

NOT DESIGNATED FOR PUBLICATION

**FRANCIS BENETRIX AND
BENETRIX ELECTRIC CO.,
L.L.C.**

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NO. 2002-CA-1031

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ALLSTATE INSURANCE
COMPANY, RAY GASPARD,
ESSENTIAL SERVICES
INCORPORATED AND THE
CITY OF NEW ORLEANS**

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-378, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge

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Judge Miriam G. Waltzer

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge Terri F. Love)

**PLOTKIN, J., - CONCURS IN PART, DISSENTS IN PART, WITH
REASONS**

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AFFIRMED

The plaintiffs, Francis Benetrix and Benetrix Electric Co., LLC, instituted the present action seeking recovery of damages to its vehicle and business as a result of an automobile accident. The plaintiffs' employee, Hans Nielsen, was driving a company truck when he was struck by a vehicle driven by Ray Gaspard and owned by Gaspard's employer, Essential Services, Inc. As a result of the accident, the Benetrix truck was out of service for approximately two months. Plaintiffs filed suit for the damages to the truck and lost profits naming as defendants Gaspard, Essential Services, Inc., Allstate Insurance Company (Essential Services, Inc.'s automobile liability insurer), and the City of New Orleans. Immediately prior to trial, the plaintiffs dismissed Gaspard and Essential Services, Inc. from the litigation but reserved their rights to proceed against Allstate and the City of New Orleans. After a bench trial on the merits, the trial court rendered judgment in plaintiffs' favor against Allstate for \$37,119.65.

On appeal, Allstate Insurance Company sets forth two assignments of error:

- (1) In calculating lost profits, the trial court erred in only deducting twenty-five per cent of costs of goods sold despite the fact that the costs of good sold reported on Benetrix's tax returns from 1997 to 2000 are approximately fifty per cent; and

(2) The trial court manifestly abused its discretion upon awarding Benetrix \$30, 793.65 lost profits for the seven weeks Benetrix's van was inoperable as a result of this accident where Benetrix's tax returns do not support that amount.

The plaintiffs answered the appeal seeking an increase in damages. However, they did not assign the issue as an error or argue the issue in their appellate brief. Therefore, the issue is deemed as abandoned.

The jurisprudence addressing business interruption losses has established two rules, application of which depends on whether the business continues to operate following the incident in question. In cases where the business ceases operation, courts generally do not include the business' fixed costs in the award of damages. Conversely, in cases where the business continues to operate, the award for loss of profits will include fixed costs. Peacock's, Inc. v. Shreveport Alarm Co., 510 So.2d 387, 407 (La. App. 2 Cir.1987); White v. Rimmer & Garrett, Inc., 340 So.2d 283, 286 (La.1976).

The rationale for this distinction is straightforward. Deduction for fixed costs is appropriate when the firm ceases operation following the delict because it has not incurred those costs. If the court were not to deduct fixed costs, the plaintiff would receive a double recovery. In contrast, when the firm continues to operate following the delict, fixed costs persist and must be paid by the firm. Accordingly, deduction of fixed costs in such a case would, in effect, be punishing the firm for continuing to operate. Thus, the net result of deducting fixed costs when a firm continues to operate is to punish the firm for mitigating its damages, as is clearly required under Louisiana law. La.C.C. art. 2002; Morton M. Goldberg Auction Galleries, Inc. v. Canco, Inc., 94-0734 (La.App. 4 Cir. 1/31/95), 650 So.2d 801, 804-805. Thus, when a business suffers a loss of

damages through the fault of another but continues in its day-to-day operations, an award of damages for loss of profits should not deduct fixed expenses. Rather, the plaintiff should be made whole by an award of net profits (that is, gross sales minus cost of goods sold minus variable costs) including fixed costs. Id.

While damages for loss of profits may not be based on speculation and conjecture, such damages need only be proven within a reasonable certainty. Landry v. Bourque, 460 So.2d 33 (La. App. 1 Cir.1984). An appellate court will not disturb such damage awards in the absence of a manifest abuse of discretion. Louisiana Farms v. Louisiana Department of Wildlife and Fisheries, 95-845 at 36; 685 So.2d at 1106. Lost profits are generally calculated by deducting the expenses that would have been incurred from the gross revenues that could have been realized. Marcel v. Becnel, 96-1139, p. 9 (La.App. 1 Cir. 3/27/97), 691 So.2d 1344, 1349. The jurisprudence is clear that fixed costs are not to be deducted from gross revenues in determining an award for lost profits. White v. Rimmer & Garrett, Inc. Fixed costs are defined as those "[c]osts that do not vary with changes in output," such as management expenses, taxes and depreciation expenses. Black's Law Dictionary 440 (Abridged 6th ed.1991); see also Rosbottom v. Office Lounge, Inc., 94-894 at 3; 654 So.2d at 379; Pelts & Skins Export, Ltd. v. State ex rel. Dept. of Wildlife and Fisheries, 97-2300 (La.App. 1 Cir. 4/1/99).

Ultimately, this is a question of discretion vested in the trial court in assessing the credibility of expert testimony and its probative value. Although there was sufficient evidence in the record to support either of the expert's positions on the question of variable expenses, the trial court is vested with the discretion to determine which expert's testimony was more persuasive and helpful. La.C.C. art. 1999 ("When damages are insusceptible of precise measurement, much discretion shall be left to the court for

the reasonable assessment of those damages."). As the Second Circuit recently reiterated in Sledge v. Continental Casualty Co., 25,770 (La.App. 2 Cir. 6/24/94), 639 So.2d 805, 815, "the effect and weight to be given expert testimony depends upon the facts underlying the opinion and, also, rests within the broad discretion of the trier of fact." See also Morton M. Goldberg Auction Galleries, Inc. v. Canco, Inc.

In the present case, the trial court heard testimony from Robert Miller, plaintiffs' accountant, and John Theriot, the defendant's expert. Miller testified that, according to his calculations and analysis, the plaintiffs suffered a net profit loss of \$30,793.65. Miller explained the process he used in determining the plaintiffs' lost profits. He stated that he computed the total sales for the months of October, November and December of 1998. The sales were averaged and compared to the loss periods of January and February of 1999. The monthly averages were then broken down to show the average per truck. The actual sales for the months of January and February of 1999 were subtracted from the projected average sales (the figure taken from the average of the months of October, November and December, 1999) to show the lost sales for the months of January and February of 1999. The salary of Hans Nielson was then added to that figure, totaling a gross lost sales of \$41, 057.42. Miller then discounted the amount by twenty-five per cent to account for the costs of goods sold, which resulted in a net profit loss of \$30,793.65. Miller acknowledged that plaintiffs' tax returns reflected costs of goods sold as being nearly fifty per cent of gross sales. Miller stated that the costs of goods sold for tax purposes include labor, insurance and depreciation. However, these items are fixed costs and should not be included as costs for the purposes of determining the plaintiffs' net lost profit.

John Theriot, the defendant's expert, testified that he reviewed the plaintiffs' tax

returns from 1997 to 2000. He determined that the plaintiffs' net lost profits for January and February of 1999 was \$4,444.00. Theriot stated that he determined that plaintiffs' costs of goods sold should be fifty percent and include costs such as insurance and depreciation.

The trial court chose to accept the expert testimony of Robert Miller in determining the lost profits sustained by the plaintiffs. Such a decision was based on credibility and within the discretion of the trial court. The trial court did not abuse its discretion in accepting Miller's testimony and determining that the plaintiffs sustained \$30,793.65 in lost profits.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED