2011-CA-00092-RT

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Summary of Argument.....1

Argument:

1) Defendants Proximate Cause Argument Seeks to Direct the Court Away from the Trial Court's Error in Not Giving Jolynne Trapani's Testimony Its Full Weight For Purposes of a Directed Verdict.....2

2) The Courts' Evidentiary Rulings on Exhibits P-15-17.....6

3) Peter Quave Was Qualified and His Testimony Would Have Assisted the Jury In Determining Whether David Treutel Breached His Duty to the Plaintiffs.....8

4) The Decisions of U.S. District Judge Senter Cited By Defendants Work Both Ways: Plaintiffs' Wind Insurer Paying Wind Limits Proves Wind Damages.....10

Conclusion.....12

Certificate of Filing and Service.....14

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Summary of Argument.....1

Argument:

1) Defendants Proximate Cause Argument Seeks to Direct the Court Away from the Trial Court's Error in Not Giving Jolynne Trapani's Testimony Its Full Weight For Purposes of a Directed Verdict.....2

2) The Courts' Evidentiary Rulings on Exhibits P-15-17.....6

3) Peter Quave Was Qualified and His Testimony Would Have Assisted the Jury In Determining Whether David Treutel Breached His Duty to the Plaintiffs.....8

4) The Decisions of U.S. District Judge Senter Cited By Defendants Work Both Ways: Plaintiffs' Wind Insurer Paying Wind Limits Proves Wind Damages.....10

Conclusion.....12

Certificate of Filing and Service.....14

TABLE OF AUTHORITIES

Cases

Billups Petroleum v. Hardin's Bakeries Corp.,
63 So.2d 543 (1953).....3, 4, 13

Ferguson v. Snell,
905 So.2d 516 (Miss. 2006).....8

Forbes v. General Motor Corp.,
935 So.2d 869, 872 (Miss. 2006).....3

Fox v. Smith,
594 So.2d 596 (Miss. 1992).....3

Imperial Trading Co., Inc. v. Travelers Prop. Cas. Co. of America,
654 F.Supp.2d 518 (E.D. La. 2009).....8, 9

LaCombe v. A-T-O, Inc., 679 F.2d 431
(5th Cir. 1982).....4, 5

Letoha v. Nationwide Mut. Fire Ins. Co.,
2007 WL 2059991 (S.D. Miss. July 12, 2007).....11

Lovett v. Bradford,
676 So.2d 893 (Miss. 1996).....8

Sanders v. Nationwide Mut. Fire Ins. Co.,
2008 WL 5003237 (S.D.Miss. Nov. 20, 2008).....11

St. Paul Fire & Marine Ins. Co. v. Vest Transp. Corp., Inc.,
666 F.2d 932, 947 (5th Cir. 1982).....12

Terrain Enterprise, Inc. v. Mockee,
654 So.2d 1122 (Miss. 1995).....9

Wall v. Swilley,
562 So.2d 1252 (Miss. 1990).....4

Statutes and Rules

Miss. R. Civ. Pro. 50.....1, 2, 3, 6

Miss. R. Evid. 803(6).....1, 6, 7

SUMMARY OF REPLY ARGUMENT

In directing a verdict for the Defendants, the Trial Court required the Trapanis to prove their case before it could even be sent to the jury. Respectfully, that is not the standard for directing a verdict. Plaintiff Jolynne Trapani's testimony, if believed by the jury, was sufficient to for a jury to find that David Treutel breached his duty to Plaintiffs and that that breach caused Plaintiffs' damages, namely the approximately $314,000 in insurance proceeds that they could have recovered had David Treutel placed the coverage limits as Jolynne Trapani instructed.

The Defendants echo that reasoning in their Appellee Brief by arguing did not prove their case by a preponderance of the evidence. Again, Plaintiffs did not have to prove their case by a preponderance of the evidence for the matter to be submitted to the jury. The Defendants give relatively little attention to the directed verdict standard under Miss. R. Civ. Pro. 50, including the requirement that inferences be drawn in favor of and weight be given to the testimony of the non-moving party, namely Jolynne Trapani.

As to the evidentiary errors for Exhibits P-15 – P-17, the Plaintiffs respectfully reassert their arguments in their Appellant Brief, adding only that if the Trial Court found the references to SBA and other contractors inadmissible hearsay, the rest of page 5 of P-15 should have been admissible under the business records exception of Miss. R. Evid. 803(6). Similarly, if the contents on P-16 were reliable and relevant, then any fixtures on that list should have been left un-redacted as proof of part of the losses to the structure.

Regarding the Trial Court's decision to disqualify Plaintiffs' expert, Peter Quave, Mr. Quave was both qualified to testify on David Treutel's ability to place the coverage in question and the timeliness of those actions. While perhaps not as complicated as explaining actuarial tables or arcane rules about underwriting, Peter Quave's testimony would have been useful in

helping prove that David Treutel could raised the limits as requested and that he failed to do so in accordance with industry practices—something particularly important in coastal Mississippi during hurricane season.

Finally, Defendants' reliance on the cases decided by Senior U.S. District Judge Senter is misplaced. Plaintiffs never disputed that they had the burden of proof to prove damages. That said, at least two of those cases contain language that the acceptance of flood proceeds by an insured is a judicial confession that the insured sustained at least that much damages in flood. The same is true for an insurer that pays damages under its policy. The windstorm policy on the Trapanis' restaurant paid the limits—as placed—on the structure, contents and business interruption. As such, those payments are an acknowledgement that wind caused significant damage to Plaintiffs' property. Defendants cite no law for the proposition that they are entitled to any defenses the insurers never sought. Finally, while Plaintiffs have to prove damages, they do not have to prove them with absolute certainty, nor do any of the Judge Senter cases Defendants hold that Plaintiffs have to prove their case with absolute certainly.

REPLY ARGUMENT

1. Defendants Proximate Cause Argument Seeks to Direct the Court Away from the Trial Court's Error in Not Giving Jolynne Trapani's Testimony Its Full Weight For Purposes of a Directed Verdict.

The Defendants respond to Plaintiffs' assignment of error concerning the Trial Court's directing of a verdict by engaging in a detailed recitation of the policies in question, focusing on testimony concerning rebuilding costs and focusing on a proximate cause argument, but ignoring the weight that Jolynne Trapani's testimony is to be given under Miss. R. Civ. Pro. 50. True, the structure Plaintiffs are rebuilding is not the same size as the one was destroyed. But Plaintiffs never sought to have Defendants pay for the entire costs of the new structure and its new

contents that might exceed the value of the old. Rather, Plaintiffs sought the approximate $150,000 in structure proceeds and $75,000 in contents proceeds from the restaurant destroyed by the wind and surge effects of Hurricane Katrina. Provided the old restaurant structure and contents were worth at least the $150,000 and $75,000 more than the sum of proceeds received under the wind and flood policies, Plaintiffs can recover those amounts.

The standard at the directed verdict stage is not a preponderance of the evidence as Defendants suggested,[1] but rather a mere prima facie case. *Forbes v. General Motor Corp.*, 935 So.2d 869, 879 (Miss. 2006)(holding "[the plaintiffs] established a prima facie case, and there were no proper grounds for the grant of a directed verdict."). Again, the standard for a directed verdict requires the reviewing court to "consider the evidence in light most favorable to the non-movant, giving that party...the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* at 872 (Miss. 2006). If there is "evidence of such a quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusion, [the reviewing court] cannot affirm the grant of a direct verdict. *Id.* "A directed verdict pursuant to M.R.C.P. 50(a) is not an appropriate means for the disposition of a case so long as questions of fact are raised in the proof at trial." *Fox v. Smith*, 594 So.2d 596, 603 (Miss. 1992).

The Defendants protest the alleged lack of precise evidence on damages; however, as the Mississippi Supreme Court held in *Billups Petroleum v. Hardin's Bakeries Corp.*, while "[i]t is undoubtedly true that the plaintiff in a case of this kind must prove its damages with a reasonable degree of certainty...the plaintiff should not be deprived of its right to recover because of its inability to prove with absolute certainly the extent of the loss...." 63 So.3d 543, 548 (1953).

[1] Br. of Appellees at 16.

Indeed, the "the law does not require such absolute accuracy of proof." *Id.* A court may not direct a verdict against a plaintiff "unless the evidence is so speculative that no reasonable juror could find more than nominal damages." *Wall v. Swilley*, 562 So.2d 1252, 1256 (Miss. 1990).

Defendants spend considerable space discussing Jolynne Trapani's testimony about the new, larger restaurant under construction at the time of time. It is true that Jolynne Trapani was asked questions about the replacement restaurant under construction at the time of the trial, but she also testified at least about the old restaurant structure, its contents and its business income. One important area of testimony concerned the remodeling to the restaurant that was completed in January 2005 and that David Treutel was familiar with that remodel.[2] Elsewhere Jolynne Trapani testified in greater detail about the structure and its contents, the recent renovations, the limits desired, and that David Treutel assented to those sought after limits.[3] In short, Jolynne Trapani testified as to the value of her structure, contents and business income. She testified as to how she obtained the desired policy limits on each. As the co-owner of a closely held business, Jolynne Trapani's status is not unlike a homeowner who is qualified to testify one the value of her structure and contents. *See LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 433-34 (5th Cir. 1982).

Although David Treutel disputed that Jolynne Trapani told him to set the structure limits at $300,000, the contents at $150,000[4] and the business income at $300,000, the jury could believe Jolynne Trapani's testimony as to valuation as well as her testimony that she instructed

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[2] Tr. Trans. at 139:11-14 (testifying "[h]e [Treutel] even sat there and talked about it for ten minutes on the new remodel that we just went through in January '05, and he was telling me who nice it is and all that stuff.").

[3] Tr. Trans. at 24:18 - 25:15.

[4] Notably David Treutel did increase the contents limits on the Safeco fire/theft policy to the $150,000 level Jolynne Trapani testified she sought for the wind policy. Tr. Trans. at 180:27 – 181:5.

David Treutel to place those limits and Jolynne Trapani was competent to give that testimony. *See Lacombe, supra.*[5] Indeed, in July 2005, David Treutel testified that he expressed some concerns to Jolynne Trapani after the January 2005 renovation and that at least some of her coverage limits might be too low.[6] Because the jury could have accepted Jolynne Trapani's testimony and her testimony, if true, could support that the Plaintiffs suffered the damages sought after and that David Treutel's negligence was the cause of those damages, the directed verdict was improper.

Additionally, in deciding the Motion for a Directed Verdict, the Trial Judge cited the $153,600 estimated replacement costs on the Trapani's flood application.[7] The Trapanis' restaurant was located in a C Zone, which was a flood zone, but as David Treutel testified, this zoning meant that the restaurant "qualified for the preferred flood rate"[8] and allowed the Trapanis to "buy coverage at a lower rate in different packages."[9] Further, as David Treutel admitted, the National Flood Insurance Program is unusual in that it "doesn't make you insure to the value."[10] While the Flood Insurance Application asked for replacement costs, an insured can underinsure for flood, making the exact amount of a replacement cost on a flood application less important than in other insurance applications. The "little different" and "little odd" National Flood Insurance Program's requirements are not necessarily the best indicators of replacement

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[5] Discussed in greater detail in Plaintiffs' Appellant Brief at pp. 9-11.
[6] Tr. Trans. at 170:18-28.
[7] See Ex. D-5 (p. 95 of Appellees' Supp. Rec. Excerpts). The Defendants also cite this $153,600 figure and Exhibit D-5 in their Brief. Br. of Appellees at 15.
[8] Of course, the jury could also have considered the role of the restaurant being located in a C Flood Zone that qualified for "preferred flood rates" in making a determination as to causation—assuming such a determination was necessary. The inference is that given the buildings relative location, it may have sustained more wind damage than flood damage.
[9] Tr. Trans. at 174:9-11.
[10] Tr. Trans. at 174:22-23.

cost value.[11] Thus, the Trial Judge's reliance on the $153,600 replacement cost figure in granting the Defendants' motion for directed verdict was, with all due respect, misplaced as a property owner (at least in a C Zone) is not required to fully insure property against flood. This inference of the structure's replacement cost should not have been drawn in defendants' favor, especially in light of Jolynne Trapani's testimony to the contrary concerning the value of her restaurant she had co-owned with her husband for several years. *See* Miss. R. Civ. Pro. 50.

2. <u>The Courts' Evidentiary Rulings on Exhibits P-15-17</u>

a. The Trial Court Erred In Redacting All of Page 5 of P-15.

The Trial Court respectfully erred in redacting all of Page 5 of Exhibit P-15 (the SBA application) as it allegedly contained "hearsay in the way of estimates of contractors and other information that the Court feels is not admissible."[12] As stated in the Appellant Brief, the only figures that did not come from Jolynne Trapani were numbers from SBA and contractors under the paragraph number one on that page. That reference to estimates from SBA and contractors could have been redacted without the removal of the entire page. The remainder of the page was part of an application to SBA made under oath by the person responsible for the running of her business. Although the Trial Court did not articulate the "other information" that was purportedly inadmissible, assuming the references to SBA and other contractors was properly excluded as hearsay, the rest of the letter contained information supplied by the Trapanis and was part of a loan application made in the ordinary course of business allowable by Miss. R. Evid. 803(6).

[11] Tr. Trans. at 175:10 (testimony of David Treutel).
[12] Tr. Trans. at 97:1-4.

b. The Contents List Was Not Just Contents

In their Brief, the defendants do not address why the redacted items of Exhibit P-16 that were part of the structure could not have been left un-redacted as evidence of some of the losses to the restaurant's structure. After all, the Trial Court overruled the defendants' objections to hearsay to the items in P-16 the Court determined to be contents, finding them to be "reliable and relevant."[13] While arguing for contents, counsel for Plaintiffs did raise the question of whether some of the redacted items were not fixtures, which would be considered part of the structure.[14] Still, the Trial Court agreed with the Defendants that certain items in Exhibit P-16 were not contents and ordered their redaction from P-16. If the contents on P-16 were a relevant and reliable, then amounts for portions of the structure (*i.e.* fixtures) were also reliable and relevant. After all Jolynne Trapani testified to a renovation of the restaurant in January 2005, less than nine months before the building was destroyed. Allowing items on P-16 that were contents, but ordering the redaction of those items that may have been part of the structure was an abuse of discretion.

c. Exhibit P-17: As the Sole Operator of the Monetary Side of Trapani's Eatery, Jolynne Trapani Was the Best Person To Testify About the Restaurant's Expenses.

The defendants call Jolynne Trapani's oral testimony about the costs of her business "pure speculation" and that the sales records of P-17 are inadmissible hearsay.[15] As with the structure and contents portions of the policy, the defendants focus intently on the language of the policies in question rather than focusing on fundamental questions about reliability. Under Rule 803(6) of the Mississippi Rules of Evidence, "the focus is properly placed on the time period when the documents were created, the trustworthiness of the documents, and whether their

[13] Tr. Trans. at 88:3-4.
[14] Tr. Trans. at 89:25 – 90:4.
[15] Appellees' Br. at 23.

creation was in the regular course of business." *Ferguson v. Snell*, 905 So.2d 516, 519 (Miss. 2006).

Here, the daily receipts were promptly recorded, the trustworthiness (*i.e.* accuracy) of the receipts themselves was not questioned and they were created in the ordinary course of business.[16] Plaintiffs never claimed that they were entitled to recover gross income; the daily receipts were the starting point for any financial analysis. The daily sales records were generated at the restaurant.[17] As Jolynne Trapani was the sole manager of the expense side of business[18] she possessed the most superior knowledge of what costs her business incurred. Counsel for the defendants thoroughly cross-examined Mrs. Trapani. The jury would have been free to accept or disregard her testimony concerning the expenses. The lack of documentation on expenses does not render the daily sales records of P-17 inadmissible hearsay.

3. **Peter Quave Was Qualified and His Testimony Would Have Assisted the Jury In Determining Whether David Treutel Breached His Duty to the Plaintiffs.**

It is true that expert testimony is not always or automatically required to show negligence in a suit alleging negligence by an insurance agent or broker. *See Lovett v. Bradford*, 676 So.2d 893 (Miss. 1996). That said, Defendants' reliance on *Imperial Trading Co., Inc. v. Travelers Prop. Cas. Co. of America,* 654 F.Supp.2d 518 (E.D. La. 2009), is misplaced.[19] In *Imperial Trading*, the Court found that plaintiffs wanted to use an expert to show that the defendant acted in bad faith. *Id.* at 520-21. The expert's testimony would have been essentially a recitation the plaintiff's lawsuit and would not have been helpful in proving causation. *Id.* at 521.

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[16] Tr. Trans. at 48:24 – 49: 8; 54:29 - 55:29.
[17] Tr. Trans. at 55:12-17.
[18] Tr. Trans. 46:6-9.
[19] Although the Mississippi Rules of Evidence are very similar to the Federal Rules of Evidence, defendants' reliance on *Imperial Trading* is also misplaced as that case deals with an insurance company's duties under Louisiana law. 654 F.Supp.2d at 521. Also, the court in *Imperial Trading* noted that "courts have ruled different ways on this issue." *Id.*

The same is not true here. As acknowledged in a case cited by the defendants in their Brief, even if it is "not particularly relevant on the ultimate issue before the jury," expert testimony is admissible if it is reliable and assists the jury. *Terrain Enterprise, Inc. v. Mockee*, 654 So.2d 1122, 1131 (Miss. 1995). In this case, Peter Quave's testimony would have been both relevant to the issues and helpful to the trial. Specifically, Plaintiffs sought to have Peter Quave to testify on two narrow, but important areas of the case, either of which would have been helpful to the jury. First, Mr. Quave would have opined that despite the very busy 2005 hurricane season, David Treutel could have placed the policy limits as Jolynne Trapani requested.[20] In other words, there were times between the series of meetings between David Treutel and Jolynne Trapani and Hurricane Katrina that David Treutel could have placed the policy limits as requested. A jury might not be familiar with restrictions on placing insurance policies or increasing insurance limits when a hurricane is in the Gulf of Mexico. Peter Quave would have been able to opine that David Treutel had time to place the limits as requested—an element necessary to proving Plaintiffs' case because if that was not true (that there was no gap for David Treutel to increase the limits on the wind policies), then Plaintiffs would not have been able to recover.

Further to that point, Peter Quave would have been helpful to the jury in opining as to whether David Treutel was dilatory in communicating what he was doing (or not doing) to Jolynne Trapani.[21] Nearly two months elapsed from David Treutel's last meeting with Jolynne Trapani and Hurricane Katrina, but Jolynne Trapani never received any sort of written verification of what limits she increased or that there might be a problem with the coverages she

[20] Tr. Trans. at 271:27 – 273:7.
[21] *See e.g.* Tr. Trans. at 269:16 - 270:24; 271:10-17.

sought.[22] A general insurance expert could explain the duties an agent or broker has regarding diligence, particularly during hurricane season on the Mississippi Gulf Coast. These items are not overly complicated, but are areas with which a layperson might not be familiar.

While the opportunity to place or increase coverages during hurricane season and basic industry standards about an agent or broker communicating with his insured might be outside the expertise of a lay jury, these areas are not beyond the qualifications of Peter Quave. In the proffer, Mr. Quave testified to decades of general insurance experience, to keeping up on relevant industry literature and to having been qualified in an expert in state and federal courts. His testimony would have only covered the narrow areas of the opportunity for defendants to have placed the coverage and whether David Treutel's actions were dilatory. Assuming for argument's sake that David Treutel misunderstood or otherwise failed to carry out Jolynne Trapani's requests, if he had no reasonable opportunity to increase the policies as requested due to hurricanes in the Gulf of Mexico, then Plaintiffs would likely have been unable to recover. Some very basic expert testimony on these narrow areas would have been helpful to the jury. Given the basic level of this expert testimony, Peter Quave was easily qualified to opine in these areas.

4. <u>The Decisions of U.S. District Judge Senter Cited By Defendants Work Both Ways: Plaintiffs' Wind Insurer Paying Wind Limits Proves Wind Damages</u>.

The opinions of Senior U.S. District Judge Senter, cited favorably by both the Trial Judge and Defendants hold that insureds are barred from denying flood damages if they accept flood

[22] Defendants repeatedly cite a notice dated August 26, 2005 directed to the Trapanis' restaurant noting the increase in business interruption on the windstorm policy from $35,000 to $200,000 (Exhibit D-8). Plaintiffs will not dwell on the absurdity of the reliance on a document allegedly mailed on the Friday before Hurricane Katrina struck the Mississippi Gulf Coast on Monday, the 29th. Not only is there a lack of any proof of mailing, but even if the document had been hand delivered or faxed, Hurricane Katrina was already in the Gulf of Mexico on August 26 and no changes could have been made to the policies at that time.

proceeds. For instance, in *Sanders v. Nationwide Mut. Fire Ins. Co.*, Judge Senter held that "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." 2008 WL 5003237, at *1 (S.D.Miss. Nov. 20, 2008); *see also, Letoha v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 2059991, at * 2 (S.D. Miss. July 12, 2007) (holding "[b]y accepting benefits tendered under a flood insurance policy, an insured makes a judicial admission that the insured property sustained flood damage at least equal to the flood insurance benefits he accepts. The insured is thereafter stopped to deny that this flood damage has occurred.").

As the *Nationwide* cases attached to the Defendants' Appellee Brief show, after Hurricane Katrina, many property owners found themselves arguing wind versus water causation with their insurance company. But in this case, the Trapanis' insurers did not dispute causation and paid the limits that David Treutel had placed. There is nothing for the Trapanis to prove in terms of causation. Their insurers (both wind and flood), by paying the limits of the policies, admitted that the Trapanis' restaurant sustained heavy damages from both wind and flood. As Judge Senter repeatedly held in cases like *Sanders* and *Letoha*, the acceptance of flood payments is an admission by the insurer of damage from that peril. If the acceptance of flood payments by an insured is a judicial admission of flood damage, then the payment of flood proceeds by an insurer is an admission of proximate cause, in is this case, causes. The Defendants cannot after-the-fact dispute causation when the Trapanis' insurers have already acknowledged the destruction from the perils of flood and wind.[23] Provided the Trapanis could prove an insurable

[23] Plaintiffs are aware of the long-standing principle that doctrines of waiver and estoppels cannot be applied "to extend the terms of an insurance contract or to provide coverage that is excluded by the policy." *St. Paul Fire & Marine Ins. Co. v. Vest Transp. Corp., Inc.*, 666 F.2d 932, 947 (5th Cir. 1982). That limitation does not apply here as the wind insurer paid the limits on each policy.

interest at least in the amount of the limits the Trapanis requested Treutel place (which can be proven by the testimony of Jolynne Trapani), they could have recovered the sought after limits for the structure and contents. Defendants are simply not entitled to policy defenses the insurers never pursued.

CONCLUSION

As with most any Plaintiffs, the Trapanis would have preferred to have had mountains of evidence and eyewitnesses galore, but simply not required to overcome a motion or a directed verdict. As the business manager and co-owner of a family restaurant, Jolynne Trapani was the best person to testify about her business, the structure its contents and business losses. Any questions about the nature of the business, would begin with Jolynne Trapani. There is simply no one more reliable and knowledgeable about her business. As a reasonable jury could have believed Jolynne Trapani's testimony and that testimony supports the required elements to support a negligence claim, the directed verdict was in error, and that error warrants reversal and remand.

As to the evidentiary and expert rulings, the Trial Court respectfully erred in its application of the business records exception to hearsay as well as restrictions on expert witnesses. Again, the source of the redacted or barred records was Jolynne Trapani. As for Peter Quave, his expert testimony was needed to help prove that David Treutel breached his duty to the Plaintiffs and Mr. Quave's decades of experience in the insurance industry and expert testimony in state and federal court made him qualified to testify.

Finally, the defendants attempt to distract the issues by focusing on cases involving suits between insurance companies and insureds—where the cause of the loss was at issue. Here Plaintiffs did not have to file suit against either their wind or flood insurer; each paid the limits of

their respective policies (as placed). Defendants are not entitled to a causation defense the insurers themselves never pursued. All Plaintiffs have to prove in terms of damages is an insurable interest in the amounts sought after and Jolynne Trapani's testimony was sufficient to show. Plaintiffs are not required to specify the exact percentage or penny of damages attributable to flood versus wind. *Billups, supra.*

For the reasons mentioned above, the Trial Court committed reversible error and the Judgment directing the verdict in favor of the Defendants should be reversed and remanded for a new trial.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed, in the above-captioned matter, the Brief of the Appellants on this 7th day of September 2011, by placing the original and three copies of same, along with an electronic version of same on CD-ROM, in an envelope addressed to the Clerk of the Mississippi Appellate Courts, and mailing same via Federal Express, postage prepaid. I further I hereby certify that a copy of the above and foregoing Brief of the Appellants has been served on the Trial Judge and counsel of record for defendants-appellees, by mailing the same, postage pre-paid and addressed to:

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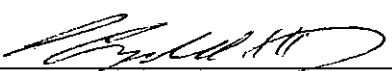

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