IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-IA-01171-SCT

WATSON QUALITY FORD, INC. — APPELLANT

VS.

CARLOS CASANOVA and
SHIRLEY CASANOVA — APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUIRED

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WATSON QUALITY FORD, INC. **APPELLANT**

VS.

CARLOS CASANOVA and
SHIRLEY CASANOVA **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Ford Motor Company - appellant/defendant;

2. Walker W. Jones, III, Esq., Barry W. Ford, Esq., Everett E. White, Esq., and BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC - attorneys for appellant/defendant Ford Motor Company.

3. Watson Quality Ford, Inc. - defendant.

4. Joe Roberts, Esq., PITTMAN, GERMANY, ROBERTS & WELSH, LLP; Barry D. Hassell, Esq., Michael W. Baxter, Esq., and COPELAND, COOK, TAYLOR & BUSH, P.A. - attorneys for defendant Watson Quality Ford, Inc.;

5. Carlos Casanova and Shirley Casanova - appellees/plaintiffs;

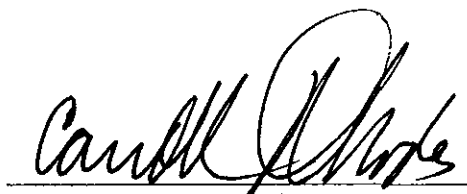
6. Carroll Rhodes, Esq. - attorney for appellees/plaintiffs; and

7. Honorable Tomie T. Green - Hinds County Circuit Court Judge.

CARROLL RHODES

STATEMENT REGARDING ORAL ARGUMENT

Appellants/plaintiffs, Carlos Casanova and Shirley Casanova, (hereinafter referred to as "plaintiffs" or "Casanovas" or "Carlos" and "Shirley"), submit that oral argument is not necessary in this case inasmuch as the facts, issues, and law are clearly stated in the parties Briefs.



CARROLL RHODES
COUNSEL OF RECORD FOR
PLAINTIFF-APPELLEE

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STATEMENT OF ISSUES

Plaintiffs agree that the central issue in this case is whether the trial court erred by denying appellant's/defendant's motion for summary judgment. Defendant, Watson Quality Ford, Inc., (hereinafter referred to as "Watson Quality"), like defendant, Ford Motor Company, (hereinafter referred to as either "defendant" or "Ford"), wrongly argue that this case is a products liability case governed by the Mississippi Products Liability Act (MPLA), § 11-1-63, Miss. Code Ann. (1972), instead of the **actual claims** plaintiffs made in their complaint - (1) a breach of implied warranty of merchantability claim and a breach of implied warranty of fitness for a particular purpose claim brought under the Uniform Commercial Code (UCC), §§ 75-2-314 and 315, Miss. Code Ann. (1972), and (2) a garden variety negligence claim brought under the State's common law.

STATEMENT OF THE CASE

a. Nature of the Case.

THIS IS NOT A PRODUCTS LIABILITY CASE! Instead, the case against both Ford and Watson Quality is a UCC breach of implied warranty of merchantability and breach of implied warranty of fitness case predicated on §§ 75-2-314 and 315, Miss. Code Ann. (1972). The case against Watson Quality is also a negligent repair claim based on the common law.

b. Course of Proceedings and Disposition Below.

Plaintiffs, Carlos and Shirley Casanova, filed their complaint against defendants, Ford and Watson Quality, in the Circuit Court of the First Judicial District of Hinds County, Mississippi on May 6, 2003. [R. 8-15, V. 1, R. E. Tab 2, Ex. C].[1] They asserted negligence, gross negligence, strict

[1]"R" denotes the Record followed by page numbers, and the Volume Number the Record page numbers are found. "R. E." denotes the Record Excerpts filed by Ford followed by the

liability (for manufacturing and design defects), strict liability (for failure to warn), breach of implied warranty of merchantability, and breach of implied warranty of fitness claims against both Ford and Watson Quality. [R. 8-15, V. 1, R. E. Tab 2, Ex. C]. They sought compensatory and punitive damages for physical pain and suffering, emotional distress, loss of enjoyment of life, loss of consortium, disfigurement, loss of income and income earning capacity, and medical bills.[2]

On September 15, 2006, the parties entered a Stipulation of Dismissal, pursuant to *M. R. C. P. 41(a)(1)(ii)*, dismissing plaintiffs' gross negligence, strict liability (for manufacturing and design defects), and strict liability (for failure to warn) claims against Ford and Watson Quality and plaintiffs' negligence claim against Ford only. [R. 61, V. 1, R. E. Tab 2, Ex. F]. Importantly, the parties did not dismiss plaintiffs' breach of implied warranty of merchantability and breach of implied warranty of fitness claims against either Ford or Watson Quality. Nor did the plaintiffs dismiss their negligence claim against Watson Quality. [R. 61, V. 1, R. E. Tab 2, Ex. F].

On March 16, 2007, Watson Quality filed a motion for summary judgment on all of plaintiffs' claims. [R. 689-837, V. 5 & 6]. Essentially Watson Quality, like Ford, argued that the viability of plaintiffs' claims was required to be evaluated and determined under the MPLA, § 11-1-63, Miss. Code Ann. (1972).

On March 27, 2007, the Casanovas filed their response to Watson Quality's summary judgment motion. [R. 874-926, V. 7]. They firmly stated that their case is a UCC breach of

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Record Excerpts Tab number and Exhibit within the Tab number. "S. R. E." denotes the Supplemental Record Excerpts filed by the Casanovas followed by the Supplemental Record Excerpts page numbers and the Tab number.

[2]Shirley Casanovas' claim for loss of consortium is derivative of Carlos' personal injury claim. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988).

warranties case under §§ 75-2-314 and 315, Miss. Code Ann. (1972), and a negligence claim based on the State's common law. [R. 874-926, V. 7]. Importantly, they asserted that the case was not a products liability case under the MPLA, § 11-1-63, Miss. Code Ann. (1972). [R. 874-926, V. 7]. The plaintiffs included evidence with their response that proves their claims. [R. 874-926, V. 7].

The learned Circuit Court Judge entered an Order on June 21, 2007 denying Watson Quality's summary judgment motion.[3] [R. 967, V. 7, R. E. 4]. Watson Quality, then filed a petition for interlocutory appeal in this Court. The Supreme Court entered an Order on August 8, 2007 granting Watson Quality's interlocutory appeal. [R. 970, V. 7, R. E. Tab 6].

c. Statement of Facts.

Carlos and Shirley Casanova are husband and wife, and they live in Jackson, Mississippi. [R. 233-234, V. 2].

Carlos began working for Jack DeMoney at Resilient Flooring (Resilient) laying tile in May, 1999. [R. 679, V. 5]. He worked at Resilient from May, 1999 until November, 2000. [R. 679, V. 5]. He used a van supplied by the company to travel to work sites. [R. 217, 824, V. 2 & 6, R. E. Tab 2, Ex. L].

On January 7, 2000, DeMoney purchased a new Ford Econoline E-250 van from Watson Quality for Resilient to use in its flooring business. [R. 217- 218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L]. The customary practice was for DeMoney or his brother, a co-owner, to call Norman Gannon, a salesman at Watson Quality, and tell him they needed "a white cargo van." [R. 217-218, 824-825,

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[3]Both Watson Quality's and Ford's Briefs contained language showing disrespect and contempt for the trial court. Such disparaging statements in Briefs exceed the scope of zealous advocacy and should be stricken from both Briefs, with this Court entering other appropriate sanctions for the disrespect and contempt demonstrated by both Watson Quality and Ford for Circuit Judge Tomie Green. *M. R. A. P. 28(k).*

V.2 & 6, R. E. Tab 2, Ex. L]. Gannon would then select a van that fit their needs, and DeMoney, or his brother, would pick the van up. [R.217-218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L]. Gannon would have the van waiting for them [R.218, 825, V. 2 & 6, R. E. Tab 2, Ex. L]. The only thing they had to do was sign the papers. [R.218, 825, V. 2 & 6, R. E. Tab 2, Ex. L].

On that date, January 7, 2000, DeMoney asked Carlos to go with him to Watson Quality to pick the van up since he (Carlos) was going to be the only person driving the van. [R.218, 825, V. 2 & 6, R. E. Tab 2, Ex. L]. Carlos was, indeed, the only driver of the van. [R. 217, 824, V. 2 & 6, R. E. Tab 2, Ex. L]. The van only had been driven only 25 miles when it was purchased. [R. 537, V. 4, S. R. E. 21, Tab 5]. It was manufactured by Ford, [R. 508, V. 4], and it had not been altered in any material way before it was sold to Resilient Flooring. [R. 508-512, 520, V. 4].

A manufacturer's new vehicle warranty came with the van from Ford. [R. 635, V. 5, S. R. E. 20, Tab 4].[4] The warranty provided that all mechanical parts and components were warranted for the first 36,000 miles or 3 years whichever came first. [R. 635, V. 5, S. R. E. 20, Tab 4].

Carlos drove the van off of Watson Quality's lot on January 7, 2000. [R. 679, V.5, S. R. E. 32, Tab 8]. The van was pulling to the right. [R. 679, V. 5, S. R. E. 30, Tab 8]. Carlos reported the pulling problem to DeMoney who told him to take the van back to Watson Quality for the dealership to correct the problem. [R. 255, V. 2, S. R. E. 27, Tab 7]. Carlos took the van back to Watson

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[4]Mr. DeMoney testified as follows:

Q. – *when you purchased it? What about any type of warranties, did* you get any warranties with it?

A. You get a new car warranty, and that's all I got.

[R. 218, 825, V. 2 & 6, DeMoney, Dep., p. 86, lines 11-15].

Quality the next day, January 8, 2000, for the dealership to correct the problem.[5] [R. 255, V.2, S. R. E. 27, Tab 7]. The van had been driven less than 200 miles when Carlos took it back with a complaint about the pulling problem. [R. 679, V. 5, S. R. E. 30, Tab 8]. He picked the van up the next day at Watson Quality, and he noticed it was still pulling to the right when he drove it. [R. 255, V. 2, S. R. E. 27, Tab 7]. Every time Carlos drove the van, it was pulling to the right. [R. 679, V. 5, S. R. E. 30, Tab 8].

On January 20, 2000, Carlos had two minor accidents in the van that did not affect the steering or wheel components of the van. [R. 680, V. 5, S. R. E. 31, Tab 8].

The first accident occurred at about 7:30 to 7:45 a.m. on McDowell Road in Jackson, Mississippi in a school zone. [R. 680, V. 5, S. R. E. 31, Tab 8]. Carlos drove the van through a school zone when he slowed down to 15 to 15 miles per hour. [R. 680, V. 5, S. R. E. 31, Tab 8].

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[5]Watson Quality argues the company does not have any record that Carlos returned the van for repairs in January, February, or March, 2000. The company relies on Jack DeMoney's deposition testimony that the van was not returned for repairs before April, 2000. However, Ford, Watson Quality, and DeMoney all have reasons to destroy records and not recall pivotal information detrimental to their interest. Casanova filed a workers' compensation claim against Resilient Flooring in November, 2000, and DeMoney fired him for filing it. [R. 239, 240, V. 2, 639-672, V. 5]. Carlos and Shirley sued Ford and Watson Quality for compensatory and punitive damages. [R. 8-15, V. 1]. Besides, if Watson Quality was provided an opportunity to repair the van in January but did not attempt to repair it, there would not be any repair records. The question of whether or not Carlos took the van back to Watson Quality for repairs in January, February, and March, 2000 involves the credibility of Carlos, DeMoney, and Watson Quality employees. This is a classic factual conflict - one party says one thing and the other party denies it. The courts cannot resolve credibility disputes on a summary judgment motion. See, *Armistead v. Minor*, 815 So. 2d 1189, 1194 (Miss. 2002); *Estate of Johnson v. Chatelain*, 943 So. 2d 684, at 687, ¶ 5 (Miss. 2006).

Besides, Watson Quality's credibility is questionable because the company could have spoiliated evidence of this and other visits to reduce or eliminate its and Ford's liability or percentage of fault in this case. See, *DeLaughter v. Lawrence County Hospital*, 601 So. 2d 818, 821-823 (Miss. 1992) (*en banc*). And, Jack DeMoney is an adverse or hostile witness whose credibility is questionable. See, *Harris v. Buxton, Inc.*, 460 So. 2d 828, 833 (Miss. 1984).

The van was hit from behind, and the front end of the car that hit the van went up under the rear bumper. [R. 680, V. 5, S. R. E. 31, Tab 8]. There was only a scratch on the rear bumper of the van. [R. 680, V. 5, S. R. E. 31, Tab 8]. Carlos called the police and reported the accident. [R. 680, V. 5, S. R. E. 31, Tab 8]. A police officer responded to the call and told Carlos to move the van. [R. 680, V. 5, S. R. E. 31, Tab 8]. As Carlos started to move the van, the officer yelled for him to stop. [R. 680, V. 5, S. R. E. 31, Tab 8]. Carlos stopped and got out of the van and noticed that the car was stuck under the back bumper. [R. 680, V. 5, S. R. E. 31, Tab 8]. Eventually Carlos and the officer had to get on the hood of the car and jump on it as the owner backed the car from under the van to dislodge the car from under the van. [R. 680, V. 5, S. R. E. 31, Tab 8]. During this process part of the rear bumper was damaged. [R. 680, V. 5, S. R. E. 31, Tab 8]. This was light damage to the van and it did not affect the ability of the van to be driven. [R. 680, V. 5, S. R. E. 31, Tab 8]. As Carlos drove the van back to Resilient, it was still pulling to the right. [R. 680, V. 5, S. R. E. 31, Tab 8].

The van was pulling to the right prior to this accident. [R. 680, V. 5, S. R. E. 31, Tab 8].

Carlos stayed at Resilient's office until about 8:15 a.m. on January 20, 2000, and then he drove the van to the Viking warehouse on Boling Street in Jackson to pick up some materials. [R. 680, V. 5, S. R. E. 31, Tab 8]. "The van was still pulling to the right." [R. 681, V. 5, S. R. E. 32, Tab 8]. Carlos had the second accident on this trip. [R. 681, V. 5, S. R. E. 32, Tab 8].

The second accident occurred on January 20, 2000 at about 9:15 a.m., [R. 681, V. 5, S. R. E. 32, Tab 8], when the van he was driving slid into another car during a light rain. [R. 681, V. 5, S. R. E. 32, Tab 9]. He was driving 20-25 miles per hour when this accident occurred. [R. 681, V. 5, S. R. E. 32, Tab 8]. A lady was driving a car in front of him, and she suddenly turned right causing

him to suddenly turn left in an effort to avoid the accident. [R. 681, V. 5, S. R. E. 32, Tab 8]. However, due to the light rain, the right front passenger side of the van collided with the rear left side brake lights of the lady's car resulting in very light damages to her car. [R. 681, V. 5, S. R. E. 32, Tab 8]. There was no noticeable damage to the van at all. [R. 681, V. 5, S. R. E. 32, Tab 8].

In fact, the damage to the van from these two accidents was so light that it "did not need to be repaired." [R. 681, V. 5, S. R. E. 32, Tab 8]. Carlos was not injured in these two accidents. [R. 682, V. 5, S. R. E. 33, Tab 8]. Importantly, he drove the van to job sites inside and outside the State of Mississippi during the months of January, February, March, April, and May, 2000. [R. 619-620, 631-632, 681, V. 5, S. R. E. 32, Tab 8]. He drove the van an average of 3,519 miles per month during this period. [R. 681, V. 5, S. R. E. 32, Tab 8]. "The van was driven approximately 11,000 or 12,000 miles after these two accidents on January 20, 2000, and [it] was still pulling to the right as [it] pulled to the right before the accidents." [R. 681, V. 5, S. R. E. 32, Tab 8].

Carlos took the van back to Watson Quality with complaints that it was pulling to the right in January, February, and March or April, 2000, and on May 9 or 11, 2000, but Watson Quality did not correct the problem. [R. 255-257, 681-682, V. 5, S. R. E. 27-29, 32-33, Tabs 7 & 8]. He also told Watson Quality employees that the pulling was causing the inside right front tire to wear until it became slick. [R. 256, V. 8, S. R. E. 28, Tab 7]. However, the dealership failed to fix this problem. [R. 682, V. 5, S. R. E. 33, Tab 8].

Invoice records from Watson Quality reflect that Carlos took the van to the dealership and left it there for repair on April 7, 2000 with a complaint that the van was constantly pulling to the right and the transmission was sluggish in shifting gears during acceleration. [R. 533-534, V. 4, S. R. E. 25-26, Tab 6]. He did not pick the van up until April 10, 2000 - three (3) days later. [R. 533,

V. 4, S. R. E. 25, Tab 6]. However, Watson Quality records indicate that the van was not supposed to be picked up until April 11, 2000 at 5:12 p.m. [R. 533, V. 4, S. R. E. 25, Tab 6]. According to the records, Carlos was unable to leave the van the additional day for the dealership to run a diagnostic test of the pulling problem. [R. 534, V. 4, S. R. E. 26, Tab 6]. The dealership did not correct the problem during the three (3) days the van was left there although it was given an opportunity to make the repairs. [R. 534, V. 4, S. R. E. 26, Tab 6].

Carlos took the van back to Watson Quality on May 11, 2000 complaining that the van was still pulling to the right. [R. 246-252, V. 2]. Watson Quality employees asked Carlos to leave the van so that repairs could be made, but he was unable to leave it because his employer, Jack DeMoney, told him not to leave it but drive it to the job site in Vicksburg. [R. 246-252, V. 2].

The dealership did not offer Carlos another vehicle to use during any of the times that he took the van back to the dealership and reported the pulling problem. [R. 681-682, V. 5, S. R. E. 32-33, Tab 8].

Carlos drove the van to the job site in Vicksburg where he had another accident in the van. [R. 682, V. 5, S. R. E. 33, Tab 8]. Carlos was driving the van down a hill at five (5) to fifteen (15) miles per hour when a car was coming up the hill at about 20-30 miles per hour. [R. 682, V. 5, S. R. E. 33, Tab 8]. Carlos turned the steering wheel to make a left turn, but the steering wheel was hard to turn. [R. 682, V. 5, S. R. E. 33, Tab 8]. As Carlos was turning the steering wheel, he heard a loud pop, and immediately he could no longer steer the van. [R. 682, V. 5, S. R. E. 33, Tab 8]. The loud pop and loss of ability to steer the van occurred prior to the van hitting the car, bouncing off the car, and hitting the car again. [R. 682, V. 5, S. R. E. 33, Tab 8]. "The left front of the van hit the left front driver's side of the car." [R. 682, V. 5, S. R. E. 33, Tab 8]. Carlos was injured and

the van was heavily damaged as a results of this accident. [R. 631, V. 5]. As a result of the accident, the van could not be driven because the steering was inoperable. [R. 631, V. 5].

An insurance estimate of the damage to the van revealed that the front bumper assembly, face bar, deflector, and isolator were damaged and had to be overhauled or replaced. [R. 551-552, 631, V. 5, S. R. E. 35-36, Tab 9]. The radiator support and cooling radiator support had to be repaired. [R. 551-552, 631, V. 5, S. R. E. 35-36, Tab 9]. The left fender panel, left fender splash shield, left front suspension radius arm, left front suspension retainer, the steering pitman arm, and the steering gear assembly had to be replaced. [R. 551-552, 631, V. 5, S. R. E. 35-36, Tab 9]. Watson Quality employees believed that the steering linkage broke as a result of the impact. [R. 530-534, V. 4, S. R. E. 22-26, Tab 6].

However, Rev. Victor Dixon, a mechanic with more than 20 years experience inspecting and repairing automobiles, including cargo and passenger vans, rendered an opinion that the steering linkage, steering pitman arm, and steering gear assembly broke prior to the accident and not as a result of the accident.[6] [R. 562-569, 592-597, 598-635, V. 5, R. E. Tab 2, Ex. J, S. R. E. 11-20, Tab

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[6]Watson Quality collaterally attacks Rev. Dixon's qualification to render an opinion about the van's merchantability. However, he is qualified to render an expert opinion. The rule on expert witnesses provides that an expert may be qualified "**by knowledge, skill, experience, training, or education...**" (Emphasis added). *M. R. E. 702.* An automobile mechanic may be qualified to render an expert opinion because of his knowledge, skill, experience, and training alone. See, *Weathersby Chevrolet Co., Inc. v. Redd Pest Co., Inc.*, 778 So. 2d 130 (Miss. 2001) (en banc); *General Motors Corp. v. Pegues*, 738 So. 2d 746, 751-53 (Miss. App. 1998).

Besides, this Court has held that an expert opinion is not required to prove that a vehicle did not perform as warranted. *Forbes v. General Motors Corp.*, 935 So. 2d 869, 877, ¶ 13 (Miss. 2006) (en banc) ("No legal authority exists to require expert testimony in this case, and we do not want to encourage such a rule").

Therefore, an expert opinion was not required in this case, and even if one was required Rev. Dixon met the qualification to be an expert witness in this breach of warranty case.

4]. That opinion is based, in part, on Carlos' testimony about the sequence of events leading to the accident, and, in part, on Rev. Dixon's twenty (20) plus years experience inspecting and repairing automobiles, including, Ford Econoline vans.[7] [R. 562-569, 592-597, 598-635, V. 5, R. E. Tab 2, Ex. J, S. R. E. 11-20, Tab 4].

Rev. Dixon's opinion is that the van was unmerchantable because the van had a history of pulling to the right since its date of purchase and the steering components broke prior to an accident on May 11, 2000 while it was being driven at a relatively slow speed. [R. 562-569, 592-597, 598-635, V. 5, R. E. Tab 2, Ex. J, S. R. E. 11-20, Tab 4]. He rendered the following opinion:

> A. Well, I've got an opinion.
> Q. All right. Well, what is that opinion?
> A. That opinion is due to the problem with this particular van, they wanted to replace all of the parts that has to do with the steering to assure that they get it straightened out.

[R. 582,V. 5].

Rev. Dixon further opined:

> A. Well, from what I understood, it was stated that these parts was broke in the wreck or they was caused – the damage was caused by the wreck. And definitely what I wanted to show was, it's really not normal to the point of one in a million that a steering part will be broken in this kind

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[7]Rev. Dixon did not inspect the defective parts of the van because they had been destroyed by Watson Quality or Ridgeland Body Shop long before the Casanovas filed this case. [R. 171, V. 2]. "Thus, none of the parties have ever seen any of the steering components." . [R. 171, V. 2].

The destruction of the defective steering components is not a bar to an expert rendering an opinion as to the operation of the van. In fact, Rev. Dixon testified that he reviewed pictures of damage to the van and vehicles involved in the two January 20, 2007 accidents, the May 11, 2000 accident, police reports concerning the accidents, and the estimate of damage and repairs prepared by Darryl Russell, the insurance adjuster, and he relied on his personal experience in inspecting and repairing vehicles for over 20 years in formulating his opinion. [R. 562-569, 592-597, 598-635, V. 5, R. E. Tab 2, Ex. J, S. R. E. 11-20, Tab 4].

of accident, in the accident we're talking about with Mr. Casanova. One in a million, you know. And even if it ever, ever be one – I don't think it will ever be one. . . .

[R. 584-585, V. 5].

And, finally, Rev. Dixon opined:

Q. You can't offer an expert opinion that something broke – part of the van broke prior to the accident?

A. Yes, sir. Yes, I can. I mean, you know, look at the thing that's pointing toward something logical. The van was pulling. He took it in for pulling. Going down the road he heard a pop and then he hit a car at low speed. Meaning – meaning that if he had control at low speed he probably wouldn't have hit that car. He probably could have turned the van a different way at low speed. So he didn't say that the van skidded to the car. It was out of control. He had no control of it.

So, you know, when I look at everything that's pointing toward his statement that's almost logical than saying – than saying these major components of the vehicle got damaged in a wreck where it's very minor damage not only to his car but even to the person's car he hit. So, I mean, his statement sounds most logical.

[R. 593, V. 5].

Carlos was physically injured, and he and his wife suffered resulting damages, as a results of the van's failure to perform as other new vans.

SUMMARY OF THE ARGUMENT

The case is before this Court on the trial court's denial of Watson Quality's motion for summary judgment. The Court applies the same standard of review as the trial court when reviewing the motion. *Estate of Johnson v. Chatelain*, supra, at 686-687. That standard requires the Court to construe the record in the light most favorable to the Casanovas and draw all reasonable inferences in their favor. *Estate of Johnson v. Chatelain*, supra, at 686-687, ¶ 4 and 5. In deciding the

summary judgment issue, the Court cannot resolve credibility disputes. *Quay v. Crawford*, 788 So. 2d 76, ¶ 3 (Miss. App. 2001) (*en banc*). When the record is construed in the light most favorable to the Casanovas, it is clear that Watson Quality, like Ford, breached the implied warranty of merchantability and the implied warranty of fitness.

The van was defective when it left Watson Quality because it did not conform to the standard of other new vans, and that defect caused the Casanovas injuries. See, *CEF Enterprises, Inc. v. Betts*, 836 So. 2d 999, 1003, ¶ 14 (Miss. App. 2003). Proof of a specific products liability defect is not required in a breach of implied warranty of merchantability, breach of implied warranty of fitness, or garden variety negligent repair case. *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024 (Miss. 1982).

Furthermore, the assumption of the risk defense does not bar the Casanovas' breach of implied warranty claims. As a matter of public policy, the assumption of the risk doctrine does not serve as a complete bar to a breach of contract, breach of implied warranty, or tort claim. *Pike v. Howell Building Supply, Inc.*, 748 So. 2d 710, 712, ¶ 5 (Miss. 1999) (en banc).

Watson Quality is not entitled to summary judgment on the Casanovas' breach of implied warranty of fitness for a particular purpose because the Watson Quality salesman selected the van for Resilient that fit the particular purpose of transporting "cargo." *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra.

Finally, Watson Quality negligently failed to repair the van because Carlos took the van back to Watson Quality on at least four (4) separate occasions with a complaint that the van was pulling to the right, and Watson Quality failed to correct the problem prior to the accident on May 11, 2000. See, *Weathersby Chevrolet Co., Inc. v. Redd Pest Control Co., Inc.*, supra.

THE ARGUMENT

a. The Standard of Review.

This case is before the Court on Watson Quality's motion for summary judgment. The Court applies the same standard of review as the trial court. *Estate of Johnson v. Chatelain*, supra, at 686-687. Summary judgment is appropriate only where there is no genuine issue of material fact, *Estate of Johnson v. Chatelain*, supra, at 686, and the plaintiff has failed to present evidence to support an essential element of his claim. *Bullard v. Guardian Life Insurance Company of America*, 941 So. 2d 812, 814, ¶ 2 (Miss. 2006) (*en banc*). "The burden of demonstrating that there is no genuine issue of material fact falls upon the party requesting the summary judgment." *Estate of Johnson v. Chatelain*, supra, at 686, ¶ 4. The burden, therefore, is upon Watson Quality to demonstrate that there is no genuine issue of material fact. As shown below, however, Watson Quality, like Ford, has failed to carry its burden.

A Court must review all of the record evidence including the "pleadings, answers to interrogatories, depositions, affidavits, etc.-in the light most favorable to the party against whom the motion for summary judgment is made." *Estate of Johnson v. Chatelain*, supra, at 686-687, ¶ 5. A motion for "summary judgment is not a substitute for the trial of disputed fact issues." *Willis v. Mississippi Farm Bureau Mutual Ins. Co.*, 481 So. 2d 256, 258 (Miss. 1985). This Court has defined a material fact as "one which resolves any 'of the issues, properly raised by the parties.'" *Strantz v. Pinion*, 652 So. 2d 738, at 741 (Miss. 1995) (en banc), *quoting, Stegall v. WTWV, Inc.*, 609 So. 2d 348, at 351 (1992).

Once a defendant moves for summary judgment and meets its burden by producing indisputable evidence that plaintiff cannot prevail on his claims, the plaintiff must then "set forth

specific facts showing that there is a genuine issue for trial." *Boyles v. Schlumberger Technology Corp.*, 832 So. 2d 503, 507, ¶ 11 (Miss. 2002). The specific facts must present an issue of fact to be resolved by a trial. Plaintiffs put forth specific evidence showing there were genuine issues of material fact for trial. This Court has held:

> An issue of fact may be present when there is more than one reasonable interpretation of undisputed testimony, where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts, or when the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed.

Boyles v. Schlumberger Technology Corp., supra, at 507, ¶ 13.

Importantly, issues involving the credibility of a witness's testimony "must be resolved by a jury, thereby precluding summary judgment." *Quay v. Crawford*, supra, at ¶ 3. Watson Quality, like Ford, urges both the trial court and this Court to resolve credibility issues on summary judgment motions. That is contrary to existing law. *Quay v. Crawford*, supra, at ¶ 3.

Consequently, the record evidence must be considered in favor of the Casanovas with all reasonable inferences being drawn in their favor. And, any disputes about the credibility of witness's testimony must be resolved by the trier of fact and not by the Court on this motion for summary judgment.

b. <u>Plaintiffs Proved a Breach of Implied Warranty of Merchantability Claim</u>.

Watson Quality, like Ford, misconstrues plaintiffs' claims. **This is not a products liability case!** The Casanovas dismissed all of their products liability claims and litigated only their breach of implied warranty and negligence claims.[8] [R. 61, V. 1]. Nevertheless, both Watson Quality and Ford

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[8]The Casanovas proceeded on their breach of implied warranty claims against both Ford and Watson Quality. [R. 61, V. 1]. They proceeded on their negligent repair claims only against

continue to argue that this is a products liability case governed by the MPLA. § 11-1-63, Miss. Code Ann. (1972).[9] As the pleadings and evidence clearly show, this is a breach of implied warranty and negligent repair case against Watson Quality.

This Court has held that "the MPLA does not abrogate a statutory cause of action for breach of implied warranty as grounds for recovery." *Bennett v. Madakasira*, 821 So. 2d 794, 808, ¶ 52 (Miss. 2002). The MPLA has no application to the present statutory breach of implied warranty case. *Bennett v. Madakasira*, supra, at 808, ¶ 52.

An "implied warranty of merchantability is found in Miss. Code Ann. § 75-2-314 (Rev. 2002)." *CEF Enterprises, Inc. v. Betts*, supra, at 1003, ¶ 14. In order to establish the claim, a plaintiff must prove: "(1) the defendant was a merchant which sold goods of the kind involved in the transaction, (2) that the defect was present when the product left the defendant's control, and (3) the injuries to the plaintiff were caused proximately by the defective nature of the goods." *CEF Enterprises, Inc. v. Betts*, supra, at 1003, ¶ 15. The person injured by the product or goods does not have to be the one who purchased the goods from the merchant. The requirement of privity has been abolished for "an implied warranty or negligence action." *May v. Ralph L. Dickerson Construction Corporation*, 560 So. 2d 729, 731 (Miss. 1990); *Hargett v. Midas International Corp.*, 508 So. 2d 663, 665 (Miss. 1987). And, when, as here, a seller submits a warranty with a vehicle, the warranty becomes part of the sales transaction such that the law assumes that the seller, through its warranty,

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Watson Quality. [R. 61, V. 1].

[9]Watson Quality also argues that the doctrine of *res ipsa loquitor* does not apply to a products liability case. This, however, is not a products liability case. It is a breach of warranty and negligence case. The doctrine of *res ipsa loquitor* applies in negligence cases. *Read v. Southern Pine Elec. Power Ass'n*, 515 So. 2d 916, 919-920 (Miss. 1987) (en banc). However, the Casanovas have not argued that the doctrine of *res ipsa loquitor* applies in this particular case.

has made assurances to the user or consumer "that the vehicle will conform to the standards of merchantability." *Volkswagen of America, Inc. v. Novak*, 418 So. 2d 801, 804, ¶ 5 (Miss. 1982). See, also, *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra.

In *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra, Melvin Wallace purchased a new 1978 Lincoln Continental automobile from Royal Lincoln-Mercury Sales, Inc. (Royal) on July 7, 1978. Royal gave Wallace a "manufacturer's new car limited warranty from Ford...along with the car." *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra, at 1025. About two weeks after the car was purchased, the engine hesitated, the chrome rattled, and the vinyl roof peeled. Later, the air conditioning failed, the paint faded, and the car leaked oil. The owner returned the car to the dealer, *Royal*, on several occasions with complaints about the defects in the car.[10] *Id.*, at 1026-1028. Royal asserted that it was not liable to Wallace. *Id.* This Court held that the breach of implied warranty of fitness statute, § 75-2-315, Miss. Code Ann. (1972), did not apply because "[t]here [was] no testimony that the plaintiff relied upon the seller's skill or judgment in selecting that car that he purchased from Royal."[11] *Id.*, at 1027. However, the Court held that the breach of implied warranty

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[10]In *Royal*, the plaintiff did not identify a specific defect in the car. The plaintiff just complained that the car did not look or perform as a new car should. This Court found that proof of a specific defect was not required. Instead, the defect recognized by this Court in that breach of implied warranty of merchantability case was a ***conformance*** defect. This Court expressly stated:

> The issue of whether the services of Royal, Ford's agent for replacement and repairs, brought the automobile into **conformity** with the seller's warranty of merchantability, was presented to the jury under proper instruction and was resolved adversely to Ford.

Royal Lincoln-Mercury Sales, Inc. v. Wallace, supra, at 1028.

[11]The breach of implied warranty of fitness statute is applicable in the present case because there is testimony that Jack DeMoney relied upon the skill and judgment of Norman Gannon, the

of merchantability statute, § 75-2-314, Miss. Code Ann. (1972), did apply to both Royal and Ford. *Id.*, at 1027-1028. As to the application of the implied warranty of merchantability statute to Royal, the Court specifically held:

> The issue of whether the services of Royal, Ford's agent for replacement and repairs, brought the automobile into ***conformity*** with the seller's warranty of merchantability, was presented to the jury under proper instruction and was resolved adversely...

Royal Lincoln-Mercury Sales, Inc. v. Wallace, supra, at 1028.

Watson Quality, like Ford, cites a string of products liability cases in support of its argument that the Casanovas were required to prove a specific manufacturing or design defect by expert testimony in support of their breach of implied warranty claims. However, this Court rejected a similar argument in *Forbes v. General Motors Corp.*, supra, at 877, ¶ 13. In order to prevail on a breach of implied warranty of merchantability claim involving an automobile, the plaintiff does not have to prove a manufacturing or design defect, but rather nonconformance of the product to similar products. See, *Hargett v. Midas International Corp.*, supra, at 664; *Forbes v. General Motors Corp.*, supra.

The Casanovas have produced evidence establishing their breach of implied warranty of merchantability claim. The evidence establishes that (1) Watson Quality Ford was a merchant and seller which sold vans, (2) the van was defective because it pulled to the right when it left Watson Quality's control,[12] and (3) Carlos' injuries were proximately caused by the defective nature of the

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Watson Quality salesman, to select a white "cargo" van to be used in the tile flooring business. [R. 217-218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L].

[12]A reasonable inference can be drawn that the van was defective when it left Watson Quality from the fact that the van was new with only 25 miles on it when it was purchased, and the fact that it was pulling to the right when it was purchased.

van. *CEF Enterprises, Inc. v. Betts*, supra, at 1003, ¶ 15.

The Casanovas have produced evidence which showed that Ford manufactured the van in 1999 and shipped it to Watson Quality Ford in Jackson where it was sold to Resilient Flooring on January 7, 2000. At the time the van was sold to Resilient Flooring it had been driven only 25 miles. Watson Quality was requested to produce all documents showing where the van had been altered, changed, modified, or worked on at any time prior to its purchase by Resilient Flooring. Watson Quality produced no such documents. In fact, all of the documents concerning any work on the van by Watson Quality show that no actual work was performed on the van dealing with the steering until after May 12, 2000. The Casanovas also produced evidence that showed the van was pulling to the right the first day it was purchased and driven by Carlos. The van continued to pull to the right until after it had more than 14,101 miles on it several months later. The inside of the tires on the van were wearing because of the pulling problem. Finally, on May 11, 2000, as Carlos was driving the van and attempting to make a left turn, he heard a loud pop, and the steering wheel became uncontrollable causing the van to crash into a car driven by Mrs. Vickie Wilson. After the accident, Carlos saw a part hanging down from under the van. The van could not be steered, and it had to be towed back to Watson Quality in Jackson. Darryl Russell, an insurance adjuster for Resilient's automobile insurance company inspected the van and determined that the left front pitman arm, left front radius arm, and steering gear assembly had to be replaced. He also determined that the pitman arm had broken. Rev. Victor Dixon, a mechanic by experience, who has inspected, repaired, and sold many vehicles, including Ford Econoline vans, testified that a new van should not have been pulling to the right and that neither the January 20, 2000 nor the May 11, 2000 accidents were severe enough to cause the pitman arm to break or the radius arm and steering gear assembly to be replaced. Rev.

Dixon further testified that there was a one in a million chance that a pitman arm would break in a two car accident at the speed of the vehicles in the accidents that Carlos was involved in. Carlos described the damage caused by the two January 20, 2000 accidents as light, and he was able to drive the van another 11,000 or 12,000 miles after those accidents with the van constantly pulling to the right as it did from the day it was purchased. Furthermore, Ford sent a new car warranty with the van when it was purchased that stated that the parts were warranted from bumper to bumper for the first 36,000 miles or three years. The van was pulling to the right with less than 25 miles on it, and it pulled to the right until after the May 11, 2000 accident when it had 14,101 miles on it. Therefore, the facts established by the Casanovas prove their breach of implied warranty of merchantability claim.

The non-merchantability of a product may be established with evidence that it does not conform to the quality of other similar products in the market.[13] *Hargett v. Midas International Corp.*, supra; *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra. The claim is clearly established when the seller is given an opportunity to repair the defect but either fails or refuses to do so. *Chaney*

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[13]The Mississippi Court of Appeals has stated the standard of merchantability as follows:

> It further states that for goods to be merchantable they must (1) pass without objection in the trade under the contract description, (2) are of fair average quality, (3) are fit for the ordinary purpose for which such goods are used, (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, (5) are adequately contained, packaged and labeled, and (6) conform to the promises or affirmations made on the label.

Easley v. Day Motors, Inc., 796 So. 2d 236, 241 (Miss. 2001). In the present case, the van was not fit for the ordinary purpose for which cargo vans are used. It was not of fair average quality. It did not pass without objection in the trade. And it did not conform to the promises or affirmations made on the label. The van was simply not merchantable.

v. General Motors Acceptance Corp. 349 So. 2d 519 (Miss. 1977). In that regard, the facts of this case sit almost on all fours with the case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J., 358, 161 A. 2d 69 (1960), a pre-UCC case on which the UCC breach of warranty statute is based.

In *Henningsen*, Mr. Henningsen purchased a brand new Plymouth Plaza 6 Club Sedan automobile from Bloomfield Motors on May 7, 1955. *Henningsen v. Bloomfield Motors, Inc.*, supra, 32 N. J. at 365. The purchase order was a two-sided one page document. *Id.*, 32 N. J. at 365-366. The front of the purchase order contained blanks to be filled in with a description of the automobile and financing details and the back contained a limited 90 day or 4,000 miles manufacturer's warranty on defective parts. *Id.*, 32 N. J. at 365-367. The car was turned over to the Henningsen on May 9, 1955, and there was no proof "adduced by the dealer to show precisely what was done in the way of mechanical or road testing beyond testimony that the manufacturer's instructions were probably followed." *Id.*, 32 N. J. at 368. Mr. Henningsen drove the car home without incident. *Id.*, 32 N. J. at 367. It was driven on short trips on paved streets around town for several days after then. *Id.*, 32 N. J. at 368-369. There was "no servicing and no mishaps of any kind before the event of May 19." *Id.*, 32 N. J. at 368-369. On that date, May 19, 1955, Mrs. Henningsen drove the car to Albury Park. *Id.*, 32 N. J. at 369. On the way back from Albury Park, Mrs. Henningsen was driving the car on "Route 36 in Highlands, New Jersey, at 20-22 miles per hour." *Id.*, 32 N. J. at 369. Mrs. Henningsen was driving in the right lane of a two-land smooth paved roadway headed North when "[suddenly she heard a loud noise 'from the bottom, by the hood.'" *Id.*, 32 N. J. at 369. She said, "[it 'felt as if something cracked.'" *Id.*, 32 N. J. at 369. All of a sudden, "[the steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall." *Id.*, 32 N. J. at 369. The vehicle had 468 miles on it. *Id.*, 32 N. J. at 369. After the accident, "the front of the car

was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident." *Id.*, 32 N. J. at 369. An insurance adjuster for the insurance carrier with 11 years experience examined the car and declared it a total loss. *Id.*, 32 N. J. at 369. He offered an opinion, based on his experience, examination, and the history of the vehicle "that something definitely went 'wrong from the steering wheel down to the front wheels' and that the untoward happening must have been due to mechanical defect or failure; 'something down there had to drop off or break loose to cause the car' to act in the manner described." *Id.*, 32 N. J. at 369. The New Jersey Supreme Court held that an implied warranty of merchantability accompanied each sales transaction. *Id.*, 32 N. J. at 370. The implied warranty of merchantability "simply means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold." *Id.*, 32 N. J. at 370. Any express warranty becomes part of the transaction and part of the implied warranty of merchantability and binds the manufacturer as well as the dealer. *Id.*, 32 N. J. at 370-384. Both Chrysler, the manufacturer, and Bloomfield Motors, the dealer, argued that the plaintiffs failed to prove the vehicle was defective. The New Jersey Supreme Court disagreed. The Court specifically held:

> Both defendants argue that the proof adduced by the plaintiffs as to the happening of the accident was not sufficient to demonstrate a breach of warranty. Consequently, they claim that their motion for judgment should have been granted by the trial court. We cannot agree. In our view, the total effect of the circumstances shown from purchase to accident is adequate to raise an inference that the car was defective and that such condition was causally related to the mishap.

Henningsen v. Bloomfield Motors, Inc., supra, 32 N. J. at 409.

The Court further held:

> The facts, detailed above, show that on the day of the accident, ten

> days after delivery, Mrs. Henningsen was driving in a normal fashion, on a smooth highway, when unexpectedly the steering wheel and the front wheels of the car went into the bizarre action described. Can it reasonably be said that the circumstances do not warrant an inference of unsuitability for ordinary use against the manufacturer and the dealer? Obviously there is nothing in the proof to indicate in the slightest that the most unusual action of the steering wheel was caused by Mrs. Henningsen's operation of the automobile on this day, or by the use of the car between delivery and the happening of the incident. Nor is there anything to suggest that any external force or condition unrelated to the manufacturing or servicing of the car operated as an inducing or even concurring factor.

Henningsen v. Bloomfield Motors, Inc., supra, 32 N. J. at 409-410. Other courts, as well, have held that a vehicle that does not perform as a normal vehicle should is defective and breaches the implied warranty of merchantability. *Mattuck v. DaimlerChrysler Corporation*, 852 N. E. 2d 485 (Ill. 1st 2006) (Jeep Cherokee was defective when it had 11,187 miles on it and the steering wheel would shake violently when the brakes were applied and continued to shake for 84,000 more miles even after repairs). This Court has recognized that a new vehicle is defective when it leaks oil and air conditioning does not work. *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra.

In the present case, the evidence is sufficient for a jury to conclude that the 2000 Ford Econoline van Mr. Casanova was driving was defective. It did not conform to other new 2000 Ford Econoline vans.

Since the van was a nonconforming van when it was purchased and Watson Quality was afforded reasonable opportunities to repair the defect but failed to do so, and the defect caused Carlos' injuries, the Casanovas have established their breach of implied warranty of merchantability claim.

In a final attempt to avoid liability, Watson Quality, like Ford, argues that the assumption of

the risk doctrine is a complete bar to the Casanovas claims. That is not true. Courts have held that assumption of the risk is not a complete bar to a contract case, *Pike v. Howell Building Supply, Inc.*, supra, at 712, ¶ 5, a breach of implied warranty of merchantability case, *Wood v. Bass Pro Shops, Inc.*, 462 S. E. 2d 101 (Va. 1995), or even a tort case. *Donald v. Triple S Well Service, Inc.*, 708 So. 2d 1318, 1325 (Miss. 1998) (en banc) ("In other words, assumption of the risk on the part of the plaintiff merely goes to the percentage of fault attributable to the plaintiff; it no longer affords a complete defense to the defendant unless the jury finds that the plaintiff's assumption of risk proportionately reduces damages to zero"). Therefore, the assumption of the risk doctrine does not bar the Casanovas; claims.

c. **Plaintiffs Proved a Breach of Implied Warranty of Fitness Claim**.

A breach of implied warranty of fitness claim is appropriate in a case involving an automobile if the plaintiff relied upon the seller's skill or judgment in selecting the [automobile] that he purchased... *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra, at 1027. In the present case, Jack DeMoney relied upon the particular skill and judgment of Norman Gannon to purchase the van. In fact, Mr. Gannon picked a van out to meet what he thought were the DeMoney specifications and had the van ready for Jack and Carlos to pick up at Watson Quality on January 7, 2000. [R. 217-218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L]. Mr. DeMoney did not inspect any van. [R. 217-218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L]. Instead, he relied on Mr. Gannon as he had done in the past. [R. 217-218, 824-825, V. 2 & 6, R. E. Tab 2, Ex. L]. In that regard, the facts of this case, at this juncture, establish a breach of implied warranty of fitness case. See, *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra.

Watson Quality argues that the van was purchased for the ordinary purpose of transportation

and not a particular purpose. That is not correct. Carlos testified that the van was used to haul supplies and equipment to work sites. He further testified in his deposition that the tiles and equipment that he transported were heavy. Jack DeMoney testified that customarily he or his brother would call Norman Gannon and request a "cargo" van. [R. 218, 825, V. 2 & 6, R. E. Tab 2, Ex. L]. Therefore, there is record evidence that the van was purchased for a particular purpose of hauling cargo to be used in the flooring tile business. These facts show that the van was purchased for a particular purpose. See, *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, supra.

d. Plaintiffs Proved a Negligent Repair Claim.

Carlos Casanova testified that he "took the van back to Watson Quality with a complaint that it was pulling to the right in January, 2000, February, 2000, and March or April, 2000, and on May 9 or 11, 2000." [R. 681, V. 5, S. R. E. 32, Tab 8]. Watson Quality failed to correct or repair "the pulling to the right problem when [he] took the van back in January, 2000, February, 2000, and March or April, 2000, and on May 9 or 11, 2000." [R. 682, V. 5, S. R. E. 33, Tab 8]. Carlos left the van at Watson Quality to repair the pulling problem in January, 2000. [R. 255, V. 2, S. R. E. 27, Tab 7]. He told Watson Quality employees what the problem was. [R. 255, V. 2, S. R. E. 27, Tab 7]. When he picked the van up the next day, it was still pulling to the right. [R. 255, V. 2, S. R. E. 27, Tab 7].[14] This evidence is sufficient to prove a negligent repair claim. See, *Weathersby Chevrolet*

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[14]Watson Quality, like Ford, argue that Carlos did not take the van back to Watson Quality in January or February, 2000 because there are repair records or invoices from Watson Quality for that time period. Essentially, the companies question Mr. Casanova's credibility. He remembers taking the van back and affording Watson Quality an opportunity to correct the problem in January, February, and March or April, 2000. If Watson Quality does not have any repair records or invoices for that period of time, then it is likely that the company destroyed those records. In any event, that is a credibility issue that must be resolved by the trier of fact and not the Court at this stage of the litigation. *Estate of Johnson v. Chatelain*, supra, at 687, ¶ 5.

Co., Inc. v. Redd Pest Control Co., Inc., 778 So. 2d 130 (Miss. 2001) (3n banc).

In *Weathersby Chevrolet Co., Inc.*, this Court held:

> This Court disagrees with the Court of Appeals' conclusion that the evidence presented to the jury was insufficient to support a jury verdict against Weathersby for negligent repair of Redd's truck. A review of the evidence indicates that sufficient evidence was presented by Redd to support the jury's verdict. The subject truck was taken to Weathersby to have the air conditioning control panel replaced after it was determined that it was the source of malfunction. Three and one-half business days later and 310 miles after the repair work was completed, the driver saw smoke emerging from the dashboard. After the driver made an emergency stop, fire engulfed and ultimately destroyed the truck.

Weathersby Chevrolet Co., Inc. v. Redd Pest Control, Inc., supra, at 134, ¶ 11.

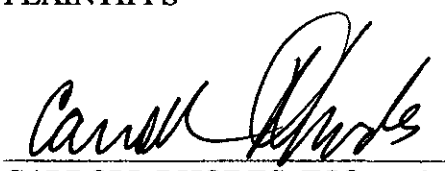
In the present case, Carlos took the van in for repairs. Watson Quality officials told him each time that the pulling problem had been corrected. Carlos testified that he left the van at Watson Quality overnight in January and on April 7, 2000. He picked the van up the next day in January and on April 10, 2000 after leaving it at Watson Quality three (3) days earlier. He was told in January that the problem had been repaired. He was told in February that the pulling problem had been repaired. And, Watson Quality was afforded ample opportunity to repair the van in April, 2000. This proof is sufficient to submit the issue of negligent repair to the jury. See, *Weathersby Chevrolet Co., Inc. v. Redd Pest Control, Inc.*, supra.

CONCLUSION

On the basis of the foregoing facts and authorities, this Court should affirm the trial court's order denying summary judgment, remand the case for trial, and assess all costs of this appeal against Ford..

This the 18th day of April, 2008.

Respectfully submitted,
CARLOS CASANOVA, ET. AL.,
PLAINTIFFS



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CERTIFICATE OF SERVICE

I, Carroll Rhodes, attorney for the appellees, hereby certify that I have this day forwarded, via Hand-Delivery, the original and four (4) copies of Appellees Brief to the following:

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Clerk of the Mississippi Supreme Court
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and I have mailed, by the United States Mail, a true and correct copy to the following:

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HINDS COUNTY CIRCUIT COURT JUDGE

This the 18th day of April, 2008.

CARROLL RHODES