BRETON SOUND OYSTER COMPANY, LLC	*	**NO. 2017-CA-0955**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
STIEL INSURANCE CO. OF NEW ORLEANS INC., ET AL.	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 57-482, DIVISION "A"
Honorable Kevin D. Conner, Judge

* * * * * *

JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Judge Terri F. Love,
Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

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AFFIRMED; ANSWER TO APPEAL DENIED; MOTION TO DISMISS ANSWER TO APPEAL DENIED

DECEMBER 12, 2018

This is an insurance agent malpractice case. Stiel Insurance Company of New Orleans, Inc. ("Stiel"); Elson DeLaune; and Westport Insurance Corporation ("Westport") (collectively, "Stiel Defendants"), appeal a partial summary judgment by which they were found to have negligently failed to procure commercial liability insurance requested by appellee, Breton Sound Oyster Company, L.L.C. ("Breton Sound"). The Stiel Defendants also appeal a subsequent jury verdict finding that this failure to procure insurance coverage caused Breton Sound damages in the form of lost profits, policy premiums, attorney's fees, and costs. Breton Sound has filed an Answer to Appeal and Demand for Damages for Frivolous Appeal ("Answer to Appeal"). The Stiel Defendants filed a Motion to Dismiss as Untimely Breton Sound's Answer to Appeal ("Motion to Dismiss"). For the reasons that follow, we affirm. We deny the relief sought in Breton Sound's Answer to Appeal. We also deny the Stiel Defendants' Motion to Dismiss as moot.

PROCEDURAL AND FACTUAL BACKGROUND

Breton Sound, located in Plaquemines Parish, harvests and sells oysters from its own oyster beds, and purchases and brokers oysters from local fishermen. Breton Sound contracts with retailers, including its largest single customer, Bon Secour Fisheries, Inc. ("Bon Secour"), a large, regional seafood distributor located in Bon Secour, Alabama. Breton Sound's member/manager is Louis Carl Pannagl, who has owned the oyster business since 1984. Christopher L. Nelson is the Vice-President of Bon Secour, which was Breton Sound's "first and most important customer."

On July 21, 2007, Breton Sound entered into an Indemnity Agreement with Bon Secour, in which Breton Sound agreed to:

> defend, indemnify and hold harmless [Bon Secour] and its employees, agents, representatives, directors and customers (individually, an "Indemnitee") from all actions, suits, claims, demands, and proceedings ("Claims"), and any judgements [sic], damages, losses, debts, liabilities, penalties, fines, costs and expenses (including reasonable attorneys fees) resulting therefrom whether arising out of contract, tort, strict liability, misrepresentation, violation of applicable law and/or any cause whatsoever:
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> * * *
>
> (III) brought or commenced by a person or entity against any Indemnitee for the recovery of damages for the **injury, illness and/or death of any person, or loss or damage arising out of or alleged to have arisen ou[t] of (a) the delivery, sale, resale, labeling, use o[r] consumption of any product** or (b) the negligent acts or omissions of Seller; provided, however, that Seller's indemnification obligations hereunder shall not apply to the extent that Claims are caused by the negligence of Buyer. (Emphasis added.)

Paragraph 3 of the Indemnity Agreement ("Paragraph 3") included a provision regarding insurance coverage, in which Breton Sound agreed to:

> maintain in effect insurance coverage with reputable insurance companies covering . . . commercial general liability . . . including product liability and excess liability, all with such limits as are sufficient in [Bon Secour's] reasonable judgement [sic], to protect [Breton Sound and Bon Secour] from the liabilities insured against by such coverages. . . .

The Indemnity Agreement further required that Bon Secour "be named as an additional insured using form CG2015 Broad Form Vendor's Endorsement or its equivalent with respect to the commercial general liability policy, including products liability."[1]

After the execution of the Indemnity Agreement, Mr. Pannagl met with Mr. DeLaune, an insurance agent employed by Stiel, to purchase insurance that would comply with Paragraph 3. Thereafter, Mr. DeLaune procured a CGL Form CG2026 policy from Century Surety Company ("Century") for the coverage period August 13, 2007 through August 13, 2008 (the "Policy").[2] The Policy had the following exclusion in Endorsement CGL 1701 0705:

> This insurance does not apply to: . . . .
>
> **6. Mold, Fungi, Bacteria, Air Quality, Contaminants, Minerals or Other Harmful Materials**
>
> a. "Bodily injury" . . . arising out of, caused by, or contributed to in any way by the existence, growth, spread, dispersal, release, or escape of any mold, fungi, lichen virus, **bacteria** or other growing organism that has toxic, hazardous, noxious, pathogenic, irritating or allergen qualities or characteristics. This exclusion applies to all such claims or causes of action, including allegations that any insured caused or contributed to conditions that encourage the growth, depositing or establishment of such colonies of mold, lichen, fungi, virus, **bacteria** or other living or dead organism. . . . (Emphasis added.)

In July 2008, Basilio Garcia, Jr., who had a preexisting medical condition, ate a raw oyster allegedly containing *vibrio vulnificus* bacteria at a buffet in

[1] According to Breton Sound, CG2015 is a broader form policy that provides coverage for any damages arising from their oysters, including all products liability cases.
[2] The Policy was renewed in 2008, with virtually identical coverage.

Colorado. After eating the oyster, Mr. Garcia developed a bacterial infection and died. The oyster was allegedly traced back to Bon Secour, and from Bon Secour to Breton Sound.

On May 29, 2009, Century sent a letter notifying Breton Sound of a wrongful death claim made by Linda Lopez on behalf of the estate of Mr. Garcia ("Reservation of Rights Letter"). Century cited the bacterial exclusion, and reserved its right to deny coverage to both Breton Sound and Bon Secour.

In July 2009, Ms. Lopez filed suit in Colorado against Breton Sound, Bon Secour and others asserting a products liability claim for the contaminated oyster that caused Mr. Garcia's death ("Lopez Suit").

On September 16, 2009, Century informed Breton Sound that it was not only denying indemnification for the Lopez Suit, but also denying Breton Sound a defense to the suit, citing the bacterial exclusion. On September 18, 2009, Mr. Pannagl received the first of several letters from Bon Secour's attorneys demanding that Breton Sound indemnify Bon Secour in the Lopez Suit.

On January 26, 2010, Breton Sound filed a Petition for Damages and Declaratory Judgment ("Petition") in Plaquemines Parish naming as defendants Stiel, Mr. DeLaune, and their errors and omissions carrier, Westport. Breton Sound sought damages caused by the Stiel Defendants' negligent failure to procure an insurance policy that did not exclude bacterial contamination. Breton Sound also sought a declaratory judgment that all claims that had arisen or might arise through the period August 13, 2007 through August 13, 2009 "that implicate a claim that would be covered but for Endorsement CGL 1701 0705, shall be covered by Stiel and Mr. Delaune."

In June 2010, the Colorado Supreme Court dismissed Breton Sound from the Lopez Suit based on lack of personal jurisdiction.

On September 10, 2010, Breton Sound amended its Petition adding Century as a defendant, and alleging, in the alternative to its allegations against the Stiel Defendants, that Century was required to defend and/or indemnify Breton Sound under the Policy.

On January 20, 2011, Breton Sound filed a Second Amended and Supplemental Petition for Damages and For Declaratory Judgment ("Second Amended Petition"), praying that Century "be found to [have] acted in bad faith," and thus "be cast in judgment for attorney's fees, costs, penalties, and damages including aggravation, inconvenience and loss of business reputation." Breton Sound also named Bon Secour as a defendant, alleging that Bon Secour was negligent in purchasing unprocessed, raw gulf oysters, most of which contained the *vibrio vulnificus* bacteria. Breton Sound also sought a declaratory judgment that Breton Sound was not required to defend or indemnify Bon Secour. On May 5, 2011, the Lopez plaintiffs dismissed Bon Secour from the Lopez Suit after a global resolution of the action.

On June 29, 2011, Breton Sound entered into a confidential settlement agreement with Century resolving all claims between them. On August 5, 2011, Breton Sound dismissed its claims against Century, with prejudice. Thereafter, Breton Sound filed a Third Amended Petition for Damages ("Third Amended Petition") omitting all claims against Century, Bon Secour, and others. In the Third Amended Petition, Breton Sound prayed for an award against the Stiel Defendants for "the full amount of Petitioner's damages, including but not limited

to, attorney's fees, court costs and expert witness fees. . . [and] including any and all business and other consequential losses."

On May 29, 2015, Breton Sound moved for partial summary judgment against the Stiel Defendants solely on the issue of liability for negligent failure to procure the requested insurance coverage. The motion was heard on August 24, 2015. On September 25, 2015, the trial court signed a judgment granting Breton Sound's Motion for Partial Summary Judgment on the issue of liability.

On January 24, 2017 through January 27, 2017, the case was tried to a jury on the issue of damages only. On February 10, 2017, after the jury reached a verdict in favor of Breton Sound, the trial court rendered a judgment against the Stiel Defendants awarding Breton Sound $831,886.00 in lost profits; $19,277.10 in reimbursement for policy premiums; and $63,227.41 in attorney's fees and costs. Overall, the Stiel Defendants were cast in judgment jointly and solidarily for the amount of $914,390.51, together with interest from the date of demand until paid and for all court costs, expert witness fees and taxable costs.

The Stiel Defendants suspensively appealed. On January 22, 2018, Breton Sound filed an Answer to Appeal, requesting damages from the Stiel Defendants for filing a frivolous appeal. On February 8, 2018, the Stiel Defendants filed a Motion to Dismiss the Answer to Appeal as untimely.

DISCUSSION

The Stiel Defendants list five assignments of error:

- The trial court erred in granting Breton Sound partial summary judgment determining the Stiel Defendants' liability for failure to procure coverage when the trial court never determined that Century's coverage denial was valid.

- The trial court erred in granting Breton Sound's partial summary judgment determining the Stiel Defendants' liability for failure to

procure coverage when fact issues remained regarding whether Breton Sound provided Stiel with an indemnity contract specifying a CG2015 Broad Form Vendor's Endorsement that Stiel ignored in placing coverage.

- The trial court erred in excluding evidence of Breton Sound's settlement with Century, alleged to be jointly liable for defense fees and costs, resulting in Breton Sound's double recovery of defense fees and costs.

- The trial court erred in allowing the jury to consider lost profits as an element of damage in an insurance agent malpractice action.

- The jury erred in awarding lost profits when Breton Sound failed to prove lost profits with reasonable certainty.

Assignments of Error No. 1 and 2: Partial Summary Judgment on Liability

As Assignments of Error No. 1 and 2 both relate to the trial court's judgment granting Breton Sound's Motion for Partial Summary Judgment against the Stiel Defendants on the issue of liability, we will address them together.

In the first assignment of error, the Stiel Defendants contend that the trial court erred in granting summary judgment in favor of Breton Sound on the issue of liability without deciding whether the bacterial exclusion was enforceable, or whether Century had a duty to defend Breton Sound. In essence, the Stiel Defendants assert that Breton Sound's Motion for Partial Summary Judgment was premature. According to the Stiel Defendants, "had the trial court examined the policy, it would have found that the terms did not unambiguously exclude coverage and thus a defense was owed." In Breton Sound's Motion for Partial Summary Judgment, it sought a ruling that the Stiel Defendants were negligent in procuring an insurance policy that excluded coverage for bacteria pathogens. In support of the motion, Breton Sound attached a copy of the Policy, which set forth the bacteria exclusion. The parties briefed the issue of coverage and Century's duty to defend. Although the trial court did not issue reasons for judgment, in granting

partial summary judgment on liability, the court necessarily decided that Century's denial of both a defense and coverage was correct in light of the bacterial exclusion. Our *de novo* review of the record confirms this conclusion.

The Policy's bacterial exclusion expressly excludes coverage for any "bodily injury . . . arising out of . . . any . . . **bacteria** or other growing organism that has toxic, hazardous, noxious, pathogenic, irritating or allergen qualities or characteristics." (Emphasis added.) Although the Supreme Court in *Simeon v. Doe*, 618 So.2d 652 (La. 1993), stated that *vibrio vulnificus* bacteria in raw oysters "poses little, if any, threat to a healthy person," the Court also found that this bacteria is harmful "to those persons with specific underlying disorders such as liver or kidney disease." *Id.* at 851. Mr. Garcia, who had underlying medical conditions, died of a bacterial infection (urosepsis).[3] We find, therefore, that the bacteria *vibrio vulnificus* has pathogenic qualities or characteristics, and that coverage is unambiguously excluded.[4] Accordingly, Century properly denied a defense and coverage based on the bacterial exclusion.

Thus, we reject the Stiel Defendants' contention that the trial court erred in failing to examine the Century Policy and determine Century's obligations before concluding that the Stiel Defendants were liable for their failure to procure adequate insurance coverage.

In the second assignment of error, the Stiel Defendants argue that issues of material fact preclude summary judgment because Breton Sound never proved what insurance coverage Mr. Pannagl requested from Mr. Delaune.

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[3] "Sepsis" is the presence of various pathogenic organisms, or their toxins, in the blood or tissues. *Stedman's Medical Dictionary* 1749 (28th ed. 2006). "Urosepsis" is a type of sepsis resulting from the infection of extravasated urine or from obstruction of infected urine. *Id.*

[4] A pathogen is "a specific causative agent (as a bacteria or virus) of disease." *Merriam-Webster's Third New International Dictionary* 1655 (1993).

An insurance agent is liable for failure to procure requested insurance where three factors are present: "(1) the insurance agent agreed to procure the insurance; (2) the agent failed to use 'reasonable diligence' in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain insurance; and (3) the agent acted in such a way that the client could assume he was insured." *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 09-2161, p. 7 (La. 7/6/10), 42 So.3d 352, 356-57 (quoting *Karam v. St. Paul Fire & Marine, Ins. Co.*, 281 So.2d 728, 730-31 (La. 1973)).

Here, the Stiel Defendants contend that Breton Sound failed to prove that it provided Stiel with the Indemnity Agreement, which specified the coverage needed, before coverage was bound with Century.

Mr. Pannagl testified that after he signed the Indemnity Agreement, he met with Mr. Delaune at his office on a Sunday morning, and showed him the Indemnity Agreement. According to Mr. Pannagl, the two of them telephoned Chris Nelson to make sure he understood that Breton Sound wanted insurance that covered the *vibrio vulnificus* bacteria listed in the Indemnity Agreement.

Mr. Delaune testified that he received the Indemnity Agreement from Mr. Pannagl before obtaining insurance coverage for Breton Sound, although he said he did not read it.[5] Even though Mr. Delaune did not immediately read the Indemnity Agreement, he testified that he knew that the insurance that Mr. Pannagl required was being requested at the behest of Bon Secour with specific reference to products liability coverage for oysters:

[5] In an attempt to establish an issue of material fact, the Stiel Defendants cite deposition testimony of Mr. Delaune that was introduced as a trial exhibit, but was not filed in the summary judgment record. This testimony cannot be considered. *See* La. C.C.P. art. 966(D)(2) ("The court may consider only those documents filed in support of or in opposition to the motion for summary judgment.").

Q: Okay, Bon Secour required him to have insurance, and do you recall what kind?
A: He had to have a million GL with products.
Q: With products liability?
A: Yes.
Q: What was the product?
A: The product was his oysters.

Instead of a obtaining a policy covering products liability claims stemming from the consumption of Breton Sound's oysters, Mr. Delaune procured a policy that excluded coverage for products liability claims. Mr. Delaune even admitted that the coverage he obtained for Breton Sound was inadequate because of the bacterial exclusion:

Q: Well, let me ask you this. If you had read that exclusion, wouldn't you—
A: I'd have cancelled the policy and I'd have notified Curt Pannagl that we had to buy a new policy immediately.
Q: Okay. You would have understood what it meant?
A: I would have definitely understood what it meant because all he's doing is buying an outrageously expensive [Owners, Landlords, and Tenants] policy.

Mr. Delaune also admitted that when he submitted Breton Sound's request for coverage, he thought that he had "complete coverage," so that Mr. Pannagl would have nothing to worry about if there was a products liability claim:

Q: Okay. So, you did know. You already inventoried the file?
A: Well, after the incident, because **I turned it in thinking I had complete coverage**. **I even told him that he had nothing to worry about**, and then I get – about two months later, we get a letter – or he gets a letter and he tells me about it, that they're putting a reservation of rights. That shocked the hell out of me. [Emphasis added.]

Based on this testimony, we find that the Stiel Defendants have not raised an issue of material fact as to whether the Stiel Defendants knew that Breton Sound wanted insurance that covered products liability claims.

The trial court, therefore, did not err in granting summary judgment in favor of Breton Sound and against the Stiel Defendants for negligently failing to procure an insurance policy that provided adequate coverage and that complied with the terms of the Indemnity Agreement.

Assignment of Error No. 3: Excluding Evidence of Settlement at Trial

The Stiel Defendants contend that the trial court erred in excluding evidence of Breton Sound's settlement of its insurance claim against Century. According to the Stiel Defendants, Breton Sound recovered defense fees and costs from both Century and the Stiel Defendants, which resulted in an impermissible double recovery. Breton Sound argues that there was no double recovery, citing the collateral source rule.

"Under the collateral source rule, 'a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution.'" *Prest v. Louisiana Citizens Prop. Ins. Corp*., 12-0513, p. 12 (La. 12/4/12), 125 So.3d 1079, 1088 (quoting *Bozeman v. State*, 03-1016, p. 9 (La. 7/2/04), 879 So.2d 692, 698). As explained in *Bozeman*, "the payments received from the independent source are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer, and, a tortfeasor's liability to an injured plaintiff should be the same, regardless of whether or not the plaintiff had the foresight to obtain insurance." *Bozeman*, 03-1016, p. 9, 879 So.2d at 698.

According to legal commentators:

> Two primary considerations guide the court's determination with respect to the collateral source rule. The first consideration is whether application of the rule will further the major policy goal of tort deterrence. The second consideration is whether the victim, by having a collateral source available as a source of recovery, either

> paid for such benefit or suffered some diminution in his or her patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the rule.

Herman & Cain, RECOVERABLE DAMAGES – COLLATERAL SOURCE RULE, 1 La. Prac. Pers. Inj. § 5:15.

Here, Breton Sound paid the premium for the Policy, which Mr. Delaune admitted was an "outrageously expensive [Owners, Landlords, and Tenants] policy," instead of the requested products liability policy. Thus, no double recovery would result from application of the collateral source rule. *See Howard v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 17-1221, p. 8 (La. App. 1 Cir. 2/16/18), 243 So.3d 4, 10, *writ denied*, 18-0435 (La. 5/11/18), 241 So.3d 1017 (no double recovery when victim's collateral source of benefits is insurance for which he has paid premiums).

The Stiel Defendants' "double recovery" argument is also foreclosed by *Prest*. In *Prest*, the Supreme Court ruled that damages awarded to an insured for an insurance agency's negligent failure to procure coverage, and the receipt of money from an insurer in settlement, did not result in double recovery for the insured, as the insured's tort recovery could not be reduced by payments received from an independent source under the collateral source rule. *Prest*, 12-0513, p. 12, 125 So.3d at 1088.

Accordingly, this third assignment of error is without merit.

Assignment of Error No. 4: Lost Profits for Failure to Procure Insurance

The Stiel Defendants contend that the trial court erred in allowing the jury to consider lost profits as an element of damages for failure to procure insurance coverage when no provision of the Century Policy provided for such damages.

The Stiel Defendants primarily rely on the Third Circuit's decision in *Hutchins v. Hill Petroleum Co.*, 609 So.2d 306 (La. App. 3d Cir. 1992), *aff'd*, 623 So.2d 649 (La. 1993), in which the appellate court stated:

> Louisiana courts recognize that a party who claims that an insurance agent failed to use due diligence to procure insurance (in this case, to add Hill as an additional insured) cannot recover for losses that are not within the scope of the coverage that the party actually requested. . . . The law on recoverable damages is clear in negligence based actions against an insurance agent. [Plaintiff] may only recover for losses it would incur within the scope of the contract had Hill been named.

Id. at 310 (citations omitted).

Initially, we note that *Hutchins* was accepted by the Supreme Court on a writ of *certiorari.* The Court, however, found that the plaintiff failed to prove his damages and declined to address the issue of the Third Circuit's determination of whether an insurance agent's negligent procurement could result in the recovery of damages such as lost profits, holding that "[t]he question of the scope of the insurance agency's tort liability is pretermitted." *Hutchins*, 623 So.2d at 651. Under the circumstances, the Third Circuit's decision in *Hutchins* lacks any precedential authority.

In any event, *Hutchins* has been superseded by the Louisiana Supreme Court's decision in *Prest*, which affirmed an award of special damages against an insurance agent for negligent failure to procure that included loss of use of insurance proceeds, and attorney's fees and costs, all of which are outside the scope of the requested coverage.[6] Thus, we find that under Louisiana law, insureds are permitted to recover all consequential damages flowing from an insurance

[6] "Loss of business income or profits is a type of special damages." *Nick Farone Music Ministry v. City of Bastrop*, 50,066, p. 4 (La. App. 2 Cir. 9/30/15), 179 So.3d 629, 631.

agent's failure to procure requested insurance coverage, including lost profits and attorney's fees and costs incurred in defending against third-party claims.

This assignment of error lacks merit.

Assignment of Error No. 5: Proof of Lost Profits

In their final assignment of error, the Stiel Defendants contend that the jury erred in awarding Breton Sound $831,886.00 in lost profits because Breton Sound failed to prove lost profits with reasonable certainty.

"The allowance of loss of profits as an element of damages is more liberal in actions purely in tort, as opposed to actions for breach of contract." *Wasco, Inc. v. Econ. Dev. Unit, Inc.*, 461 So.2d 1055, 1057 (La. App. 4th Cir. 1985). "Broad latitude is given in proving lost profits because this element of damages is often difficult to prove and mathematical certainty or precision is not required." *Maloney Cinque, L.L.C. v. Pac. Ins. Co.*, 11-0787, p. 18 (La. App. 4 Cir. 1/25/12), 89 So.3d 12, 25. As a general rule, "damages for loss of profits may not be based on speculation and conjecture; however, such damages need be proven only within reasonable certainty." *Id*. (citing *Cox Communications v. Tommy Bowman Roofing, LLC*, 04–1666, p. 8 (La. App. 4 Cir. 3/15/06), 929 So.2d 161, 166-67). "That is, the plaintiff must show that the loss of profits is more probable than not." *Wasco*, 461 So.2d at 1057.

To support its claim of lost profits, Breton Sound retained expert Ralph A. Litolff, Jr., who was the Director of Consulting Services at Bourgeois Bennett. Mr. Litolff is a certified public accountant, a certified valuation analyst, a certified financial services auditor, a certified government financial manager, and he is also accredited in business valuation and certified in financial forensics. Mr. Litolff has

20 years of experience in public accounting with an emphasis on providing financial consulting and accounting services.

The parties stipulated that Mr. Litollf was an expert in the field of forensic accounting and economic valuation. Breton Sound retained Mr. Litolff to "analyze the economic losses sustained by [Breton Sound] as a result of lost sales to [Bon Secour], its primary customer as of the date of the knowledge of the claim, which was on or around April of 2009."

In his November 24, 2014 expert report, Mr. Litolff stated that his "background understanding" was that, because the insurance policy sold by Mr. Delaune to Mr. Pannagl did not provide the coverage specified in the Indemnity Agreement, Century denied coverage and a defense and indemnity to both Breton Sound and Bon Secour arising from a claim of food poisoning allegedly resulting from the ingestion of contaminated raw oysters. Mr. Litolff further stated that:

> As a result of the failure to procure the appropriate coverages, [Breton Sound] was unable to fulfill its obligations under the Indemnity Agreement with [Bon Secour], thus causing harm to their business relationship. As a result of the subject litigation, [Breton Sound's] relationship with [Bon Secour] was damaged, ultimately causing [Bon Secour] to decrease their overall level of business with [Breton Sound], resulting in economic harm to [Breton Sound].

Mr. Litolff's calculation of the total lost gross profits sustained by Breton Sound utilized sales records provided to him by Bon Secour for the period January 2006 through March 2014. Chris Nelson, Vice President of Bon Secour, discussed these records with Mr. Litolff and verified their accuracy, as did Bon Secour's accountant. Mr. Litolff testified that he also reviewed the books and records of Breton Sound, although most of the records had been destroyed by hurricane flooding in 2012. Mr. Litolff also testified that he spoke extensively with people in the seafood industry to verify his assumptions.

Mr. Litolff's lost profits calculation was based on the following list of assumptions taken from an affidavit by Mr. Pannagl ("Pannagl Affidavit"):

- Breton Sound was a major oyster supplier to Bon Secour, providing approximately 36% of all the oysters purchased by Bon Secour during the period January 2006 through March 2009.
- Historically, during the months of May through September, approximately 50% of the oysters sold by Breton Sound to Bon Secour were harvested from oyster beds owned and operated by Bon Secour and/or its affiliates, and 50% were purchased directly from other oyster fishermen.
- Historically, during the months of October through April, approximately 20% of the oysters sold by Breton Sound to Bon Secour were harvested from oyster beds owned and operated by Breton Sound and/or its affiliates, and approximately 80% were purchased directly from other oyster fisherman.
- Breton Sound typically earned a gross profit of $19 per sack on oysters harvested from oyster beds owned and operated by Breton Sound and/or its affiliates and subsequently sold to Bon Secour.
- Breton Sound typically earned a gross profit of $5 per sack on oysters purchased directly from other oyster fishermen and sold to Bon Secour.
- As a result of the harm done to the business relationship between Breton Sound and Bon Secour stemming from the failure to procure insurance coverage in accordance with the Indemnity Agreement, or other appropriate insurance coverage, the overall sales by Breton Sound to Bon Secour experienced a significant decline, resulting to economic harm to Breton Sound.

Mr. Litolff's "but for" analysis of lost profits was a three-step process. In the first step, Mr. Litolff calculated lost sales measured in terms of sacks of oysters. Based on Bon Secour's sales records, Mr. Litolff determined that in the period April 2006 through March 2009, 36.37 percent of the oysters purchased by Bon Secour came from Breton Sound. Mr. Litolff then determined from these records that Bon Secour purchased 526,731 sacks of oysters between April 2009 through March 2014. Mr. Litolff multiplied this 526,731 figure by 36.37 percent, and found that the expected purchases from Breton Sound "but for" the litigation totaled 191,573 sacks of oysters. Mr. Litolff subtracted the actual quantity

purchased by Breton Sound (100,492 sacks) from 191,573, and concluded that the lost quantity suffered by Breton Sound was 91,081 sacks of oysters.

In the second step, Mr. Litolff calculated the weighted average gross profit per sack of oysters. The Pannagl Affidavit sets forth the percentage of oysters harvested on Breton Sound leases versus the percentage of oysters brokered from other fishermen. It also sets forth the gross profits earned on oysters harvested on Breton Sound leases versus the gross profits earned on oysters brokered from other fishermen. Mr. Litolff calculated that the weighted average gross profit per sack was $12.00 between the months of May and September, and was $7.80 between the months of October and April.

In the third step, Mr. Litolff calculated Breton Sound's lost gross profits. He multiplied the lost quantity in sacks suffered by Breton Sound (91,081 taken from step one) by the weighted average gross profits per sack ($12.00 and $7.80 taken from step two), to reach a total of $831,886 in lost gross profits.

Exhibit A
Breton Sound Oyster Companyv Stiel Insurance Company of New Orleans
Analysis of Lost Gross Profits

Calculation of Lost Sales (in sacks of Oysters)

		May- Sep	**Oct-Apr**	Total
Total Quantity Post•	(April 2009 - March 2014)	206,707	320,024	526,731
Death Pre-Suit% of total		36.37%	36.37%	36.37%
Expected Purchases from Breton Sound Oysters "But For"		75,180	116,393	191,S73
Litigation Less; Actual Quantity Purcha5ed by flreton Sound Oyster		(46,261)	(54,231)	(100,492)
Lost Quantity (in sacks) Suffered by Breton Sound Oyster		28,919	62,162	91,081

Calculation of Weighted Average Gross Profit per Sack

	May - Sep	Oct - Apr
Percentage of Oysters Harvested on Company Leases [1]	50%	20%
Gross Profit Earned on Oysters Harvested on Company Leases [3]	$ 19	$ 19
Percentage *of* Oysters Brokered from Other Harvesters [2]	50%	80%
Gross Profit Earned on Oysters Brokered from Other Harvesters [3]	$ 5	$ 5
Weighted **Average** Gross Profit per Sack [4][5]	$ 12.00	$ 7.80

Calculation of Lost Gross Profits

	May-Sep	Oct - Apr	Total
Lost Quantity (in sacks) Suffered by Breton Sound Oyster	28,919	62,162	91,081
Weighted Average Gross Profit per Sack	$ 12.00	$ 7.80	
Lost Gross Profits by Breton Sound Oysters	$ 347,022	$ 484,854	$ **831,886**

Assumptions•:
[1] Fifty-percent of the oysters sold by Breton Sound Oyster Company from May through September of e<1ch year were harvested from Company leases, and the remaining fifty-percent were brokered from other harvesters.
[2] Twenty-percent of the oysters sold by Breton Sound Oyster Company from October through April of each year were harvested from Company leases, and the remaining Eighty-percent were brokered from other harvesters.
[3] Breton Sound Oyster Company earned an average gross profit of $19 per sack on oysters harvested from their own leases and an average of $5 per sack on oysters brokered from other harvesters.
[4) To calculate the weighted average gross profit per sack for May through September the following formula was used: (50% x $19) + (S0%x$5).
[5J To calculate the weighted average gross prof1t per sack for October through April the following formula was used: {20% x $19) + (80%x$5).

* Assumptions utilized in the subject economic loss calculations are based on the affidavit of Mr. Louis Curt Pannagl.

The Stiel Defendants argue that Bon Secour stopped buying fewer oysters from Breton Sound because of the deterioration of the quality of its oysters, rather than Mr. Nelson's anger at the lack of appropriate insurance coverage for the Lopez Suit. The Stiel Defendants point to a June 11, 2009 email from Mr. Nelson to Mr. Pannagl in which Mr. Nelson complained about the deterioration of the quality of Breton Sound's oysters, and stated that Bon Secour's "ability to continue to buy [Breton Sound's] oysters and stay in our end of the business is fast coming to a close unless significant improvements are seen in terms of quality and consistency of performance on your end." Mr. Nelson did not testify at trial.

Mr. Pannagl testified at trial that this email reflected Mr. Nelson's thinly veiled anger with the insurance coverage issue and the legal claims against Bon Secour. According to Mr. Pannagl, Mr. Nelson was threatening to cut off his business because Mr. Pannagl didn't "hold up [his] end of the bargain . . . [and] didn't do what [he] was contracted to do" under the Indemnity Agreement. Mr. Pannagl also stated that there were no problems with the quality of his oysters. Mr. Litolff also testified that, based on his personal experience serving on the boards of various organizations, he believed that Mr. Nelson's email did not reflect actual quality issues, but was an attempt to "paper the file" to create a record for future litigation.

In the verdict form, the jury decided that it was the Stiel Defendants' negligent failure to procure the insurance coverage requested by Mr. Pannagl that "caused damage to the business relationship" between Breton Sound and Bon Secour. The jury was faced with conflicting testimony regarding the reason for Breton Sound's loss of profits, and ultimately assessed the weight and credibility of the witnesses. We find that the jury's reasonable evaluations of credibility and

reasonable inferences of fact should not be disturbed upon review. *See Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. College v. Villavaso*, 14-1277, p. 6 (La. App. 4 Cir. 12/23/15), 183 So.3d 757, 762.

The Stiel Defendants also challenge Mr. Litolff's decision to exclude the period of May 2010 through January 2011 from his calculation of lost profits because the oyster beds were closed due to the massive oil spill caused by the Deepwater Horizon. The Stiel Defendants contend that the impact of the oil spill was not just limited to the months the oyster beds were closed, citing Breton Sound's lawsuit against BP in which it alleged that its business operations had been decimated.

Mr. Litolff, however, explained why he limited his analysis to those months, pointing out that Breton Sound was not merely an oyster harvester, but also an oyster broker, so that it could broker as many oysters as it could sell. This comports with Mr. Pannagl's testimony that his business was not limited by the oil spill because he could have brokered oysters in other states that were not impacted, but for the loss of his business relationship with Bon Secour.

Finally, the Stiel Defendants assert that their own economic expert, William Legier, who examined Breton Sound's financial records, properly concluded that Breton Sound did not lose any profits during the period in question, and that Breton Sound's level of sales continued to rise after the BP oil spill. Mr. Legier assumed that "make up sales" would have yielded a benefit of $135,030.00 in additional profits to Breton Sound as a result of losing its primary customer. As Mr. Litolff explained, however, it was the volume of oyster sacks that Breton Sound sold that primarily determined its profit, and not its general revenues. Breton Sound also notes that Mr. Legier incorrectly assumed a general cost

percentage for Breton Sound rather than taking into account the particular cost percentage for Breton Sound's business with Bon Secour, which paid for various handling and shipping expenses that other customers did not. Mr. Litolff testified that the cost percentage for Bon Secour was 70 percent (rather than the 90 percent in Mr. Legier's analysis), and that if Mr. Legier had used that figure instead, the lost profits total would be similar to that in Mr. Litolff's report.

The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Villavosa*, 14-1277, p. 6, 183 So.3d at 762. Where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is most credible. *Mistich v. Volkswagen of Germany, Inc.*, 95-0939, p. 5 (La. 1/29/96), 666 So.2d 1073, 1077, *opinion reinstated on reh'g*, 95-0939 (La. 11/25/96), 682 So.2d 239. It is also the function of the jury to evaluate and weigh the testimony of each expert. *Laura's Products, Inc. v. 600 Conti St., LLC*, 07-0819, p. 11 (La. App. 4 Cir. 4/9/08), 982 So.2d 934, 941.

Ultimately, the jury credited Mr. Litolff's testimony and conclusions over those of Mr. Legier. Breton Sound proved its lost profits with reasonable certainty. We conclude that the jury's award of $831,886.00 in damages for lost profits is not manifestly erroneous or clearly wrong. *See N-Y Assoc., Inc. v. Board of Comm'rs of Orleans Parish Levee Dist.*, 04-1598, 04-1986, p. 13 (La. App. 4 Cir. 2/22/06), 926 So.2d 20, 27.

Answer to Appeal

Breton Sound has filed an Answer to Appeal in which it seeks damages for the Stiel Defendants' frivolous appeal. "'[A]ppeals are always favored and, unless the appeal is unquestionably frivolous, damages will not be granted due in part to

the possible chilling effect on the appellate process.'" *Perry v. Dept. of Law*, 17-0609, p. 10 (La. App. 4 Cir. 1/31/18), 238 So.3d 592, 599 (quoting *Sullivan v. Malta Park*, 16-0875, p.5 (La. App. 4 Cir. 1/31/17), 215 So.3d 705, 709). La. C.C.P. art. 2164, which provides for sanctions for frivolous appeals, must be strictly construed in favor of the Stiel Defendants, as it is penal in nature. *Perry*, 17-0609, p. 10, 238 So.3d at 599. In this matter, we find that the imposition of damages for frivolous appeal is not warranted. Accordingly, we deny Breton Sound's Answer to Appeal. Given our disposition of the Answer to Appeal, we deny the Stiel Defendants' Motion to Dismiss as moot.

CONCLUSION

For the reasons given above, we affirm the trial court's September 25, 2015 judgment granting Breton Sound's Motion for Partial Summary Judgment on the issue of liability. We also affirm the jury's award of $831,886.00 in damages to Breton Sound for lost profits. We deny Breton Sound's request for sanctions, as we do not find the Stiel Defendants' appeal to be frivolous. We dismiss as moot the Stiel Defendants' Motion to Dismiss Breton Sound's Answer to Appeal.

AFFIRMED; ANSWER TO APPEAL DENIED; MOTION TO DISMISS ANSWER TO APPEAL DENIED