrial customer usage was based on an evaluation of the individual customer. VGS has not revisited the values it used in its 2012 Petition to account for market or other developments. (Palmer Cross 1, Suppl. A.PALMER: VGS.1-11)

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[14] Tr, 6/23/2015, at 24:5, Simollardes RT, p. 11, lines 9-12.
[15] Residential ROI Scenario 3. The 10-year annual average price of residential oil is $2,393 and for natural gas is $1,870 ($2,156/1,153).
[16] Gross PFT, NP_2R_GMGROSS_Exhibit-B, p. 15. Fuel oil growth rate=3.7% and natural gas=4.2%.

58. High efficiency Multi-Head Heat Pumps with a seasonal COP in range of 2.7 to 3.0, are now readily available on the market and meet residential and small-scale business demand for space heating. (Neme RT Exhibit B).

59. Residential and small-scale businesses that switch to CCHP for building-space heating can realize total economic benefits from dynamically switching between the incumbent fossil-fuel and the electricity-driven CCHP systems. (Gross PFT, NP_2R_GMGROSS_Exh-B, "heating energy TCO" worksheet p. 4).

60. Building energy efficiency retrofits offer superior total cost of ownership benefits compared to any alternative fuel source, including ANGP piped natural gas with the anticipated 15.3% rate increase. (Gross PFT, NP_2R_GMGROSS_Exh-B, p. 13, "heating energy 20 year cash flow").

61. CNG service can satisfy present and future demand for large-scale and medium-scale building space heating capable of dynamically switching between gas and a backup fuel. (Palmer Cross 1, A.PALMER:VGS.RTA-1-14).

62. In Middlebury, VGS' CNG gas island service is already meeting present and future demand for industrial process and large-scale and medium-scale building space heating. Trucked CNG is meeting industrial process thermal energy demand in Vergennes. (Gross PFT, NP_2R_GMGROSS_Exh-D, p. 1).

63. From a physical and technical standpoint, CNG, delivered directly by truck or through gas islands, can meet present and future residential and small-scale business demand for service.

64. CNG services, delivered either as direct CNG tanker transport to the customer (Tr. 6/22/15 at 235:20-25 and 236:1-6) or through a CNG gas island distribution network, have emerged as a major new competitive force in the Addison County thermal energy market (Gross PFT, at 14:13-16, 15:1-14, 16:1-8; May 8th 2015, corrected)

65. CNG tanker transport services and a CNG gas island are already deployed in Addison County. (Palmer Cross 1, A.PALMER:VGS.RTA-1-12)

66. CNG service can scale to satisfy the need for present and future demand for large-scale industrial thermal energy processes, such as for the IP Ticonderoga Mill. (Gross PFT, NP_2R_GMGROSS_Exh-F).

67. CNG service can satisfy the need for present and future demand for large-scale and medium-scale building space heating when the heating plant is capable of dynamically switching between gas and a second backup fuel (a .k. a. dual-fuel heating system) (PALMER Cross 1, A.PALMER:VGS.RTA-1-14)

68. In Middlebury, the VGS CNG gas island service is already meeting the need for present and future demand for the industrial process market and the large-scale and medium-scale building space heating market (Id., NP_2R_GMGROSS_Exh-D, page 1, last paragraph].

69. CNG tanker trailers can transport a cargo of 355 Mcf (Id., NP_2R_GMGROSS_Exh-J, p. 13, para. 12)

70. An analysis of the Middlebury CNG gas island peak heating demand design day load has estimated the projected gas service load at approximately 2,300 Mcf per day. (Id., NP_2R_GMGROSS_Exh-A, worksheet tab "Middlebury gas island", p. 14).

71. The Middlebury CNG gas island peak heating demand load will require 7 CNG tanker truck rolls per day. (Id.)

72. The CNG service can scale to roll enough trucks per day to meet the Middlebury CNG gas island's peak heating day demand. (Id., NP_2R_GMGROSS_Exh-F, p. 2).

73. To meet the demand for firm service on peak heating days or in the case of inclement weather, CNG distributors pre-stage tanker trailers at a gas island's unloading facility and store extra gas on-site.[17]

74. Delivered and gas-island CNG services offer a viable lower-cost alternative for expanding natural gas into Addison County and Rutland under the 2011 Comprehensive Energy Plan.

75. A CNG unloading facility provides an interface to a CNG gas island wherein two or more qualified CNG Vendors can bid on the business of transporting CNG from their terminal facility to the CNG unloading facility (Id., at 18:15-18, 19:1-7, 20:1-15).

76. CNG gas island unloading facilities avoid the capital construction costs for pipeline networks between remote or geographically dispersed bio-methane facilities and injection points. (Id., at 20:16-18)

77. CNG transport overhead for delivering gas to a Middlebury CNG unloading facility could be reduced to $1.80 to $3.297 per Mcf through competitive bidding procedures. (Id., NP_2R_GMGROSS Exh-A, worksheet tab "CNG Energy Pricing") (Id., PFT at 28:12 and 27:19).

[17] Tr, 6/23/2015 at 310:3-18.

78. Without the capital investment in the Project, existing VGS ratepayers will be freed from multi-decade construction subsidies thereby creating downward pressure on rates since CNG gas sales volume would contribute revenue to defray cost of service.

79. If the VGS Interruptible Sales Service, G4, G3, G2, and G1 gas rates increase 15.3% or more and CNG transport overhead is $1.805 per Mcf or less then a CNG thermal energy service could realize a price per MM-BTU advantage relative to ANGP delivered thermal energy service. (Id., NP_2R_GMGROSS_Exh-A, worksheet tab "public CNG gas island vs ANGP").

RULE 60(b)(2) CONCLUSIONS OF LAW

Under Board Rule 2.221, Vermont Rule of Civil Procedure 60(b)(2) applies to proceedings before the Board. Rule 60(b)(2) states:

> On motion and upon such terms as are just, the court may relieve a party of a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Rule 60(b)(2) "generally applies when the parties are unaware of evidence existing at the time of the judgment and, through no fault of their own, discover that evidence only after the judgment." *Tobin v. Hershey*, 174 Vt. 634, 2002 VT ¶ 11, 820 A.2d 982, 986-87 (2002) (citations omitted). Rule 60(b)(2), which gives the Board discretion to reopen a judgment based on newly discovered evidence, does not contemplate relief when the new evidence is cumulative or impeaching only. See *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (newly discovered evidence under F.R.C.P. 60(b)(2) "cannot be merely impeaching or cumulative"); *Weissmann v. Freeman*, 120 F.R.D. 474, 476 (S.D.N.Y. 1988) (same). Ultimately, as the Board

noted, the issue is whether the newly discovered evidence "would probably change the outcome." *Order Re: Second Request for Remand*, Docket No. 7970, Order of 1/16/2015 at 7.

In this Docket, the Board has recognized that in addition to background and particulars of the updated cost estimate, updates to other evidence presented in the case are also relevant to the Board's review of whether to reopen the case under Rule 60(b)(2). Section 248(b)(2) establishes three standards, against which to measure this Project: 1) there must be present and future demand for natural gas service in Addison County; 2) the investment in and construction of the pipeline must be required to meet present and future demand, if any, for service; and 3) and, consistent with lowest-cost integrated resource planning, if there is actually demand for service, the proposed pipeline must be the lowest-cost option for meeting that demand compared to energy conservation, energy efficiency, or load management measures.

When taken together, the updated cost increase and other updated evidence demonstrates that if the Board reviewed the Petition today, it would find that the Project does not meet the requirements of 30 V.S.A. Section 248(b)(2) because the investment or construction is not required to meet the need for present and future demand for service that cannot be otherwise met through energy conservation, energy efficiency, or load-management measures. Thus, the Board would not have issued a certificate of public good (CPG) and should vacate the judgment on the grounds of new evidence that could not have been discovered through due diligence.

Specifically, the decrease in the current and projected market price of oil and propane, and the rate increases that will be necessary to address the increased cost of service and VGS' authorized return on equity (ROE) associated with expanded pipeline infrastructure have reduced the competitive advantage of natural gas to such a degree that the remaining cost differential is

no longer "substantial" enough to assume demand for natural gas in Addison County. The ready availability of affordable alternatives to meet industrial process, large-, medium-, and small-scale business, and residential demand for service mitigate current and future demand.

Alternatively, even if the Board finds that any demand for service might remain under current and anticipated market conditions and regulatory requirements, there is no necessity for the Project to meet remaining present or future demand. Instead, that demand could be met at a lower cost through energy efficiency measures[18], such as fuel and thermal energy source switching[19]. Moreover, given reduced demand, the current Project design is no longer right-sized to meet current and future service needs. Had the most recent cost increase and other newly discovered evidence been available to the Board, it would have likely reached a different decision in its October 10, 2014 Order on remand from the Vermont Supreme Court. In short, the Board would have concluded that the project not only doesn't meet those standards of Section 248 addressed in the briefs of AARP and Kristin Lyons, whose positions we adopt, but also cannot possibly be found to meet the standards set forth in Section 248(b)(2).

IV. THE PROJECT IS NOT NEEDED BECAUSE THERE IS LITTLE OR NO PRESENT OR FUTURE DEMAND FOR NATURAL GAS AT THE PRICE POINT REQUIRED TO BUILD THE ANGP

Despite VGS' professed commitment to competitive and affordable rates, ratepayers will have to pay for the increased cost of service and authorized ROE in the context of a lesser competitive advantage for natural gas over other fuels when the project comes into service. As acknowledged by VGS, VGS is a fixed-asset business; therefore, regardless of whether VGS takes advantage of tools available to avoid disruptive rate increases, ratepayers will either pay

[18] Gross PFT, NP_2R_GMGROSS_Exh-B, p. 13, "heating energy 20 year cash flow"
[19] Palmer Cross 1, A.PALMER:VGS.RTA-1-14

more now, or pay more later. The relative cost of constructing a lengthy transmission backbone, distribution mainlines, and distribution networks in Middlebury and Vergennes – all of which are necessary to deliver gas to customers via pipeline – substantially erodes the price advantage of natural gas over oil and propane in these markets to a degree that it would be unreasonable to continue to assume current or future demand for service. There has been no assessment of present or potential demand for service by a qualified economist or reasonable effort to model future rates or their impact on demand for service[20]. Conventional wisdom suggests that the pronounced narrowing of VGS' competitive advantage will not only wash away any preexisting demand for natural gas service but will also make it impossible for piped natural gas to compete with equally viable lower-cost alternatives. In the absence of demand for piped natural gas there is no need to build a pipeline. Any minimal demand that does still exist after rate increases can be met by lower-cost thermal energy sources already available in Addison County such as high-efficiency, multi-head cold-climate heat pumps[21] for residential and small-scale businesses, and CNG delivered by truck or via gas island[22] for medium- and large- businesses' building space-heating needs and industrial thermal process energy requirements[23].

A. The limited up-to-date quantitative and qualitative data and anecdotal evidence on demand for natural gas service in Addison County indicate little or no demand for piped natural gas service.

VGS continues to make unrealistic market demand assessments. VGS' early project cost estimates, were "prepared using quotes from equipment vendors, discussions with contractors

[20] Palmer Cross 1, Suppl. A.PALMER: VGS.1-11
[21] Gross PFT, NP_2R_GMGROSS_Exh-B, "heating energy TCO" worksheet, p. 4
[22] Gross PFT, NP_2R_GMGROSS_Exh-D, p. 1
[23] Id., NP_2R_GMGROSS_Exh-A, worksheet tab "public CNG gas island vs ANGP"

familiar with the work and historical costs from similar projects."[24] During the first remand, then CEO, Donald Gilbert noted that VGS' original contractor, CHA, did not keep up with market developments resulting in, among other things, surprise increases in construction costs after the first budget realignment in February 2013 and March 2014. History is repeating itself. VGS now asks that the Board rely on pre-CPG demand estimates that were developed in 2012[25] on the basis of VGS' marketing department's judgment, experience entering communities with materially different characteristics, and 911 maps. Those estimates have never been subjected to review or consideration of market developments in the intervening 3 years, during which game-changing project cost increases have occurred, and the competitive advantage of natural gas over other fuels has decreased dramatically. According to sworn statements, VGS never did any market research in Addison County to measure demand for natural gas.[26] DPS' Dr. Hopkins asserts a rational-basis model of consumer fuel-switching and conversion behavior; however, he claims no expertise, knowledge or research into fuel-switching behavior[27] and no reasonable basis for his model or incorporated conversion estimates. Evidence from VFDA[28] and Vermont Gas[29] contradict the conversion values he uses in his projections of comparative demand for natural gas service and heat pumps.

In contrast, while not a scientific study, a finite number of surveys collected by Just Power provide concrete evidence that potential customers would not convert to natural gas at the current and projected savings rates available through expanded pipeline service associated with

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[24] Heintz 12/20/2012 PFT at 36:13-15, Heintz 2/28/13 SPFT at 42:13-15
[25] Palmer Cross 1, Suppl. A.PALMER: VGS.1-11
[26] Board Order on Palmer Motion to Compel Responses to Discovery at 6, Section IV.
[27] Hopkins RT, pp. 4-6.
[28] Cota PFT, pp. 6-8.
[29] Palmer Cross 1, Suppl. A.PALMER:VGS.1-1.

the ANGP.[30] Dr. Hopkins and his predecessor also received countless postcards specifically stating that potential future residential customers did not want natural gas service, a sentiment also expressed directly by landowners living along planned distribution routes in Addison County and included on VGS' 911 distribution maps.

B. The minimum competitive-advantage and price-stability conditions necessary to realistically support demand in Addison County in June 2011 no longer exist.

VGS' feasibility assessment for the Project identified competitive advantage and rate stability as critical elements to attracting customers and demand for natural gas service in Addison County[31]. Specifically, VGS identified two conditions precedent for adequate demand to justify the need for present and future service: a substantial competitive advantage and rate volatility (upward rate swings) of no more than 10-15%. To reduce the risk of project financial failure, VGS petitioned the Board for permission to establish a System Expansion and Reliability Fund (SERF)[32] to smooth a projected 10% rate increase when the Project came into service. VGS proposed and received approval to hold back a 5.4% rate reduction owed to customers in order to maintain its competitive advantage over oil and propane and to avoid sticker shock in the Addison County once it became to start signing up new customers. VGS stated and DPS confirmed that, but for an "innovative mechanism" like the SERF[33] to smooth rates such that no or nearly no rate increase would be needed in connection with the Project, VGS would not expand into Addison County because the company would need to maximize customer uptake to make the Project doable and deliver project benefits beyond new customers to all of Vermont.

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[30] Peyser PFT at 21:19-22:16.
[31] Docket 7712 Order, p. 6 item 2.
[32] Id., p. 8, item 19.
[33] Id., p. 2.

In June 2011, VGS represented that its best estimates was about 10% increase to carry out the Project at a capital cost of $60-$70M.[34] Mr. Gilbert and Ms. Simollardes further certified that if VGS applied that rate increase directly to customer bills upon gasification of the Project (rather than being smoothed through prior collection of the 5.4% surcharge into the SERF and application to future revenue requirements) the disruption to demand in Addison County would make the Project a high-risk endeavor. Ms. Simollardes also noted that if the conditions were to change dramatically, it might make sense to pull the plug on VGS' ambitious expansion plans and terminate the SERF. VGS is now characterizing its rate calculations as hypothetical in addition to claiming both that it has no plans to increase rates and that it will utilize all tools available to ensure competitive and affordable rates. Coincidentally, evidence shows that the conditions precedent to generating adequate demand for service in Addison County has all but disappeared. It's reasonable to assume that if a rate increase of about 10% would have been necessary when the project cost was $60M-$70M that with a project cost of more than double the original estimate, the required rate increases would far exceed that 10%. In the absence of any market research to begin with and no updating of VGS' customer uptake projections, the Board should conclude that a substantial decrease in competitive advantage and new rate volatility (rate increases) exceeding 10% would mitigate any assumed demand for service in Addison County.

VGS' suggestion that the Board can influence rates by making adjustments to the conditions[35], under which VGS operates, such as the company's authorized capital structure, approved rate of return on equity, and annual rate adjustment, is reminiscent of DPS' contention

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[34] Other updates with detailed rate information are the original version of BOARD-1, VGS estimated 4.5% increase. (See Exhibit BOARD-1, cited in 10/10/14 Order at p.11.) First remand: at $121.6 million, estimated 10.2% increase. (See Remand Exh. Pet. Supp. EMS-2, cited in 10/10/14 Order at p.11.)

[35] Simollardes PFT at 8:14-18

in the original proceeding that VGS' proposed expansion should be exempt from traditional needs analysis and statutory least-cost standards.[36] While VGS has made this argument with respect to the economic benefit of the Project, the proposition is equally damaging to a fair assessment of whether the Palmers have a meritorious claim that the project no longer meets the need standard under Section 248(b)(2). The clear intent of Section 248 was to establish criteria to ensure that utility infrastructure investments and associated recovery of costs from ratepayers were in the best interests of ratepayers and the public. As a pro-planning and risk-mitigation statute, Section 248 provides an elegant and relatively simple set of standards, against which the Board can evaluate the reasonableness of a utility's planned project and the likelihood that the project will both benefit and not adversely affect the state's economy, environment, natural resources, health, and safety. As a threshold issue, the statute is designed to guarantee that only necessary investments are made and only necessary costs are incurred. In order to accomplish the important objectives of the statute and particularly of Section 248(b)(2), a reasonable projection of the cost of the project to ratepayers – whether through cost recovery in rates or otherwise – is available to regulators at the time the project is proposed or capital costs increase materially. In the absence of such estimates, it would be impossible to carry out the evaluation mandated in the statute.

C. At a project cost of $153.6 million and 19.5% levelized rate impact, the remaining price advantage of natural gas over other heating fuels is no longer sufficiently substantial for the Board to find that there is demand for natural gas service in Addison Count over other fossil fuels or heat pumps in the residential sector or over CNG, delivered by truck or gas island, in the industrial or commercial sectors.

[36] *See* 12/23/13 Order at p. 73.

In its October 10, 2014 Order regarding the cost increase to $121.6 million, the Board echoed VGS' conclusion that demand for natural gas service depends on the relative price and potential savings of natural gas over other fuels: "Put simply, if the Project costs drive the price of supplying natural gas too high, the demand for natural gas will fall."[37] The Board further clarified that it would come to a different conclusion if the project cost drove the price of natural gas so high that the remaining price advantage of natural gas over other fuel options were no longer substantial. Today, the price advantage of natural gas over fuel oil is only about 25%. The expected rate increase, required to support a $153.6 million is over 15% before accounting for the cost of converting to natural gas. Seventy-five percent of new residential customers converting from fuel oil rent conversion equipment from VGS[38]. Based on the EIA 2015 Outlook and VGS' own spreadsheets, when rental costs are taken into account, the current price advantage of natural gas over fuel oil in the residential sector drops to about 1% and the projected average savings over the next ten years drops to nearly zero (.1%)[39]. Using the same methodology, fuel oil is projected to have a 4% price advantage over natural gas in 2022 for residential customers. A remaining price advantage of natural gas over oil of 0.1% could not possibly be considered "substantial," and a finding of continued demand over other fuel sources would therefore be unreasonable. Projected rate increases will also likely motivate existing VGS customers to apply energy efficiency techniques and fuel switching to competing energy sources to reduce their energy consumption and increase savings[40]. Current ratepayers may also move to replace or reduce natural gas service with less expensive alternatives, including cold-climate heat

[37] 10/10/14 Order at p. 16.
[38] Wilson PFT, Exhibit NP_2R_WILSON-7-2.
[39] Gross PFT, NP_2R_GMGROSS_Exhibit-B, p. 15.
[40] Palmer Cross 1, A.PALMER:VGS.RTA-1-14.

pumps thereby creating downward pressure on throughput and upward pressure on rates. Traditional energy efficiency measures[41] and heat pumps[42] offer superior energy savings for residential and small business space heating and about the same conversion cost as natural gas.

D. New evidence of the affordability and availability of delivered CNG to industrial and large commercial clients, the potential availability of delivered CNG to residential customers, and new technological advances in and market availability of heat pumps demonstrate that these alternative thermal energy sources have already and will continue to displace demand for piped natural gas.

The combined effect of the above risk factors jeopardizes the financial stability of the Project and the company and overturns the Board's core finding that there will be a long-term demand for the Project's energy services as previously assumed. By their own admission, neither VGS nor DPS has conducted any market studies to model, measure, or substantiate future demand for natural gas or other thermal energy services under comparative competitive scenarios and energy pricing assumptions. Given the evidence of multiple increases in the Project's construction cost and the advent of CNG services, the Project no longer offers the lowest cost integrated plan to meet any remaining need for present and future thermal energy services.

V. EVEN IF THERE IS DEMAND FOR NATURAL GAS IN ADDISON COUNTY, THE PROPOSED INVESTMENT IN AND CONSTRUCTION OF A NATURAL GAS TRANSMISSION MAINLINE, DISTRIBUTION MAINS, AND DISTRIBUTION SERVICE NETWORKS ARE NOT REQUIRED TO MEET THAT DEMAND BECAUSE OF VIABLE ALTERNATIVES

The selection of the lowest-cost alternative to the ANGP project's gas product depends on the market segment. For the large scale industrial and commercial thermal energy customers, purchasing direct CNG tanker trailer deliveries to the customer's private CNG unloading facility

[41] Gross PFT, NP_2R_GMGROSS_Exh-B, p. 13, "heating energy 20 year cash flow".
[42] Neme RT Exhibit B and Gross PFT, NP_2R_GMGROSS_Exh-B, "heating energy TCO" worksheet, p. 4.

realize most of the available fuel switching energy cost savings[43] and it is scalable[44]. The large and medium-scale building space heating customers are most cost effectively served by a CNG deliveries to a gas island. These customers can share the common costs of the gas island's CNG unloading facility and CNG tanker truck rolls. The CNG tanker transport cost overhead per Mcf consumed is added to the customer's bill as a surcharge called the "CNG Adder". If the CNG transport role was placed up for competitive bid, then it is estimated that the CNG Adder could decrease to the range of $1.80 to $3.297 per Mcf at the Middlebury gas island[45]. In the scenario where the VGS ANGP gas product incurs a 15.3% rate increase to pay for the ANGP pipeline and the CNG Adder is $1.80 per Mcf, the CNG gas island service achieves near parity with ANGP pipeline gas in its price per MM-BTU[46]. The CNG delivered price per MM-BTU is within 6% or less of the ANGP gas, depending on the rate class.

In the residential and small-scale business market segment, there are many space heating options competing with the VGS ANGP delivered gas product. Like the ANGP Project's gas product, the total cost of ownership of a CNG gas island fueled residential heating system is strongly dependent on both the gas price and the household's fuel switching conversion costs.[47] Both CNG and ANGP gas product face stiff competition from heat pumps and building energy efficiency retrofits. In the residential market, building energy efficiency retrofits offers a lower total cost of ownership than the ANGP project and they are the least-cost alternative plan[48]. Therefore, the ANGP project does not satisfy 30 V.S.A. §248(b)(2).

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[43] Wilson PFT at 22:11-14.
[44] Gross PFT, NP_2R_GMGROSS_Exh-F.
[45] Id., NP_2R_GMGROSS Exh-A, worksheet tab "CNG Energy Pricing" and Id., PFT at 28:12 and 27:19.
[46] Gross PFT, NP_2R_GMGROSS_Exh-A, worksheet tab "public CNG gas island vs ANGP"
47 See NP_2R_GMGROSS_Exh-B, page 14.
[48] Gross PFT, NP_2R_GMGROSS_Exh-B, p. 13, "heating energy 20 year cash flow"

Reallocating the Project's investment towards developing CNG gas islands presents an opportunity for introducing a gas energy fuel choice to businesses across the State that cannot be matched by the limited service territory offered by the Project. CNG gas islands present other compelling advantages, and are worthy of additional study. The current $6 overhead per Mcf differential in price between CNG delivery[49] and its delivery by the ANGP pipeline should not be controlling because this differential is an artifact of the current private business arrangement wherein VGS buys its own gas back from NG/Advantage and then turns around sells that gas to the gas island customers[50].

VI. PROJECT DESIGN AND CAPACITY AS PROPOSED ARE UNNECESSARY AND INAPPROPRIATE TO MEET THE MORE LIMITED PRESENT AND FUTURE DEMAND FOR NATURAL GAS IN ADDISON COUNTY AND POTENTIAL FUTURE MARKETS

In its December 23, 2013 Order, the Board determined that the Project design was VGS' estimates of customer savings depend upon what VGS has called a "conservative" conversion or uptake rate along the proposed distribution routes in Middlebury and Vergennes. With VGS' withdrawal of its Phase II application and no articulated plan to expand service to Rutland or extend transmission to interconnect with the U.S. pipeline system, there is no justification for Project design that provides capacity beyond what is required to serve Middlebury, Vergennes, and other Addison County markets. VGS' project cost design were established for the purpose of meeting a need for present and future demand for service that has greatly diminished if not disappeared. Moreover, VGS can no longer claim that its projected project costs and revenues are "conservative" now that International Paper Company will no longer contribute to project construction or VGS' long-term revenue. If information about the cancellation of Phase II along

[49] Tr. 6/22/2015 at 58:1-12.
[50] Gross PFT, Exhibit-D "Re: Tariff Filing — Revisions to Interruptible Sales Service Tariff"

with increased Project costs and decreasing oil prices had all been available at the time that the Board issued the CPG, the conclusion that VGS had appropriately designed the project to meet present and future demand would surely have been different since there is no necessity for a 12 inch diameter, high pressure transmission pipeline to serve any level of demand in Vergennes and Middlebury in the foreseeable future. Moreover, the oversized project design would only contribute to the cost-favorability of alternatives such as trucked or gas-island CNG offering lower-cost alternatives to the Project for industrial and commercial customers, and heat pumps and self-financed efficiency measures being lower-cost options for homes and small-scale businesses.

VII. ANY AND ALL DEMAND FOR NATURAL GAS SERVICE IN ADDISON COUNTY CAN BE MET IN A MORE EFFECTIVE MANNER THROUGH ENERGY EFFICIENCY MEASURES, INCLUDING A COMBINATION OF DELIVERED CNG, TECHNOLOGICALLY ADVANCED HEAT PUMPS, AND TRADITIONAL ENERGY EFFICIENCY MEASURE SUCH AS WEATHERIZATION.

There is no necessity to construct the Project. Depending on the thermal energy application, either Compressed Natural Gas (CNG) service or Cold Climate Heat Pumps (CCHP) can substitute for the Project. In Middlebury, the CNG transport services and CNG gas islands are an existing and permanent alternative to the thermal energy services that could be provided by the Project. The advent of CNG tanker trailer technology enables an alternative to the traditional view that VGS should construct a backbone transmission pipeline to expand its service territory. The CNG gas island expansion does not require the mobilization of hundreds of millions of dollars of investment and decades of repayment. The CNG gas island concept could be permanently deployed in any town or city in Vermont where the anticipated demand in the industrial process, large-scale building space heating, and medium-scale building space heating

market segments can justify the investment of a CNG unloading facility and an associated gas island distribution network.

VIII. THE EVIDENCE DEMONSTRATES THAT THE OUTCOME WOULD CHANGE IF THE BOARD GRANTS THE RULE 60(b)(2) MOTION

Rule 60(b)(2) requires re-opening where the new evidence would probably result in a different outcome. While this is a high standard to meet, the economics of the Project are such that it is met with the latest cost increase. The Board has no doubt tired of this matter, but it must be remembered that it is VGS which has prolonged this docket, not the parties. Mr. and Mrs. Palmer have shown, through circumscribed efforts, that the cost increases mandate a new outcome, and thus, grant of the Rule 60(b)(2) motion.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE Nathan and Jane Palmer request that the Board grant the Rule 60(b)(2) and (b)(3) motions as set forth above, and that the CPG issued to VGS for the Project be voided or stayed, as appropriate, until such time as the Board has concluded all necessary proceedings for the full and fair adjudication of the Project.

Dated this 8th day of July 2015.

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APPENDIX A

Rozier v. Ford Motor Company, 573 F.2d 1332 (5th Cir. 1978)

573 F.2d 1332, 50 A.L.R. Fed. 914, 25 Fed.R.Serv.2d 1133, 3 Fed. R. Evid. Serv. 119
(Cite as: 573 F.2d 1332)

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United States Court of Appeals,
Fifth Circuit.
Martha Ann Brundage ROZIER, Plaintiff-Appellant,
v.
FORD MOTOR COMPANY, Defendant-Appellee.

Nos. 76-2848 and 77-1929.
June 5, 1978.
Rehearing and Rehearing En Banc Denied July 31, 1978.

Widow of passenger who was killed when the vehicle in which he was riding caught fire after being struck from behind brought diversity suit against the manufacturer of the vehicle, alleging that negligent design of the fuel tank caused the fatality. The United States District Court for the Southern District of Georgia, Anthony A. Alaimo, Chief Judge, entered judgment on a verdict for the manufacturer, and plaintiff appealed. During the pendency of the appeal, plaintiff moved for a new trial on the basis of newly discovered evidence and alleged misconduct on the part of defendant. After hearing arguments, the district court denied the motion on all grounds, and plaintiff's appeal from that order was consolidated with her appeal from the judgment. The Court of Appeals, Simpson, Circuit Judge, held that: (1) the misconduct of the automobile manufacturer in failing to disclose a document relevant to plaintiff's case that was within the scope of a discovery order and in failing to amend an inaccurate response to an interrogatory prejudiced plaintiff by denying her information that might well have reshaped the case she ultimately presented to the jury; (2) under the circumstances, plaintiff's timely motion for a new trial should have been granted, and (3) though, under the circumstances, the abuse of discretion would not in itself have required reversal, the district court abused discretion by admitting evidence that the driver of the impacting vehicle had pleaded guilty to manslaughter charges arising out of the collision.

Reversed and remanded with directions.

West Headnotes

|1| Federal Civil Procedure 170A ⚷2658

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2658 k. Time for instituting proceedings. Most Cited Cases

Generally speaking, only the most egregious misconduct such as bribery of a judge or jurors or the fabrication of evidence by a party in which an attorney is implicated will constitute a "fraud on the court" for purpose of "saving clause" excepting from requirement that motion for relief from judgment be made within a reasonable time, motions wherein a party seeks to set aside the judgment for "fraud upon the court." Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|2| Federal Civil Procedure 170A ⚷613.10

170A Federal Civil Procedure
170AVI Motions and Orders
170AVI(C) Reconsideration
170Ak613.6 Grounds and Factors
170Ak613.10 k. Fraud; misconduct. Most Cited Cases

Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct. Most Cited Cases

In order to set aside a judgment or order because of "fraud on the court," it is necessary to show an unconscionable plan or scheme which is

designed to improperly influence the court in its decision. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|3| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct.
Most Cited Cases
(Formerly 170Ak2651.1, 170Ak2651)

The distinction between a motion for relief from judgment because of fraud, misrepresentation or other misconduct of an adverse party and a motion alleging fraud on the court is rooted in policies basic to the law of judgments, specifically the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|4| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct.
Most Cited Cases
(Formerly 170Ak2657.1, 170Ak2657)

One who asserts by motion for relief from judgment that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|5| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct.
Most Cited Cases
(Formerly 170Ak2651.1, 170Ak2651)

In order to warrant setting aside a final judgment for fraud, misrepresentation or other misconduct of an adverse party, the conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|6| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct.
Most Cited Cases
(Formerly 170Ak2651.1, 170Ak2651)

Although the rule authorizing the court to relieve a party from a final judgment for fraud, misrepresentation or other misconduct of an adverse party applies to misconduct in withholding information called for by discovery, the rule does not require that the information withheld be of such nature as to alter the result in the case. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|7| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct.
Most Cited Cases
(Formerly 170Ak2651.1, 170Ak2651)

Subsection authorizing court to relieve a party from a final judgment for fraud, misrepresentation or other misconduct of an adverse party is aimed at judgments which were unfairly obtained, not at judgments which are factually incorrect. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|8| Federal Civil Procedure 170A ⚷2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct. Most Cited Cases
(Formerly 170Ak2651.1, 170Ak2651)

Where, by any fair reading, document prepared by auto manufacturer's cost engineer was within scope of district court's discovery order and where approximately one month after responding to interrogatory by stating that it could find no such report, the manufacturer discovered the document but neither disclosed the document nor amended its inaccurate response to the interrogatory, such conduct amounted to "misrepresentation or other misconduct" within scope of rule authorizing the court to relieve a party or his legal representative from a final judgment for fraud, "misrepresentation, or other misconduct" of an adverse party. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|9| Federal Civil Procedure 170A ⚿1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In general. Most Cited Cases
(Formerly 170Ak1636)

If automobile manufacturer in good faith believed that district court's discovery order was not intended to compel production of a document that the manufacturer discovered approximately one month after answering interrogatory by stating that it could not find any documents relevant to the interrogatory, appropriate remedy was to seek a ruling by the district court at that point. Fed.Rules Civ.Proc. rule 26(e)(2), 28 U.S.C.A.

|10| Federal Civil Procedure 170A ⚿1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In general. Most Cited Cases
(Formerly 170Ak1636)

In suit against automobile manufacturer wherein plaintiff contended that the manufacturer was negligent in designing a fuel tank that could not withstand an impact such as that involved in the accident which took the life of plaintiff's husband and wherein, prior to trial, plaintiff expressed an intention to rely on 14 theories to explain how the manufacturer deviated from the appropriate standard of care, it was inevitable that information developed in the discovery stages would influence decision as to which theories would be emphasized at trial and, therefore, under such circumstances, automobile manufacturer's failure to disclose an engineering document bearing on the comparative advantages and disadvantages of alternate fuel tank locations prejudiced plaintiff by preventing her from fully and fairly presenting her case.

|11| Federal Civil Procedure 170A ⚿1276

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1276 k. Use of testimony or information. Most Cited Cases

The admissibility of evidence is irrelevant in the discovery process so long as the information sought appears reasonably calculated to lead to discovery of admissible evidence. Fed.Rules Civ.Proc. rule 26(b)(1), 28 U.S.C.A.

|12| Federal Civil Procedure 170A ⚿1572

170A Federal Civil Procedure
170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)2 Subject Matter in General
170Ak1572 k. Relevancy and materiality. Most Cited Cases

Where engineering document which automobile manufacturer failed to disclose in violation of a discovery order was not an isolated document but contained references to other documents, also not produced during discovery, so that production of the document at a minimum could have led to the discovery of other relevant documents, document was reasonably calculated to lead to the discovery of admissible evidence and thus clearly satisfied the rule permitting discovery of information reasonably calculated to lead to the discovery of admissible evidence. Fed.Rules Civ.Proc. rule 26(b)(1), 28 U.S.C.A.

|13| Federal Civil Procedure 170A ⚷2662

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2662 k. Hearing and determination. Most Cited Cases

On motion for relief from judgment wherein wrongful withholding of information during discovery is alleged, though admissibility of such information is not a sine qua non for granting relief, it may be a relevant factor in weighing prejudice suffered by the moving party. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|14| Evidence 157 ⚷219.20(3)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k219.10 Subsequent Remedial Measures
157k219.20 What Are Subsequent Remedial Measures
157k219.20(3) k. Time relative to manufacture, sale or event. Most Cited Cases
(Formerly 272k131, 170Ak1189)

Rule prohibiting the admission of evidence of subsequent safety measures to prove negligence or culpable conduct in connection with an event did not preclude admission of document produced by automobile manufacturer's cost engineer where the document was written well before the automobile accident which gave rise to the suit and was not itself a subsequent remedial measure. Federal Rules of Evidence, rule 407, 28 U.S.C.A.

|15| Evidence 157 ⚷219.70

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k219.10 Subsequent Remedial Measures
157k219.70 k. Measures compelled by superior authority. Most Cited Cases
(Formerly 272k131)

Rule prohibiting introduction of evidence of subsequent remedial measures to prove negligence or culpable conduct is based on social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety; therefore, invoking such policy to justify exclusion of evidence would be particularly inappropriate where the offered evidence was prepared not out of a sense of social responsibility but because a remedial measure was to be required in any event by a government authority. Federal Rules of Evidence, rule 407, 28 U.S.C.A.

|16| Evidence 157 ⚷219.55(2)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k219.10 Subsequent Remedial Measures
157k219.55 Feasibility of Precautions
157k219.55(2) k. Change of design

or product. Most Cited Cases
(Formerly 272k131)

Even if document prepared by automobile manufacturer's cost engineer qualified as evidence of a subsequent remedial measure for purpose of rule prohibiting introduction of such evidence to prove negligence or culpable conduct, the document would have been admissible, in suit alleging that manufacturer negligently designed fuel tank, as proof of subsidiary questions concerning the manufacturer's knowledge of the alleged dangerous condition or the feasibility of precautionary measures. Federal Rules of Evidence, rule 407, 28 U.S.C.A.

|17| Federal Courts 170B ⚷3083

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3063 Substantive Matters
170Bk3083 k. Motor vehicles. Most Cited Cases
(Formerly 170Bk405)

In diversity action against automobile manufacturer, federal court was bound to apply the law of Georgia where Georgia was the forum state and the state in which the fatal injury giving rise to the suit occurred.

|18| Products Liability 313A ⚷133

313A Products Liability
313AII Elements and Concepts
313Ak132 Warnings or Instructions
313Ak133 k. In general. Most Cited Cases
(Formerly 313Ak37, 48Ak16)

Products Liability 313A ⚷203

313A Products Liability
313AIII Particular Products
313Ak202 Automobiles
313Ak203 k. In general. Most Cited Cases
(Formerly 313Ak37, 48Ak16)

Under Georgia law, there is a cause of action against automobile manufacturers for negligence in failing to warn of latent dangers arising from defective design.

|19| Products Liability 313A ⚷133

313A Products Liability
313AII Elements and Concepts
313Ak132 Warnings or Instructions
313Ak133 k. In general. Most Cited Cases
(Formerly 313Ak14)

A manufacturer's failure to use reasonable care in design or its knowledge of a defective design gives rise to a reasonable duty on the manufacturer to warn of this condition.

|20| Federal Civil Procedure 170A ⚷2334

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2333 Trial Errors
170Ak2334 k. Evidence. Most Cited Cases

Where engineering document that automobile manufacturer failed to disclose in violation of a discovery order provided evidence that, prior to fatal accident giving rise to the suit, the manufacturer had knowledge that fuel tanks on models with designs comparable to car in which plaintiff's husband was killed could not withstand rear-end collisions at 30 miles per hour or greater and that a design to correct the condition was both economically and structurally feasible and where it was apparent that the document, far from being a cumulative tidbit of evidence, might have been the catalyst for an entirely different approach to the case, manufacturer's wrongful withholding of the document prejudiced plaintiff, requiring that her timely motion for a new trial be granted. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|21| Federal Civil Procedure 170A ⚷1261

170A Federal Civil Procedure

170AX Depositions and Discovery
170AX(A) In General
170Ak1261 k. In general. Most Cited Cases

Our system of civil litigation cannot function if parties, in violation of court orders, suppress information called for in discovery; mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation.

|22| Federal Civil Procedure 170A ⚿1262.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1262 Nature and Purpose
170Ak1262.1 k. In general. Most Cited Cases
(Formerly 170Ak1262)

The aim of the liberal discovery rules provided by the Federal Rules of Civil Procedure is to make a trial less a game of blindman's bluff and more a fair contest. Fed.Rules Civ.Proc. rule 26(b)(1), 28 U.S.C.A.

|23| Federal Civil Procedure 170A ⚿1531

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1531 k. In general. Most Cited Cases

Discovery by interrogatory requires candor in responding.

|24| Federal Civil Procedure 170A ⚿2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct. Most Cited Cases
(Formerly 170Ak2646)

Where, through its misconduct in violating discovery orders, automobile manufacturer completely sabotaged the federal trial machinery, preventing the "fair contest" that the Federal Rules of Civil Procedure are intended to assure and where, instead of serving as a vehicle to ascertain the truth, the trial accomplished little more than to adjudicate hypothetical fact situation imposed by the manufacturer's selective disclosure of information, policy protecting finality of judgments was not so broad as to require protection of such judgment and district court abused discretion in denying timely motion for relief from judgment which was filed by plaintiff after plaintiff learned of the wrongfully withheld information. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|25| Federal Civil Procedure 170A ⚿2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds and Factors
170Ak2654 k. Fraud; misconduct. Most Cited Cases
(Formerly 170Ak2646)

Although it is within the discretion of the trial court whether to set aside judgment obtained through fraud, misrepresentation or other misconduct, the rule authorizing court to set aside judgment for such reasons is remedial and should be liberally construed. Fed.Rules Civ.Proc. rules 60, 60(b), (b)(3), 28 U.S.C.A.

|26| Federal Civil Procedure 170A ⚿2353

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2350 Newly Discovered Evidence
170Ak2353 k. Sufficiency and probable effect of evidence. Most Cited Cases

Under the rules authorizing district court to grant a new trial based on newly discovered evidence, moving party must show, among other things, that the newly discovered evidence is such that a new trial would probably produce a new result.

Fed.Rules Civ.Proc. rule 60(b)(2), 28 U.S.C.A.

|27| Evidence 157 ⚷207(4)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k207 In General
157k207(4) k. Confession or plea of guilty in criminal prosecution. Most Cited Cases

In products liability action against automobile manufacturer which arose out of fatal rear-end collision, a certified copy of a guilty plea to charges of involuntary manslaughter which was entered by the driver of the impacting vehicle was not inadmissible hearsay. Federal Rules of Evidence, rule 803(22), 28 U.S.C.A.

|28| Evidence 157 ⚷99

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k99 k. Relevancy in general. Most Cited Cases

Under the Federal Rules of Evidence, admissibility is predicated on more than mere logical relevance. Federal Rules of Evidence, rule 403, 28 U.S.C.A.

|29| Evidence 157 ⚷99

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k99 k. Relevancy in general. Most Cited Cases

In determining legal relevance under the rule authorizing a court to exclude relevant evidence if its probative value is substantially outweighed by danger of prejudice or confusion, the district court has broad discretion which is reviewable only for abuse. Federal Rules of Evidence, rule 403, 28 U.S.C.A.

|30| Evidence 157 ⚷207(4)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k207 In General
157k207(4) k. Confession or plea of guilty in criminal prosecution. Most Cited Cases

In suit against automobile manufacturer based on allegation that primary collision with impacting vehicle caused secondary collision with fuel tank which, in turn, caused the death of plaintiff's husband by creating the fire that incinerated him and wherein key question was whether automobile manufacturer owed plaintiff's husband a duty to build a fuel tank that could withstand an impact such as that inflicted by the impacting vehicle, the interrelationship between cause and duty in the second collision context was sufficiently difficult that it should not have been further complicated by unnecessary, confusing and potentially misleading fact that driver of impacting vehicle had pleaded guilty to voluntary manslaughter in connection with the accident and, therefore, the district court abused discretion in admitting in evidence a certified copy of the third party's guilty plea. Federal Rules of Evidence, rule 403, 28 U.S.C.A.

|31| Products Liability 313A ⚷208

313A Products Liability
313AIII Particular Products
313Ak202 Automobiles
313Ak208 k. Crashworthiness in general. Most Cited Cases
(Formerly 313Ak38, 48Ak16)

Under the second collision principle, there is no rational basis for limiting the manufacturer's liability to those instances where a structural defect caused the collision and resulting injury; even if a collision is not caused by a structural defect, a col-

lision may precipitate the malfunction of a defective part and cause injury and, in that circumstance, the collision, the defect and the injury are interdependent and should be viewed as a combined event the foreseeable risk of which a manufacturer should assume.

[32] Federal Courts 170B ⚿3701(3)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)4 Harmless and Reversible Error
170Bk3686 Particular Errors as Harmless or Prejudicial
170Bk3701 Evidence
170Bk3701(2) Admission of Evidence
170Bk3701(3) k. In general. Most Cited Cases
(Formerly 170Bk896.1, 170Bk896)

Though district court abused discretion, in products liability suit against automobile manufacturer, by admitting in evidence the fact that a third party had pleaded guilty to manslaughter charges arising out of the fatal collision, the abuse of discretion would not in itself have required reversal where plaintiff's counsel had an opportunity to subpoena the third party to question him about the circumstances surrounding the plea and could have argued to the jury that by his plea of guilty, the third party did not absolve the automobile manufacturer of liability for negligent design of fuel tank. Federal Rules of Evidence, rule 403, 28 U.S.C.A.

***1336** Austin E. Catts, Foy R. Devine, Atlanta, Ga., for plaintiff-appellant in both cases.

Ben L. Weinberg, Jr., John H. Stanford, Jr., F. Clay Bush, Atlanta, Ga., Albert Fendig, Jr., Brunswick, Ga., for defendant-appellee in both cases.

Appeals from the United States District Court for the Southern District of Georgia.

***1337** Before GOLDBERG and SIMPSON, Circuit Judges, and FREEMAN, District judge.[FN*]

FN* District Judge of the Northern District of Georgia, sitting by designation.

SIMPSON, Circuit Judge:

The controlling issue raised by this appeal concerns the post-trial relief available to a party who has lost a civil suit after an adverse party failed to disclose relevant information called for by interrogatories and court order. For reasons not stated in its order, the district court denied plaintiff's motion for a new trial pursuant to Rule 60(b), Fed.R.Civ.P. timely filed when plaintiff's counsel, after adverse jury verdict and final judgment, learned of the existence of the undisclosed material. Aware of our limited role in reviewing this discretionary function, we nonetheless hold that the unique facts of this case require reversal and remand for a new trial.

I. THE FACTS

On March 13, 1973, the 1969 Ford Galaxie 500 in which William Rozier was riding as a passenger on a Georgia public highway was struck from behind by a faster moving vehicle driven by Benjamin J. Wilson, Jr. The impact caused the Ford's fuel tank to rupture, resulting in a fire which engulfed the car and severely burned Mr. Rozier. Within 24 hours, he died as a result of the burns he sustained. On August 26, 1974, his widow, Martha Ann Brundage Rozier, filed suit below against Ford Motor Company (Ford), based on diversity jurisdiction (Title 28, U.S.C., s 1332), alleging that Ford's negligent design of the 1969 Galaxie's fuel tank caused the death of her husband. After a one week trial, the jury returned a verdict for Ford. Judgment was entered on March 6, 1976, and Mrs. Rozier timely filed her notice of appeal to this Court, No. 76-2848. During the pendency of that appeal, counsel for Mrs. Rozier learned of the existence of a document prepared by a Ford cost engineer, A. Mancini, in 1971 and arguably covered by plaintiff's interrogatories in this case, as limited by

an order of the trial judge entered on January 6, 1976. Because Ford had failed to produce this document in response to the court's order, Mrs. Rozier, on February 9, 1977, filed a motion for a new trial pursuant to Rule 60(b)(2), Fed.R.Civ.P., newly discovered evidence, and 60(b)(3), fraud, misrepresentation, and other misconduct. After hearing oral arguments and considering briefs and affidavits filed by the parties, the district court denied the motion on all grounds. Mrs. Rozier's appeal from this later order, No. 77-1929, has been consolidated with her appeal from the original judgment.

II. PLAINTIFF'S RULE 60(B)(3) MOTION

The pivotal question in this case is whether the trial judge abused his discretion in denying Mrs. Rozier's motion for a new trial pursuant to Rule 60(b)(3), Fed.R.Civ.P. We hold that he did and reverse on that basis.

Rule 60(b)(3) provides as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Under the express terms of the rule, 60(b)(3) motions must be made within a reasonable time, not more than one year, after the challenged judgment was entered. In this case, Mrs. Rozier moved for a new trial, relying on Rule 60, less than a year after entry of the district court's judgment for Ford, and only five days after her counsel received the information upon which the motion was based.

Because Mrs. Rozier's 60(b)(3) motion was filed timely, we have no occasion to review Ford's conduct in light of the more exacting "fraud upon the court" standard also provided for by Rule 60(b), but not subject to ***1338** any time limitation.[FN1] With few exceptions, the cases cited by Ford in support of its argument for affirmance deal with motions made after the one year limitation period had run.[FN2] Consequently, these cases were decided on the basis of Rule 60(b)'s "saving clause", and were limited to consideration of whether the challenged conduct amounted to fraud upon the court.

FN1. A saving clause in Rule 60(b) provides: "This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." See Dausuel v. Dausuel, 90 U.S.App.D.C. 275, 195 F.2d 774 (1952).

FN2. See, e. g., United States v. Standard Oil Co. of Calif., 73 F.R.D. 612 (N.D.Cal.1977); H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976); Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972); Keys v. Dunbar, 405 F.2d 955 (9th Cir. 1969); England v. Doyle, 281 F.2d 304 (9th Cir. 1960).

[1][2] Cases in other Circuits make clear that "fraud upon the court" under the saving clause is distinguishable from "fraud . . . misrepresentation, or other misconduct" under subsection (3). As the district court explained in United States v. International Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D.Conn.1972), aff'd without opinion, 410 U.S. 919, 93 S.Ct. 1363, 35 L.Ed.2d 582 (1973):

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); Root Refin. Co. v. Universal Oil Products, 169 F.2d 514 (3d Cir. 1948) 7 J. Moore, Federal Practice, P 60.33 at 510-11. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. See Kupferman v. Consolidated Re-

search & Mfg. Co., 459 F.2d 1072 (2d Cir. 1972); see also England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960).

Alternately stated, "(in) order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." England v. Doyle, supra, 281 F.2d at 309. See also United States v. Standard Oil Co. of Calif., 73 F.R.D. 612, 615 (N.D.Cal.1977).

[3] The distinction between a 60(b)(3) motion and a motion alleging fraud upon the court is rooted in policies basic to the law of judgments, as the Supreme Court explained prior to the 1946 revision of Rule 60:

> Federal courts . . . long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. . . . From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against the judgments regardless of the term of their entry. Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, 322 U.S. at 244, 64 S.Ct. at 1000 (citations omitted).

Although Rule 60(b) substitutes a general one year limitations period for the earlier "term rule", it continues to reflect a strong policy favoring an end to litigation by severely restricting the relief available after the one year limit has run.[FN3] In the year after a judgment has been entered, however, the district courts have greater discretion to balance the policy of finality of judgments against the other salutary policies embodied in the alternate grounds for relief provided in subsections (1) through (3) ***1339** of Rule 60(b). Essentially, this discretion, as guided by the Rule, furnishes an escape valve to protect the fairness and integrity of litigation in the federal courts.

> FN3. Cf. Lockwood v. Bowles, 46 F.R.D. 625, 633 (D.D.C.1969): "Except in extraordinary circumstances such as those truly contemplated by the term 'fraud upon the court' in Rule 60(b), the law favors an end to lawsuits rather than a free reopening and retrial of them".

Our review in this case must focus on two questions: (1) Did the plaintiff satisfy the threshold requirements for relief under Rule 60(b)(3)? And, if so, (2) would the granting of a new trial in this case effectuate any policy more significant than that of preserving the finality of judgments?

1. Rule 60(b)(3) Requirements :

[4][5][6][7] One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. Saenz v. Kenedy, 178 F.2d 417, 419 (5th Cir. 1949); Gilmore v. Strescon Industries, Inc., 66 F.R.D. 146, 153 (E.D.Pa.1975), aff'd without opinion, Bucks County Const. Co. v. P. Agnes, Inc., 521 F.2d 1398 (3d Cir.). The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense. Toledo Scales Co. v. Computing Scale Co., 261 U.S. 399, 421, 43 S.Ct. 458, 464, 67 L.Ed. 719 (1923); Atchison, Topeka & Santa Fe Ry. Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957); Rubens v. Ellis, 202 F.2d 415, 417 (5th Cir. 1953). Although Rule 60(b)(3) applies to misconduct in withholding information called for by discovery, Petry v. General Motors Corp., 62 F.R.D. 357 (E.D.Pa.1974), it does not require that the information withheld be of such nature as to alter the result in the case. Seaboldt v. Pennsylvania RR. Co., 290 F.2d 296, 299-300 (3d Cir. 1961). See generally, 11 C. Wright & A. Miller, Federal Practice and Procedure, s 2861 (1970). This subsection of the Rule is aimed at judgments which were unfairly ob-

tained, not at those which are factually incorrect. [FN4]

> FN4. Factually incorrect judgments are the subject of Rule 60(b)(2), which provides for relief from a judgment on grounds of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". We have held that under Rule 60(b)(2), the newly discovered evidence must be "such that a new trial would probably product a new result". Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 143 (5th Cir. 1975).

The facts relevant to Mrs. Rozier's 60(b)(3) motion are as follows.

[8] On August 25, 1975, counsel for Mrs. Rozier served her fourth set of interrogatories upon counsel for defendant Ford. Interrogatories 8, 10, 12, and 16 asked whether Ford had conducted "any cost/benefit analyses" with respect to four possible design modifications of fuel tanks for passenger cars, including full-sized sedans and hard-tops. Interrogatory 19 requested similar information not limited to "cost/benefit analyses":

> 19. In conducting "its own in-house research and development work on . . . alternate fuel tank locations" over the last ten years (Stenning Deposition Vol. II, p. 32), has Ford Motor Company prepared any written reports or analyses of the comparative advantages or disadvantages of alternate locations, (e. g. on top of the rear axle or in front of the rear axle) for fuel tanks in full-sized sedans and hardtops, including the 1969 Galaxie 500? R. 434. [FN5]

> FN5. Stenning, a Ford engineer, had testified that "Ford has had at least in the last ten years and prior its own in-house research and development work on alternate fuel tank designs, number one, and we have looked at alternate fuel tank locations . . ."

The interrogatories also asked whether, in the event such documents exist, Ford would make them available for inspection and copying without the necessity of a request for production.

In response, Ford objected to these and other interrogatories on the grounds that "the information sought therein does not relate to vehicles of the same size, chassis and fuel system as the 1969 Ford Galaxie 500". R. 445. On December 11, 1975, counsel for Mrs. Rozier moved in writing to compel Ford to answer the fourth set of interrogatories. R. 484. On January 6, 1976, the district court entered an order directing in part, as follows:

> ***1340** Defendant shall file with the Court and serve upon Plaintiff's counsel, no later than January 21, 1976, answers to questions numbered 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, and 20 of Plaintiff's Fourth Interrogatories; provided, however, that the aforesaid questions are limited to such written requirements, cost/benefit analyses, and written reports or analyses which are applicable to the 1969 Ford Galaxie 500. The fact that a written requirement, cost/benefit analysis or written report may also be applicable to vehicles other than the 1969 Ford Galaxie 500 does not render it beyond the scope of the aforesaid interrogatory and must be disclosed in response to the aforesaid interrogatories. R. 578-79 (emphasis in original).

Finally, on January 22, 1976, in purported compliance with this order, Ford filed amended responses to the fourth set of interrogatories. In answering interrogatories 8, 10, 12 and 16 concerning cost/benefit analyses of alternate fuel tank designs, Ford stated: "There would be no formal cost-benefit analysis with regard to this information". R. 606. In response to interrogatory 19, concerning "written reports of analyses of the comparative advantages and disadvantages of alternate locations . . . for fuel tanks", Ford stated: "Defendant cannot find such written analysis covering the inquiry". R. 609.

Approximately one year after Ford filed these amended responses and ten months after the jury returned a verdict favorable to Ford plaintiff's counsel learned of the document from Ford's files at issue in this appeal. Dated "2/9/71", this "Confidential Cost Engineering Report" states as its subject:

Trend Cost Estimate Fuel Tank Proposals (30 MPH Safety Std.) Prop(osal) I Tank Over Rear Axle Surrounded by Body Sheet Metal Barrier & Prop(osal) II Tank in Tank Filled With Polyurethene Vs. 1971 Ford Design 1975 Ford/Mercury.

So far as we can determine from the face of the document and on the basis of remarks by counsel for Ford during oral argument, this "Trend Cost Estimate" was prepared in anticipation of a revised National Highway Traffic Safety Administration safety standard of 30 m. p. h. for rear end collisions. It compares the costs of parts and labor associated with two proposed alternate fuel tank designs based on the design of a 1971 full-sized Ford. Without dispute the 1969 Galaxie 500 model was a full-sized Ford car. Apparently, Ford planned to begin using a new fuel tank design sufficient to satisfy the 30 m. p. h. standard in its 1975 full-sized models.

In her motion for a new trial pursuant to Rule 60(b)(3), Mrs. Rozier contended that the 1971 Trend Cost Estimate should have been produced in response to the district court's January 6, 1976, order because it was "applicable to the 1969 Ford Galaxie 500". In support of her motion, Mrs. Rozier filed affidavits by Frederick E. Arndt, a safety engineering consultant, and Byron Bloch, a product safety consultant, both of whom had testified on her behalf at the trial. Each affidavit stated:

(T)he 1969 Ford Galaxie 500 is so similar in size, design, and fuel tank location to the 1971 Ford that the subject "Confidential Cost Engineering Report" is as applicable and valid for the 1969 Ford Galaxie 500 as it is for the 1971 Ford. S.R. (Supplemental Record) 49, 51.

In response to Mrs. Rozier's motion to vacate, Ford produced an affidavit by Thomas G. Grubba, an attorney on the house legal staff of Ford Motor Company, who "was involved in" the case. Mr. Grubba swore that he was unaware of the Trend Cost Estimate when the answers to plaintiff's interrogatories were prepared, but that he became aware of the document on February 25, 1976. [FN6] S.R. 114. We note ***1341** that although Ford's answers were filed on January 22, 1976, the trial did not begin until March 1, 1976, a week after Mr. Grubba discovered the document.

> FN6. In his affidavit, Mr. Grubba stated that the Trend Cost Estimate "would have no application to the 1969 Ford Galaxie nor to any other vehicle produced by the defendant during that model year". This conclusory statement does not necessarily contradict the Arndt and Bloch affidavits filed on behalf of Mrs. Rozier. Arndt and Bloch concluded that the document was applicable to the 1969 model because the 1969 and 1971 models were, in effect, structurally indistinguishable. The brief to which the Grubba affidavit was appended makes clear that Ford's theory of nonapplicability is based on cost, not structural factors. According to the brief, the document could not apply to a 1969 Ford because "the estimated cost of materials are measured against the 1971 Ford automobile". S.R. 110. Even assuming, as we do not, that the only possible relevance of the document concerned the cost of alternative fuel tank designs, the difference of two or more years would not eliminate it from the scope of the discovery order because the costs could be adjusted to reflect the time differential.

By any fair reading, the district court's January 6, 1976, discovery order called for production of this Trend Cost Estimate. Ford, in response to the motion to vacate and in this appeal, has urged that,

as a term of art, a "trend cost estimate" is not a "cost/benefit analysis". Whether the document in question technically is or is not a cost/benefit analysis to our non-expert eyes, the terms are synonymous, as alike as "Tweedledum and Tweedledee" is largely irrelevant in this case because plaintiff's interrogatories were not limited to "cost/benefit analyses". Interrogatory 19 asked whether Ford had "prepared any written reports or analyses of the comparative advantages or disadvantages of alternate locations . . . for fuel tanks" (emphasis added); the court's January 6 order compelled production of all such "written reports or analyses which are applicable to the 1969 Ford Galaxie 500", specifically noting that written reports also applicable to vehicles other than the 1969 Ford Galaxie 500 were not beyond the scope of the discovery order "and must be disclosed in response to the aforesaid interrogatories". Undeniably, the Trend Cost Estimate is a report "of the comparative advantages or disadvantages" of alternate fuel tank locations, since the alternative which could satisfy the safety standard for the least cost would, in terms of Ford's interests, be the most advantageous.[FN7] Also, in light of the unchallenged assertions made in the Arndt and Bloch affidavits, this estimate based on the design of a 1971 full-sized Ford is applicable to a 1969 full-sized Ford.[FN8] We recognize that the Trend Cost Estimate does not purport to estimate the cost of installing new fuel tanks on automobiles already manufactured, such as a 1969 Galaxie 500; however, neither the interrogatory nor the court order limited discovery to reports of that description.

FN7. In his deposition, Ford engineer Stenning noted that one alternate location was disfavored because it would not allow different bodies to be installed on the same base, thus cutting down on "interchangeability". "(W) e are in the business of making money", he added. Stenning Deposition, May 1, 1975, Vol. II, at 32.

FN8. Ironically, Ford objected to the fourth interrogatories as filed not because they were not limited to reports applicable only to the 1969 Galaxie 500, but on the broader ground that "the information sought therein does not relate to vehicles of the same size, chassis and fuel system as the 1969 Ford Galaxie 500". R. 445. Ford thus appears hardly in a position to argue that the Trend Cost Estimate was not covered by the district court's order simply because it does not refer specifically to a 1969 Galaxie but rather to a 1971 model which is "of the same size, chassis and fuel system as the 1969 Ford Galaxie 500".

[9] We conclude that Mrs. Rozier has proved by clear and convincing evidence that Ford engaged in misrepresentation and other misconduct.[FN9] Plaintiff's interrogatory***1342** 19, as limited by the district court's order, called for production of the Trend Cost Estimate. In its written response, Ford stated that it could find no such report. A month later, an in-house attorney for Ford involved in this case discovered the Trend Cost Estimate but failed to disclose it or to amend the inaccurate response to interrogatory 19.[FN10] If Ford in good faith believed that the district court's order was not intended to compel production of this document, the appropriate remedy was to seek a ruling by the district court at that point and not a year after the trial and then only when, by chance, the plaintiff learned of it.

FN9. In this respect we are not substituting our judgment for that of the district court. See Atchison, Topeka & Santa Fe Ry. Co. v. Barrett, supra, 246 F.2d at 849. Unfortunately, the district court made no findings of fact, and its order denying the motion for a new trial stated simply: "the Court is of the opinion that said motion should be and is hereby denied upon each and every ground therein stated". S.R. 127. Our conclusion that Ford engaged in misconduct is

not inconsistent with the district court's holding because, conceivably, the court could have found that Ford engaged in misrepresentation or other misconduct but that a new trial was nevertheless unwarranted. This reading of the court's holding is buttressed by comments made by the trial judge at the hearing on plaintiff's motion. When counsel for Ford attempted to argue that plaintiff's interrogatories were intended to discover only that which went into the design of the 1969 Ford Galaxie 500, the trial judge interrupted:

THE COURT: Wait a minute. But then if anything was learned by Ford up between that time and the time of the death of Rozier that would have application to the safety of the '69 Ford, that would be relevant. That's why we limited it to the time of his death, didn't we? 2/26/77 Transcript at 26.

Shortly thereafter, the following exchange ensued:

MR. WEINBERG (for Ford): In any event, the Court's order, we contend is clear and that there has been no violation of this Court's order by Ford Motor Company, that the report simply does not fit into the ambit of the definition, even though so stated by Mr. Arndt and Mr. Block (sic), and that the fair . . .

THE COURT: Let me say this, you know. In a nontechnical sense, I would say it does, just by looking at it. I mean, they're talking about variable costs on the proposed design . . .

MR. WEINBERG: It doesn't have anything to do with the cost of tooling, the cost of production? This, Your Honor . . .

THE COURT: Whatever. Whatever. It does have reference to variable costs . . .

MR. WEINBERG: But this is costs and materials only, and that's different from a cost/benefit analysis, we urge upon the Court.

THE COURT: It would seem to me to be a factor that would go into it. Id. at 29-30.

FN10. Ford's duty to amend its inaccurate response is based on Rule 26(e)(2), Fed.R.Civ.P.: "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment". See Havenfield Corp. v. H & R Block, Inc., 509 F.2d 1263 (8th Cir. 1975), cert. denied, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 665.

Although we are unaware of the precise nature of Mr. Grubba's involvement in this case, he did not participate in the trial itself or in the appeal. The attorneys retained by Ford to represent the company at trial and in the appeal have assured this Court that they were personally unaware of the Trend Cost Estimate until Mrs. Rozier filed her motion to vacate almost a year after the trial. We accept their statements.

[10] The more vexing question is whether nondisclosure of the Trend Cost Estimate prevented Mrs. Rozier from fully and fairly presenting her case. At trial, Mrs. Rozier contended that Ford was negligent in designing a fuel tank that could not withstand an impact such as that involved in the accident which took her husband's life. Prior to trial, she expressed an intention to rely on 14 theories to explain how Ford deviated from the appropriate standard of care. R. 471-72. Inevitably, information developed in the discovery stages of the case influ-

enced the decision as to which theories would be emphasized at trial. We are left with the firm conviction that disclosure of the Trend Cost Estimate would "have made a difference in the way plaintiff's counsel approached the case or prepared for trial", Rock Island Bank & Trust Co. v. Ford Motor Co., 54 Mich.App. 278, 220 N.W.2d 799 (1974), and that Mrs. Rozier was prejudiced by Ford's nondisclosure. See Seaboldt v. Pennsylvania RR. Co., 290 F.2d 296, 299-300 (3d Cir. 1961).

Although Ford does not specifically dispute this conclusion, it has argued, in a related context, that the Trend Cost Estimate, if admissible at trial, would merely have been cumulative because plaintiff's experts testified at length as to the feasibility of alternative fuel tank designs. Additionally, Ford contends that the document would have been inadmissible by virtue of Rule 407, Fed.R.Evid. We think that these arguments misconstrue the significance of the withheld document.

[11][12] The admissibility of evidence is irrelevant in the discovery process so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence". Fed.R.Civ.P. 26(b)(1). ***1343** The Trend Cost Estimate clearly satisfies this test. It was not an isolated document, but rather one in a series; some of the other documents, also not produced by Ford during discovery, are referred to in the estimate itself: "Request from J. M. Chiara", "Layouts LA-901277 and 901278", "our report dated February 4, 1971", "A proposal for a fuel tank installation over the rear axle is illustrated in the attached drawing". At a minimum, production of the Trend Cost Estimate could have led to discovery of these other documents.

[13] Nevertheless, while admissibility is not a sine qua non for granting relief under Rule 60(b)(3) where the wrongful withholding of information during discovery is alleged, it may be a relevant factor in weighing the prejudice suffered by the moving party. Ford argues against admissibility by invoking the protective mantle of Rule 407, Fed.R.Evid.:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of cautionary measures, if controverted, or impeachment.

[14][15][16] Rule 407 does not preclude admission of the Trend Cost Estimate for several reasons. First, this 1971 document was not written after the "event" in question, a 1973 automobile accident, and was not, in itself, a remedial measure taken. Hence, the threshold requirements for invoking the rule are absent. Secondly, the rule of exclusion is based "on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety". Notes of Advisory Committee on Proposed Rules, Fed.R.Evid. 407. Invoking this policy to justify exclusion here is particularly inappropriate since the estimate was prepared not out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority, the National Highway Traffic Safety Administration. Finally, even if we assume that the Trend Cost Estimate qualifies as evidence of a subsequent remedial measure, it would be admissible as proof of subsidiary issues in the case, such as knowledge of the dangerous condition or feasibility of precautionary measures. [FN11] Our acceptance of Ford's 407 argument would effectively "turn the blade inward".

> FN11. Vockie v. General Motors Corp., 66 F.R.D. 57, 61 (E.D.Pa.1975), cited by Ford as illustrative of the policy behind Rule 407, is not pertinent to this case. Vockie concerned the admissibility of a recall notice and campaign by General Motors involving a design defect which plaintiffs alleged had existed in their car and had res-

> ulted in injuries to them. The district court excluded the recall evidence, reasoning that "(m)anufacturers should not be inhibited in, or prejudiced by, a good faith effort to protect the public safety and comply with their statutory duty". Id. at 61. Additionally, the court noted that evidence of the recall "has minimal probative value to the existence of a defect in a particular vehicle". The key to the case, however, is that the plaintiffs argued for admissibility of the recall notice on the grounds that it constituted an admission by an adverse party; Rule 407 was not raised by either party, although its policy was relied upon by the court for analogy to the facts before it. The memorandum opinion in Vockie is dated February 20, 1975; the effective date of the Federal Rules of Evidence was July 1, 1975, 180 days after their enactment, H.R. 5463, P.L. 93-595, approved January 2, 1975.

We cannot know what use, if any, plaintiff's counsel would have made of the Trend Cost Estimate had it been produced by Ford prior to trial. However, consideration of one likely use reveals the prejudice that Mrs. Rozier may have suffered as a consequence of Ford's misconduct.

The negligence alleged by Mrs. Rozier may have taken place in one or both of two time frames: (1) up to and including the production of the 1969 Ford Galaxie 500, and (2) between the time of production in 1969 and the time of the fatal collision in 1973. Under the facts of this case, the task of proving negligence in the pre-production period was the more difficult. Given the ***1344** industry practices and standards in 1969, the jury was less likely to find that Ford's conduct fell below that to be expected from an ordinarily prudent manufacturer in designing the fuel system for a full-sized sedan. In the post-production period, however, Ford may have had a duty to warn consumers of a latent danger such as a defectively designed fuel tank. Here the plaintiff need not have been hamstrung by the less sophisticated state of the art in 1969, and may have been able to make a convincing case based on the Trend Cost Estimate.

[17][18][19][20] Georgia courts [FN12] recognize a cause of action against automobile manufacturers for negligence in failing to warn of latent dangers arising from defective design. Friend v. General Motors Corp., 118 Ga.App. 763, 165 S.E.2d 734, 737 (1968). And, as the Eighth Circuit has explained in discussing this duty to warn:

> FN12. In this diversity case, we are of course "Erie-bound" to apply the law of Georgia, both the forum state and the state where Mr. Rozier's fatal injury occurred. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The failure to use reasonable care in design or knowledge of a defective design gives rise to the reasonable duty on the manufacturer to warn of this condition. Larsen v. General Motors Corp., 391 F.2d 495, 505 (8th Cir. 1968) (emphasis added). [FN13]

> FN13. Although Georgia courts have not specifically cited Larsen, Friend, supra, and its progeny make clear that Larsen, a seminal case on manufacturer liability for "second collision" injuries, accurately reflects the law in Georgia. Cf. Ford Motor Co. v. Lee, 137 Ga.App. 486, 224 S.E.2d 168 (1976). Georgia has been listed as a follower of Larsen in Huff v. White Motor Corp., 565 F.2d 104, 110 (7th Cir. 1977) and Polk v. Ford Motor Co., 529 F.2d 259, 264 n.5 (8th Cir. 1976). See also Note, Products Liability in Georgia, 12 Ga.L.Rev. 83, 96-98 (1977).
>
> In discussing the duty to warn, the court in Larsen quoted from our decision in Blitzstein v. Ford Motor Co., 288 F.2d 738, 744 (5th Cir. 1961), in which we used language

relevant to the instant case:

> We think that a jury could reasonably have found that the American Ford Company was negligent in marketing a product which was inherently dangerous, of which danger it should have been aware from its long experience in the design and manufacture of automobiles, and that American Ford failed to exercise reasonable care to inform the buying public of this dangerous condition.

Here, arguably, the Trend Cost Estimate furnishes evidence that Ford, in 1971, had knowledge that the fuel tanks on those models with designs comparable to the 1969 Galaxie 500 could not withstand rear-end collisions at 30 m.p.h. or greater and that a design to correct this condition was both economically and structurally feasible. If a jury were persuaded that the fuel tank of the 1969 Galaxie was latently but not negligently defective at the time of production, it might still have found that once Ford acquired the knowledge evidenced by the Trend Cost Estimate it negligently failed to warn Galaxie users of the defect.[FN14]

> FN14. In arguing against the relevance of the Trend Cost Estimate, Ford cites our decision in Barnes v. General Motors Corp., 547 F.2d 275 (5th Cir. 1977), regarding the admissibility of experimental and comparative tests. We held such evidence inadmissible in Barnes because the test vehicle lacked a crucial safety feature, a "roll-stop" mount, which had been installed on the plaintiff's automobile. No similar disparity is present in this case. Ford notes that expert testimony at the trial indicated that the speed of impact the "differential" speed between the Galaxie and the impacting vehicle, a Chevrolet was in excess of 60 m.p.h., while the Trend Cost Estimate dealt with a proposed 30 m.p.h. safety standard. However, the evidence at trial allowed the jury to conclude that the closing speed at impact ranged from as low as 20 to as high as about 70 m.p.h. Trooper Gary Swindell, the officer who investigated the accident, testified that the speedometer on the Chevrolet was stuck at 68 m.p.h. and that the Galaxie was traveling at approximately 40 to 45 m.p.h. when hit. T. 58-60. On cross-examination, Swindell conceded that the Galaxie might have been moving at less than 10 m.p.h. and the impacting vehicle in excess of 68 m.p.h. at the moment of impact. T. 64-66. One of plaintiff's experts opined that the speed of the Galaxie was between 2.3 and 8.6 m.p.h. and that of the Chevrolet was between 65.7 and 72 m.p.h., indicating a maximum differential of 69.7 m.p.h. T. 303. Another expert estimated the differential speed as between 60 and 68 m.p.h. T. 766. Because the jury's verdict is consistent with almost any differential speed, we cannot determine how the jury evaluated this evidence; it could have concluded that the speed of impact was only 30 m.p.h. but that Ford nevertheless had not breached its duty of care toward Mr. Rozier. Similarly, although the Trend Cost Estimate is directed at satisfying a 30 m.p.h. safety standard, it is conceivable that the design modifications suggested would also satisfy a higher standard, perhaps up to 60 m.p.h. Hence, the fact that the Trend Cost Estimate refers to a proposed 30 m.p.h. standard does not necessarily diminish its potential materiality in this case.

***1345** By a peculiar turn of events, the jury in this case was foreclosed at the last minute from considering Ford's failure to warn as a possible negligent omission. At least as early as December 10, 1975, when the parties filed a "Consolidated Proposed Pre-Trial Order", Mrs. Rozier indicated that one "act of negligence" upon which she intended to rely was "(f)ailure to warn owners and users of the vehicle of the risk of injury or death due to fire in

the event of a collision". R. 471-72. The trial judge so instructed the jury, T. 5A, noting that although several acts of negligence were alleged, the plaintiff "is merely required to prove one such act. . . ." T. 14A. Counsel for Ford objected to the warning instruction because it did not specify that the duty to warn extended only to unreasonable risks of injury. The exchange which followed this objection suggests that plaintiff's counsel, in the light of the information then available to him, viewed the duty to warn as an inconsequential part of the case:

THE COURT: What do you say about the last exception?

MR. DEVINE (For Plaintiff): Your Honor, I think it might do well to clarify that. The Jury has to find that there is a danger before the Defendant has a duty to warn of that danger. I believe that there is plenty of evidence to support that there is a danger.

THE COURT: Nevertheless, what do you say . . .

MR. DEVINE: I think it should be clear.

THE COURT: . . . You concede that I should withdraw then that charge from the Jury's consideration?

MR. DEVINE: I have no objection, Your Honor.

The Court thereupon further charged the Jury as follows:

THE COURT: Members of the Jury, I had charged you that the Plaintiff claimed that the Defendant was negligent in failing to warn owners and passengers of the 1969 Ford Galaxie 500 of the risk of burn injury attendant to occupying that vehicle. I now withdraw that charge, and you will not give that charge any weight whatsoever in your deliberations.

The following colloquy ensued out of the presence of the jury:

THE COURT: Any exceptions to that?

MR. WEINBERG: No, sir.

MR. DEVINE: No, sir. T. 32A-33A.

It is apparent, then, that the Trend Cost Estimate, far from being a cumulative tidbit of evidence already subsumed in the case presented to the jury, might have been the catalyst for an entirely different approach to the case on a theory that the plaintiff, lacking the document, let die before it reached the jury. Under these circumstances, we hold that Ford's wrongful withholding of information prevented Mrs. Rozier from fully and fairly presenting her case.

2. Policy Considerations :

[21][22][23] Our system of civil litigation cannot function if parties, in violation of court orders, suppress information called for upon discovery. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession". Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). The Federal Rules of Civil Procedure substitute the discovery process for the earlier and inadequate reliance on pleadings for notice-giving, issue-formulation, and fact-revelation. As the Supreme Court stated in Hickman v. Taylor, supra, "civil trials in the federal courts no longer ***1346** need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial". 329 U.S. at 501, 67 S.Ct. at 389. The aim of these liberal discovery rules is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent". United States v. Proctor & Gamble Co., 356 U.S. 677, 683, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). It is axiomatic that "(d)iscovery by interrogatory requires candor in re-

sponding". Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 616 (5th Cir. 1977).

[24] Through its misconduct in this case, Ford completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by Ford's selective disclosure of information. The policy protecting the finality of judgments is not so broad as to require protection of judgments obtained in this manner.

[25] Within a year of their entry, judgments obtained through fraud, misrepresentation or other misconduct may be set aside under Rule 60(b)(3). Although the granting of such relief is within the discretion of the trial court, Hand v. United States, 441 F.2d 529 (5th Cir. 1971), the rule "is remedial and should be liberally construed". Atchison, Topeka & Santa Fe Ry. Co. v. Barrett, supra, 246 F.2d at 849. In reviewing the instant denial of plaintiff's Rule 60(b)(3) motion for abuse of discretion, it is not without significance that the trial judge stated no reasons for the denial. S.R. 127. Cf. Dollar v. Long Mfg., N.C., Inc., supra, 561 F.2d at 618. We have searched for reasons justifying denial of the motion and can find none sufficient to sustain this exercise of discretion. Under the unique facts of this case, the policy of deterring discovery abuses which assault the fairness and integrity of litigation must be accorded precedence over the policy of putting an end to litigation.

[26] We do not reach the question of whether the district court abused its discretion in denying plaintiff's motion for a new trial based on newly discovered evidence, pursuant to Rule 60(b)(2). Under that Rule, the moving party must show, inter alia, that the newly discovered evidence is "such that a new trial would probably produce a new result". Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 143 (5th Cir. 1975). To hold the plaintiff in this case to such a showing would be manifestly unfair:

> (I)t cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent". Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin, 1931, 283 U.S. 520, 521-22, 51 S.Ct. 501, 502, 75 L.Ed. 1243.

Seaboldt v. Pennsylvania R.R. Co., supra, 290 F.2d at 300.

We hold that the district court abused its discretion in denying plaintiff's Rule 60(b)(3) motion and that a new trial is required.

III. THE EVIDENTIARY QUESTION

In her original appeal, Mrs. Rozier alleged that the district court erred in admitting into evidence over plaintiff's objection the plea of guilty by Benjamin Wilson, the driver of the impacting vehicle, to charges of involuntary manslaughter in the deaths of Mr. Rozier and Frank Mitchell, the driver of the Ford Galaxie. Although not necessary to our disposition of this appeal, we address this issue because of the near certainty that the question will arise at a new trial.

[27] Ford introduced a certified copy of Wilson's guilty plea for two stated purposes: (1) to corroborate the testimony of the investigating officer, Trooper Swindell, that Wilson's car was traveling at approximately***1347** 68 m.p.h. at the moment of impact, and (2) as evidence that Mr. Rozier's death was caused by Wilson's criminal act and not by Ford's negligence. While we agree with Ford that this evidence is not excluded by the hearsay rule by virtue of Rule 803(22), Fed.R.Evid., we hold that it is inadmissible under the test for legal relevancy set forth in Rule 403.

[28][29] Under the Federal Rules of Evidence, admissibility is predicated on more than mere logical relevance:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed.R.Evid. 403.

In determining legal relevance under Rule 403, the trial judge has broad discretion, reviewable only for abuse. United States v. Johnson, 558 F.2d 744 (5th Cir. 1977); United States v. Bailey, 537 F.2d 845 (5th Cir. 1976).

As relevant to the speed of Wilson's car, there is little question that the guilty plea amounted to a "needless presentation of cumulative evidence". Trooper Swindell testified that the impact speed was about 68 m.p.h., and that figure is recorded on his accident report, Defendant's Exhibit 19, and on the speeding citation that he issued to Wilson, Defendant's Exhibit 20.[FN15] Additionally, plaintiff did not dispute that Wilson was traveling at 68 m.p.h. Wilson's speed was never a contested issue at trial. Whether admission of this cumulative evidence of speed constituted an abuse of discretion under Rule 403 we need not decide in light of the discussion which follows.

> FN15. Trooper Swindell also testified that when he arrived at the scene shortly after the accident, he observed that the speedometer on Wilson's car was stuck at 68 m.p.h. By the time the speedometer was photographed, however, it had slipped to the 57 m.p.h. mark. Photographs of the speedometer in this position were admitted into evidence. Plaintiff's Exhibits 24 and 25.

[30] We recognize that Wilson's guilty plea was logically relevant to the issue of causation in that, by the plea, Wilson admitted that he "did cause the death of William Burel Rozier". We conclude, however, that the slight probative value of this evidence was clearly outweighed by the danger that it would confuse and mislead the jury.

[31] The legal concepts of cause in fact, proximate cause, and policy cause are confusing in any case, especially one such as this involving the doctrine of "second collision" injuries. Under the second collision principle,

(t)here is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Huff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977).

There are thus several dimensions to the cause question in this case. On a purely factual level, Mr. Rozier's death was caused by a variety of factors, among them the impact of Wilson's car as well as the design of the Galaxie fuel tank. The legal cause of death, however, must be evaluated in the context of the social policies sought to be advanced by attaching liability to the consequences of specific actions by specific persons. As Professor Prosser explains, "(o)nce it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused". W. Prosser, Handbook of the Law of Torts 244 (4th ed. 1971). In this case, the State of Georgia charged Wilson with causing the death of Mr. Rozier in an effort to enforce ***1348** its traffic laws; in terms of this important social interest, it makes sense to hold the driver of a speeding vehicle responsible for damage inflicted by it. Georgia also allows a private action in damages against an automobile manufacturer who negligently produces a car with a defect which causes injury when activated by a foreseeable collision; thus, in the context of encouraging automotive safety, Georgia law has determined that the negligent man-

ufacturer "causes" second collision injuries even though the primary collision was caused by a third party.

The jury in this case hardly needed Wilson's guilty plea to demonstrate what had caused the accident in which Mr. Rozier lost his life. The fact of the accident was conceded by the plaintiff, and numerous photographs put in evidence by both parties graphically depicted the devastating consequences of the impact. Certainly, the jury realized that the fuel tank would not have ruptured had it not been for the crushing blow inflicted by Wilson's car.

The real purpose for introducing the guilty plea would seem to be as evidence of legal cause. It is here that the danger of confusion arises.[FN16] Because Wilson's admission of responsibility for Mr. Rozier's death was made in the context of a criminal action to deter reckless driving, its relevance in a civil action based on a legal doctrine presumably intended to deter the negligent manufacture of automobiles is attenuated at best. The liability which Wilson admitted in his guilty plea is based on a different social policy than that with which Mrs. Rozier charged Ford Motor Company. Furthermore, the second collision doctrine assumes that the primary collision is caused by a party other than the manufacturer. Here, Mrs. Rozier has alleged that the primary collision with Wilson caused the secondary collision with the fuel tank which, in turn, caused the death of her husband by creating the fire that incinerated him. The key question in the case is whether Ford owed a duty to Mr. Rozier to build a fuel tank that could withstand an impact such as that inflicted by Wilson's car. If Ford owed such a duty then, other considerations aside, Ford caused Mr. Rozier's death. We think that the interrelationship between cause and duty in the second collision context was difficult enough for the jury to grasp so that it should not have been further complicated by the unnecessary, confusing, and potentially misleading element of the Wilson guilty plea. We hold that the trial court abused its discretion in admitting this evidence.

FN16. Arguably, this evidence was not offered to prove a factual proposition at all, but rather to support a legal position that the Wilson guilty plea determined the issue of legal responsibility for the death of William Rozier. Of course, the guilty plea would be entitled to no collateral estoppel effect in this case. But, as Prosser explains, the question of factual cause is often difficult to separate from that of legal cause. The question, writes Prosser, is "whether the policy of law will extend the responsibility for the conduct to the consequences which have in fact occurred. Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff. . . . This is not a question of causation, or even a question of fact . . . and the attempt to deal with it in such terms has led and can lead only to utter confusion". W. Prosser, supra, at 244.

[32] Although we find an abuse of discretion, our holding is not that this error would, in itself, have required reversal. Plaintiff's counsel had an opportunity to subpoena Mr. Wilson to question him about the circumstances surrounding the plea and could have argued to the jury that by his plea of guilty, Wilson did not absolve Ford of liability for negligent design of the fuel tank. Additionally, we note that the able trial judge may have been led astray by the contradictory and often merely conclusory arguments for and against admissibility made by counsel for both sides. Initially, in arguing a pretrial motion, plaintiff's counsel took the position that the guilty plea was inadmissible to impeach Wilson's testimony; the court then ruled in favor of Ford that such evidence was admissible on cross-examination under Rule 609(a), Fed.R.Evid. T. 10-11. During the trial, however, neither party called Wilson as a witness. In cross-examining Trooper Swindell, counsel for Ford elicited testimony concerning ***1349** the manslaughter charge against Wilson. In response to an objection by

plaintiff's counsel, Ford assured the court that the information sought was relevant to the issue of speed. T. 68. At the close of the testimony, Ford tendered and the court admitted over plaintiff's objection the plea and judgment of conviction of Wilson. At this point, Ford explained that the plea was relevant "(t)o illustrate an admission by a person involved in the occurrence of responsibility for the occurrence". The court sought a contrary argument from plaintiff's counsel and was assured, seven times, that the plea was either "irrelevant", "totally irrelevant", or "absolutely irrelevant" but never told why. Apparently impressed that counsel could generate so much heat with no light, the court overruled the objection. T. 1132-39.

IV. CONCLUSION

The record in this case establishes that defendant Ford was aware of a document in its files relevant to the plaintiff's case, sought by the plaintiff through interrogatories, and included within a discovery order, but that it failed to disclose the document or to amend its response to an interrogatory, falsely stating that it was unable to locate such a document. Ford's misconduct prejudiced the plaintiff by denying her information which might well have reshaped the case she ultimately presented to the jury. Under these circumstances, plaintiff's timely motion for a new trial pursuant to Rule 60(b) (3) should have been granted. We reverse the district court's denial of the 60(b)(3) motion and remand this case for a new trial. Additionally, because any probative value that it might have is substantially outweighed by the danger of confusing the issues and misleading the jury, we hold that evidence of Wilson's guilty plea to manslaughter charges arising out of the fatal collision in this case is inadmissible under Rule 403, Fed.R.Evid.

REVERSED and REMANDED, with directions.

C.A.Ga., 1978.
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573 F.2d 1332, 50 A.L.R. Fed. 914, 25 Fed.R.Serv.2d 1133, 3 Fed. R. Evid. Serv. 119

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