IN THE SUPREME COURT OF MISSISSIPPI

TRAPANI'S EATERY, INC.;
ANTHONY TRAPANI; and
JOLYNNE TRAPANI **APPELLANTS**

V. **DOCKET NO. 2011-CA-00092**

TREUTEL INSURANCE AGENCY, INC.
AND DAVID TREUTEL **APPELLEES**

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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RESTATEMENT OF THE ISSUES

1. The trial court correctly and properly directed a verdict for the Defendants/Appellees because of the failure of the Plaintiffs/Appellants to establish that the actions of the Defendants/Appellees proximately caused any damages sustained by the Plaintiffs/Appellants.

2. The Court did not abuse its discretion and properly excluded the following documentary evidence:

   A. The trial court properly redacted Page 5 of Exhibit P-15 as hearsay;

   B. The trial court properly redacted certain items from Exhibit P-16 because they were not personal property and, therefore, not relevant; and

   C. The trial judge properly excluded Exhibit P-17 as not being relevant, as being inadmissible hearsay, and not being the best evidence of business income as defined in the subject insurance policy.

3. The trial judge properly excluded the expert testimony of Pete Quave because he lacked the proper qualifications to testify on the proffered subject matter and because, even if qualified, his testimony would not have assisted the jury.

4. The trial judge properly required the Plaintiffs/Appellees to prove the amount of damages sustained as a result of wind as opposed to the damages sustained as a result of water.

STATEMENT OF THE CASE

Statement of the Nature of the Case.

This is an action brought by Trapani's Eatery, Inc., Anthony Trapani and Jolynne Trapani (hereinafter collectively referred to as "Trapani") against The Treutel Insurance Agency, Inc. and David Treutel (hereinafter collectively referred to as "Treutel") for negligence. Trapani claims that Dave Treutel, while acting as an agent and employee of the Treutel Insurance Agency, Inc. (hereinafter sometimes separately referred to as "the Agency") was guilty of negligence when, as their insurance agent, he failed to secure for their business the requested limits of coverage against the peril of windstorm. They contend that these acts proximately caused damages to them by limiting the amount of money that they could recover after the business was totally destroyed by Hurricane Katrina.

Course of the Proceedings Below.

On December 2, 2005, Trapani filed a Complaint in the Chancery Court of Hancock County, Mississippi, seeking recovery from Treutel and asking for specific performance or, alternatively, monetary damages, claiming that they relied upon Treutel to secure specific amounts of insurance coverage against the peril of windstorm on the building which housed their restaurant, the personal property used to operate the restaurant, and for loss of business income against the risk of windstorm.[1] Treutel answered the Complaint, denying any liability and asserting various affirmative defenses.[2] By an order of the Chancery Court entered on April 7, 2009, the case was transferred to the Circuit Court of Hancock County, Mississippi, for a jury trial.[3]

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[1] R. 5-9. References herein to the Clerk's Record or papers are referenced by "R." References herein to the transcript of the testimony are referenced by "Tr."

[2] R. 10-14.

[3] R. 3.

After the completion of discovery, the case was set for a trial in the Circuit Court, presided over by the Honorable Roger T. Clark. A jury was impaneled on December 14, 2010.[4] During the course of the trial, the Court excluded all or part of three documents offered by Trapani for lack of a proper foundation and because it was hearsay.[5] The Court also excluded the testimony of an expert called by Trapani because he did not have sufficient training and experience in property and casualty insurance sales to qualify as an expert, and on the additional ground that the testimony would not assist the jury to understand the issues.[6] After the presentation of oral and documentary evidence, Trapani rested on December 16, 2011, at which time Treutel moved for a directed verdict under Rule 50 of the Mississippi Rules of Civil Procedure. The grounds for the motion were that Trapani had failed to prove they had suffered any damage that was proximately caused by the acts of Treutel. More particularly, Treutel argued that even if the amount of windstorm coverage under their policies had been for the amount which Trapani claimed they requested, Trapani failed to produce sufficient evidence to prove they would have recovered any more insurance proceeds than they, in fact, collected.[7] The trial judge agreed, and granted the motion dismissing the Complaint.[8]

A final judgment on the directed verdict was entered on December 16, 2010. On January 14, 2011, Trapani timely filed a Notice of Appeal to this Court.[9]

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[4] Tr. 10-12.

[5] Tr. 73-74, 78-79, 82, 97-101, 104-106.

[6] Tr. 267-268.

[7] Tr. 283-304.

[8] Tr. 305-306.

[9] R. 103.

Statement of Facts.

The Agency and/or its predecessor, has been serving clients in Bay St. Louis and Hancock County, Mississippi, since 1924. David Treutel served as President of the Agency and was an experienced insurance agent and consultant. He began working full time for the Agency in 1983, after working for a short time as an accountant for a national accounting firm.[10] The Agency was an independent agency, which allowed it the flexibility of placing insurance coverage for their clients with any one of a number of companies, and to fashion insurance coverage to meet the particular needs of each client.[11]

Beginning in 1994, Treutel wrote the insurance coverage for the restaurant owned by Trapani. Ames Kergosien, an employee of Treutel, was the agent servicing the Trapani account. During the summer of 2004, Treutel was advised that the company providing windstorm coverage for Trapani would be withdrawing from the Mississippi market and would no longer write the coverage on Trapani's business. Treutel then began to look for another company to provide coverage. Treutel found coverage for Trapani through XL Specialty Insurance Co. (hereinafter "XL"), a surplus lines company. Treutel prepared and submitted to XL a request for a quotation for coverage from XL.[12] At that time, Trapani also had coverage with Safeco Insurance Co. insuring Trapani against fire and other risks, except windstorm, for the building, personal property and loss of business income in the amounts of $153,000.00, 75,300.00 and $81,000.00, respectively.[13]

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[10] Tr. 207-209.

[11] Tr. 212-213.

[12] The actual title of the document was a "Detail Data For Quote Number 35683". Tr. 213-218, Exhibit D-1.

[13] Exhibit P-3. Although referred to throughout the trial as Safeco, the policy was actually issued by American States Insurance Company, a Safeco subsidiary.

On November 12, 2004, Jolynne Trapani signed an application for coverage with XL based upon the previously submitted request. The application requested coverage in the amount of $149,477.00 for the building, $76,794.00 for the personal property in the building and $35,000.00 for loss of business income. Above Trapani's signature was the notation that providing false or inaccurate information was a crime and that the representations on the application were, in fact, true.[14] On December 1, 2004, a letter summarizing the coverage and advising Trapani that they had no flood coverage, was sent to them by Ames Kergosien.[15]

During the summer of 2005, Jolynne Trapani met with Treutel on three or four occasions to review the limits of coverage on the business. Throughout these discussions, the premium cost for the increased coverage was of concern to Jolynne Trapani. All of the coverages were discussed, including those provided by the Safeco fire policy, as well as those provided by the XL policy.[16] Because Safeco was an admitted company, Treutel had the authority to bind coverage immediately. More importantly, Treutel had access to the premium rates so that they could provide Trapani with the amount their premiums would increase for any requested increase in coverage. On the other hand, XL was a non-admitted or surplus lines company. Treutel had no authority to bind coverage for XL, and could not provide Trapani with the amount of any premium increase as a result of an increase in the coverage. Treutel would have to submit a request for the increased coverage to XL through a third-party broker, and if XL accepted the increase, XL would then send Treutel confirmation of the change, along with an invoice for the

[14] Exhibit D-1.

[15] Tr. 222-223; Exhibit D-3.

[16] Tr. 226-232.

increased premium. Until receipt of the invoice, Treutel would not know how much the premiums would increase, and could not advise Trapani of the size of the premium increase.[17]

As a result of these meetings, the limits of coverage under the fire insurance policy were increased to $150,000.00 for personal property and to $200,000.00 for loss of business income. The limit of coverage for the building structure was not increased. The coverage under the XL windstorm insurance policy was increased from $35,000.00 to $200,000.00 for loss of business income, but the limits of coverage for the building and for the personal property were not increased. Dave Treutel testified that these increases were the only increases in coverage that were requested by Trapani. He specifically denied that they requested increases to $300,000.00 for loss of business income, $150,000.00 for loss of personal property and $300,000.00 for loss of the building structure.[18]

As a result of these discussions, Trapani also purchased flood insurance for the first time. They purchased coverage in the amount of $100,000.00 on the building and $100,000.00 on the personal property. In order to purchase the flood insurance, Jolynne Trapani signed and submitted to the National Flood Insurance Program an application which represented that the replacement value of the building structure was $153,600.00. The application was submitted on July 8, 2005.[19]

On July 18, 2005, Tammy Garfield, an employee of Treutel, sent Trapani copies of the endorsements to the Safeco policy. These endorsements increased the coverage for personal property to $150,000.00 and increased the coverage for the loss of business income to $200,000.00. It did not include any increase in the coverage for the building. Treutel did not

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[17] Tr. 219-222; 237-238.

[18] Tr. 231-242; 245-246; 248-249.

[19] Tr. 143-148, 231-236; Exhibit D-5.

receive a response or inquiry from Trapani regarding these endorsements, despite the fact that Trapani later claimed they requested increases greater than those made by the endorsements.[20]

On August 26, 2005, Garfield sent another memo to Trapani. This memo transmitted a copy of the endorsement to the XL policy. The XL endorsement increased the coverage for loss of business income to $200,000.00 and did not include any increases in coverage for personal property or for the building.[21] August 26, 2005, was the Friday before Hurricane Katrina made landfall. On that day, documents relevant to Trapani's homeowner's coverage were hand delivered to the restaurant. Treutel would frequently hand deliver documents to Trapani if someone from the office was going to or near the restaurant. However, Treutel did not have a personal recollection of whether the August 26, 2005, memo was mailed or whether it was delivered with the homeowners' documents.[22]

On August 29, 2005, Katrina came ashore and Bay St. Louis was at or near the eye of the storm. Trapani's restaurant was totally destroyed.[23] It is undisputed that the destruction of the restaurant was by a combination of wind and water (waves, wave action or storm surge). Trapani was paid the policy limits under both the windstorm and flood coverage. Specifically, they were paid $100,000.00 for damage to the structure under the flood policy, $100,000.00 for personal property under the flood policy; $200,000.00 for loss of business income under the XL policy,[24] $76,794.00 for loss of personal property under the XL policy, and $149,477.00 for damage to the structure under the XL policy. They also received $10,000.00 for loss of

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[20] Tr. 236-241; Exhibit D-6; Exhibit D-7.

[21] Tr. 241-242; Exhibit D-8.

[22] Tr. 152-155, 242-246.

[23] Tr. 55-56.

[24] Exhibit D-12; Tr. 128.

inventory under the Safeco policy. The total amount received was $636,271.00, of which $426,271.00 was paid under the XL policy.[25]

On December 2, 2005, Trapani filed suit against Treutel claiming that, during the meetings with Dave Treutel in June and July of 2005, they requested that the coverage under the XL policy be increased to $300,000.00 on the structure, $300,000.00 for loss of business income, and $150,000.00 for loss of personal property.[26] Treutel denied those allegations, and contended that he obtained all of the coverage that was requested.[27]

During the course of the trial, Trapani called as witnesses Jolynne Trapani, who testified that she requested the increased limits; Dave Treutel, who testified that she did not request any limits greater than what he had provided; and Pete Quave, who was presented as an expert in insurance agency operations and procedures. Counsel for Treutel objected to Quave's qualifications.[28] Quave's testimony was not heard by the jury. It was excluded by the trial court on the ground that Quave had insufficient education and training in the sale of property and casualty insurance to qualify as an expert, and for the further ground that the case was not one where expert testimony was necessary to assist the jury in understanding the issues.[29]

Trapani sought to establish their damages through the testimony of Jolynne Trapani and with several documents. Among the documents proffered were: a Disaster Business Loan Application (hereinafter "SBA Application") from the U. S. Small Business Administration; a Tax Asset Detail list; and a schedule of the daily gross sales for the period of January, 2005,

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[25] The amounts received were calculated from the testimony of Jolynne Trapani covering pages 47-56 and Exhibit P-21. More importantly, Trapani admitted in their brief that they received the limits of the flood insurance ($200,000.00) and the limits of the windstorm coverage through XL as written in Exhibit D-2. (Brief of Appellants, pp. 4-5).

[26] R. 3-5.

[27] R. 10-14.

[28] Tr. 263-269.

[29] Tr. 267-268.

through December, 2006.[30] They also proffered the testimony of Jolynne Trapani that, historically, the business incurred costs of goods sold, costs of labor, and other expenses in an amount equal to two-thirds (2/3) of the amount of their gross sales, with their gross profit being one-third (1/3) of their gross sales. She produced no documentation to support these estimates.[31] Upon objection by Treutel, the court refused admission of the documents in their proffered form and also allowed the admission of Exhibits P-15 and P16 after the redaction of certain information which the court found to be inadmissible.[32] The court also sustained an objection by Treutel to testimony by Jolynne Trapani as to what she was told by a contractor would be the cost of replacing the restaurant structure on the ground that it was hearsay, and excluded the testimony regarding the usual amount of expenses and profit.[33]

When Trapani rested, Treutel moved for a judgment as a matter of law pursuant to Rule 50. The circuit judge granted the motion and dictated his findings and opinion into the record. Judge Clark stated that the basis for his ruling was that Trapani had failed to prove their damages. He explained that the maximum amount that Trapani could recover from all sources, flood insurance as well as wind storm, was the value of the property immediately before the loss. It was the trial judge's opinion that they had not presented admissible evidence which established that the value of the property, both real and personal, and the amount of business income loss exceeded the total amount of insurance money that they had recovered from all sources.[34]

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[30] Exhibits P-15, P-16, P-17, P-18 and P-19.

[31] Tr. 65-66.

[32] These exhibits then became Exhibits P15 and P16 for Identification, and Exhibits P-18 and P-19 in evidence in their redacted form.

[33] The rulings on the evidence and the objections to these three documents were the result of a lengthy hearing and proffer outside the presence of the jury. Tr. 59-106.

[34] Tr. 305-307.

SUMMARY OF THE ARGUMENT

This is a simple negligence case. As a plaintiff, Trapani had the burden of presenting evidence to support the four essential elements of a negligence claim: duty, breach, proximate cause and damages. Trapani failed to carry that burden. When the evidence they presented is viewed in a light most favorable to Trapani, there was no set of facts under which Trapani proved that they suffered any damage as a proximate cause of any act or failure to act by Treutel. Without proof of damages, they are missing an essential element of their claim.

It was undisputed that Trapani received $100,000.00 from their flood insurance carrier for flood damage to the building and $149,477.00 from XL for wind damage to the building, for a total of $249,477.00. It was undisputed that Trapani received $100,000.00 from their flood insurance carrier for damage to the personal property and $76,794.00 for a total of $176,794.00. Also, it was undisputed that Trapani received $200,000.00 for loss of business income. To prove their damages, it was first necessary for Trapani to present admissible evidence that had the limit of coverage on the building, personal property, and the loss of business income been increased to the amounts which they claimed to have requested, and that on the date of the loss, the actual cash value of the building and the personal property as determined by the terms of the XL policy, was greater than $249,477.00 and $176,794.00, respectively. Then they had to establish how much more than those values they would have recovered as damage from windstorm. However, they failed to produce any admissible evidence that would support an award of damages in excess of the amount of insurance proceeds they had already received. Therefore, they failed to produce any evidence that they sustained any damage or loss as a proximate result of any act of or failure to act by Treutel. Likewise, they had the burden of proving that they would have recovered in excess of $200,00.00 for loss of business income, which they failed to do. There

was no evidence from which a jury could reasonably or logically reach any verdict other than one in favor of Treutel.

The exclusion of part of Exhibits P-15 and P-16 and the exclusion of P-17 in its entirety must be affirmed unless found to be an abuse of discretion. The parts of P-15 and P-16 which were ordered redacted by the trial judge were properly redacted on the grounds of hearsay and relevancy, respectively. While P-15 was, in part, a business record, Page 5 was not within the definition of the business records exception of Rule 803(6). The content was not the result of the personal knowledge of the person creating the document as required by Rule 803(6), and, therefore, was improper hearsay. Exhibit P-16 was offered to prove the value of the lost business personal property. The pages of the exhibit which were excluded contained items that were not personal property, but which were part of the building or structure. Therefore, they were not relevant. As to Exhibit P-17, it was merely a listing of gross sales. The XL policy in question provided for the recovery of "net income" as evidenced by certain documents, not gross sales. Trapani did not produce any documentation to support their expenses. Despite acknowledging that they had documentation of the expenses in the possession of their accountants, they never produced the records. Instead, they tried to establish their expenses by oral testimony of the historical average of their gross expenses grouped into two categories: labor expense and costs of goods sold, and other expenses. Excluding that testimony as hearsay was clearly proper.

The exclusion of the expert testimony of Pete Quave to establish liability was proper for two separate reasons. First, this dispute centered on whether Trapani told Treutel to increase their insurance coverage to certain limits. Resolution of that dispute does not require opinion testimony from an expert. In other words, it is not such a complex issue that it cannot be understood by a lay juror. The second reason for the exclusion of Quave's testimony is because

Quave had no specialized education or training in selling property and casualty insurance or securing such coverage for a customer. He never sold such coverage, was never licensed to sell such coverage, and never worked in a property and casualty sales office. Therefore, it was not an abuse of discretion for the trial judge to exclude his testimony.

Finally, the issue of wind versus water damage was an essential element of Trapani's damages. Under Mississippi Law, Trapani was only entitled to recover as damages the amount of any loss that would have been paid under the XL policy, over and above the amount that they were actually paid. The XL policy covered only damage to their business caused by the peril of windstorm, and excluded damage caused by the peril of water. It was admitted that their loss was caused by a combination of wind and water. Therefore, to determine the amount of their loss, Trapani had to establish the amount of their loss caused by wind.

ARGUMENT

I. The trial court correctly and properly directed a verdict for the Defendants/Appellees because of the failure of the Plaintiffs/Appellants to establish that the actions of the Defendants/Appellees proximately caused any damages sustained by the Plaintiffs/Appellants.

This case requires the analysis of insurance policies and issue of wind versus water to establish damages. However, that does not change the fact that it is simply a case involving a claim of negligence. Trapani had the burden of proving the four basic elements necessary to any negligence case: duty, breach, proximate cause, and damages. That is, they had the duty of proving that they requested Treutel to increase their insurance coverage for certain perils to a particular amount; that the coverage was available and that Treutel failed to secure the coverage; that as a proximate cause of that failure they suffered a loss; and the specific amount of the damages which they sustained. ***Mladineo v. Schmidt*, 52 So. 3d 1154, 1164 (Miss. 2010); *Lovett v. Bradford*, 676 So. 2d 893, 896 (Miss. 1996); *McKinnon v Batte*, 485 So. 2d 295, 297**

(Miss. 1985); *Security Insurance Agency, Inc. v. Cox*, 299 So. 2d 192, 194 (Miss. 1974). A failure by Trapani to produce sufficient evidence which, when viewed in a light most favorable to them, established any one of these elements warranted the granting of a directed verdict. In order to prove their damages, Trapani had to prove not only how much coverage they requested, but they also had to prove that they sustained damage from a risk that was covered by the subject policy, and how much they were entitled to recover for their loss under the terms of the policy. ***See, Simpson v. M-P Enterprises, Inc.*, 252 So. 2d 202, 207 (Miss. 1971); *Atlas Roofing Manufacturing Co., Inc. v. Robinson & Julienne, Inc.*, 279 So. 2d 625, 628 (Miss. 1973).**

Trapani complains that, as an owner of the damaged property, Jolynne Trapani should have been allowed to testify as to the value of the lost building, personal property and business income, and that would have been sufficient to overcome the motion for a directed verdict.[35] However, their argument mischaracterizes Ms. Trapani's testimony. Her testimony was not as to the value of the property or the business loss. It was presented to establish the replacement cost necessary to rebuild the structure or replace the personal property. In this regard, Trapani's argument ignores the language of the XL policy which governs what evidence is relevant to prove their damage. Under the terms of the policy they were not entitled to recover the so called value of the property. They were only entitled to recover the "actual cash value" as defined under the policy.[36] That is, the properly calculated replacement cost less the value of the depreciation applicable to the property. As to the loss of business income, they were only entitled to recover the properly documented "net income" as that figure is defined in the policy.

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[35] Of the authorities cited by Trapani in support of this issue, none of them involved evidence used to establish the amount recoverable under a property and casualty insurance policy and therefore they are not persuasive.

[36] As Judge Clark correctly noted in his ruling, the actual value of the property immediately before the loss set the limit of recovery from all sources. ***See, Ross v. Metropolitan Prop. and Cas. Ins. Co., et al.***, 2008 WL 4861698 at *4-6 (S. D. Miss., Oct. 24, 2008); ***Sanders v. Nashville Mut. Ins. Co.*, 5003239 at *2 (S.D. Miss. Nov. 20, 2008).**

The XL windstorm policy provided coverage for the damage to the building or structure, the damage to the personal property in the building, and the loss of business income from direct physical damage sustained as a result of a windstorm. The policy excluded losses sustained as a result of water or storm surge.[37] Under the terms of the XL policy, the "Buildings(s) and/or Structure(s)", "Business Personal Property" and "Loss of Business Income" were considered to be "Covered Property". The policy also provided that:

> **Article VIII Valuation**
>
> We shall not pay more than the Actual Cash Value of the Covered Property at the time of loss or damage from a covered Cause of Loss. The loss or damage shall be ascertained according to such Actual Cash Value. Actual Cash Value will be determined based on the replacement cost of the property less depreciation (however caused) but in no event shall such amount exceed what it would then cost to repair of replace the Covered Property with material of like kind and quality at the same location, nor the amount for which the Named Insured may be liable.

Under this provision of the policy, XL agreed to pay only for damage sustained by wind, not storm surge, and would pay only the amount equal to the replacement cost of the same structure using "materials of like kind and quality" minus depreciation. Therefore, in order to establish their damages under Mississippi law, Trapani had to establish the cost of rebuilding a masonry structure of 2,000 square feet at the same location, and then subtract from that figure the value of the depreciation applicable to the structure that existed on August 29, 2005.[38] The "covered loss" would be an amount equal to the difference. Trapani had a similar burden with regard to

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[37] Under Article 1 of the policy, the "Insuring Agreement" insured against "direct physical loss or damage to Covered Property from any external cause" except for causes that were excluded. Article XI, Clause 3 excluded damage from weather, including wind, hail, wind driven rain, rain . . .waves, wave wash and wave action." This would have excluded any loss claimed by Trapani in this action. However, by Wind and Hail Coverage Endorsement Form 204, the exclusions for damage from "wind and hail" were deleted. The exclusion for damage from waves, wave wash and wave action as well as weather generally, remained in effect. (Exhibit D-2). Therefore, Trapani had coverage for "direct physical loss of damage" from wind.

[38] On Exhibit D-2, Jolynne Trapani certified to XL that the building was built in 1945, was 2,000 square feet in size, and was of masonry construction.

the business personal property. That is, they had to identify the items lost or damaged by the wind, establish the cost to repair or replace those items, and then deduct from that figure the depreciation applicable to them. The evidence produced at trial wholly failed to meet that burden both as to the structure and as to the personal property.

The only admissible evidence produced by Trapani as to the replacement cost of the structure was the amount that Jolynne Trapani listed on the Request for Quotation submitted to XL and on the application for flood insurance. Those figures were $149,477.00 and $153,600.00, respectively. Trapani did proffer, as an attachment to P-15 for Identification, a written statement that was appended to their SBA Application in which they made a representation that the SBA told them it would cost $720,000.00 to replace the structure and that an unnamed contractor told them that the cost to replace the restaurant would be in excess of $1,000,000.00. However, upon Treutel's timely objection as to the relevancy and hearsay nature of that statement, it was excluded from evidence.[39] Even had the statement been admitted, it would have been insufficient to establish their damages. There is nothing in the statement to establish that the estimate was based upon a structure of the same size and built with the same or similar materials, and there was no evidence presented as to the amount of depreciation that would have been deducted from the replacement cost.[40] Therefore, Trapani failed to prove the actual cash value of the building at the time of the loss, which is all that they were entitled to recover under the policy.

Trapani's burden as to the loss of personal property was the same as for the loss of the building. It was incumbent on them to establish the items damaged and the extent of the damage

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[39] The exclusion of that document is the subject of Trapani's second assignment of error, which has been restated by Treutel as Issue 2(A). The propriety of the trial judge's ruling on that point is addressed *infra*.

[40] There is an admission in the record by counsel for Trapani that the replacement building was larger than 2,000 square feet. (Tr. 116-117).

caused by a covered peril. That is, they had to identify the items that were damaged as a result of wind, and the value of that damage. The formula for establishing the personal property loss was the same as for the structure. The loss was based upon the actual cash value of the personal property immediately before the loss on August 29, 2005. This would have been the replacement cost less the value of the depreciation. While Trapani did produce a detailed list of items that were contained in the restaurant at the time of the storm, and while there was no evidence to dispute that the items were a total loss, Trapani produced no evidence as to the replacement cost of the items or the value of the depreciation. However, the trial court did admit Exhibit P-19[41] which was identified as a Tax Asset Detail list, containing information regarding the initial cost of the listed items and the year they were placed in service. The value of the listed items, at the time of purchase and without any deduction for depreciation, was $172,226.44. It was this amount which Trapani claims they were entitled to recover under the Business Personal Property coverage of the XL policy. Regardless of whether it was proper to admit P-19 the evidence established that the Trapanis received insurance payments in an amount in excess of the value of the items listed on P-19 They were paid $100,000.00 by their flood insurance carrier for the loss of business personal property and $76,794.00 by XL.[42] Even had they asked for and received $150,000.00 in Business Personal Property coverage from XL, they could not have recovered in excess of the value of the property as established by the evidence. That is, they could not have recovered in excess of $172,226.44. Therefore, they failed to prove by a preponderance of the evidence that they suffered any damage because the coverage limit for Business Personal Property was not increased to $150,000.00.

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[41] This was Exhibit P-16 after the redaction of certain pages.

[42] Exhibit D-12, Tr. 94.

The coverage for the loss of business income is found in an endorsement to the policy. The "Loss of Business Income; Rental Value; Extra Expense Endorsement Form 300" attached to the XL policy. The language of that endorsement governs the payment of the loss of business income, and defines what evidence is necessary to establish a business income loss. It provides:[43]

> II. We will indemnify and pay You for actual loss of Business Income and Rental Value which You sustain due to the necessary suspension of Your Operations (as defined herein) during the Period of Restoration (as defined herein). The suspension of Your Operations must be caused by direct physical loss or damage to Covered Property at a Covered Location caused by a covered Cause of Loss occurring during the Policy Period.
>
> A. Business Income as used herein means:
>
> 1. Net Income (net profit before taxes, a positive amount; or net loss before taxes, a negative amount) that would have been earned or incurred and had such physical loss or damage not occurred; plus
>
> 2. Continuing normal operating expenses incurred by You, including payroll, after such physical loss or damage.
>
> 3. The amount of Your Business Income will be determined based upon:
>
> a. The Net Income of Your Business before the direct physical loss or damage occurred;
>
> b. The likely Net Income of Your Business if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact

[43] Exhibit D-2.

of the covered Cause of Loss on customers or on other businesses;

c. The actual operating expenses You incur, including payroll expenses, necessary to resume normal Operations with the same quality of service that existed just before the direct physical loss or damage; and

d. Other relevant sources of information, including but not limited to:

i. Your financial records and accounting procedures;

ii. Bills, invoices and other vouchers, and

iii. Deeds, liens or contracts.

Despite admitting that accounting records which would have clearly documented all of the income and expenses necessary to establish the elements of a claim for loss of business income were available, Trapani neither produced them prior to trial, nor did they offer them into evidence.[44] Instead, they offered a list of their "gross sales" and sought to establish the expenses and profit through the oral testimony of Jolynne Trapani, without any documentary support, that historically their labor expense was equal to one third (33 1/3%) of their gross sales, that their cost of goods sold and other expenses were historically equal to one third (33 1/3%) of their gross sales, and that their profit was equal to the remaining one third (33 1/3%).[45] The trial court properly excluded that evidence. Trapani then sought to rely upon estimated projected income figures set out in their SBA Application. However, that figure represented their projected costs over the next year and did not represent past income. Nevertheless, the total income in their projection was only $151, 475.00, which is almost $50,000.00 less than the amount they were

[44] Tr. 68-74.

[45] Tr. 54-66; 78-82.

paid by XL for loss of business income. It is undisputable that Trapani wholly failed to produce any evidence of their "net profit" which was necessary to support a claim for loss of business income under the terms of the XL policy.

II. The trial court correctly excluded all or parts of Exhibits P-15, P-16 and P-17 by redacting the same before admission of the remaining part of the exhibits into evidence.

Trapani next assigns as error, the trial judge's decision to exclude all or part of three separate exhibits. The standard for reviewing a trial court's rulings excluding part or all of each document is a two-step process. It is settled law in this state that the trial court has broad discretion in ruling on the admissibility of evidence, and on appeal the decision will not be reversed unless there is both an abuse of discretion and the admission or exclusion of the evidence affects a substantial right of one of the parties. ***E.g., Terrain Enterprises, Inc. v. Mockbee,* 654 So. 2d 1122, 1131 (Miss. 1995).** ***See also,* Miss. R. Evid. 103(a).**

A. The trial court properly redacted Page 5 of Plaintiffs' Exhibit P-15 as hearsay.

Treutel objected to the entirety of Exhibit P-15[46] on the ground of hearsay, and further objected to the admission of Page 5 of the exhibit, on the additional ground of relevancy and improper foundation.[47] Exhibit P-15 is Trapani's SBA Application. Page 5 is an attachment to that application wherein Trapani states, without any supporting documentation, that the SBA has estimated the cost to rebuild the restaurant to be $720,000.00 and that an unnamed contractor

[46] P-15 became Exhibit P-15 for Identification. It was mislabeled in the record as P-17 for Identification. The correction was noted by the clerk on the Exhibit List filed when the exhibits were filed with the Record on Appeal. The redacted exhibit was admitted as P-19 in evidence.

[47] The initial objection was at Pages 88 through 89 of the transcript. At Page 104, Treutel objected to Page 5 of the exhibit for the additional ground that there was nothing in the exhibit to indicate that the cost to reconstruct the building was the cost of replacing a similar building of 2,000 square feet, which is the starting point for the determination of Actual Cash Value in the policy. Essentially, this is an objection on the ground of relevancy.

provided an estimate of the cost to rebuild the restaurant to be in excess of $1,000,000.00.[48] There was no proper foundation for this document and it is both irrelevant and hearsay.

We must begin with the language of the policy to determine what XL would have been obligated to pay in order to then determine what is relevant.[49] Under the policy, Trapani would have been entitled to the actual cash value of the restaurant building as of the date of the loss. The actual cash value is calculated by first determining the cost to replace the restaurant building with a 2,000 square feet building using similar material. There is nothing in the testimony of Jolynne Trapani to establish that the estimated cost in the redacted document is the cost of reconstructing a similar building. In fact, there is an admission in the record that the replacement building is neither the same as, nor similar to, the building that was destroyed.[50] Furthermore, there is no evidence of the amount of depreciation that had to be deducted from the replacement costs in order to arrive at the actual cash value.

Even if relevant, the attached statement contained inadmissible hearsay. It was merely a restatement of what someone told the Trapanis. As such, it fits the classic description of hearsay. It is an obvious out-of-court statement used for the purpose of proving the truth of the matter (the estimated costs) asserted. **Miss. R. Evid. 801(c).** ***See, Koestler v Koestler,*** **976 So. 2d 372, 380-82 (Miss. Ct. App. 2008):** ***National Fire Ins. Co. of Hartford v. Sladen,*** **227 Miss. 285, 85 So. 2d 916, 918 (1956).** (Where cost of repairs are relied on as part of the measure of damages, the person making the estimated cost must testify in order for the evidence to be admissible)

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[48] Exhibit P-15; Tr. 103-104.

[49] Miss. R. Evid, 401 defines "Relevant Evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence." The only evidence of consequence to the determination of the amount of the loss is evidence that would tend to establish a loss as defined in the policy. That is, the replacement cost of a building of similar size constructed with the same or like materials. Any thing else is not relevant.

[50] Tr. at 116-117.

Unless there is some applicable exception, the letter was properly excluded, even if relevant. Trapani claims that Exhibit P-15 was a "business record" and subject to the exception of **Rule 803(6).**[51] Even though part of a document is admissible as a business record, the entire document is not necessarily admissible, and it is proper to "redact" any part of the document that does not satisfy the requirements of Rule 803(6). ***See, Kroger Company v. Scott,* 809 So. 2d 679, 689 (Miss. Ct. App. 2001).** The trial court in this case redacted Page 5 because of the content. Trapani did not have personal knowledge of the estimates set out on Page 5; did not know what information was used to arrive at the estimate; and did not know how the estimate was calculated. Trapani merely had a figure that was given to them by someone else. It was nothing more than unreliable hearsay, and did not satisfy the criteria to be an exception to the hearsay rule.

In ***Scott,*** the Court of Appeals affirmed the exclusion of two pages of a three-page incident report prepared by a store manager. The Court of Appeals held that the trial court properly found that part of the report was a business record and that only that part could be admitted. The Court found that two handwritten pages prepared by the manager and containing the results of his investigation were properly excluded because in order for the document to be admissible under the business record exception, the "source of the information had to be an informant with knowledge who is acting in the course of the regularly conducted activity." **Miss. R. Evid. 803(6), Comment.** The Court of Appeals then went on to say that the manager

> did not personally witness the accident, but only the end result as well as the safety condition of the store prior to the accident. So, much of the context provided on the second and third pages of the incident report including his opinion of negligence were hearsay due to the fact that [the manager] was not the original source of the information. **809 So. 2d at 689.**

[51] **Miss. R. Evid. 803(6).**

The information which was redacted from Exhibit P-15 was the same as that which was excluded from the incident report in ***Scott***. Neither of the Trapanis was the original source of the information. As a result, the trial court properly excluded page five and the decision was not an abuse of discretion.

B. The trial court properly determined that certain items on Exhibit P-16 were part of the dwelling coverage and not personal property and redacted them from Plaintiffs' Exhibit P-16.

A review of the decision to redact certain information from P-16 must also start with the language of the insurance policy. Article IV Coverage B defines Business Personal Property:

> **Business Personal Property** [sic] defined as Stock(as defined herein); materials and supplies usual or incidental to the Operations of the Named Insured is legally liable; furniture, fixtures, equipment and machinery, that are the property of the Named Insured, and like property of others in the care, custody or control of the Named Insured and for which the Named Insured is legally liable. Business Personal Property is covered so long as it is located at the Covered Location.

The items redacted were two pages of "Leasehold Improvements."[52] These items would have been covered by Coverage A for Building(s) and/or Structure(s) which was defined as:

> **Building(s) and/or Structure(s),** including additions and extensions permanently attached to the building(s) or structures(s); and all property belonging to and constituting a permanent part of said building(s) and/or structures(s) and pertaining to the service, upkeep, maintenance and operation thereof.

The items redacted were most often identified simply as "Leasehold Improvements;" however, those that were specifically identified were items such as "plumbing," "electrical work," "fence," "slab," "flooring," "steel roof," and "a/c system and vents."[53] These items are clearly within the

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[52] Interestingly, when she applied for coverage from XL, Jolynne Trapani represented that leasehold improvements, defined in the application as "Tenant Improvements and Betterments," had a value of $0. Exhibit D-1.

[53] Also excluded was a category labeled "intangibles" which does not fall within the definition of any coverage.

definition of the Building(s) and/or Structures(s) coverage of the policy, and therefore they are not part of the Business Personal Property Coverage. The trial court excluded them for that reason. In other words, the Court found them to be irrelevant. It was therefore, proper for the trial court to redact the inadmissible information. ***See, United States Fidelity and Guaranty Company of Mississippi v. Martin,* 998 So. 2d 956, 967-68 (Miss. 2008)** (Based upon relevancy, the Supreme Court affirmed redaction of part of an exhibit covering the costs of similar repairs performed after two separate events only one of which was covered by the policy sued upon).

C. The trial judge properly excluded Plaintiffs' Exhibit P-17 as not being relevant, inadmissible hearsay, and not being the best evidence of business income as defined in the policy covering the Plaintiffs' business.

It must be restated that the Trapanis were paid $200,000.00 for loss of business income under the XL policy. At trial, they sought to recover another $100,000.00. The only documentary evidence offered as to their loss of income was Exhibit P-17. This exhibit was identified as a schedule of the gross sales of the restaurant for the period January 2005 through November 2006. However, the policy does not allow recovery for "loss of gross sales." It covers loss of "net income." In order to arrive at net income, it was necessary to deduct various expenses from the "gross sales". Trapani produced no documentary evidence of their expenses. They sought to establish their expenses only through oral testimony from Jolynne Trapani. Her proffered testimony, unsupported by any documentation, was that historically their profit was an amount equal to one-third (1/3) of their gross sales. This testimony was pure speculation and hearsay that was inadmissible. ***See, United States Fidelity and Guaranty Co., v. Whitfield,* 355 So. 2d 307, 308-09 (Miss. 1978); *Sladen,* 85 So. 2d at 918.** She contended that all of her records of the expenses that were incurred in the operation of the business were lost when the building was destroyed during the hurricane. However, when cross-examined during the proffer, Ms. Trapani admitted that records of the receipts and expenses were given each month to her

accountant in order for the accountant to prepare the business and personal tax returns and to prepare other financial statements and reports. Yet she did not produce them, despite having been requested to do so by Treutel during discovery.[54] Without documentation of the expenses that were to be deducted from the gross sales, the gross sales were not relevant. Furthermore, the gross sales report was not the best evidence of net income available to the Trapanis.

Mississippi jurisprudence has long acknowledged that, when seeking to prove an element of damages that is proven by documents, such as loss of profit, the best evidence of the contents of the document must be offered. ***E.g., National Cash Register Co. v. Griffin,* 192 Miss. 556, 6 So. 2d 605, 606-07 (1942); *Eastland v. Gregory,* 530 So. 2d 172, 174-75 (Miss. 1988).** The Mississippi Rules of Evidence have preserved this rule, known as the "best evidence rule." **Miss. R. Evid. 1002, Comment.** The "best evidence rule" requires "a party seeking to prove damages to offer into evidence the best evidence available [of] each and every item of damage. If he has records available they must be produced. While certainty is not required, a party must produce the best that is available to him." ***Eastland,* 530 So. 2d at 174.**

The approach taken by Trapani to prove their lost income is similar to that which was condemned by the Fifth Circuit in ***Harrison v Prather,* 435 F. 2d 1168 (5th Cir. 1970) *cert. denied* 404 U.S. 829, 92 S. Ct. 67 (1971).** In *Harrison*, the plaintiff sought to prove lost profits from the sale of a herd of cattle by introducing the invoice for the purchase of the cattle, and then testifying as to the usual and ordinary expenses that would have been incurred to raise them to an age and size to sell, subtracting from that figure the average number of calves that would die, and then calculate the amount that the surviving cattle would have brought at sale based upon his knowledge of the usual market price for such cattle. Except for the invoice evidencing the

[54] Tr. 68-74.

purchase of the cattle, the witness had no documentation of the expenses or the sale price. Applying Mississippi law,[55] the Fifth Circuit found that the admission of such evidence violated the best evidence rule, and noted that, on retrial, such evidence should not be admitted. ***Id. at* 1174-76.** The oral testimony of Jolynne Trapani as to the business' expenses and the estimated net profit was no different than the testimony found to be inadmissible in ***Harrison.*** Particularly, there was available to Trapani more accurate and credible documentary evidence in the form of the business' accounting records to which they admittedly had access, but which were never produced.

There was no abuse of discretion on the part of the trial judge when he excluded P-17 and the oral testimony of Ms. Trapani.

III. The trial judge properly excluded Plaintiffs' expert because he lacked proper qualifications to testify on the proffered subject matter and because even if qualified, his testimony would not have assisted the jury.

When expert testimony is proffered, the first decision that the trial judge must make as the gatekeeper is not whether the expert is qualified or whether his methodology and opinions satisfy the appropriate *Daubert* standard, but whether the expert's testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." **Miss. R. Evid. 702.** Simply put, the trial judge must decide whether the nature of the case requires the presentation of expert testimony. If it is determined that such testimony will not assist the jury or is not necessary for the jury to reach a decision, then expert testimony should not be admitted.

Although Treutel objected to the testimony of the expert proffered by Trapani on the ground that he lacked the requisite qualifications to render an opinion on insurance agency operations, the learned trial judge also noted that expert testimony that would not assist the trier

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[55] The Court found that both the Mississippi rule and the federal rule were essentially the same. ***Harrison,* 435 F.2d at 1174.**

of fact should not be admitted.[56] That is, he concluded that expert testimony was not necessary. His decision is supported by the holding in ***Lovett,* 676 So. 2d 893.** In **Lovett,** the Mississippi Supreme Court held that it was not error to exclude expert testimony in a suit against an insurance agent over the failure of the agent to obtain proper coverage. The court held that in cases that do not involve testimony regarding underwriting, actuarial tables or something similarly complicated, but which only place in issue discussions of a clients application for insurance coverage, the case is one in which a layman can understand "based on common sense and practical experience." ***Id. See also, Imperial Trading Co., Inc. v Travelers Prop. and Cas. Co. of America,* 654 F. Supp. 2d 518, 520-22 (E.D. La. 2009)** (Excluded testimony of proffered expert on issue of bad faith in the adjustment of a Katrina claim on the ground that the issue was not so complicated that it required expert testimony.)[57]

Even should this Court determine that this was a proper case for expert testimony, the trial court properly excluded Mr. Quave as not qualified on the subject matter of this case. The decision of the trial court to exclude the testimony of an expert witness because he lacks the necessary qualifications is judged against a standard of abuse of discretion and will be reversed only if it is found to have been arbitrary and capricious. ***Tucker v. Rees-Memphis, Inc.,* 17 So. 3d 122, 127-128 (Miss. App. 2009).** (Exclusion of the testimony of mechanical engineer regarding the adequacy of a warning on industrial sanding equipment was proper since he had no training or experience regarding the adequacy of warnings). This case involved the application

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[56] The trial judge stated that, "In order to be qualified as an expert witness in a certain field, the testimony of a witness must be *relevant and reliable.* The witness must have sufficient training to render such an opinion, and such opinion *must be helpful to the trier of fact,* which is the jury in this case." (Emphasis supplied). (Tr. 267).

[57] The District Court found the expert qualified, but still excluded his testimony. Their holding on the expert's qualifications is in conflict with the Mississippi Supreme Court's decision in ***General Motors Acceptance Corp. v. Baymon,* 732 So. 2d 262, 272 (Miss. 1999)** However, that does not diminish the persuasive argument made by the District Court that the subject matter was not so complicated that a jury would need expert testimony to assist them.

for and securing of property and casualty coverage by an insurance agent. Nearly all of Mr. Quave's experience in the insurance industry involved the handling and supervision of claims. He had additional experience handling claims and suits against insurance companies with a plaintiff's law firm. He had no experience as a property and casualty agent. He had never held a property and casualty license in Mississippi or any state. He had never sold a policy of property and casualty coverage and had not secured such coverage for a customer. And, he never worked in a property and casualty office.[58] In ***General Motors Acceptance Corp. v. Baymon,* 732 So. 2d 262, 272 (Miss. 1999),** it was held to be error to allow a witness proffered as an expert to testify that a lender had overcharged a borrower for credit protection insurance and therefore received excessive commissions, when the witness had not sold the same or similar kinds of insurance for over 10 years and had never sold insurance in Mississippi.

It is clear that Quave did not possess the requisite knowledge, training and experience in the field of property and casualty sales and the operation of an office selling such coverage. Undoubtedly, the trial court did not abuse its discretion in excluding his testimony and his decision was not arbitrary and capricious under any standard.

IV. The trial judge properly required the Plaintiffs to prove the amount of damages sustained as a result of wind as opposed to the damages sustained as a result of water.

Trapani's final assignment of error sends us again to the language of the policy. The policy provides that it covers direct physical "loss or damage caused by wind or hail." They claimed that they requested Treutel to increase their limits of coverage for the structure from $149,477.00 to $300,000.00, for business personal property from $76,794.00 to $150,000.00 and for loss of business income from $35,000.00 to $300,000.00. Forty years ago, the Mississippi

[58] Tr. 263-267.

Supreme Court opined that when an insurance agent's neglect results in a failure to obtain requested coverage for a customer, and "where a loss is suffered by the intending insured, the courts have generally held that the damages should be equal to the amount that would have been due under the policy, provided it had been obtained." ***Cox*, 252 So. 2d at 207.** That is, the customer must show that had the policy issued with the requested coverage, the customer's loss would have been recovered under the terms of the policy, and the customer must prove the amount that would have been recovered for the loss. ***Robinson & Julienne, Inc.*, 279 So. 2d at 628.** This is not a case where Treutel failed to secure any coverage, or where Treutel secured the wrong type of coverage. Trapani claims that the result of the alleged failure on the part of Treutel was that there was a lower amount of coverage on the insured property than was requested. To recover additional losses it became Trapani's burden to prove how much more they would have recovered *under the terms of the policy.* If they failed to do so, then a directed verdict was in order.

In order to determine whether Trapani had proven their damages, it was first necessary for the trial court to determine how much Trapani would have been entitled to recover from XL under the terms of the XL policy, if the coverage limits had been increased to the level that Trapani claimed they requested. That is, they had to prove that they had a loss cause by a covered peril (windstorm); and that XL would have paid them for damage to their property from that peril an amount greater than they had already been paid. They could not recover for any damage that would not have been paid by XL, even if the increased limits had been obtained. That is, they would not be entitled to recover any damage that would have been excluded under the terms of the policy, i.e. flood. Therefore, the cause of the damage was a necessary element

of their proof, and the trial judge properly considered whether it was caused by a covered peril (wind), or by an excluded peril (water).

When damage is caused from both wind and water during a hurricane, it is now well accepted that the burden first falls on the insured to prove that there was damage from a covered risk, in this case wind and how much. If there is a claim that all or part of the damage is caused by an excluded peril, in this case water, then the party seeking the benefit of the exclusion, in this case Treutel, has the burden of establishing the amount of damage caused by the excluded peril. In order to prove their damages, Trapani had to prove or establish that the amount of their loss or damage caused by wind or hail exceeded the $249,477.00 which they were paid under the coverage for the structure, the $176,794.00 that they were paid for personal property, and in excess of the $200,000.00 that they were paid for loss of business income. ***Corban v. United Services Automobile Association,* 20 So. 3d 601, 618-19 (Miss. 2009); *Lunday v. Lititz Mut. Ins. Co.*, 276 So. 2d 696, 698 (Miss. 1973). *See also, Leonard v. Nationwide Mut. Ins. Co.*, 499 F. 3d 419, 429 (5th Cir. 2007)** Trapani received $100,000.00 for damage to the structure under the flood insurance policy and $100,000.00 for loss or damage to business personal property under their flood insurance policy. Once they had accepted benefits for a loss under their flood insurance policy, it became a judicial admission that the structure and personal property sustained storm surge or water damage in an amount at least equal to the amount of benefits which they had received. ***Sanders v. Nationwide Mut. Fire Ins. Co., Inc.*, 2008 WL 5120679 at *1 (S.D. Miss. Dec. 3, 2008); *Letoha v. Nationwide Ins. Co.*, 2007 WL 2059991 at *2 (S.D. Miss. July 12, 2007); *Ruiz v. State Farm Fire and Cas. Co.*, 2007 WL 1514015 at *5 (S.D. Miss., May 21, 2007); *Espinosa v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 276534**

at *1-2 (S.D. Miss. Jan. 30, 2008).[59] Therefore, Treutel carried the burden of proving damage or loss from the excluded peril. As is argued in greater detail in Treutel's rebuttal to Trapani's first assignment of error,[60] Trapani failed to produce any admissible evidence to establish that they suffered a loss from the peril of wind in excess of the amount that they were paid by XL. Consequently, they failed to prove that they sustained any damages.

CONCLUSION

As Plaintiffs, it was Trapani's burden to present to the Court sufficient evidence which, when examined in a light most favorable to them, established the four essential elements of a negligence claim. They wholly failed to produce enough evidence that would allow a reasonable juror to conclude that they would have recovered any more money from XL under any peril against which they were insured than the amount that they were in fact paid following Hurricane Katrina. They did not produce any evidence that could be remotely considered to have been relevant under the terms of the policy issued to them. As a result, they failed to present sufficient evidence that they sustained any damage which was proximately caused by any act or failure to act on the part of Treutel.

The evidence excluded by the trial court would not have changed the outcome. The exhibits, or parts thereof that were excluded, were properly excluded under the Mississippi Rules of Evidence. It was the failure of Trapani to produce and offer admissible evidence that led to the dismissal of their case. The issues were not complicated. They did not need expert testimony, and particularly from someone who had never sold property and casualty insurance and had never worked in an office that sold such insurance.

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[59] These are all insurance disputes arising out of Hurricane Katrina decided in the United States District Court for the Southern District of Mississippi under its diversity jurisdiction and applying Mississippi law.

[60] Brief of Appellee, *supra.*, 12-18.

For all the reasons cited herein, the Court should affirm the judgment of the Circuit Court of Hancock County, Mississippi.

RESPECTFULLY SUBMITTED, this the 24th day of August, 2011.

Treutel Insurance Agency, Inc. and David Treutel,
By and through Their Attorneys of Record

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APPENDIX

Not Reported in F.Supp.2d, 2008 WL 5003237 (S.D.Miss.)
(Cite as: 2008 WL 5003237 (S.D.Miss.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Mississippi,
Southern Division.
Billy Dale **SANDERS** and Judy Dianne **Sanders**, Plaintiffs
v.
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Defendants.

Civil Action No. 1:07CV988 LTS-RHW.
Nov. 20, 2008.

Earl L. Denham, Kristopher W. Carter, Dustin N. Thomas, Denham Law Firm, Ltd., Ocean Springs, MS, for Plaintiffs.

Christian D.H. Schultz-PHV, Kenneth S. Clark-PHV, Padraic B. Fennelly-PHV, Robert B. Gilmore-PHV, Kirkland & Ellis, LLP, Washington, DC, F. Hall Bailey, Janet McMurtray, Laura Limerick Gibbes, Watkins Ludlam Winter & Stennis, P.A., Jackson, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

L.T. SENTER, JR., Senior Judge.

*1 The Court has before it Nationwide Mutual Fire Insurance Company's (Nationwide) Motion for Judicial Estoppel [114]. This motion has two parts:

First, Nationwide asks the Court to find, as it has on many other occasions, that the plaintiffs' having accepted flood insurance benefits is a judicial admission that the insured property sustained flood damage at least equal to the benefits the plaintiffs collected. This part of Nationwide's motion will be granted.

Second, Nationwide asks the Court to find that the plaintiffs are estopped from presenting evidence that the insured building (the plaintiffs' dwelling and other structures) had a greater value at the time of loss than the value reflected in documents prepared in connection with the plaintiffs' Mississippi Development Authority (MDA) grant. This part of Nationwide's motion will be denied.

Basic Undisputed Facts

At the time of Hurricane Katrina, plaintiffs owned a home at 408 Graveline Road, Gautier, Mississippi. The plaintiffs' home and its contents were destroyed in the storm. Plaintiffs' Nationwide homeowners policy (number 63 23 MP 065 096) provides coverage limits of $199,400 (dwelling), $19,940 (other structures) $145,815 (personal property), and $39,880 (loss of use). Nationwide has paid, under this homeowners policy, $94,266.92 (check number 0077107779) for wind damage to the plaintiffs' dwelling and $6,271.77 (check number 00771077780) for wind damage to the plaintiffs' other structures. Nationwide has also paid $9,000 in additional living expenses, but that coverage has not yet been exhausted. There has been no payment under the homeowners policy for damage to the plaintiffs' personal property.

Plaintiffs' Standard Flood Insurance Policy (SFIP), also sold by Nationwide, provided limits of $108,900 (building) and $49,700 (contents). The flood insurance limits have been tendered by Nationwide and accepted by the plaintiffs. The remaining dispute centers on the question of what damage was done by wind (a loss covered by the Nationwide homeowners policy) versus that done by storm surge flooding (a loss excluded by the Nationwide homeowners policy).

Calculation of the Plaintiffs' Uncompensated Losses

The documents now in the record do not conclusively establish the pre-storm value of the insured dwelling. The "Homeowners Assistance Grant To-Do List" indicates that the dwelling had an "Insurable Value" of $219,340 and an "Allied Cost to Repair" of $280,760. These are the figures that Nationwide is asking the Court to accept as an upper limit for the plaintiffs' total claim for damages to their insured dwelling. I cannot determine the identity of the firm nor the individual who made these estimates. I infer that these figures do not include the value of the contents of the plaintiffs' dwelling nor the value of the plaintiffs' other insured structures. The MDA grant program does not purport to take the value of per-

sonal property or other structures into consideration. This document is not signed by the plaintiffs, and there is no indication that it was the plaintiffs who made this estimate of the value of their insured property.

***2** This document does state: "If any of the information below has been reported in error, please contact us immediately at 1-866-369-6302." MDA furnished the plaintiffs a copy of this document, and Nationwide asserts that because the plaintiffs did not contest this figure, they should not be allowed to present evidence that their home has a higher pre-storm value. While this estimate, if properly authenticated and sponsored, may be evidence that is relevant to the issue of the pre-storm value of the insured property, I do not believe it is conclusive on this issue of fact. Nor do I believe that the plaintiffs' having accepted the MDA grant that contains this estimate constitutes an admission or an affirmation that this value is accurate. Insured value may be different from actual cash value or replacement cost, and it is these latter values, rather than the insured value, that are potentially relevant in calculating benefits under the insurance coverage at issue.

The pre-storm value of the insured property (the dwelling, its contents, and other structures) represents the maximum recovery the plaintiffs may obtain from all applicable insurance coverages under the indemnity principle. Unless the insurance policy under consideration provides coverage for replacement cost, inflation, or other factors that may cause the insurance benefits to exceed the pre-storm value of the building (and the plaintiffs' Nationwide homeowners policy does contain provisions of this type), the pre-storm value of the insured property provides a ceiling on the amount of the plaintiffs' total potential insurance recovery from all sources.

The current remaining Nationwide homeowners policy limit for the insured dwelling is $105,133.08 (dwelling limits of $199,400 less benefits of $94,266.92 paid for windstorm damage to the dwelling) and the remaining Nationwide policy limit for other buildings is $13,668.23 (other structures limits of $19,940 less benefits of $6,271.77). The plaintiffs' maximum recovery in this action under their Nationwide homeowners policy will be the lesser of: a) the remaining Nationwide coverage; or b) the amount of uncompensated wind damage to the insured property that is established by the evidence (taking into consideration both the payments made by Nationwide under its homeowners policy and the payments made under the plaintiffs' SFIP). The plaintiffs' recovery would be enhanced to account for inflation, in accordance with the terms of the Nationwide homeowners policy.

I will grant Nationwide's Motion for Judicial Estoppel [114] to the extent that the plaintiffs' application for the MDA grant constitutes an admission that there was some amount of flood damage to the plaintiffs' home, and I will deny the remainder of this motion.

Accordingly, it is

ORDERED

That the motion [114] of Nationwide Mutual Fire Insurance Company [114] is **GRANTED IN PART** and **DENIED IN PART** in accordance with the terms set out above.

***3 SO ORDERED.**

S.D.Miss.,2008.
Sanders v. Nationwide Mut. Fire Ins. Co.
Not Reported in F.Supp.2d, 2008 WL 5003237 (S.D.Miss.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2008 WL 5120679 (S.D.Miss.)
(Cite as: 2008 WL 5120679 (S.D.Miss.))

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Mississippi,
Southern Division.
Billy Dale **SANDERS** and Judy Dianne **Sanders**, Plaintiffs
v.
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Defendant.

Civil Action No. 1:07CV988 LTS-RHW.
Dec. 3, 2008.

Earl L. Denham, Kristopher W. Carter, Dustin N. Thomas, Denham Law Firm, Ltd., Ocean Springs, MS, for Plaintiffs.

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MEMORANDUM OPINION AND ORDER

L.T. SENTER, JR., Senior Judge.

***1** The Court has before it plaintiffs' Motion for Estoppel [111]. Plaintiffs are seeking a ruling that certain payments made by Nationwide Mutual Fire Insurance Company (Nationwide) constitute evidentiary admissions.

Plaintiffs' dwelling and personal property were destroyed during Hurricane Katrina. The cause of this destruction is the fact issue at the heart of this litigation. Loss or damage caused by windstorm is covered under the plaintiffs' Nationwide homeowners policy, but there is a valid policy exclusion within this coverage for damage caused by storm surge flooding.

Plaintiffs had both a homeowners policy and a Standard Flood Insurance Policy (SFIP) sold by Nationwide. The limits of the plaintiffs' SFIP coverage have been paid, and I have ruled in this and other cases that acceptance of flood insurance benefits is an admission by the recipient that the insured property was damaged by storm surge flooding to the extent of the SFIP benefits accepted.

Plaintiffs in this action ask that the Court apply the converse of this rule to Nationwide's payment of benefits under its homeowners policy. Nationwide has paid $94,266.92 for wind damage to the plaintiffs' dwelling and $6,271.77 for wind damage to plaintiffs' other insured structures. Plaintiffs assert that Nationwide should not be allowed to deny that covered wind damage occurred, at least to the extent of the payments Nationwide made under the plaintiffs' homeowners policy.

Nationwide objects to the plaintiffs' request, but Nationwide does not deny that it made these payments, totaling $100,538.69, for wind damage to the insured property. Nationwide has stated as much in writing. In its July 19, 2007, cover letter for these payments Nationwide states: "Based on all available and reliable evidence, we have attempted to calculate and separate the damages caused by wind from those caused by flood. Based on our review of the evidence, we believe that there may be circumstances supporting an additional payment on [the plaintiffs'] claim ... We are enclosing a check for the amount of damages which we believe we owe at this time for damages caused during Hurricane Katrina."

These statements are admissions for evidentiary purposes, and I do not believe there could be a clearer indication that Nationwide had concluded, at the time this letter was written, that the plaintiffs' dwelling and other structures had sustained $100,538.69 in wind damage during the storm. I have seen no indication that Nationwide intends to contradict or disclaim these admissions, and Nationwide has stated, in its response to this motion, that it will not undertake to contradict these admissions at trial. In light of Nationwide's admissions, and in light of Nationwide's representations to the Court, I will deny the plaintiffs' motion because I believe it to be moot. The denial will be without prejudice to the plaintiffs' right to

reassert this motion in the event Nationwide undertakes to present evidence to contradict its admissions.

*2 Accordingly, it is

ORDERED

That the plaintiffs' Motion for Estoppel [111] is hereby **DENIED AS MOOT,** without prejudice.

SO ORDERED.

S.D.Miss.,2008.
Sanders v. Nationwide Mut. Fire Ins. Co.
Not Reported in F.Supp.2d, 2008 WL 5120679 (S.D.Miss.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2008 WL 4861698 (S.D.Miss.)
(Cite as: 2008 WL 4861698 (S.D.Miss.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Mississippi,
Southern Division.
Dr. William S. **ROSS** and Cynthia **Ross**, Plaintiffs
v.
METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, et al., Defendants.

Civil Action No. 1:07CV521 LTS-RHW.
Oct. 24, 2008.

Kristopher W. Carter, Earl L. Denham, Denham Law Firm, Ltd., Ocean Springs, MS, for Plaintiffs.

Dale G. Russell, Ellen Patton Robb, Randall E. Day, Copeland, Cook, Taylor & Bush, Ridgeland, MS, for Defendants.

MEMORANDUM OPINION and ORDER

L.T. SENTER, JR., Senior District Judge.

***1** The Court has before it the defendants' motions [115][121] *in limine* to exclude evidence of the actual cost the plaintiffs incurred in replacing their insured property (real and personal) damaged or destroyed in Hurricane Katrina. For the reasons set out below, these motions will be granted, subject to a qualification concerning the replacement of items of personal property.

The plaintiffs' Economy Premier Assurance Company's (EPAC) homeowners policy number 1823417700 has coverage limits of $540,100 (dwelling) and $378,070 (personal property). The policy provides for "Inflation Protection," an adjustment to policy limits based upon a "construction price index," a term not defined in the policy. The plaintiffs purchased "Replacement Cost" coverage for their dwelling and "Replacement Cost on Contents" coverage for their personal property.

The replacement cost coverage has the potential to allow a recovery greater than the actual cash value of the insured property at the time of loss (as defined in the policy, actual cash value is replacement cost less depreciation). This replacement cost coverage does not increase the liability limits stated in the policy declarations, but it does eliminate any deduction for "physical deterioration and depreciation including obsolescence" in the event the insured elects to replace the insured property. By eliminating this deduction, the actual replacement cost for the insured dwelling and for the insured personal property becomes the measure of the plaintiffs' contract damages, up to the limits of coverage set out in the policy declarations.

The insured property (both the dwelling and its contents) was severely damaged in Hurricane Katrina. The storm caused both a covered windstorm loss and a flood loss that was not covered by the EPAC homeowners policy. The question of the extent of the loss caused by these two forces (wind versus water) and the question how to properly ascertain the replacement cost value of the insured property (both the dwelling and its contents) lie at the heart of this dispute. This motion concerns only the latter question, i.e. the replacement cost valuation of the insured property.

This valuation question arises because the replacement dwelling the plaintiffs built is not a duplication or replication of the insured dwelling, nor is it constructed from materials of like kind and quality. The replacement dwelling is a different design with many features that are dissimilar to the insured dwelling, and the question is whether the cost the plaintiffs actually incurred for building this replacement dwelling is relevant to establish the amount of replacement cost coverage provided by the EPAC policy.

This valuation question is separate from the wind versus water causation question. As to causation, the plaintiff bears the ultimate burden of proving their right of recovery under the insurance contract, and the defendants bear the burden of proof as to the flood damage exclusion they are relying upon. I will assume, *for purposes of this discussion only,* that the plaintiffs will meet their burden of proof and establish to the satisfaction of the jury that the destruction of their dwelling was caused mainly by storm winds.

*2 This valuation question cannot be considered in isolation from other relevant facts, including the effect of the plaintiffs' having collected flood insurance benefits and benefits for wind damage under the EPAC policy. Fortunately, the plaintiffs insured against flood damage through a Standard Flood Insurance Policy (SFIP) issued by Audubon Insurance Company (Audubon) under the National Flood Insurance Program. Plaintiffs collected their flood insurance limits: $250,000 for damage to their building and $100,000 for damage to the contents of their building. Defendants have paid wind damage benefits of $104,952.31 under the plaintiffs' homeowners policy, but the plaintiffs contend that the wind damage to their property far exceeds the payment the defendants have made. Both the flood insurance benefits the plaintiffs have collected and the wind damage payments the defendants have made must be taken into consideration to ascertain the remaining benefits the plaintiffs may collect under their EPAC policy. The relationship between these other insurance recoveries and the remaining valuation question necessarily complicates the issue presented in this motion.

While I will, for the sake of simplicity, omit the defendants' wind damage payments from my discussion of the issues presented by this motion, the defendants will certainly be allowed a credit for these payments against their policy limits or against replacement cost if that proves to be less than policy limits. I will also omit the policy's inflation protection provision from this discussion. I will discuss the valuation question as it applies to the plaintiffs' dwelling, but these same principles will govern the plaintiffs' claim for damage to their personal property.

Plaintiffs built a new home on the lot where the insured dwelling was located. The defendants admit that the plaintiffs are entitled to replacement cost coverage, but the parties sharply differ on how the amount of replacement cost coverage should be calculated and whether the rebuilding cost the plaintiffs actually incurred is relevant to that calculation.

Based on my reading of the EPAC policy, and in light of the defendants' having admitted that replacement cost coverage has been triggered, I conclude that the cost the plaintiffs have actually incurred in building their new home is not relevant to the amount of replacement cost coverage available under this policy. The amount of replacement cost coverage is the replication cost of the insured property, i.e. the cost the plaintiffs would have incurred if the insured dwelling had been duplicated or replicated using materials of like kind and quality.

My analysis begins with the terms of the EPAC homeowners policy, which provides, in relevant part:

GENERAL DEFINITIONS

* * *

*"**Actual cash value** " means the amount which it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation including obsolescence.*

* * *

SECTION 1-ADDITIONAL COVERAGES

*3 17. **Inflation Protection.** The limits of liability specified in the Declarations of this policy, or any amendments thereto, for Coverages A, B and C and Loss of Use are continuously adjusted in accordance with the applicable construction price index in use by **us.** This index will then be multiplied by the limit of liability for Coverage A, B and C and Loss of Use separately.*

PROPERTY LOSS SETTLEMENT

SECTION 1-HOW WE SETTLE A PROPERTY LOSS

*1. **Coverage A-Dwelling and Coverage B-Private Structures***

Covered property losses are settled as follows:

*A. **Actual Cash Value Settlement.** Subject to the applicable deductible, we will pay the **actual cash value** at the time of the loss for the damaged property, but no more than the lesser of:*

(i) the amount required to repair or replace the damaged property with property of like kind and quality; or

(ii) the limit of liability applying to the property.

* * *

*2. If **you** repair or replace the damaged or destroyed property, **you** may make further claim for any additional payments for **Replacement Cost Settlement** provided:*

*a. **you** have not reached the applicable limit of liability;*

*b. **you** still have an insurable interest in the property;*

*c. **you** notify us within 180 days after the date of **actual cash value** payment of your decision to repair or replace the damaged or destroyed dwelling or private structure;*

*d. **you** notify **us** within 30 days after the repair or replacement has been completed; and*

*e. the date of completion is within one year from the date of **actual cash value** payment.*

*The foregoing time limitations shall apply unless **you** or **your** representative submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.*

*B. **Replacement Cost Settlement.** If at the time of loss the amount of insurance applicable is determined to be 80% or more of the full current replacement cost, **we** will pay the full cost of repair or replacement, subject to the applicable deductible, without deduction for depreciation subject to the following:*

*1. **we** will not be liable unless and until actual repair or replacement is complete; and*

*2. **our** liability will not exceed the smallest of:*

a. the limit of liability applicable to the building;

b. the cost to repair or replace the damaged part(s) of the building with materials of like kind and quality on the same premises for the same occupancy and use; or

c. the amount actually and necessarily spent to repair or replace the damaged part(s) of the building with materials of like kind and quality on the same premises for the same occupancy and use .

* * *

4 2. **Coverage C-Personal Property*

Covered property losses are settled as follows:

*A. **Actual Cash Value Settlement.** Subject to the applicable deductible, **we** will pay the **actual cash value** at the time of the loss for the damaged property, but no more than the lesser of:*

1. the amount required to repair or replace the damaged property with property of like kind and quality; or

2. the limit of liability applying to the property.

*B. **Replacement Cost on Contents***

This provision applies when replacement Cost on Contents is shown in the Declarations.

*If **you** repair or replace the damaged or destroyed property, **we** will pay the full cost of repair or replacement less the applicable deductible, without deduction for depreciation.*

1. This settlement applies to:

* * *

*c. personal property covered under **COVERAGE C-PERSONAL PROPERTY** other than [certain specified exceptions];*

* * *

*2. **Our** liability for any loss shall not exceed the smallest of the following amounts for any one loss:*

a. the cost to replace the property with a similar property of like kind and quality;

b. the full cost of repair to restore the property to its original condition;

c. the limit of liability for Coverage C shown in the Declarations subject to [other policy limitations on specified types of property] ...

*3.If **you** decide not to repair, restore or replace the damaged or stolen property, settlement will be on an **actual cash value** basis. **You** may make any claim within 180 days after the date of **actual cash value** payment for any additional payment on a replacement cost basis if **you** repair, restore or replace the damaged or stolen property.*

The plaintiffs have constructed a new building on the same premises and for the same use as the insured dwelling. Defendants recognize that this triggers the replacement cost coverage provisions of the EPAC policy. Rather than duplicating the insured building, plaintiffs elected to build a different type or style of dwelling, a home with very different features from the insured dwelling. Defendants do not contest the plaintiffs' right to replacement cost coverage, but the defendants contend that the cost the plaintiffs have incurred in building their new dwelling should not be admissible as the measure of the plaintiffs' contract damages, i.e. replacement cost coverage, under their homeowners policy.

I agree with the defendants on this point. The policy does not require the defendants to pay replacement cost for a dissimilar building that is not of like kind and quality as the insured building. But, once the insured dwelling is replaced, even with a very different building, the policy does require the defendants to pay the cost of replicating the insured building using materials of like kind and quality, without a deduction for depreciation from this replication cost. By the policy terms set out above, replacement cost coverage for the insured building cannot exceed the policy limits set out in the declarations ($540,100) and it cannot exceed the replication cost. The plaintiffs will be entitled to recover the smaller of these two figures (after credit for defendants' prior payment).

*5 The insurance contract does not establish any obligation on the part of the plaintiffs to rebuild or replace their insured dwelling. Had the plaintiffs elected to move to a new residence, they would be entitled to the actual cash value of the insured dwelling, as defined in the policy, up to the policy limit stated in the declarations ($540,100) (assuming the plaintiffs could prove that the damage or destruction of the dwelling was attributable to a covered cause, i.e. windstorm). The election whether to replace the insured dwelling was entirely within the discretion of the plaintiffs.

Nor were the plaintiffs obliged, under their insurance contract with EPAC, to replicate the insured dwelling. Replacement does not imply that the insured dwelling must be replicated. I believe a reasonable reading of the insurance contract would allow the plaintiffs to claim replacement cost coverage whether they built a far more expensive home (one that cost more than the policy limit or $540,100 and more than the cost of replication) or a less expensive one. The insurance contract provides only that the insured dwelling may be replaced, and the proper measure of damages under the contract in this situation is replication cost, i.e. the actual cost the plaintiffs would have incurred to duplicate or replicate the insured building using materials of like kind and quality as those in the insured building, up to the coverage limit ($540,100).

If I understand the position of the parties reflected in the pre-trial order, the plaintiffs will spend $623,420 in replacing their insured dwelling. Neither the plaintiffs nor the defendants indicate what the replication cost for the insured dwelling would have been. If the replication cost would have exceeded the policy limit ($540,100), the parties could considerably simplify the trial by making that stipulation or by making a stipulation of the replication cost if it were less than $540,100. It is the smaller of these two figures (replication cost or policy limits) that represent the potential contract damages in this action before credit for the payments the defendants have already made.

For purposes of giving proper credit for the flood insurance collections, it will be necessary to establish the actual cash value of the insured property at the time of loss. The actual cash value of the dwelling at the time of loss is relevant to the credit I must allow for the $250,000 flood insurance recovery for damage to the insured dwelling. Depending on what the actual cash value is determined (or stipulated) to be,

it will be the necessary starting place in ascertaining the plaintiffs' original loss, and, under the indemnity principle, the ceiling on the plaintiffs' recovery from all sources of insurance. The actual cash value of the insured property at the time of loss is the figure against which the flood insurance recovery must be credited. This figure may be more or less than the EPAC policy limit for dwelling coverage. The plaintiffs' dwelling was insured for $790,100 ($540,100 under the EPAC policy and $250,000 under the Audubon SFIP). The limits of coverage available under the EPAC policy for damage to the plaintiffs' dwelling will not be affected by the plaintiffs' flood insurance recovery if the actual cash value of the dwelling at the time of loss was equal to or greater than this total insured value ($790,100).

***6** The parties may also wish to stipulate the actual cash value of the insured dwelling at the time of loss if they can reach an acceptable figure by negotiation. If, by negotiation, the parties could arrive at a stipulation of both the actual cash value of the insured property (dwelling and contents) and the duplication cost, this trial would be considerably shortened, but any or all of these figures may be the subject of wide and yet reasonable disagreement so that arriving at such a stipulation may prove impossible.

Whatever the jury determines these two figures (actual cash value and duplication cost) to be, by special interrogatory if necessary, the Court will make the appropriate deduction for the flood insurance recovery, for the inflation protection feature of this policy, and for partial payments already made by EPAC. I will expect the parties to reach a stipulation of the "applicable construction price index" in use at the time of trial.

Accordingly, the defendants' motions [115][121] *in limine* to exclude evidence of the actual cost the plaintiffs incurred in replacing their insured property (real and personal) damaged or destroyed in Hurricane Katrina is **GRANTED** with the exception that plaintiffs may offer evidence of actual replacement cost they have incurred for any items of personal property that have been replaced with similar items of like kind and quality, provided these items of personal property were disclosed to the defendants before the pre-trial conference.

SO ORDERED.

S.D.Miss.,2008.
Ross v. Metropolitan Property and Cas. Ins. Co.
Not Reported in F.Supp.2d, 2008 WL 4861698 (S.D.Miss.)

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