IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DUETT LANDFORMING, INC. APPELLANT

VS. NO. 2008-CA-00022

BELZONI TRACTOR COMPANY RESPONDENT

APPELLANT'S BRIEF

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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 justices of this Court may evaluate possible disqualification or refusal.

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Respectfully submitted,

DUETT LANDFORMING, INC.

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities:

Other Authorities:

STATEMENT OF FACTS

Since 1989, the Appellant, Brookie Duett, has been in the business of dirt moving, leveling, and building catfish ponds in the Delta. Brookie followed in the footsteps of his father. Tr. 188. Previously he purchased John Deere tractors from Larry Shurden at Belzoni Tractor located in Humphreys County. Tr.188.

Prior to buying the tractors that became the subject of this controversy and civil action, Brookie owned several John Deere tractors, model number 8970. Tr.194. These tractors operated in an effective manner for his work. In December 1998 and January 1999, Brookie bought four (4) new John Deere, model 9400 tractors from Belzoni Tractor. Tr.196-197. Brookie bought the 9400 tractors only after speaking with Mr. Shurden. Mr. Shurden knew the nature of Brookie's work and what these new tractors would be used for on a day by day basis. Tr. 195-195. Brookie had prior success with the John Deere model 8970 tractors and reasonably expected that the new 9400 models would operate in the same or similar manner. Tr. 194-195. He bought the tractors on cash and credit, paying hundreds of thousands of dollars for the tractors. Tr. 197/D-31; Tr. 199-200/D-2; Tr. 203/D-3, D-4; Tr.207/D-5. There is no dispute that Brookie planned to use the tractors to dig catfish ponds and Belzoni Tractor was aware that Brookie was going to use the tractors for this purpose. Tr. 208, 244.

The tractors began to give Brookie problems in the summer of 1999. Tr. 209. Conservatively speaking this was approximately seven (7) months after the purchase. The transmission started locking up on one of the tractors and the transmission on another would run hot. Tr. 210. John Deere required that the entire transmission be returned to them to get repaired. As a result Brookie was unable to utilize the tractors during this

time. Without detailing every single lengthy problem that is adequately described in the record, Brookie's tractors experienced oil leaks, axle leaks, hydraulic line malfunctioning, fuel line problems, hydraulic tank leaks, rear differential problems, and various other problems. Tr. 210-225.

One serious problem Brookie experienced was with the gudgeons malfunctioning. The gudgeon is a large pipe that mounts to the rear frame of the tractor. Tr. 225. The gudgeons on each 9400 tractor wore out several times over the three (3) year period in which Brookie owned them. Tr. 227. When the gudgeons wore out the tractors were out of commission for at least a week. Tr. 226-227.

Brookie spoke with Larry Shurden at Belzoni Tractors about the gudgeon issues and Belzoni tried to fix the problems. The problems were not capable of repair. Tr. 228. Mr. Shurden then contacted John Deere who sent representatives down to look at Brookie's tractors. Tr. 229. During this down time, which was frequently when Brookie needed the tractors the most, he was never offered any loaner tractors. Rather he lost work and income while the tractors sat idle under repair. Of course, the promissory notes on the broken tractors did not sit idle. Unlike the tractors, the payments on the tractors experienced no "down time" and came due each month. Tr. 231-232. Because of the defects and repairs Brookie had to turn down jobs and finish jobs behind schedule. Tr. 232-233. An expert for Brookie determined that he had lost 267 days of work.

Brookie Duett had no serious problems or issues with his previous John Deere Tractors, model 8970. Tr 240. Brookie had over Nine Thousand (9,000) hours on the 8970's when he sold them. Tr. 241. However, he was only able to put Three Thousand (3000) Hours on two of the 9400's, Three Thousand Six Hundred (3,600) hours on

another, and Four Thousand Hours (4,000) on the fourth. Tr. 230. Brookie was forced to sell the 9400's due to their constant breakdowns or face ruination. Tr. 242. Brookie's expert, Charlie Sanders, opined that Brookie lost $114,914 in resale value on the tractors. Tr. 434. Specifically, Mr. Sanders determined that Brookie Duett sustained several hundred thousand dollars in damages based on the "down time" when the tractors were not working. Tr. 426-430.

The warranties on the 9400's were void if used in commercial or dirt scraping operations, a fact that was not made known to Brookie. Tr. 244. Mr. Shurden and Belzoni Tractor were fully aware that Brookie Duett intended to use the tractors for commercial dirt scraping. An extended, special Powerguard warranty which covered dirt moving was applied to Brookie's tractors. Tr 244.

After the Plaintiff rested the Court granted a directed verdict to Belzoni Tractor on the express warranty claim. Tr. 510. All other claims were allowed to proceed to the jury against Belzoni Tractor and John Deere.

Larry Shurden testified on behalf of Belzoni Tractors, a company which is no longer in business. Tr. 527. Mr. Shurden acknowledged a long history of dealing with Brookie Duett and his father. Tr. 514-515. Mr. Shurden was aware that Brookie intended to use the new 9400 tractors for commercial dirt scraping. Mr. Shurden corroborated all of the tiresome problems Brookie had with the tractors. Tr. 540-541. Mr. Shurden claimed at trial that he offered many options to Brookie, such as trading the 9400's out for different tractors and buying a 9400 or 8970 to have in stock so Brookie could rent it. However, Mr. Shurden admitted that he was not an agent of John Deere when he made these offers to Brookie. Tr. 527. Mr. Shurden had not even talked with John Deere to see

if there were viable options. Tr. 542. Mr. Shurden only assumed he could convince John Deere to go along with it. Tr. 542.

Scott Cook testified on behalf of John Deere. Mr. Cook was directly responsible for the design activities of the 9000 Series, including the 9400 design which Brookie purchased. Mr. Cook acknowledged the problems which Brookie experienced, but pointed out that John Deere did everything they were required to do under their "repair and replace" contract. Tr. 581, 583. Over a strenuous objection by Brookie's attorney, Mr. Cook was allowed to give expert testimony and opine that Mr. Duett's gudgeon problems could have resulted from improperly moving the tractor when it got stuck. Tr. 565-568. This testimony was not disclosed on the interrogatory submitted by the Plaintiff to the defendants asking for a delineation of any expert testimony expected to be used at trial. Although Brookie experienced many, many more problems, and much more frequently than Mr. Cook would have liked, Mr. Cook steadfastly claimed John Deere honored the contract by repeatedly repairing the tractors. Tr. 573. Mr. Cook never mentioned or confirmed that John Deere was willing to give Brookie a loaner or offer to trade out the 9400's for another model as Mr. Shurden hypothesized.

After denying the defendant's judgments as a matter of law, the Jury was instructed and returned a verdict for the Defense. Tr. 689-691, R.E. 1106. Brookie filed a timely Motion for J.N.O.V. or in the alternative a new trial, raising several issues. R.E. 1108-1134. After a hearing, the Court denied the Plaintiff's post trial motion. R.E. 1250. A timely Notice of Appeal was then filed. R.E. 1254.

ISSUE ONE

DEFENSE WITNESS SCOTT COOK WAS IMPROPERLY ALLOWED TO GIVE EXPERT WITNESS TESTIMONY FROM AN "ENGINEERING STANDPOINT" WITHOUT BEING QUALIFED AS AN EXPERT WITNESS OR BEING DISCLOSED AS AN EXPERT TO THE PLAINTIFF DURING PRETRIAL. THE RESULT OF MR. SCOTT'S TESTIMONY PREJUDICED THE PLAINTIFF AND REQUIRES A REVERSAL

The trial court committed reversible error by allowing Scott Cook, John Deere's corporate representative, to give what amounted to expert testimony without advance notice to the Appellant and without being qualified to give such testimony. Specifically, Mr. Cook testified that the gudgeons on the tractors could have been damaged by the tractor being pushed on "the nose or front end of the tractor." Tr. 567. Mr. Cook rendered his opinion even though he had never personally inspected Brookie's tractors. Appellant's trial counsel timely objected to Mr. Cook's testimony on the basis that it was expert testimony. Tr. 566. In response to the objection Defense counsel told the trial judge that Mr. Cook's testimony involved "strains that have-***from an engineering standpoint, the strains that are applied at tractors if they're stuck***. He knows that. ***It's not an opinion; it's a fact.***" (emphasis supplied) Tr. 566. Despite defense counsel's admission that Mr. Cook's testimony involved "engineering" the Court overruled the objection and allowed him to testify as a lay witness. Tr. 567.

The Court committed reversible error by overruling plaintiff's objection and allowing Scott Cook to testify as an expert. First, Mr. Cook was not properly identified or designated as an expert witness by Appellee John Deere in discovery. Secondly, Mr. Cook was not qualified as an expert to render the opinions which he gave.

STANDARD OF REVIEW

In *Palmer v. Volkswagen*, this Court held that it "will not reverse the admission or exclusion of evidence unless the error adversely affects a substantial right of a party." *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1092 (Miss. 2005), citing *Crane Co. v. Kitzinger,* 860 So.2d 1196, 1199 (Miss.2003) (citing *Floyd v. City of Crystal Springs,* 749 So.2d 110, 113 (Miss.1999)). "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Id.* (citing *Terràin Enter., Inc. v. Mockbee,* 654 So.2d 1122, 1131 (Miss.1995))

A. THE COURT CLEARLY ERRED BY FINDING THAT MR. COOK'S TESTIMONY WAS LAY TESTIMONY AND NOT EXPERT TESTIMONY

Mr. Cook's testimony regarding the gudgeon problems was clearly expert testimony. "A lay witness is someone who offers opinion testimony regarding something they know from first-hand knowledge, not something they concluded from applying technical formulae." *Kilhullen v. Kansas City Southern Ry.* 2008 WL 852636, 4 (Miss.App.) (Miss.App.,2008). After Plaintiff's counsel objected to Mr. Cook's testimony being improper expert testimony, Defense counsel conceded to the trial court that Mr. Cook's testimony was "from an engineering standpoint". Tr. 566. Even though the defense claimed Mr. Cook's testimony was that of a "lay witness", Mr. Cook's conclusions came from an "engineering standpoint".

In a recent case, this Court confronted a similar issue. The defense had untimely designated an expert witness. The trial court refused to allow the witness to testify as an expert but did allow him to testify as a lay witness. The witness then gave testimony

regarding airbag deployment using "highly technical calculations." The Plaintiff objected to the testimony as improper expert testimony allowed under the guise of a lay opinion. The Supreme Court agreed:

> To be clear, the test for expert ***testimony is not whether it is fact or opinion.*** The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.

Palmer v. Volkswagen of America, Inc. 904 So.2d 1077, 1092 (Miss.,2005) (emphasis supplied)

The Court also found that the admission of the testimony prejudiced the plaintiffs and required a reversal because "[the expert's] testimony rebutted that of the [the plaintiffs'] expert[.]" Id. @ 1092.

In *Cotton v. State*, 675 So.2d 308 (Miss. 1996) the controversy involved a witness who explained to the jury the mechanical features of a particular brand of gun. The witness stated that the gun would not fire unless a specific sequence of events was followed. The Court found that, "[i]n order to assist the jury, he was indeed required to reveal particular knowledge about the Llama .45 caliber semi-automatic pistol. We find that the testimony ... constituted expert opinion." *Id.* at 311.

In the case at bar, defense counsel argued to the trial court that Mr. Cook's testimony was "not an opinion, it's a fact." Tr. 566. However, as the Court held in *Palmer*, "the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such." *Id.* at 1092. Defense counsel advised the trial court

that Mr. Cook's testimony would be "from an engineering standpoint." Clearly, the testimony was going to involve "scientific, technical, or other specialized knowledge." Mr. Cook proceeded to testify about how gudgeons on the 9400 tractors could be damaged applying force to either the front or back of the tractors. Surely no one can dispute that such testimony is not within the knowledge of the "randomly selected adult".

Mr. Cook's testimony clearly prejudiced Brookie's case. First, Brookie's lawyer did not have the ability to rebut Mr. Cook's testimony with his own expert. Additionally, defense counsel used Mr. Cook's testimony in closing to argue to an alternative theory for Brookie's tractor problems.

> And Mr. Cook took the stand yesterday and he talked about this particular picture and he talked about the stresses that you can put on a gudgeon as you're trying to pull tractors or push tractors out of – out of gumbo like this. And he talked about the fact that these tractors are all mounted with push bars and that sometimes they would push these tractors and the forces that would put on them. We came in and we explained exactly why these tractors – why Mr. Duett in his operation broke these tractors. Tr. 672.

This was the first time anyone for the plaintiff was notified that 'Mr. Duett broke the John Deere tractors' would be a theory of the defense. And this theory was initiated by an improper lay opinion provided by Mr. Cook, and was heard by the jury over the objection of the plaintiff.

Mr. Cook's testimony was clearly improper. Just as in *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110 (3d Cir.1987), the Third Circuit held that a district court abused its discretion in allowing a tractor sales representative to testify as an expert regarding the cause of a tractor fire. The court noted that the salesman was not an engineer, had no experience in designing construction machinery, had no knowledge or experience in

Court has held "There is a bright-line rule. That is, where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a *Miss. R. Evid.* 702 opinion and not a Rule 701 opinion." *Sample,* 529-530 (citing *Miss. State Highway Commission v. Gilich*, 609 So.2d 367, 377 (Miss. 1992).

In the case at bar, the testimony at issue required more than just personal observation. Particular knowledge was necessary for Cook to testify as to the "forces in the gudgeon area." Tr. 569. Furthermore, Cook never personally inspected the tractors at issue in this case! (Id.) Cook's testimony should have been limited to only that of which he personally observed or had any firsthand knowledge.

Throughout Cook's testimony he repeatedly used a model of a tractor to demonstrate "what tends to happen" when a tractor is being pushed on "the nose or front end of the tractor." Tr. 567. From here, Cook goes a step further by explaining that "the motion here would cause that – that gap there to change and so it tends to work it and would tend to bring more debris through that seal. As that seal gets breached and you continue to do that, even if it's on an infrequent basis, you tend to pump material into that – that bearing." Tr. 567-568.

It has long been established that lay witness opinion testimony must assist the trier of fact and must be based on the witness's firsthand knowledge or observation. *Kmart Corp. v. Hardy ex rel. Hardy*, 735 So.2d 975 (Miss. 1999). Lay witnesses are not allowed to testify when special experience or expertise is necessary. *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So.2d 555 (Miss. 1998).

Cook has a bachelor's degree in ***agricultural*** engineering from Iowa State. Mr. Cook has no other formal education. However, the defense offered no testimony to provide the jury that Mr. Cook had any special expertise in working with the gudgeon. No testimony was received by the court of any other times Scott Cook had testified as an expert regarding the workings of the gudgeon. No evidence was presented to show that Mr. Cook had any particular knowledge of the gudgeon as it is applied to the John Deere 9400, only that he is "familiar with the gudgeon and how it works" (Plaintiff Exhibit #10, page 7, line 24). Yet he was permitted to render an opinion as to how the gudgeons on Brookie's tractors broke despite the fact that no evidence was ever submitted that Brookie's tractors were ever stuck in the mud and improperly pushed or pulled.

The issue is whether Mr. Cook's testimony was that of a lay witness or an expert witness. The Mississippi Supreme Court has applied the following test: "...if a trial court must delve into a witness's background to determine if he possesses the necessary education, experience, knowledge, or training in a specific field in order for the witness to testify as to his opinions concerning that particular field, then M.R.E. 702 applies." *Langston,* 4. (citing *Hardy v. Brantley*, 471 So.2d 358, 366). Clearly, Mr. Cook's testimony fits this description. The average person simply does not possess the knowledge to opine as what can cause a tractor gudgeon to break. Indeed, the average person would not even recognize a gudgeon.

The trial court has the discretion to determine whether a witness is sufficiently knowledgeable to be considered an expert. *Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So. 2d 373, 384 (Miss. 2004). The United States Supreme Court has questioned the reliability of particular expert testimony when "the question before the court was specific,

not general." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999). The basis of this lawsuit is incredibly precise and involves machinery outside the knowledge and scope of a lay person witness. In the present case, Mr. Cook's qualifications are central to the court's analysis as gatekeeper during trial. The Appellant's trial counsel challenged his expertise in the specialized knowledge of the analysis of the gudgeon, yet the trial court allowed Mr. Cook to delve into matters outside the scope of any ordinary witness testifying in the capacity of corporate representative.

The framework employed in determining whether particular proffered expert testimony meets the requirements of *Mississippi Rule of Evidence Rule* 702 necessarily involves the trial court's first determination of whether the expert testimony is relevant. *McLemore*, 863 So. 2d at 40. If the trial court finds that the proffered testimony is relevant, then the court next considers whether the proffered testimony is reliable. Each determination by a trial court regarding the admissibility and reliability of expert testimony is a fact intensive one, and "requires immersion in the subject matter of the case." *Id.*.

No fact intensive inquiry was made by the attorneys or the trial court. Mr. Cook was simply allowed to give expert testimony without first being qualified as an expert to render such testimony. No "immersion in the subject matter of the case" was made at any point before or during Mr. Cook's testimony. "Litigants are forewarned to err on the side of disclosure, where the question is whether or how to respond to discovery inquiries regarding expert opinion." *Langston*, 670 at 4. Defense counsel failed to timely disclose Mr. Cook as an expert witness and effectively "sand bagged" the plaintiff. As this Court

has long observed, the days of "trial by ambush" are over. See *Harris v. General Host. Corp.*, 503 So.2d 795, 796-97 (Miss. 1986).

In this case, John Deere's attorney failed to properly and timely designate Mr. Cook as an expert witness. Nevertheless, the trial court ordered that the defendant would be allowed to ask questions to Cook regarding what amounted to expert opinions. Mr. Duett's attorneys timely objected to Cook's testimony when he crossed the line from lay opinion to expert opinion. (Tr. 566-568) The trial court erred in ruling that the defendant may allow its witness to testify to opinions which explore subjects restricted entirely to expert witnesses.

Discovery of "facts known and opinions held by experts" is governed by Rule 26 of the *Mississippi Rules of Civil Procedure*, which states in pertinent part: "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial...." *Miss. R. Civ. P.* 26(b)(4)(A)(I). For purposes of the instant case, the key phrase is "expects to call." The defendant knew Mr. Cook would testify, but did not inform the plaintiff he would discuss matters relating to "forces [that] will affect this tractor that's being pushed." Tr. 566. The practical effect of this ruling by the trial court is that the defendant would be allowed to call an undisclosed expert to provide undisclosed opinions to rebut any testimony which was fully disclosed by the plaintiff in discovery, and of which the defendant was fully aware.

This ruling is inherently unfair and a violation of our rules of civil procedure for the defendant, who ignored the rules of disclosure and violated discovery rules by not properly disclosing to the plaintiffs the intent to offer such evidence in the defendant's case-in-chief. This Court has found it "disingenuous" for a party to argue she does not

"expect" to call her experts, as envisioned by Rule 26(b). *Banks v. Hill*, 978 So.2d 663, 666 (Miss. 2008).

Furthermore, since the defendant did not disclose any expert testimony Cook may give during trial, the plaintiff was severely prejudiced by not having any opportunity to challenge the credentials of the expert. While a *Daubert* hearing is not required before reaching a decision on the admissibility of an expert's opinion, the plaintiff was never even given a chance to challenge the expert or his opinion. When the trial court abuses its discretion by clearly failing to provide a fair opportunity for such a challenge, reversible error occurs. The plaintiff was never on notice of the opinions Cook would give at trial, which prejudiced Duett by not having any opportunity to determine the reliability of Cook's testimony and opinion.

The trial court abused its discretion by allowing Cook to testify about matters reserved for expert opinions under *M.R.E.* 702 without being qualified to render such opinions. Further, the Plaintiff's were ambushed by this testimony because the defense failed to identify Mr. Cook as an expert in discovery and did not respond to any expert interrogatories. The Plaintiff was clearly prejudiced by Mr. Cook's testimony because it permitted the jury to find that Brookie Duett was the proximate cause of the tractor damage instead of the defendant. Had the trial court adhered to rules regarding expert testimony, Mr. Cook's testimony would have been inadmissible. A new trial is required.

ISSUE TWO

THE JURY VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE WHICH CLEARLY ESTABLISHED THAT THE IMPLIED WARRANTIES ON THE TRACTORS HAD BEEN BREACEHD. THE APPELLANT'S NUMEROUS PROBLEMS WITH THE TRACTORS AND THE APPELLEES REPEATED, UNSUCCESSFUL ATTEMPTS TO CURE THE PROBLEMS AMOUNTED TO A BREACH OF THE IMPLIED WARRANTIES OF MERCHANTIBILITY AND FITNESSS FOR A PARTICULAR PURPOSE

"Insanity: doing the same thing over and over again and expecting different results." Albert Einstein, 1879-1955

This is a breach of implied warranty of merchantability and fitness for a particular purpose case involving commercial equipment, specifically John Deere model 9400 tractors, and also involves the harms and losses sustained by Brookie Duett, Appellant, due to the constant malfunction and repairs required on his tractors. Duett Landforming, Inc. and its owner Brookie Duett, are in the business of leveling and moving dirt. Brookie learned the business from his dad. He also builds catfish ponds in the Mississippi Delta region and he purchased by cash and credit four model 9400 tractors to utilize in his business. Tr. 188.

Brookie was forced to file a civil action due to the defective character of the tractors. All four of the model 9400 tractors needed constant repair. In simpler terms, the tractors repeatedly broke down. The evidence at trial, including every witness that testified, admitted-in fact could not deny-that the tractors were constantly, repeatedly and habitually breaking down and out-of-use. Indeed, one would have to travel to the Island of Misfit Toys[1] to find comparative defective products. In the eyes of the law, these four

[1] From the children's classic cartoon "*Rudolph the Red Nosed Reindeer*", the Island of Misfit Toys is a home for defective and unwanted toys. Presumably, there were no tractors on the island but the 9400's would have been right at home.

tractors were neither fit for their intended purpose and use, nor were they merchantable as Brookie was led to believe.

Brookie bought the tractors from Belzoni Tractor. He had purchased good quality John Deere tractors there before and the owner Larry Shurden knew just what Brookie needed. Tr. 195-196. Unfortunately, the model 9400 tractors were rife with problems, breakdowns, leaks, faults and other mechanical issues. Bookie filed a civil action charging breach of multiple warranties against John Deere and Belzoni Tractor. The complaint further alleged that Brookie's company, Duett Landforming, Inc. lost profits and customers due to these defects. If there ever was a case of a breach of implied warranty of fitness for a particular purpose and warranty for merchantability, this was it.

Almost immediately after purchasing these tractors Brookie experienced major problems with transmissions, hydraulic lines and fuel lines and various other maladies. Tr. 210-225. Perhaps the biggest and most troubling problem Appellant experienced was the repeated malfunction of a part known as a gudgeon. Tr. 227. The gudgeons on each tractor malfunctioned several times over the course of the three year period in which Brookie owned them, each time requiring a loss of a week's use. Tr. 226-227. The inefficiency of these machines caused Brookie's business to turn down jobs and finish jobs late. Tr. 232-233. The defendants may have also considered the gudgeons to be a major "bone of contention" in this civil action. John Deere brought a corporate representative, Scott Cook, to the trial who happened to be a designer and engineer of John Deere tractors. During their case-in-chief, the Defendant John Deere elicited testimony that can be described as nothing less than expert testimony from Mr. Cook.

Mr. Cook opined that Brookie damaged the gudgeons by improperly pushing or pulling the tractors. Tr. 566-569. The problem with this testimony was that John Deere had not designated Mr. Cook as an expert witness. Tr. 566, 962, 1120-1121. (See point I for full discussion of this issue). In closing, defense counsel was able to utilize Mr. Cook's improper expert testimony as an alternative basis for the tractors' malfunctioning. Tr. 672.

Brookie offered clear and compelling testimony about his tractor problems, as outlined in the accompanying *Statement of Facts*. It should not go unnoticed that every fact witness confirmed the problems with these model 9400 tractors, including the John Deere representative. Testimony from Appellee Shurden, owner of Belzoni Tractor, confirmed that as the seller of these tractors to Brookie, he was aware of the use for which Brookie intended the tractors. Tr. 537, 540. No one disputed that the tractors continually malfunctioned. Rather, the Appellees hid behind the express warranty "repair and replace" policy. The only problem with this policy is that at some point, enough is enough! The law does not require or demand that a person who is saddled with a defective product keep it forever while it goes through repair, after repair, after repair, *ad infinitum*. No reasonable person considering the testimony in this case could have reached the verdict that was returned.

The standard of review in determining the weight of the evidence has been stated many times. The available testimony and evidence is viewed in the light most favorable to the Appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. After heeding that inference, if the facts considered point so overwhelmingly in favor of the Appellant that reasonable men could not have

arrived at a contrary verdict, then the Court is required to provide relief to Appellant. See, *Munford Inc. v. Fleming*, 597 So.2d 1282, 1284 (Miss.1992); citing *Litton Systems, Inc. v. Enochs*, 449 So.2d 1213, 1214 (Miss.1984).

1. BROOKIE DUETT ESTABLISHED A BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE

This Court must review the denial of a motion for a new trial under an abuse of discretion standard and a new trial is appropriate if the record demonstrates that the verdict was contrary to the substantial weight of the evidence. *Eason v. State*, 2008 WL 570447 (Miss.App.) In the instant matter the overwhelming weight of the evidence was so contrary to the jury's decision that the trial Court abused its discretion in failing to provide Bookie relief by granting a new trial.

Pursuant to *Miss. Code Ann.* §§ 11-7-18 and 75-2-719(4), the implied warranties of merchantability and fitness for a particular purpose cannot be waived or disclaimed. *Gast v. Rogers-Dingus Chevrolet*, 585 So.2d 725, 728 (Miss. 1991). Brookie Duett had the burden of proving the breach of implied warranty of merchantability by presenting evidence showing that the seller was a merchant with respect to goods of that kind (i.e. sold tractors), that the tractors were not fit for use as intended, that the defects existed at the time the products were purchased, and that Appellees were given a reasonable opportunity to correct the defect(s). See, *Settlemires v. Jones*, 736 So.2d 471 (Miss.App. 1999). For the implied warranty of fitness for a particular purpose, Brookie was required to show the following:

> [w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an

> implied warranty that the goods shall be fit for such purpose.

Murray v. Blackwell, 966 So.2d 901, 904 (Miss.App. 2007).

During the trial, Larry Shurden, agent of Appellee Belzoni Tractor Co., testified that he offered Brookie "many options" to help him with the constant problem of the tractors breaking down and needing repairs. However, when Mr. Shurden made those "offers" he was not an agent of John Deere and had no authority to offer anything on their behalf or make guarantees that any such offer would be honored. Tr. 527, 542. Moreover, Scott Cook testifying as a representative of John Deere fully believed that the "repair and replace" was the only thing John Deere was required to do. Tr. 583. And this "repair and replace" attitude so graciously spoken of by John Deere had come to an end after so many problems were encountered with the tractors. After each John Deere "repair and replace," Brookie still continued to have the same mechanical problems.

Records were introduced and deposition videos shown explaining in great detail the nature of Appellant's equipment problems, the frequency of the problems, the number of times the problems occurred, and the loss of business directly attributable to the equipment trouble. There was substantial testimony regarding the repairs performed on these products as well. A copious amount of information was offered into evidence that illustrated by a preponderance of the evidence that these tractors did not work for the purpose for which they were intended or sold. As this Court has stated in cases of this nature: "There comes a time when enough is enough' – when a consumer no longer must tolerate or endure a seller's repeated (though good faith) attempts to cure the defect." *North River Homes, Inc. v. Bosarge*, 594 So.2d 1153, 1160 (Miss. 1992); quoting *Guerdon Industries, Inc. v. Gentry*, 531 So.2d 1202, 1208 (Miss. 1988). Brookie was not

required to permit the seller John Deere to indefinitely tinker with the products in the hope that they might ultimately be made to comply. *North River Homes, Inc. v. Bosarge*, 594 So.2d 1153, 1160 (Miss. 1992); citing *Orange Motors Credit of Coral Gables v. Dade County Diaries*, 258 So.2d 319, 321 (Fla.App. 1972). Brookie's case falls squarely within the "enough is enough" category.

This Court has recognized that the right to cure an implied warranty breach is not unlimited in the wake of repeated deficiencies and repeated attempts at repair. *Mercury Marine v. Clear Water Construction, Inc.*, 839 So.2d 508 (Miss. 2003)(finding right to cure not unlimited in case where seller made ten attempts to repair a mobile home's defects in a five-month period). At some point in time it must become obvious that the product cannot be repaired or parts replaced so that the same is made free from defect. *Id.* Time and time again Brookie requested and received repair work on these tractors over the three-year period that he owned them. Trial Exhibit 1 illustrates some of the repairs these tractors needed:

Tractor Serial No.	Open Dates (date maintenance requested by Appellant)
11013	09-15-99
	12-15-99
	02-04-00
	04-06-00
	06-23-00
	07-25-00
	10-04-00
	04-24-01
	07-06-01
1034	08-12-99
	12-15-99
	07-10-00
	09-20-00
	04-24-01

20007	10-18-99
	12-06-99
	02-02-00
	04-26-00
	05-01-00
	05-12-00
	07-10-00
20246	09-09-99
	12-15-99
	08-23-00
	09-17-01

These records were produced by Mississippi AG Company, formerly Peaster Tractor Inc., who performed maintenance work on Brookie's equipment. Each maintenance request indicates not only a repair, but obviously time the tractor was not usable. Further, these numbers do not represent *other* repair work Appellant had performed. Testimony established that Appellee Belzoni Tractor Co., Inc. had nearly 40 additional work orders of its own concerning Brookie's equipment. Tr. 409. Brookie was only able to log between 3,000 and 4,000 hours on these four John Deere model 9400 tractors before he was forced to sell each tractor for a loss. Tr. 230, 242. The John Deere tractors he owned immediately prior to the 9400 model provided him with over *9,000 hours* of work time. Tr. 241.

The Appellees were able to hide behind their "repair and replace" express warranty to stunning success. The Appellees argued that Brookie had signed the express warranty so he knew what he was getting into. See Jury Instruction Tr. 1057. They argued they had made ever single repair under warranty, and that Brookie was not out of pocket for any of the repair costs.[2] In short, the Appellees proclaimed they did all that they were required to do *under the express warranty*. The jury was obviously swayed.

[2] Of course Mr. Duett continued to pay his monthly notes on the malfunctioning tractors.

However, the "repair and replace" express warranty cannot be used to waive the implied warranties of merchantability or fitness for a particular purpose.

Perhaps it was the comments made by defense counsel during closing argument which swayed the jury against Mr. Duett. Belzoni's counsel accused Brookie's case of being about nothing more than "greed." Tr. 654. He referred to Brookie's lawsuit as an "abusive claim", Tr. 651, and warned the jury that if his client was found liable for merely helping Brookie, what would happen to the next person who helps him? Tr. 655. Most disturbing was counsel's "send a message" argument:

> What do you want people to say about Humphrey's County and justice in Humphrey's County? Do you want them to say that you can cook up some damages, come to court and roll the dice and try to get a lot of money, or do you want them to say that Lady Justice, she'll meet you at the courthouse and if your case is not a good case, the jury's gonna tell you so.

Tr. 656.

Although the Court has yet to apply "send a message" to civil cases, *Alpha Gulf Coast v. Jackson*, 801 So.2d 709, 728-729 (Miss. 2001) suggests that such an argument could result in reversible error. Perhaps these comments were simply trial counsel's attempt at trying to "keep it real" as he claimed, Tr. 643, but these inflammatory and baseless comments are typically what causes a jury to ignore the facts and law and decide the case on something entirely inappropriate.

The Jury's verdict could also have been the result of Mr. Cook's improperly allowed expert testimony. Mr. Cook testified that gudgeon damage could occur if a tractor was improperly pushed or pulled. Tr. 566. 569. However, there was absolutely no testimony that occurred in this case. Further, Mr. Cook admitted *he never even*

examined Brookie's tractors. Tr. 569. The overly prejudiced effect of Mr. Cook's testimony is more fully discussed in Issue I, *infra.*

Brookie Duett clearly established through each and every witness that the Appellee's breached the implied warranties of merchantability and fitness for a particular purpose. Regardless of the repairs performed by Appellees and the parts replaced, there came a time when it was obvious that the tractors were defective and not fit for the use which the seller sold the product and for which the consumer purchased it. The Jury's verdict and the trial court's refusal to order a new trial were both clearly erroneous.

2. THE APPELLANT ESTABLISHED SIGNIFICANT HARMS AND LOSSES AS A RESULT OF THE FAULTY TRACTORS

Although the jury did not reach the damage issue, it is important to see how Brookie's small business was harmed by the defective tractors. The Court's opinion in *Parker Tractor & Implement Co, Inc. v. Johnson*, 819 So.2d 1234 (Miss. 2002) is analogous to the facts *sub judice* and supports Brookie's position. In *Parker* a buyer of a John Deere combine discussed his plans for the product with the seller prior to purchasing the equipment. Despite assurances that the product would be sufficient for the buyer's purposes, the buyer incurred numerous repairs and downtime of the combines, affecting his productivity and profits. *Id.* The lower court ruled for the buyer/plaintiff and the Supreme Court affirmed holding that the buyer of the defective product was entitled to recover lost profits in a breach of warranty action, where the seller's representative knew what use the buyer intended and that it was reasonably foreseeable any problems with the product would cause the buyer to lose profits. *Id.* Specifically the Court stated:

> Mississippi law allows a buyer suing for breach to recover

> consequential damages for 'any loss resulting from general or particular requirements and needs of which the seller at the time of the contracting had reason to know . . .'

Id. at 1239; quoting *Miss. Code Ann. §* 75-2-715(2)(a)(Supp. 2001). This authority allows for the recovery of lost profits in the following situation:

1. the seller had reason to know at the time of contracting that if he breached the buyer would lose profits;
2. the loss of those profits is foreseeable;
3. the lost profits are ascertainable and
4. the losses could not have been prevented.

Parker, at 1239; citing *Massey-Ferguson, Inc. v. Evans*, 406 So.2d 15, 19 (Miss. 1981).

The *Parker* authority is controlling in the instant analysis. Throughout the trial of this matter, there does *not appear any contradiction or denial* that Brookie incurred substantial and repeated mechanical problems that were brought to the attention of Belzoni Tractor and John Deere. The record is replete with acknowledgement of the myriad problems experienced by Brookie. Testimony by Larry Shurden, on behalf of Appellee Belzoni Tractor Co., Inc. corroborated all the issues experienced by Brookie with the defective tractors. Tr. 540 – 541. Moreover, Mr. Shurden testified he was aware of Brookie's intended use for the tractors when he purchased them. Tr. 537, 540. Scott Cook testified as an agent of John Deere. He also acknowledged the problems Brookie experienced. Tr. 581. Expert testimony substantiated that Brookie incurred 267 down days and lost several hundred thousand dollars due to the tractors failing to operate

properly. Tr. 426-430. All of these facts are analogous to *Parker* and cannot be understated.

Following the opinion of *Parker* and the language of *Miss. Code Ann.* § 75-2-715(2)(a), the trial testimony clearly established Appellees knew, at the time of selling these tractors, the purpose Brookie intended to use these tractors. It was clearly foreseeable that he would sustain lost profits if the machines were unfit for that purpose. Testimony went further to illustrate that profits were, in fact, lost due to the down time of the machines. This testimony, applied to the applicable authority and controlling statute concerning breach of implied warranty, illustrates that Brookie sustained substantial damages to his small business. As stated earlier, the testimony and evidence offered was overwhelmingly in favor of a verdict contrary to the jury's decision.

Small business owners like Brookie Duett are the backbone of this State and this Country. While four (4) tractors and several hundred thousands of dollars may be a trivial matter for a big business like John Deere, to Brookie Duett it means everything. Mr. Duett relied upon John Deere to make tractors with which he could use to run his business. Mr. Duett essentially invested in John Deere with his money and livelihood. In return, John Deere was able to hide behind a "repair and replace" warranty which had the affect of eviscerating the implied warranty of merchantability and fitness for a particular use. If the Appellee's "repair and replace" succeeds, no small business owner will be able to afford to stay in business. The Court should "repair and replace" the jury's verdict and replace it with a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Merrida P. Coxwell, Jr., attorney for appellant, Duett Landforming, Inc., certify that I have this day filed this Appellant's Brief with the clerk of this Court, and have served a copy of this Appellant's Brief by United States mail with postage prepaid on the following persons at these addresses:

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