

**UNITED STATES DISTRICT COURT  
EASTERN OF LOUISIANA**

<b>JUDY KODRIN AND MICHAEL KODRIN</b>	*	<b>CIVIL ACTION NO.: 06-8180</b>
<b>versus</b>	*	<b>SECTION: "J"</b>
<b>STATE FARM INSURANCE COMPANY AND BRIAN R. BUBRIG INSURANCE AGENCY, INC.</b>	*	<b>MAG. "5"</b>

**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EXPERT  
TESTIMONY OF PLAINTIFFS' ENGINEERING EXPERT NEIL B. HALL**

MAY IT PLEASE THE COURT:

Defendant State Farm Fire and Casualty Company (hereinafter "State Farm") requests that this Honorable Court exclude the expert testimony offered by plaintiffs' engineering expert, Neil B. Hall. State Farm asks this Honorable Court to prohibit Mr. Hall from offering an expert opinion regarding the causation of the alleged damage to the plaintiffs Judy and Michael Kodrin's residence as a result of Hurricane Katrina. State Farm contends that the testimony of Mr. Hall will not be reliable and will not assist the trier of fact in understanding or determining the material facts at issue in this litigation, and therefore, should be excluded.

## **Background**

Plaintiffs Judy and Michael Kodrin (“Plaintiffs”) filed suit against State Farm and Brian R. Bubrig Insurance Agency, Inc. in the 25<sup>th</sup> Judicial District Court for the Parish of Plaquemines, State of Louisiana on August 25, 2006, seeking benefits under their State Farm homeowners policy in connection with Hurricane Katrina. State Farm removed the instant case to federal court. The State Farm homeowners policy provided the following coverages to the Plaintiffs’ property: \$105,000.00 in dwelling coverage; \$10,500.00 in dwelling extension coverage; \$78,750.00 in contents coverage; and actual loss sustained for loss of use coverage. (Exhibit 1, Homeowners Policy Declarations Page) The Plaintiffs also maintained a flood policy on their property with the following coverages: \$56,800.00 in dwelling coverage, and \$19,200.00 in personal property coverage. (Exhibit 2, Flood Policy Declarations Page) The plaintiffs were paid their flood policy limits for the damage to their property which resulted from Hurricane Katrina.

Even though Plaintiffs were paid their flood policy limits, the Plaintiffs are seeking their homeowners policy limits as well based upon their expert reports that the damage to their dwelling was caused by wind. State Farm, based upon its expert reports, determined that the flood water and storm surge (an excluded peril), rather than wind were the causes of loss to the property and denied the Plaintiffs’ homeowners claim.

## **LAW AND ARGUMENT**

- I. Neil B. Hall Is Insufficiently Qualified to Offer Expert Testimony Based Upon Weather Data and Weather Conditions Regarding Whether Wind, Water, Or A Combination of Wind and Water Damaged Plaintiffs’ Property**
  - A. Federal Rule of Evidence 702 and the Standard of Expert Competency**

The Federal Rules of Evidence Article 702 allow a witness to qualify as an expert by knowledge, skill, experience, training, or education. Fed. R. Evidence 702. If a witness has special knowledge or experience, Rule 702 requires the area of the witness's competence to match the subject matter testimony. *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6<sup>th</sup> Cir. 1994), *cert. denied*, 115 S.Ct. 902 (U.S. 1995). (“The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a witness to answer a specific question.”)

Thus, while Mr. Hall holds an undergraduate degree in architecture and graduate degrees in systems management, landscape, landscape architecture, and urban studies, this does not automatically qualify him to offer expert testimony regarding a specialized field of engineering, for which he has not had corresponding specialized training, education, or experience. See *Matke v. Deschamps*, 374 F. 3d 667, 671 (8<sup>th</sup> Cir. 2004) ( physician specializing in sleep and pulmonary disorders was not qualified to offer opinion on an aspect of pathology); *United States v. Lopez*, 543 F.2d 1156, 1158 (5<sup>th</sup> Cir. 1976) (professor and scholar of psychology was not qualified to offer opinion as to whether defendant suffered “sensory deprivation psychosis” as he was not a “clinical psychologist”); *Fireman’s Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1180 (3<sup>rd</sup> Cir. 1976) (geologist not qualified to testify as to whether earthquake caused landslide as he had no training in seismology); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969-970 (10<sup>th</sup> Cir. 2001) (orthopedic surgeon not qualified to provide expert opinion on surgical bone nail, as the surgeon had never researched the product.)

**B. Mr. Hall Is Not Qualified to Offer Expert Engineering Testimony Based Upon Weather Data and Weather Condition In This Lawsuit**

The fact that Mr. Hall has been practicing as a civil engineer for many years does not mean that he is qualified to offer testimony on whether the plaintiffs' house was damaged by wind and/or water. Mr. Hall is not a climatologist, meteorologist, nor a forensic engineer. Mr. Hall does not have sufficient qualifications to offer his expert opinion as to whether the plaintiffs' house was moved and damaged by wind, a covered loss under the plaintiffs' homeowners policy, or by water, a non-covered loss under the homeowners policy.

**C. Even If Mr. Hall Is Qualified to Offer Expert Testimony, His Methodology Is Unreliable And His Conclusions Are Based On Incorrect And Erroneous Underlying Data That Will Not Assist The Trier of Fact And Must Be Excluded**

Even if the Court finds that Mr. Hall is qualified to offer expert testimony as to the cause of damage to the plaintiffs' house, which State Farm disagrees, Mr. Hall's "expert" opinion is based upon unreliable methodology as well as erroneous or non-existent facts and data and hearsay such that his testimony is precluded under the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Federal Rule of Evidence 702 requires that an expert witness may testify in the form of an opinion or otherwise, if: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witnesses applied the principles and methods reliably to the facts of the case."

An expert's testimony can be admitted only if it is both relevant and reliable. *Daubert*, 509 U.S. at 591, *Kumho*, 526 U.S. at 152. *Daubert* sets forth a two prong test for the trial judge to determine the admissibility of expert testimony. The Court, "must at the outset, ... determine whether the expert is proposing to testify to, (1) scientific knowledge; that (2) will assist the trier

of fact to understand or determine a fact in issue.” *Daubert* supra. at 592. Both prongs of the *Daubert* test must be satisfied before the proffered expert testimony may be admitted. *Id.* at 595.

This analysis, “entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue. “ *Id.* The first part of the *Daubert* analysis is a determination of whether the expert testimony is based on reliable methodology. In determining an expert’s reliability, the Court’s focus, “must be solely on principals and methodology not on the conclusion that they generate.” *Id.* at 595.

The Supreme Court set forth several factors which may be considered to determine the soundness of scientific methodology including:

- (1) whether the theory or technique can be and has been tested;
- (2) whether the theory or technique has been subjected to peer review and publication;
- (3) the known or potential rate of error and the existence or maintenance of standards; and
- (4) whether the theory or technique used has been generally accepted

The second part of the *Daubert* analysis, i.e. whether the proposed testimony will assist the trier of fact to understand or determine a fact at issue goes primarily to the issue of relevancy. *Daubert* at 591. The court must decide whether the expert testimony proffered in the case is sufficiently tied to the facts of the case such that it will aid the jury in resolving a factual dispute.

**1. Mr. Hall's Opinions Do Not Meet the *Daubert/Kuhomo* Threshold of Reliability As the Facts/Data Upon Which Mr. Hall's Opinion Is Built Is Inaccurate, Untested, and/or Non-Existent as Well as Hearsay**

In Mr. Hall's report, his investigative methodology and opinion was based on available evidence including analysis of weather conditions, physical data collected at the site location and his knowledge, training, and experience. (Exhibit 3, Hall's report, page 2.) Mr. Hall gave a synopsis of weather conditions in his report based upon wind data from Automotic Surface Observation Systems instrumentation, the National Weather Service, The Corps of Engineers IPET report, NOAA wind map, the Enhanced Fujita Scale, Hurricane Katrina Surge Inundation and Advisory Board Base Flood Elevation Map LA-042, Forest One Hurricane Katrina Wind Speed Map, and SLOSH Model Map. (Exhibit 3.)

In Mr. Hall's report, he states the following:

- (1) The roof clearly is wind damaged; such damage would have occurred prior to the rise of flood water. It is clear from the photograph that the roof was damaged by wind; it is not clear from the photograph if the entire roof was removed by wind. (Id., page 3.)
- (2) Useful in assessing wind damage to building is the Enhanced Fujita (EF) Scale which is used by the National Weather Service to estimate surface wind speeds based on ground indicators such as damaged buildings and structures...Based on the NOAA wind gust map enclosed with Attachment A, three-second winds gusts as high as 149 mph may have crossed the area...Assuming the building was properly strapped (as per Mr. Kodrin); for purpose of this analysis it is assumed that the building would meet the current requirements of hurricane resistant construction. (Id. page 4.)

- (3) ...it is clear that the roof sustained the “loss of significant roof covering” (which occurs at 97 mph) before the rise of storm surge. (This does not preclude higher wind speeds before the rise of flood waters, but shows based on physical evidence alone that wind reached 97 mph before the rise of flood water.) (Exhibit C, page 5.)
- (4) It is clear that the flood would not have removed the roof from the site unless the building collapsed because the roof was strapped through the building walls to the foundation. Water overtopping (as opposed to breaching) the levee would not have a strong current velocity; hence there was insufficient hydronamic force to collapse the exterior walls of the building. Since flood could not collapse the walls, flood could not remove the roof. The only way for the roof to travel down the street would be if the wind lofted and blew the roof down the street or (more likely) if wind collapsed the building allowing flood the float the roof after which time wind pushed the roof on top of the water. (Exhibit C, page 5.)
- (5) Wind attacked and destroyed the Kodrin residence before the rise of storm surge. Storm surge eventually rose to a height about 12 feet above mean sea level (higher than the Kodrin roof) but without a strong current velocity or wave load there is no reason to believe that height of water alone would collapse a building strapped to the foundation and capable of resisting hydrostatic loads. Some parts of the building and its contents may have remained on the property until the rise of storm surge. However, the building and garage were economically totaled by wind before the rise of storm surge. (Exhibit C, page 5.)



Mr. Hall, a civil engineer, is attempting to give an analysis of the weather conditions, which something he is clearly not qualified to do. Mr. Hall is a civil engineer not a climatologist, meteorologist, or forensic engineer. Furthermore, Mr. Hall based his entire report on unreliable weather data.

**D. Mr. Hall's Methodology and Conclusions Are Based On Demonstrably Incorrect and Incomplete Underlying Data And Thus His Methods, Opinions, And Conclusions Are Insufficiently Unreliable To Assist The Trier Of Fact And Must Be Excluded From Expert Testimony**

The trial court serves a gate keeping role to keep out expert testimony that is based solely on speculation or unsupported data. *Daubert*, 509 U.S. at 589. Where the testimony's factual basis, data, principles, methods or their application are called sufficiently into question, the trial judge, must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. *Kumho*, 526 U.S. 137, 149. The goal is to ensure that the expert's opinion is based on sufficient data and an appropriate methodology such that the opinion is connected to the facts by more than the conclusion and assertions of the expert. *Id.* at 149. Any step that renders an expert's analysis unreliable renders the expert testimony inadmissible. *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3<sup>rd</sup> Cir. 1994).

As part of the court's gatekeeper rule, a district court must ensure that the underlying facts and/or data upon which a proffered expert's opinion are based, are in and of themselves reliable. If an expert's opinion is based on unreliable facts, the opinion must be excluded. See *In Re TMI Litigation*, 193 F. 3d at 697, *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 448 (3<sup>rd</sup> Cir. 2003).

Mr. Hall's ultimate conclusion is that Hurricane Katrina's wind and not flood water damaged plaintiffs' home. However, he did not make calculations or studies as to determine the



force of water necessary to shift the house versus the force of water necessary to cause such movement. Mr. Halls' opinions are based on hearsay and wind data from Automotic Surface Observation Systems instrumentation, the National Weather Service, The Corps of Engineers IPET report, NOAA wind map, the Enhanced Fujita Scale, Hurricane Katrina Surge Inundation and Advisory Board Base Flood Elevation Map LA-042, Forest One Hurricane Katrina Wind Speed Map, and SLOSH Model Map. In fact, Mr. Hall based his opinions on unreliable and incorrect data, including the NOAA Wind Map shows that three second peak wind gusts reached 149 mph in Port Sulphur. (Exhibit 3, page 2.) However, according to Barry Keim, an expert climatologist, in Port Sulphur, the maximum sustained winds were near 98 mph. (Exhibit 4, Barry Keim Report, page 3.) Peak gusts of wind were measured in Buras and Belle Chase at 107 and 102 mph, which are the closest locations to the Kodrin's property. (Id.)

Mr. Hall, a civil engineer, relied on unreliable weather data regarding the plaintiffs' house rather than accurate scientific data in determining the wind speed in the plaintiffs' neighborhood and excluding water by flooding as a source of the damage and displacement of plaintiffs' house. Mr. Hall's methods are based upon the premise that the house was destroyed by wind. Using this premise, there is no validation to Mr. Hall's conclusions. This is not the scientific method based upon the collection of data, the use of reliable principles and methods, and the application of those principles and methods to the facts at issue which allows for opinion testimony pursuant to Federal Rule of Evidence 702. An opinion based upon such methodology, as used by Mr. Hall will not assist the trier of fact in accurately determining whether wind or water caused damage to plaintiffs' house. Furthermore, the weather data that Mr. Hall relies upon is hearsay. Therefore, Mr. Hall's testimony and expert report should not be admitted into evidence.

**CONCLUSION**

As set forth more fully throughout this memorandum, Mr. Hall has no background, training, or experience with climatology, meteorology, or forensic engineering. His opinions and methods used to form his opinion do not pass the reliability threshold required by *Daubert* and *Kumho*. For the foregoing reasons, State Farm respectfully requests that its Motion to Exclude the expert testimony and expert report of Mr. Hall be granted.

	<p>Respectfully submitted,</p> <p><u>/s/ Wm. Ryan Acomb</u></p> <hr/> <p><b>WM. RYAN ACOMB (16780)</b> <b>MICHELE L. TROWBRIDGE (30974)</b> Porteous, Hainkel &amp; Johnson, L.L.P. 704 Carondelet Street New Orleans, LA 70130 Telephone: (504) 581-3838</p>
--	---

**CERTIFICATE OF SERVICE**

**I DO HEREBY CERTIFY** that on September 20, 2007, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

John Redmann

Margaret Madere

/s/ Wm. Ryan Acomb  
WM. RYAN ACOMB  
MICHELE L. TROWBRIDGE