2011-CA-00092-T

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. The representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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2) Whether the Trial Court improperly redacted Page 5 of Plaintiffs' Exhibit P-15 as hearsay.
3) Whether the Trial Court improperly redacted portions of Plaintiffs' Exhibit P-16.
4) Whether the Trial Judge improperly excluded Plaintiffs' Exhibit P-17 as not being the best evidence.
5) Whether the Trial Judge erred in excluding Plaintiffs' expert Peter Quave.
6) As the wind insurer paid all the policy limits as placed, whether the Trial Court improperly allowed the Defendants to claim a defense never asserted by the insurer.

STATEMENT OF THE CASE

Jolynne and Anthony "Tony" Trapani are the sole owners of Trapani's Eatery, Inc., a restaurant located in Bay St. Louis, Hancock County, Mississippi. Prior to Hurricane Katrina, the restaurant was located in a building along Beach Boulevard in Bay St. Louis at a lower risk "C" flood zone.[1] In the mid-1990s, Jolynne and Tony Trapani bought the restaurant along with a partner whose share they purchased around 1999.[2] From approximately 1999 to the present, Jolynne and Tony Trapani have been the sole owners and operators of Trapani's Eatery, Inc., with Tony primarily charged with supervising the kitchen and Jolynne in charge of the restaurant's finances.[3]

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[1] Exhibit D-5, p. 5 (Treu-0120).
[2] Trial Transcript at 16, l. 6-27.
[3] Trial Transcript at 16, l. 11-27; 46, l. 10-13.

Several months after Hurricane Ivan struck the Alabama coast, Jolynne Trapani took her children on a visit to Florida, passing through Orange Beach, Alabama on their return ride home.[4] There Jolynne Trapani saw the devastation of Hurricane Ivan and how many businesses were still not operating several months later.[5] Although the Trapani's insurance on their restaurant had a policy year of November to November, near the beginning of the 2005 hurricane season, the devastation prompted Jolynne Trapani contacted her insurance company, Treutel Insurance Agency, Inc. to inquire about increasing coverage limits on the restaurant in the middle of the policy year.[6] The Trapanis had purchased all their insurance for the restaurant through Treutel Insurance Agency for several years, primarily through their agent Ames Kergosian.[7] But in 2005, Mr. Kergosian had developed some serious health problems, which impacted his ability to work. While Mr. Kergosian was in the hospital, David Treutel, Jr. took over some of Mr. Kergosian's files, including the Trapani's Eatery file.[8]

One of the first actions David Treutel did was to have Jolynne Trapani sign a document making Treutel the agent for the Trapani's restaurant.[9] During the course of three or four meetings from late May to early July 2005, David Treutel and Jolynne Trapani discussed a series of changes to the restaurant's policies.[10] A number of the policy changes are not at issue here. For instance, Jolynne Trapani decided to purchase a flood policy on the restaurant, something it had not had since the Trapani's owned it, given its high elevation in Bay St. Louis. Other changes not in dispute included an increase in restaurant's general liability coverage from $1

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[4] Trial Transcript at 17, l. 3-15.
[5] Trial Transcript at 17, l. 16 – 18, l. 29.
[6] Trial Transcript at 19, l. 1-9.
[7] Trial Transcript at 19, l. 1-16.
[8] Trial Transcript at 19, l. 18-22.
[9] Exhibit P-11.
[10] Trial Transcript at 19 – 27. This includes a telephonic meeting on June 30. See Trial Transcript at 128, l. 1-16.

million to $2 million and the acquisition of a liquor bond. During these meetings David Treutel also convinced Jolynne Trapani to switch her and Tony's homeowner's insurance to a company for which Treutel was a broker. While Jolynne Trapani subsequently discovered a problem with the homeowner's insurance as placed by David Treutel, the homeowner's coverage is not part of this litigation.

In these meeting between Jolynne Trapani and David Treutel (in which no one else was present), the two discussed increasing the limits of coverage on the restaurant structure, the contents, and the business income. The restaurant was insured by two different companies, Safeco for Fire/Theft and XL for Wind/Hail. The coverage limits on the structure, contents and business interruption on the Fire/Theft policies had very similar limits to the corresponding coverages in the Wind/Hail policy. When the Trapani's renewed their policy in November 2004, the relevant Wind/Hail policies limits were: $149,477 on the structure, $76,794 on the contents and $35,000 on the business interruption coverage. Again, after her visit to hurricane-devastated Orange Beach, Alabama, Jolynne Trapani saw a need to increase the Wind/Hail policies coverage limits and asked David Treutel to make the following changes:[11]

- Structure: Increase from $149,477 to $300,000
- Contents: Increase from $76,794 to $150,000
- Business Interruption: Increase from $35,000 to $300,000

The desired increase on the wind structure was not a reflection of what the property was worth, but rather how much damage Jolynne Trapani though the restaurant might sustain given its relatively high elevation and that it survived Hurricane Camille in 1969. A total loss was not contemplated.[12] Further adding to their desire to increase the insurance limits on the restaurant

[11] Trial Transcript at 107-111.
[12] Trial Transcript at 24, l. 6 – 25, l. 15.

was the fact that the Trapanis had performed a renovation on the restaurant in January 2005 and had upgraded the restaurant's fixtures and contents.[13] As for business interruption, the desired $300,000 figure came from Jolynne Trapani after telephoning her account.[14] Again, Jolynne Trapani's concern was having the restaurant covered for possible hurricane damage.[15]

David Treutel failed to make any of the requested changes. Treutel increased the business interruption limits from $35,000 to $200,000, but not the correct $300,000. He did raise the restaurant's contents limits to $150,000 on the Fire/Theft policy, but failed to increase either the structure or contents on the Wind/Hail policy for this restaurant located in coastal Mississippi, despite the fact that the whole impetus of Jolynne Trapani requesting mid-year policy changes was her experience in hurricane devastated Alabama and the 2005 hurricane season that began on the 1st of June. As for the requested changes to the structure, contents, and business interruption policies made starting in late May 2005, neither David Treutel nor anyone from Treutel Insurance Agency contacted or informed the Trapanis that there was a delay or problem in raising the limits as requested. Defendants did not send any kind of notice or confirmation to Plaintiffs of the steps taken to increase limits until mailing out a form (Exhibit D-8) showing $200,000 in business interruption. That form, dated August 26, 2005 was never received by the Plaintiffs.[16]

On August 29, 2005, Hurricane Katrina devastated Bay St. Louis and the rest of the Mississippi Gulf Coast. Plaintiffs' restaurant was a total loss; virtually nothing was left.[17] After Katrina, Jolynne Trapani discovered for the first time that David Treutel did not increase the wind policy's limits on the structure and contents at all, and did not increase the business

[13] Trial Transcript at 24, l. 18-24.
[14] Trial Transcript at 110, l. 5-18.
[15] Trial Transcript at 41, l. 13-15.
[16] Trial Transcript at 143, l. 23 – 145, l. 29.
[17] Trial Transcript at 46, l. 14- 47, l. 6.

interruption limits as requested. Plaintiffs made the claims on the policies as placed, recovering the limits of the flood policy ($100,000 structure and $100,000 contents) and the limits under the wind policy as placed. The total payments did not compensate the Plaintiffs for all their losses.

David Treutel has disputed Jolynne Trapani's claims that she asked him to make any changes to the policies that he did not make. Plaintiffs filed suit in Hancock County Chancery Court on December 2, 2005. After discovery, and after a number of postponed trial dates and a transfer to Circuit Court, this matter went to trial in the Circuit Court of Hancock County. Judge Roger T. Clark presided over an trial just over two days in length. During that trial, the Trial Judge struck one of Plaintiffs' exhibits in its entirety and redacted two of Plaintiffs' exhibits. The Trial Court also disqualified Plaintiffs' expert Peter Quave. After the Plaintiffs rested, Defendants moved for a directed verdict, which the Trial Court granted. Plaintiffs appeal a number of evidentiary rulings made by the Trial Court as well as the Trial Court's decision to direct a verdict on all the policies instead of sending all or part of the case to the jury.

SUMMARY OF ARGUMENT

In directing a verdict for the Defendants, the Trial Court failed to consider the testimony of Jolynne Trapani in making a determination that Plaintiffs could not prove the elements of their case, contrary to the inferences and weight given to the non-moving party's testimony under Miss. R. Civ. Pro. 50. Also, the Trial Court abused its discretion in striking one of Plaintiffs' exhibits and ordering the redaction of two others. Although a trial court has considerable discretion with evidentiary rulings, those rulings can be reversed if there is an abuse of discretion and a party is prejudiced. Respectfully, the Trial Court made a number of rulings that warrant reversal and remand for a new trial.

First, the Trial Court erred in stepping into the shoes of the jury. The Trial Court made a decision to sustain the Defendants' Motion for a Directed Verdict as to all three coverages

(structure, contents and business interruption) on the basis that Plaintiffs were fully compensated for their losses. Such a determination completely discounts the testimony of Jolynne Trapani that the insurance proceeds the restaurant received did not come close to compensating them for their losses, particularly considering that the wind policy in place contained an endorsement providing for replacement cost of the structure. As discussed below, the adverse evidentiary rulings did cause Plaintiffs prejudice; however, Jolynne Trapani's testimony alone was sufficient for the matter to go to the jury. Counsel for the Defendants thoroughly cross-examined Jolynne Trapani, the Defendants introduced several pieces of evidence and Defendant David Treutel testified at great length. The jury could have made—and should have been able to make—the decision about whether it believed Jolynne Trapani's testimony about both the breach of the agent's duty and the extent of the damages suffered. As the sole manager of the business affairs of her business and sole source of income and employment for her and her husband, Jolynne Trapani's testimony—if believed—carries tremendous weight. That testimony alone was sufficient to overrule the Motion for Directed Verdict and allow the matter go to the jury.

Putting aside that Jolynne Trapani's testimony was enough to send the case to the jury, the Trial Court made a number of evidentiary determinations that allowed the Court a basis for directing a defense verdict. First, determining that portions of a Small Business Administration (SBA) loan application (Exhibit P-15) made under penalty of perjury did not fit the business records hearsay exceptions of Miss. R. Evid. 803(6). The two sources of the information were the SBA itself and Jolynne Trapani. What fits in a hearsay exception and what does not depends in large part on the reliability of the exception. A form submitted under penalty of perjury to a government agency containing one piece of data from that same agency, along with other data from a business owner applying for a business loan is not an unreliable document. Not

recognizing the reliability of the redacted portion of P-15 was an abuse of discretion that caused Plaintiff harm.

As for Exhibit P-16, a partial list of contents and structural components, the Court ordered the redaction of portions of the list it deemed not to be contents. Nevertheless, despite holding that the fixtures and other structural (i.e. non-contents) items on that list could be used to document some of the non-contents losses, the Trial Court ordered the exhibit to be redacted. If there was any confusion about Exhibit P-16 in terms of what were contents and what were not contents, any such confusion could have been cleared up by an instruction to the jury. Although the Trial Court did not let the matter go to the jury, Plaintiffs raise the redaction of P-16 as an error.

As for Exhibit P-17, stricken in its entirety, the Trial Court erred in its determination that P-17 was not the best evidence of the lost profits. Exhibit P-17, a computer printout of the restaurants daily gross sales was the starting point of any analysis of lost net income recoverable under the business interruption portion of the Plaintiffs' insurance policy. Jolynne Trapani was not only the ultimate source of that information, but was also the best person to explain and interpret the data, as she knew the restaurant's expenses better than anyone, including any outside accountants. Jolynne Trapani was the most knowledgeable person about the business's expenses from every utility bill to every pound of shrimp purchased. As the daily receipts were the starting point of any net income analysis and Jolynne Trapani was available to testify about the restaurant's expenses, excluding P-17 was an abuse of discretion. For the same reasons, the document is admissible under the business records exception of Miss. R. Evid. 803(6). Finally, counsel for defendants ably and thoroughly cross-examined Jolynne Trapani and her losses, including business interruption. As such, the Defendants would not have been prejudiced by the introduction of P-17.

Next, the Trial Court erred in disqualifying Plaintiffs' expert Peter Quave. There is no requirement that an expert have the same or virtually the same experience and certifications as the person about whose conduct he is opining. Mr. Quave had more than adequate background to testimony about Defendants' conduct, particularly regarding that his testimony would have been relatively limited in scope, focusing largely on two inquiries: could Defendants have possibly place the coverages requested by Jolynne Trapani and whether Defendants acted with the measure of diligence accepted in the insurance industry. As such, the Trial Court's decision to disqualify Peter Quave was an abuse of discretion.

Finally, the Trial Court erred by affording Defendants the same benefits the insurer would receive under the relevant policies, but not holding the Defendants to the same limitations as an insurer would face in defending a claim. In other words, the Trial Court allowed to Defendants to walk in the shoes of the insurer assuming a defense (that the damage was caused by an excluded peril) the insurer did not pursue as evidenced by its defense to pay policy limits and its acknowledge that Plaintiffs suffered damage in excess of limits as placed.[18] While Plaintiffs do not dispute that they have the burden of proof to prove the elements of negligence including damages, Defendants here should be estopped from raising defenses that the wind insurer did not raise, namely that windstorm forces in some measure contributed to the destruction of Plaintiffs' restaurant, its contents and its lost business income. While the defendants have disputed the business interruption losses above what was paid on the policies as placed, and the defendants have disputed the value of the totally destroyed structure and contents, it is undisputed that the building and its contents were a total loss. The flood insurer and the wind insurer each paid the respective limits on the policies as placed. As such, it is undisputed that the losses were caused by some combination of wind and flood.

[18] See Exhibit P-14.

ARGUMENT

1. The Trial Court Erred In Directing A Verdict On Each Of The Three Coverage Areas Instead of Allowing the Jury to Make the Factual Determinations.

The Trial Judge erred in directing a Verdict for the Defendants as Jolynne Trapani, the co-owner and everyday business manager of Trapani's Eatery, Inc., was qualified to testify about the value of the restaurant structure and its contents, as well as the restaurant's income and expenses. Additionally, no expert testimony was required to prove damages for the value of the structure, contents and business interruption losses.

Miss. R. Civ. Pro. 38 provides that "[t]he right of trial by jury...shall be preserved inviolate." A motion for a directed verdict under Miss. R. Civ. Pro. 50 "tests the legal sufficiency of the plaintiff's case." *Solanki v. Ervin*, 21 So.3d 552, 556 (Miss. 2009). In making a determination as to whether to grant a motion for a directed verdict, the trial court is

> **to look solely to the testimony on behalf of the party against whom a directed verdict is requested.** He will take such testimony as true along with all reasonable inferences which can be drawn from that testimony which is favorable to that party, and, if it could support a verdict for that party, the directed verdict should not be given. **If reasonable minds might differ as to this question, it becomes a jury issue.**

Id. (quoting *White v. Thomason*, 310 So.2d 914, 916-17 (Miss. 1975)(emphasis added).

A judgment granting a directed verdict under Miss. R. Civ. Pro. 50 is reviewed de novo. *Solanki*, 21 So. 3d at 556.

The owner of property is qualified by her ownership alone to testify as to her property's value. The U.S. Court of Appeals for the Fifth Circuit has held that a property owner could testify on the value of his home and the furnishings within it which were destroyed by fire. *LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 433-34 (1982). The court reasoned that the testimony is then "subject to attack through cross-examination or independent evidence refuting the owner's

estimate ... with the jury as fact-finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony." *Id.* at 434 (quoting *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 699 (5th Cir. 1975)). The court concluded that the owner's testimony as to the value of his property was admissible despite the fact that the owner may have been relying to some extent on hearsay. *Lacombe*, 679 F.2d at 435-436. The court further stated the general principle, acknowledged in the Fifth circuit, that the owner of property is qualified by his ownership alone to testify as to its value. *United States v. 329.73 Acres of Land*, 666 F.2d 281, 284 (5th Cir. 1982) (land); *Dietz v. Consolidated Oil & Gas, Inc.*, 643 F.2d 1088, 1094 (5th Cir. 1981) (growing crops); *Meredith v. Hardy*, 554 F.2d 764, 765 (5th Cir. 1977) (trucks, camper and personal property); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), ("good will" value of a business); *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) (personal property).

As for contents in particular, a witness may testify to the value of those lost or damaged contents based upon personal knowledge. The Mississippi Supreme Court has held that a witness may use a previously prepared list detailing items lost in a house fire in order to more fully testify as to the lost contents and their estimated valued. *New Orleans & Northeastern R. Co. v. Bryant*, 46 So.2d 433, 435-36 (1950)(in banc). There, the Bryant family had sustained losses in a house fire and prepared a detailed list of the various articles destroyed by the fire, placing values opposite such listed articles. *Id.* at 435. At trial, two Bryant family members had a copy of this list before them as they testified on the stand to the destroyed articles and their values. *Id.* The lower court sustained an objection as to the reading to the jury the various values shown on the list but permitted the witnesses to state their personal knowledge of the various articles and their estimate of the articles' values. *Id.* One witness testified that she helped purchase much of the

property and knew the purchase prices. *Id.* She also testified that she purchased replacements for much of the destroyed articles and knew the market values of the articles.

On appeal, the Mississippi Supreme Court held that such testimony was proper. *Id.* at 435-36. The Court reasoned that the witnesses were subjected to cross examination regarding their knowledge of the articles destroyed and the accuracy of their knowledge of the values. Therefore, the Court held that there was no error in the use of the list during the witnesses' testimony and that the witnesses could testify to the value of their lost articles based upon their personal knowledge.

In this case, Jolynne Trapani is the co-owner of the restaurant and is thoroughly familiar with the business and its lost assets. She has been running the business for years, paying taxes on the structure, acquiring insurance on the property, etc. Jolynne Trapani had personal knowledge of the items in the restaurant and their market value. She made the purchasing decisions for all the items and knew their purchase prices. Furthermore, she also bought replacement items as Katrina reduced the restaurant to a slab and knew the market value of those items. As such, Jolynne Trapani's testimony about the value of the restaurant's lost contents should have been admitted as proper testimony based on personal knowledge. Indeed, she is competent to testify about the structure's value and is the best person to testify about the restaurant's contents, as well as its income and expenses.

The Trial Court apparently refused to allow the contents portion in particular to go to the jury because the non-structural items (i.e. contents) on Exhibit P-16 totaled approximately $76,000—the limits of the insurance placed by David Treutel. Such a determination does not take into account that Plaintiffs only had to supply their insurance company with a contents list that added to the limits of the policy as placed. Handing an insurance company a partial contents

list totaling the limits of the policy as placed does not mean that there were not more than $75,000 in contents losses. It would be of no concern to Plaintiffs' insurance company that Plaintiffs' had windstorm contents losses in excess of the policy limits. Plaintiffs provided a proof of loss to the policy limits as placed, and the wind insurer paid the limits. A contents list is not the sole competent source of proof of contents losses. As the *Bryant* case supra provides, an insured can testify about the value of the contents of her own property. As Jolynne Trapani testified, she knew the value of the contents in the restaurant she co-owned with her husband and she knew how much it cost to replace those contents and that the cost to replace all the contents exceeded the contents coverage paid on the wind and the flood policies. No expert is required, nor is any documentary evidence necessarily required to prove contents losses. The jury was perfectly capable of weighing Jolynne Trapani's testimony against the remaining testimony and evidence. Also, counsel for the defendants ably and thoroughly cross-examined Jolynne Trapani about her losses, including asking about the unredacted portions of the contents list in P-16. The jury should have been allowed to weigh Jolynne Trapani's testimony against David Treutel's and make its factual determination.

Further, in making its findings directing a verdict in favor of the defendants, the Trial Court relied solely on what little documentation there was as a basis for finding that the Plaintiffs had been fully compensated (e.g. pre-storm valuations of contents and structure) [19]. The Trial Judge gave no explanation that he considered the testimony of the Jolynne Trapani as to the value of the restaurant structure, its contents, and the lost business income. In citing what little documentation there was as a basis for finding the Plaintiffs had been fully compensated (e.g. pre-storm valuations of contents and structure), the Trial Court did not give Jolynne Trapani's testimony its due weight. In any event, it was for the jury to decide whether to believe Jolynne

[19] *See* Trial Transcript at 296, l. 17 – 298, l. 17.

Trapani's explanations about whether there were contents not listed on the Contents List (Exhibit P-16) or whether the pre-storm listed value of the home (Exhibit D-1) was too low. By not giving any weight to Jolynne Trapani's testimony—something *Bryant* and other cases cited above say is competent evidence—the Trial Judge overstepped his bounds by assuming the role of the jury in weighing the testimony and directing a verdict for the defendants.

Finally, the Trial Court's reliance on two Memorandum Opinions, *Sanders v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 5003237 (S.D. Miss. 2008) and *Ross v. Metropolitan Prop. & Cas. Ins. Co.*, 2008 WL 4553060 (S.D. Miss. 2008) by Senior U.S. District Judge Senter was misplaced. In citing *Sanders* and *Ross*, the Trial Court remarked that "the pre-storm value of the insured property, the dwelling and it's [sic] contents and other structures, represents the maximum recovery the plaintiffs may obtain from all applicable insurance coverages under the indemnity principle."[20] While Plaintiffs do not dispute the legal validity of what Judge Senter said in those two opinions, nothing in those opinions states that the insured's testimony is not competent evidence to testify about value of the property. Again, the Trial Court stepped into the shoes of the jury by accepting some evidence (e.g. pre-Katrina forms with a listed value of only about $150,000 for the restaurant structure) but not taking into account the testimony of the party against whom the directed verdict was requested. Jolynne Trapani's testimony, if true, could have supported a case against defendants for failure to place the correct insurance limits and that damages occurred as a resulted. As a result, the Trial Court erred in directing a verdict for the Defendants.

[20] Trial Transcript at 296, l. 11-16.

2. The Trial Court Erred in Redacting Page 5 of Exhibit P-15 As Hearsay

A trial court's evidentiary rulings are reviewed with "an abuse of discretion standard." *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss. 2002) (citing *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 210 (Miss. 1998)). For a trial court's evidentiary rulings to be reversed, the ruling "must result in prejudice and adversely affect a substantial right of the aggrieved party." *Id.* (citing *Terrain Enters, Inc. v. Ockbee*, 654 So.2d 1122, 1131 (Miss. 1995)). In other words, a decision to be reversed, the trial judge must abuse his discretion and inflict harm "severe enough to harm a party's substantial right." *Id.*

The Trial Court ordered[21] the redaction of Exhibit P-15, specifically the removal of page 5 of that Exhibit, which consists of a letter to the Small Business Administration (SBA) that was attached to a SBA Disaster Business Loan Application. Page 5 to Exhibit P-16 should have been admitted under the business records exception of Miss. R. Evid. 803(6). That one item of information, namely the statement that SBA estimated the rebuilding costs at $752,000, came from another source does not necessarily exclude the entire page. As the Mississippi Supreme Court has held, "[u]nder Rule 803(b) and the comment, it is not necessary to call or to account for all participants who made the record. However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity." *Mississippi Gaming Com'n v. Freeman*, 747 So.2d 231, 242 (Miss. 1999)(citing *Watson v. State*, 521 So.2d 1290 (Miss. 1988)).

Here the source of the $752,000 figure was the SBA itself; the remaining information came from Jolynne Trapani. The redacted page was contained in a loan application prepared by

[21] Trial Transcript at 96-97.

the business owners under penalty of perjury.[22] Applying for loans is something businesses will do from time to time. Its reliability is enhanced by the fact it was prepared and authenticated by Jolynne Trapani and submitted under penalty of perjury. Thus, it qualifies under the business records exception of Miss. R. Evid. 803(6).

3. The Trial Court Erred in Redacting Portions of Exhibit P-16

Upon objection by the Defendants, the Trial Court ordered Plaintiffs to redact portions of Plaintiffs' Exhibit P-16 labeled "Asset Detail."[23] While the Court allowed a redacted form of the Exhibit listing a number of items of contents, the Court ordered the redaction of all items that it deemed to be fixtures or part of the building.[24] Assuming for argument's sake that the redacted items are fixtures not compensable under the contents portion of the policy, as fixtures or parts of the structure they would be compensable under the structure portion of the policy which provided for replacement cost. Although the Court did hold that the redacted items "can be used maybe for other purposes,"[25] the items not deemed contents were redacted. The items deemed fixtures or part of the building should not have been redacted as the documents contained evidence of some of the loss to the building's fixtures and the structure itself. As such, any redaction of P-16 was in error.

4. The Trial Court Erred in the Application of the Best Evidence Rule In Excluding Plaintiffs' Daily Receipt, Exhibit Number P-17.

The best evidence rule, Miss. R. Evid. 1002, does not preclude a witness from testifying from personal knowledge. Ordinarily, the contents of documents or records cannot properly be shown except by introducing the document itself, which is the best evidence. *Casey v. Valentour*,

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[22] *See* Page 2 of Exhibit P-16, which contains a warning that false statements are subject to possible prosecution by the U.S. Attorney General.
[23] Also referred to as the "Contents List."
[24] Trial Transcript at 88-93.
[25] Trial Transcript at 91, l. 13-15.

218 So.2d 863, 865 (Miss. 1969). However, the best evidence rule only expresses a preference for original documents, but does not preclude the admission of secondary evidence." *Watson v. State,* 465 So.2d 1091, 1092 (Miss. 1985). Courts have held that the best evidence rule is not applicable when a witness testifies from personal knowledge of the matter, even though the same information is contained in a writing. *United States v. Conteh*, 234 Fed. Appx. 374, 387 (6th Cir. 2007) (applying Fed. R. Evid. 1002).[26] In *Conteh*, the court ruled a witness's testimony admissible even though the witness described fraudulent checks (original documents) based on personal knowledge.

Furthermore, the best evidence rule does not require the production of an accountant's statements or work. The best evidence rule does not require the introduction of books of account or other documentary evidence where the business owner is "intimately familiar with his business and could speak with sufficient accuracy about the costs and relative volumes of business." *Lynn v. Sottera, Inc.* 802 So.2d 162 (2001). Courts have also held that business owners may provide testimony and supporting documentation to prove lost profits. *Warren v. Derivaux*, 996 So.2d 729 (Miss. 2008). In *Warren*, the court held that the use of past earnings is a sufficient method for the trier of fact to make a fair and reasonable estimate of lost profits. *Id.* at 737. There, the business owner estimated how many sales were lost and provided calculations for average gross-and net-income values. *Id.* The court held that the witness's testimony combined

[26] Miss. R. Evid. 1002 and Fed. R. Evid. 1002 are substantively the same. Miss. R. Evid. 1002 reads "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided by law" whereas Fed. R. Evid. 1002 reads, "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by an Act of Congress." Where a Mississippi rule is patterned after a federal rule, Mississippi courts may look to the "federal courts' interpretation for guidance." *Brent v. State*, 632 So.2d 936, 943 (Miss. 1994).

with the sales figures and the calculations was ample evidence upon which to estimate lost profits to a reasonable certainty. *Id.*

Here, Jolynne Trapani was familiar with the sales and expenses of her business. She had independent knowledge of these figures because she was actively involved with the restaurant's finances and record keeping. Indeed, Jolynne Trapani managed payroll, purchasing and possessed a unique familiarity with the restaurant's receipts. Additionally, Jolynne Trapani was personally familiar with the level of taxes her business paid every year and the amount of business income her business made every year based upon the sales figures she provided. The Daily Receipts Exhibit (P-17) was a document prepared in the normal course of business that contained data transmitted by Jolynne Trapani (the most knowledgeable person about the restaurant's business) to her accountant. As such the document fits in the "business records" hearsay exception of Miss. R. Evid. 803(6). While the Trial Judge voiced a preference for the accountant to testify on the restaurant's net income calculations, such testimony is not required or even the most reliable. No one knew her business better than Jolynne Trapani. Jolynne Trapani knew how much her daily sales were and she was in charge of paying the restaurant's expenses from the utility bills to buying supplies. As the daily receipts were a document made in the ordinary course of business and otherwise allowable by the hearsay exception of Miss. R. Evid. 803(6), the document was not barred by the best evidence rule and should have been admitted into evidence, and Jolynne Trapani should have been allowed to testify about how net income was calculated from those daily receipts.

Even if the daily receipts (Exhibit P-17) was properly excluded by the Trial Judge under the best evidence rule, Jolynne Trapani could still testify about the restaurant's net income. Jolynne and her husband Anthony were the sole owners of the restaurant and it was their only source of livelihood. As the person who made the financial decisions in their marital business,

Jolynne Trapani had a familiarity with the restaurant's net income. After all, the restaurant's net income was her and her husband's income. Additionally, counsel for the defendants thoroughly cross-examined Jolynne Trapani on the business income losses. As such, the defendants would not have been prejudiced. Thus, even if the Trial Judge was correct in excluding Exhibit P-17 under the best evidence rule, Jolynne Trapani was competent to testify on the restaurant's income and the jury should have been given the opportunity to weigh Jolynne Trapani's testimony against the testimony of David Treutel and any remaining documentary evidence.

5. The Trial Court Erred in Striking Plaintiffs' Expert Peter Quave

The Trial Court would not allow Plaintiffs' proposed expert Peter Quave to testify, citing what the Court determined to be his lack of relevant experience as well as the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).[27] The appropriate injury is not *Daubert* as that case is concerned with the expert's methodology as opposed to the expert's qualifications. *Id.* at 592-595. Instead the correct determination is the two-part analysis of Miss. R. Evid. 702. Rule 702 provides that for expert testimony to be admitted, the witness must satisfy two prongs: "be qualified by virtue of this or her knowledge, skill experience or education....[and] the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue." *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 35 (Miss. 2003)(citing Miss. R. Evid. 702). A trial judge's determinations on whether to admit or suppress an expert witness will not be reversed except where "discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Id.* at 34 (quoting *Puckett v. State*, 737 So.2d 322, 342 (Miss. 1999)).

[27] *See* Trial Transcript at 259, l. 2-10. The Trial Judge stepped back from *Daubert* somewhat later on in the record (see Trial Transcript at 260, l. 13 – 261, l. 9); however, he did cite *Daubert* as a basis in his oral reasons for excluding Mr. Quave.

For the first prong—qualifications—the expert does not have to practice in the exact same field as the person whose conduct he is testifying about. Whether a witness can be qualified as an expert depends "on his knowledge, skill, experience, training, education, or a combination thereof. *Thompson v. Carter*, 518 So.2d 609, 614 (Miss. 1987). "Qualification as an expert does not necessarily rest upon the educational or professional degree a witness possesses." *Id.* Even in medical malpractice actions, as a general rule, an expert in a particular field of specialty is not required. *Brown v. Mladineo*, 504 So.2d 1201, 1202 (Miss. 1987) (holding "[m]ost courts allow a doctor to testify if they are satisfied of his familiarity with the standards of a specialty, though he may not practice the specialty himself.").

As for the second prong of Miss. R. Evid. 702—assisting the trier of fact— "[t]he general rule in Mississippi is that expert testimony is not required where the facts surrounding the alleged negligence are easily comprehensible to a jury." *Wal-Mart Stores, Inc. v. Johnson*, 807 So.2d 382 (Miss. 2001). A suit against an insurance agent is not one that automatically requires expert testimony; but instead, whether an expert is required or helpful to the trier of fact depends on the particular subject matter of that case. *Lovett v. Bradford*, 676 So.2d 893, 895 (Miss. 1996).

Explaining the duties of an insurance agent can be explained with expert testimony. The Mississippi Supreme Court has held that "[a]n insurance agent owes the duty to his principal to exercise good faith and reasonable **diligence** to procure insurance on the best terms he can obtain...." *First United Bank of Poplarville v. Reid*, 612 So.2d 1131, 1137 (1992) (emphasis added)(internal quotations omitted). An agent is required to "faithfully carry out the instructions given him by his principal, his duty being not merely to obtain a policy, but to obtain one which conforms to the application." *Id.* (internal quotations omitted). Put another way, "[i]t is the duty of an insurance agent to exercise reasonable **diligence** in obtaining a policy conforming to the

request of the insured. *Haggans v. State Farm Fire & Cas. Co.*, 803 So.2d 1249, 1252 (Miss. App. 2002) (emphasis added)(citing *Ritchie v. Smith*, 311 So.2d 642, 646 (Miss. 1975)). But where the insured has a copy of the policy, he is charged with knowledge of the contents of that policy. *Id.*

Unlike the insured in *Haggans*, here Plaintiffs did not receive a copy of their insurance policy or even a copy of the declaration pages for windstorm coverage on the structure, contents and business interruption. *See* 803 So.2d at 1252. After their last meeting sometime in early July, defendants did not communicate any problem about acquiring the limits as requested. In fact, other than hand-delivering some paperwork on the Trapani's homeowner's policy (a new policy), defendants did not provide any sort of verification or communication about the policy limits being placed on any of the policies at issue until mailing a memorandum on August 26, 2005, the Friday before Hurricane Katrina struck (which Plaintiffs did not receive).[28]

Here Plaintiffs' expert Peter Quave had a limited, but well-defined role on which to testify, namely the lack of diligence on the part of the defendants in securing the requested increases in the policies. The issue of defendants' lack of diligence is particularly important given the timing of events, specifically Jolynne Trapani going to David Treutel at the beginning of hurricane season seeking additional coverage in the middle of a policy year. Had time not been of the essence, Jolynne Trapani could have waited until the policy year ended in November to make all these changes to the various wind limits. While in a different line of insurance business than David Treutel, Peter Quave's knowledge and experience in the insurance field did give him knowledge about what insurance products are available, when they are available, and any industry standards concerning placing the coverage.[29] Such industry details are likely not

[28] Trial Transcript at 118, l. 18-22.
[29] Trial Transcript at 263-268.

familiar to a layperson. Mr. Quave had the requisite knowledge and experience in the insurance industry to know whether David Treutel could have placed the coverage limits as Jolynne Trapani requested and whether he was sufficiently diligent in performing the tasks requested and communicating with the client.[30] Mr. Quave would have opined that taking several weeks to make Jolynne Trapani's requested changes was too long in industry standards. He would have similarly testified that defendants' failure to timely communicate the changes to the client and take other steps to ensure the accuracy of the Jolynne Trapani's application was similarly contrary to industry standards.[31] After all, Jolynne Trapani testified to coming to David Treutel out of fear of inadequate coverage for hurricane losses and she came to him at the beginning of hurricane season, outside the normal policy year. While not particularly complicated compared to underwriting or interpreting actuarial tables, here the agent's duty of diligence (or lack thereof) is particularly important. Defining diligence in the industry would have been helpful to the jury, and Mr. Quave was qualified to testify in that area. As a result, the Trial Court's disqualification of Peter Quave was an abuse of discretion and reversible error.

6. As the Wind Insurer Paid All Policy Limits as Place, the Trial Court Improperly Allowed the Defendants to Claim a Defense Never Asserted by the Insurer.

If an insurance agent or broker negligently fails to place coverage, "the damages should be equal to the amount that would have been due under the policy, provided it had been obtained." *Simpson v. M-P Enterprises, Inc.*, 252 So.2d 202, 207 (Miss. 1971) (quoting 29 A.L.R. 2d Insurance Broker or Agent-Liability § 3, pp. 174-75). If agent fails to place the coverage in a manner conforming to the insured's instructions, "the measure of damages has been held the amount for which the insurer would have been had proper insurance been affected." *Id.*

[30] *See* Exhibit P-20 (Mr. Quave's curriculum vitae).
[31] *See generally,* Trial Transcript at 269, l. 7 – 273, l. 10.

Naturally, for an insured to collect from an agent's error, there has to be loss that the insurer would have paid had the policy been properly placed. So long as the total amount of the insurance does not exceed the insurable interest of the property, an insured "is entitled to look for compensation to all of the coverages for which he has paid." *Ruiz v. State Farm Fire & Cas. Co.*, 2007 WL 1514015, at *1 (S.D. Miss. 2007)(unpublished). The acceptance of flood payments does not preclude recovery under a wind policy as well. *Id.* at *1.

When an insurer waives certain provisions or defenses in its policy, it may be estopped from arguing them later. *Larr v. Minnesota Mut. Life Ins. Co.*, 924 F.2d 65, 66 (5th Cir. 1991) (holding that the insurer waived provision requiring termination of policy at age seventy when it continued to accept premium payments after the insured's 70th birthday). Similarly an insurer may waive its right to assert any defenses to liability when it accepts premium payments and pays benefits "without reservation." *Pitts v. Am. Sec. Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991).

Here, because there were payments for both wind and flood losses, both the wind and flood insurers confessed that significant wind and flood damage occurred to the building. Thus the cause(s) of the loss are not at issue. Indeed, both the wind and flood policies paid their respective limits. The Trial Judge improperly shifted the burden to the Plaintiffs to prove that they could have recovered for wind damages if David Treutel had placed the correct windstorm limits on the structure (a difference of approximately $150,000) and the contents (a difference of approximately $74,000). The Trial Judge essentially required to Plaintiffs to prove that the additional losses were caused by wind when both the wind and flood insurers each paid for damages on a building that was reduced to a slab. In other words, the insurers had already admitted (by paying the policy limits) that the structure and its contents were destroyed by some combination of wind and water. Indeed, as Exhibit P-14 shows, Boulder Claims (the claims

servicer for the wind policies), told the Trapanis they were receiving a $10,000 supplemental debris removal payment in addition to their wind limits as that amount was paid "when your covered loss exceeds your available coverage." Thus, not only did the wind insurer admit a total loss under the policy limits as placed, but conceded that the Trapanis had covered losses exceeding the policy limits. With a concurrently caused loss, an insurer admission of losses from a covered peril in excess of policy limits, Plaintiffs could have recovered up to the value of the structure and the contents—items on which Jolynne Trapani was qualified to testify.

In siding with the Defendants here, the Trial Court is requiring a higher threshold of proof than the insurers themselves ever demanded and imposing a causation defense the insurer never pursued for any duration, if any all. If the Defendants get the benefits an insurer would under the policy (such as indemnification for flood payments), then the defendant does not also get the benefit of defenses that the insurer chose never to raise (such as requiring plaintiffs to prove wind, not water, caused the damage). Because the wind insurer did not refuse to pay policy limits on wind, it waived any dispute as to causation. Indeed, paying the entire policy limits and a supplemental $10,000 because the "covered loss exceed[ed] [the] available coverage," is a confession that there were covered wind losses in excess of the limits as placed by the Defendants. All Plaintiffs have to prove is that the Defendants could have placed the coverage limits as request and that they sustained damages equal to or greater than the policy limits as they should have been placed. The jury could have made the factual determination as to whether to believe Jolynne Trapani's testimony as to the extent of damages.

CONCLUSION

In failing to consider the testimony of Jolynne Trapani the party against whom the directed verdict was requested in the light most favorable to Plaintiffs, the Trial Court erred in directing a verdict for the Defendants. Jolynne Trapani's testimony, if true, could support a

claim that Defendants were negligent in their duties and that Plaintiffs suffered damages as a result. It should have been left to the jury to determine whether to believe Jolynne Trapani's testimony against the evidence put forth by the Defendants. The jury should have been given the opportunity to make a decision whether it believed Plaintiffs that they suffered at least $400,000 in structural damages ($300,000 as requested on the flood policy, plus $100,000 paid in flood), $250,000 in contents ($150,000 as requested on the wind policy, plus $100,000 paid in flood) and $300,000 in business interruption (compared to $200,000 paid). The jury was perfectly capable of accepting all Plaintiffs' arguments, rejecting all Plaintiffs' arguments or some combination of the two. A *de novo* review of the trial proceedings warrants reversal.

Additionally, while a trial judge's evidentiary rulings are reviewed under the more deferential standard of abuse of discretion, the Trial Court here erred in ordering the redaction of Exhibit P-15 and P-16. Exhibit P-15 was admissible in its entirety under the business records hearsay exception, or given that it was part of a document completed and submitted to a federal agency under oath, its reliability warranted admission under the residual hearsay exception. The Trial Court further ordered the redaction of items on Exhibit P-16 deemed not to be contents. The redacted items, if not contents of the restaurant, included structural elements and fixtures that would be compensable under the structure portion of the policy. While incomplete in terms of proving all of Plaintiffs' structural losses, the redacted items in P-16 were admissible and should have been left unredacted had the matter gone to the jury.

As for Exhibit P-17, the Trial Court erred in refusing to allow the document to be admitted into evidence. Although the Trial Court held that the daily sales figures in P-17 were not the best evidence, the daily sales figures are the starting place for any business interruption analysis and Jolynne Trapani, the person who had been in sole charge of managing the finances of the restaurant was the best person to testify about the restaurants income and expenses.

Further, as a business record ordinarily kept in the running of the business, P-17 is admissible under the business records exception of Miss. R. Evid. 803(6).

Next, the Trial Court erred in excluding Plaintiffs' Expert Peter Quave. The nature of Peter Quave's expected testimony was important to proving that David Treutel could have placed the coverage limits as requested and in the time allowed. Peter Quave's testimony would have also helped the explain the diligence (or lack therof) in placing these policies in a timely manner during hurricane season. As for Mr. Quave's experience, his decades in the insurance industry qualified him to testify about these matters, which relatively uncomplicated within the insurance industry, but likely unfamiliar to members of the jury.

Finally, the Trial Court erred in giving the defendant agent and agency defenses on causation and indemnification the wind insurer waived by paying the wind policy as placed in full. If causation and indemnification were not issues for the insurer, then the agent cannot step into the shoes of the insurer and claim a defense it did not pursue. So long as the Plaintiffs had an insurable interest up to the limits Jolynne Trapani instructed David Treutel to place, they could recover for his negligence.

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 22nd day of June, 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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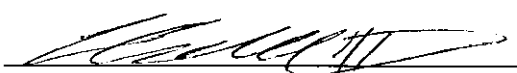

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