

The Expert's Magic Words: Exploring Outcome-Determinative Testimony in Hurricane Katrina Recovery Cases

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On August 29, 2005, Hurricane Katrina struck the coasts of Louisiana, Mississippi, and Alabama with winds up to 125 mph and a storm surge of 25-28 feet.¹ Not all of Hurricane Katrina's destruction came directly from its impressive storm surge or powerful winds alone. Cherri Porter lost her Biloxi home to a casino barge,² which broke free from the Grand Casino of Mississippi and destroyed her beachfront house on impact. Another of Grand Casino's barges, ironically dubbed *The Lady Luck*, broke free from its moorings and destroyed K.R. Borries's construction site on the nearby Schooner Pier.³

Borries sued Grand Casino for negligence in mooring its barge. Porter sued Grand Casino for negligence and sued her insurer for a bad faith denial of coverage. Lower courts granted summary judgments in favor of the casinos in Porter and Borries's claims, as well as the insurance company in Porter's case. This means that the court believed there were no disputed facts, and there was no need to have a trial in order for the court to find in favor of the defendants.

Eleven years after the hurricane, Borries and Porter's cases finally came before the Supreme Court of Mississippi. The Court had precedent, from the case of *Eli v. Silver Slipper*, of allowing similar claims to be decided by a jury, and it followed suit by remanding Borries's case back to the trial court for a jury trial. With respect to *Porter*, however, the Court almost inexplicably affirmed all of the lower courts' summary judgments.⁴ Although a barge destroyed Porter's house, the Court held that the barge owner was not to blame and that Porter's insurance provider was not accountable either. Effectively, there was no legal recovery for Porter for Hurricane Katrina damages.

An Act of God?

The pivotal question in each of these cases was whether Hurricane Katrina's massive storm surge amounted to an "Act of God" that, under law, freed the casino owners from liability. Those who use the phrase colloquially would certainly say the storm was

some divine event, an uncontrollable force of nature. However, the Mississippi court system took nearly a decade to solidify its position on whether Hurricane Katrina was *legally* an Act of God. That is, whether use of reasonable precaution could have prevented its damage.

In 2010, the Court of Appeals of Mississippi held that Hurricane Katrina was an Act of God.⁵ This meant it would be nearly impossible for victims to bring negligence claims because the court said that the storm was unforeseeable and even the highest standard of care could not have prevented property from causing damage. In 2013, however, the case of *Eli v. Silver Slipper* brought the issue before the Supreme Court of Mississippi.⁶ The Court distinguished the appellate judgment and instead held that whether Hurricane Katrina was an Act of God depended on a question of fact: whether or not reasonable care could have prevented foreseeable damage. Thus, the court in *Eli* found that the casino owner was not entitled to a summary judgment just for raising an Act of God defense and sent the case back to trial to determine whether the casino was negligent.

When the Court heard Porter's case less than three years later, the majority opinion did not discuss the Act of God defense by name, but the Court made clear that it decided the case on the issue of foreseeability. Porter argued that she established a battle of the experts similar to that which led the Court in *Eli* to determine that there was a genuine issue of fact as to whether the casino could have anticipated Hurricane Katrina's storm surge and whether it employed a reasonable amount of care to prevent damage. The Court disagreed and concluded that no material issues of fact existed and ruled in Grand Casino's favor.

Two months after *Porter*, in March 2016, the Supreme Court of Mississippi heard Borries' negligence claim. In that case, the casino-defendant raised the Act of God defense, and the Court held that the parties' experts presented genuine issues of fact. The Court remanded the case to trial for a jury

to determine whether the storm should be called an Act of God, but the parties settled in 2017, just before trial.

The Experts' Magic Words

How is it possible that two seemingly identical claims related to the same storm and against the same casino came out of the Supreme Court of Mississippi with vastly different results? Based on the Court's opinions, the somewhat unsatisfactory answer is that Porter's expert's language may not have been precise enough, or he may not have included all of the information at his disposal to address the key issue of whether the casino should have foreseen a storm of Hurricane Katrina's magnitude. A closer look at these testimonies alongside the defendants' arguments provides clarity.

Borries v. Grand Casino

Borries' expert claimed that, while the barge's mooring was designed to withstand up to a fifteen-foot storm surge, a reasonable engineer for the casino should have used the known surge height of Hurricane Camille, which was around twenty-four feet. Grand Casino's experts responded that the barge's mooring could withstand up to a seventeen-foot storm surge, which exceeded the Mississippi Gaming Commission's minimum licensure requirement and was dispositive of reasonable care.

Porter v. Grand Casino

Porter's expert presented evidence that Grand Casino of Mississippi had failed to submit to annual structural inspections of their mooring system or develop a heavy storm-mooring plan, which was industry standard. Notably, the expert did not testify to the foreseeability of the storm surge. Grand Casino responded with expert testimony that it met and exceeded the minimum regulatory requirements from the gaming commission and therefore met its standard of care.

The Supreme Court made it clear in each case that the casinos had a duty to prevent foreseeable damage to nearby property owners in the event of a hurricane. The court held that, as in *Eli*, Borries presented a genuine issue of material fact as to the element of foreseeability, while Porter pointed to evidence of the casino's negligence without discussing whether the casino should have foreseen Hurricane Katrina's destruction. The difference that resulted in Borries's success was the expert testimony as to foreseeability. The appellate court

decision on *Porter*, which the Supreme Court of Mississippi affirmed, notes that Porter's failure to directly tie her evidence to foreseeability was "outcome determinative" in the court's eyes.⁷

Insurance Claims

Cherri Porter, her home left in rubble after Hurricane Katrina, also tried to recover from her insurer, State Farm Fire and Casualty Co. After all, what is insurance for if not to cover an Act of God? Porter held an all-risk policy, meaning that any damage would be covered, unless it was specifically excluded. State Farm denied her initial claim for coverage, citing an exclusion for both wind and water damage. Porter sued for bad faith denial of coverage, wielding expert evidence that a casino barge destroyed her home, not wind or water. For her argument, Porter again relied on a prior Hurricane Katrina case in which the Supreme Court of Mississippi interpreted a common policy clause to favor the insured.

In that case, *Corban vs. USA Insurance Agency*, a homeowner suffered major wind and water damage to her house during Hurricane Katrina. Corban's insurer denied that it was required to pay for the loss based on her all-risk policy's water damage exclusion and the "anti-concurrent cause (ACC) clause." This type of provision means that an insurance policy only provides coverage when damage is *directly* caused by a covered peril, not when there is a chain of events leading to the loss. The insurer in *Corban* claimed that the ACC barred recovery where water damage was involved, regardless of any other damage or the order in which it occurred.⁸ The Supreme Court of Mississippi held that the ACC clause in Corban's policy was only applicable where an excluded peril and a covered peril acted in conjunction to cause the same damage. The case was sent back for a jury trial to determine the factual question of how much damage was caused by water, an excluded event, versus how much damage was caused by wind, a covered event.

Porter argued that her home was at least partially destroyed by a covered event, as in *Corban*, and a jury should sort out the damage. In her case, Porter contended, the insurance policy covered damage from debris like the casino barge. The Supreme Court gave less discussion to the anti-concurrent cause language and instead pointed to a phrase within Porter's policy that refused coverage for any damage that would not have happened in the absence of an excluded event. Accordingly, as Porter's policy excluded wind and water damage, the Court held that the casino barge could not have caused damage without either of these excluded events.



Another Expert's Shortcoming

The dissenting justice in *Porter* expressed that the majority made a mistake by not using *Corban* as precedent. He pointed out that a home destroyed by detached casino barge did not fit any commonly held understanding of water or wind damage and a jury should have determined the causes of Porter's damage.

A look at the 2014 appellate court decision in Porter's case may shed light on why the majority in the highest court held there were no factual issues as there were in *Corban*. Porter presented expert testimony that the proximate cause of her damages was the casino barge. In his testimony, the expert stated that the casino barge allided with Porter's house. The appellate opinion notes that "allided" is a nautical term that is used to describe something propelled by water crashing into something stationary. Therefore, the court saw the expert opinion's use of that word as a concession that the barge would not have destroyed Porter's house but for the storm surge, which was water damage excluded from coverage by her insurance policy. Again, one could speculate that the outcome of Porter's claim turned on her expert's precise word choice.

Conclusion

The legal aftermath of Hurricane Katrina is still evident in Mississippi's court system. Claims are still coming to review and parties are still settling a storm of litigation over a decade after the wind and waves devastated the Gulf Coast. For K.R. Borries, the courts kept his claim afloat long enough to have leverage to

reach a settlement, perhaps recovering some percent of the value of his lost construction site. In the case of Cherri Porter, the legal system offered no recovery, although her home was destroyed. A close look at the court's decision reveals the significance of the expert's testimony, including the importance of precise language, in reaching a determination, even where cases with seemingly identical facts resulted in opposite outcomes. 🐟

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Endnotes

1. NOAA.
2. In Mississippi pre-Katrina, gambling businesses were only allowed to operate on offshore barges, as a compromise to groups that opposed legal gambling in the state. Most of the casinos were permanently moored just off the coast. *See*, Rick Lyman, *Mississippi May Move Its Casinos Ashore*, The New York Times (Sept. 28, 2005).
3. *Borries v. Grand Casino of Mississippi, Inc.*, 187 So. 3d 1042 (Miss. 2016).
4. *Porter v. Grand Casino of Mississippi, Inc.*, 181 So.3d 980 (Miss. 2016).
5. *Bay Point High and Dry, LLC v. New Palace Casino, LLC*, 46 So. 3d 821 (Miss. Ct. App. 2010).
6. *Eli Investments, LLC v. Silver Slipper Casino Venture, LLC*, 118 So.3d 151 (Miss. 2013).
7. *Porter v. Grand Casino of Mississippi, Inc.*, 138 So. 3d 952 (Miss. Ct. App. 2014).
8. *Corban v. USAA Ins. Agency*, 20 So. 3d 601 (Miss. 2009).