IN THE SUPREME COURT OF MISSISSIPPI

M. CURTISS MCKEE AND
ANN CRAFT MCKEE — APPELLANTS

VERSUS — CASE NO. 2009-CA-01314

BOWERS WINDOW & DOOR COMPANY, INC. — APPELLEE

(CONSOLIDATED WITH)

M. CURTISS MCKEE AND
ANN CRAFT MCKEE — APPELLANTS

VERSUS — CASE NO. 2009-CA-01315

WEATHER SHIELD MANUFACTURING, INC. — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF MADISON COUNTY, MISSISSIPPI
CAUSE NO. 2002-0230

BRIEF OF APPELLEE WEATHER SHIELD MANUFACTURING, INC.

ANDERSON CRAWLEY & BURKE, PLLC
TIMOTHY D. CRAWLEY (MB[redacted])
MITZI LEASHA GEORGE (MB#[redacted])
ATTORNEYS AT LAW
216 DRAPERTON COURT
RIDGELAND, MS 39157
TELEPHONE: (601) 707-8800
FACSIMILE: (601) 707-8801
E-MAIL: TCrawley@ACBLaw.com
MGeorge@ACBLaw.com

COUNSEL FOR APPELLEE, WEATHER SHIELD MANUFACTURING, INC.

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

M. Curtiss McKee
Plaintiff/Appellant

Ann Craft McKee
Plaintiff/Appellant

Dennis L. Horn. Esq./Shirley Payne
Attorneys for Plaintiffs/Appellants

Bowers Window & Door Company, Inc.
Defendant/Appellee

J. Wade Sweat, Esq./Marisa C. Atkinson, Esq.
Attorneys for Defendant/Appellee, Bowers Window & Door Company, Inc.

Weather Shield Manufacturing, Inc.
Defendant/Appellee

Timothy D. Crawley Esq./Mitzi Leasha George, Esq.
Attorneys for Defendant/Appellee, Weather Shield Manufacturing, Inc.

TIMOTHY D. CRAWLEY
MITZI LEASHA GEORGE
Attorneys for Appellee,
Weather Shield Manufacturing, Inc.

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STATEMENT OF THE FACTS

On or about August 28, 1998, the Appellants, M. Curtiss McKee and Ann Craft McKee, entered into a contract with Ellington Homes, Inc., for the Construction and Supervision of a Residence to be located at 306 Deer Haven Drive, Madison, Mississippi. (R.E. p. 1; R.V. 1, p. 16). According to the Appellants' Complaint, James Ellington and Ellington Homes, Inc., were responsible for supervising and ensuring that the work done building the residence was satisfactorily performed. The Appellants also aver that Ellington Homes, Inc. (hereinafter referred to as "Ellington Homes"), was responsible for ordering materials and supplies to be utilized in the building of their residence. (R.E. p. 2; R.V. 1, p. 17).

Mrs. Ann McKee testified that, during the construction of their home and at the direction of James Ellington, she and Curtiss went to the showroom of Appellee, Bowers Windows & Doors, Inc., (hereinafter referred to as "Bowers") to look at windows. (R.E. p. 6; R.V. 3, p. 412). Upon arrival, the Appellants were shown a variety of styles of windows including, but not limited to, clad, wooden, metal, and vinyl-styled windows by Bowers' employee, Mark McKee. (R.E. p. 8; R.V. 3, p. 438). Ann McKee stated that she liked wooden windows and, ultimately, selected wooden windows that were manufactured by Appellee, Weather Shield Manufacturing, Inc. (hereinafter referred to as "Weather Shield"), to be installed in the Appellants' home. (R.E. p. 8; R.V. 3, p. 438). Bowers' employee, Mark McKee, informed the Appellants that the wood windows would need to be maintained because wood rots, in response to which the Appellants informed Bowers' employee that they understood that – they had wooden windows before in their house in Eastover in Jackson, and they maintained them appropriately. (R.E. p. 9; R.V. 3, p. 438). The windows selected by the Appellants were delivered to the construction site and installed by the subcontractors. (R.E. p. 11; R.V. 4, p. 493).

During the Spring of 2002, the Appellants hired a general contractor, Bill Birdsong, to paint their home. (R.E. pp. 13-15; R.V. 3, pp. 317-318). Mr. Birdsong testified that he went to the residence to look at the trim and facia boards and, after walking around the property, he expressed his opinion regarding the type of work that would need to be done as well as his personal opinion about the use of wooden windows in a house in Mississippi. (R.E. pp. 15-16, 18-19; R.V. 3, pp. 319-320, 322-323).

The Appellants commenced the instant lawsuit on September 9, 2002, by the filing of their Complaint with Discovery attached, against Ellington Homes, Bowers and Weather Shield. (R.E. pp. 1-4; R.V. 1, pp. 16-19). In addition to numerous specific allegations against Ellington Homes, the Appellants broadly asserted that the windows they purchased form Bowers, which were manufactured by Weather Shield, were "a defective product in that they have leaked ever since they were placed in the house". (R.E. p. 3; R.V. 1, p. 18). Subsequently, the Appellants filed a First Supplemental and Amended Complaint and a Second Supplemental and Amended Complaint. (R.E. pp. 26, 40; R.V. 1, pp. 83, 139). Neither of those amendments changed the claim as stated against Weather Shield; the Appellants' sole allegation against Weather Shield was that the windows manufactured by Weather Shield and incorporated in their home were "a defective product in that they have leaked ever since they were placed in the house". (R.E. pp. 29, 43; R.V. 1, pp. 86, 144).

In their discovery responses, the Appellants alleged numerous and sundry errors and problems with their home which had nothing whatsoever to do with the windows incorporated in that house, including, but not limited to, the following: leaking and sagging roof; wet, soft spots in the roof decking; required replacement of a cosmetic chimney; siding; improper installation of the electrical system; the alarm system would not work and shorted out; bracing in the attic was inferior; framing was defective; master bathroom was improperly constructed; the plumbing was

defective; flooring was inadequately installed; the air conditioning was never properly sealed, etc. (R.E. pp. 49-53; R.V. 4, pp. 557-561). The Appellants designated Bill Birdsong as their only expert in the field of wooden windows and disclosed that Mr. Birdsong would testify that the wooden windows purchased from Bowers and installed in their house did not meet the industry standard for that location and caused rot and damage to the Plaintiffs' house.

Bill Birdsong's deposition was taken on April 1, 2008. The Appellants failed to produce any type of curriculum vitae or professional resume to assist with determining whether Mr. Birdsong was a qualified expert in the field of wooden windows; Mr. Birdsong actually testified that no such document exists. (R.E. pp. 14-15; R.V. 3, pp. 318-319). During his deposition, Mr. Birdsong provided testimony regarding his purported qualifications and ability to express an expert opinion regarding the wooden windows in the Appellants' home failing to meet the industry standard for the location. According to Mr. Birdsong, he has been a general contractor in the Central Mississippi/Jackson Metro area for twenty-three (23) years. (R.E. pp. 14, 18; R.V. 3, pp. 318, 322). He also testified that he received his high school diploma, but beyond that, he has had no other special education, training, or experience specific to windows and has never worked for a window manufacturer. (R.E. pp. 45, 46; R.V. 3, pp. 327-328). Mr. Birdsong testified that, prior to this case, he had never been retained as an expert in any type of litigation. (R.E. p. 14; R.V. 3, p. 318). Mr. Birdsong denied having any personal notes regarding this case, and admitted that his opinions were not memorialized in any type of written report he authored. (R.E. pp. 14-15; R.V. 3, pp. 318-319).

Bill Birdsong also testified regarding the type of investigation, inspection and tests he performed in order to assist him in reaching his "expert" opinion regarding the windows installed in the Appellants' home. Mr. Birdsong stated that he has been on the premises of the Appellants home on only two (2) occasions. According to Mr. Birdsong, his first visit to the Appellants'

home was in the spring of 2002 (after being hired to paint it). Birdsong visited the residence in order to determine what type of preparation work would need to be done prior to beginning the painting job. (R.E. pp. 15-16; R.V. 3, pp. 319-320). Mr. Birdsong testified that he thought the Appellants' house was new, and assumed he would only need to do some cleaning and touchup work. (R.E. p. 16; R.V. 3, p. 320). After he had the opportunity to look at the trim and fascia boards, noticing some "mildew or stuff", he was able to tell that more work would need to be done, and expressed his opinion on that to the Appellants. (R.E. pp. 15-16; R.V. 3, pp. 319-320). He did not actually perform the painting job at that time.

According to Birdsong, the only other time he went to the Appellants' residence was in the fall of 2007 and "there was new stuff". (R.E. p. 22; R.V. 3, p. 326). By that point in time, the Appellants had already remodeled the home and, as Mr. Birdsong admitted, he was not present to observe the removal of any of the original windows. (R.E. p. 22; R.V. 3, p. 326).

Since Mr. Birdsong's opinion is entirely based upon one (1) pre-remediation visit to the Appellants' residence, it was important to determine the type of activities, tests and inspections he performed while he was there that day. According to Mr. Birdsong, he doesn't recall whether he walked around the residence to even determine *how many* windows were installed, and he was unable to articulate whether the windows were even the same or similar style or design. (R.E. p 16; R.V. 3, p. 320). In his own words, Birdsong stated that "[the windows were] just different sizes, but yes, they all ***seem to be*** the same brand". (R.E. p. 16; R.V. 3, p. 320). Despite testifying that the majority of the problem he observed at the Appellants' residence was a water intrusion issue, and that an effective moisture barrier is a window's "insurance policy" and was necessary to prevent water from intruding into the residence, Mr. Birdsong never inspected the windows to determine whether or not any type of moisture barrier or seal had been used around any of the

windows.[1] (R.E. pp.16-17, 22-23; R.V. 3, pp. 320-321, 326-327). During the *Daubert* hearing held before the learned trial court, Mr. Birdsong admitted that he had no knowledge regarding the number of windows in the Appellants' home that had rot. (R.E. p. 34; R.V. 13, p. 7). In fact, Birdsong testified that he did not even attempt to open or close any windows to determine if they were operable. (R.E. p. 16; R.V. 3, p. 320).

Since Mr. Birdsong testified that he never returned to the Appellants' residence in order to perform any tests or make any additional observations, Weather Shield questioned him about his off-site investigation and research. (R.E. p. 22; R.V. 3, p. 326). Birdsong testified that he never reviewed any invoices to determine what type of windows were delivered and installed in the Appellants' residence. (R.E. p. 23; R.V. 3, p. 327). According to his testimony before the trial court in the *Daubert* hearing, Birdsong was not even able to testify with any degree of certainty as to what company manufactured the windows used in the Appellants' home. Upon being asked, Mr. Birdsong responded "Uh -- Weather Shield, I believe". (R.E. p. 35; R.V. 13, p. 15). At that same hearing, Mr. Birdsong also admitted he had no knowledge regarding the type of wood used to manufacture the Appellants' windows or the manufacturing process and he did

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[1] Deposition of Bill Birdsong, pp. 19-20. **Q**: When you looked at the McKee's house... were you able to discern whether there was any moisture barrier around the windows placed in their house? **A**: No. I did not tear the windows open to see.

Deposition of Bill Birdsong, p. 38. **Q**: Were you able to observe whether the windows at the McKee's house had been properly caulked? **A**: When I looked at it, I could not tell whether they were properly caulked or not. I mean they just -- evidently they weren't because they were already failing.

Deposition of Bill Birdsong, p. 40. **Q**: Did you observe whether there was any weather stripping around any of the windows? **A**: I never opened them so, no, I did not -- I didn't see whether they had stripping or not.

Deposition of Bill Birdsong, p. 44-45.**Q**: In you observation of the windows, did you make any specific observation of the windows, did you make any specific note about the sealant around the windows? **A**: I didn't take -- I never -- I don't have an x-ray. I couldn't x-ray them. I didn't take the wood off. All I can see is what I could see. **Q:** Did you make any observations about flashing on the house either being inadequate of [sic] improper or absent? **A**: I don't recall.

not review any documentation that would assist him with ascertaining that knowledge. (R.E. pp. 36-37; R.V. 13, pp. 18-19)

Mr. Birdsong also never performed any research, through the internet or any other source, to learn about Weather Shield's products. (R.E. p. 25; R.V. 3, p. 329). According to Mr. Birdsong, he never reviewed Weather Shield's installation instructions or maintenance and care instructions for the windows that were sold and delivered to the Appellants. (R.E. p. 19; R.V. 3, p. 323). During Mr. Birdsong's deposition he admitted that there was also no investigation performed to determine when the windows were delivered to the Appellants' residence, how long the windows were on-site before they were installed by Ellington Homes, or whether they had been primed and/or painted prior to installation. (R.E. p. 21; R.V. 3, p. 326). Birdsong confirmed some of these deficiencies during his testimony at the *Daubert* hearing before the trial court. (R.E. p. 39; R.V. 13, p. 22). Furthermore, Mr. Birdsong testified that, in the process of reaching his opinion, he was not made aware that the Appellants' neighbors (Mrs. McKee's cousin, actually) had a water intrusion problem with their house as well, and that the neighbors did not use the same brand of windows as the Appellants – Weather Shield. The common link between the two (2) residences is that they were both built by Ellington Homes. (R.E. p. 22; R.V. 3 p. 326).

Mr. Birdsong was asked in his deposition to identify the industry standard which he claimed the wooden windows did not meet; he responded "[w]ell, I would have thought they would have put [sic] a metal clad or vinyl clad window". (R.E. p. 20; R.V. 3, p. 324). Mr. Birdsong stated that he could not testify that the use of wooden windows, in general, does not meet industry standards, "[n]o, no, I didn't say that. I mean they sell them. I am just saying those windows on that house in that area were not right". (R.E. p. 20; R.V. 3, p. 324). According to Mr. Birdsong, no one should put wooden windows on the outside of a house in Mississippi,

whether the home faces the water or is a hundred miles from it. (R.E. pp. 18-19; R.V. 3, pp. 322-323). Ultimately, Mr. Birdsong admitted that there is in fact ***no*** standard in the residential construction industry nor in any applicable Building Code that prohibits the use of wooden windows on the outside of a house in Mississippi, "[t]here should be, but there isn't". (R.E. p. 20; R.V. 3, p. 324). Mr. Birdsong testified that it is "just Birdsong common sense". (R.E. p. 20; R.V. 3, p. 324). In sum, Birdsong stated that all fifty-plus windows in the Appellants' residence, "don't meet *[his]* standard" for windows used "anywhere in Mississippi". (R.E. pp. 20-21; R.V. 3, pp. 324-325). Mr. Birdsong admitted that he is not aware of any other contractor that adopts his personal standard. (R.E. p. 21; R.V. 3, p. 325). Mr. Birdsong also admitted that he is familiar with other well known window manufacturers such as Anderson, Pella and Marvin, and admitted that ***all*** of them manufacture wooden windows which they sell throughout Mississippi. (R.E. p. 21; R.V. 3, p. 325). There is no question that Mr. Birdsong acknowledged that he was not aware of any codes or industry standards that say wood windows cannot be included into a home near a lake specifically nor in Mississippi in general, it is simply a standard that he goes by. (R.E. p. 25; R.V. 3, p. 329).

The sole premise for the "Birdsong Standard" is that "wood rots...metal isn't going to rot"; even if you properly maintained wooden windows they would "last a little longer, but it's all going to rot. Wood is going to over time in Mississippi humidity, hot and cold, is going to rot". (R.E. pp. 18-19; R.V. 3, pp. 322-323). According to Mr. Birdsong, he has never conducted an independent study regarding moisture and humidity levels in Mississippi. (R.E. p. 25; R.V. 3, p. 329). Birdsong did not even look at any materials to determine the type of weather central Mississippi had for the time period in question. (R.E. p. 25; R.V. 3, p. 329). Mr. Birdsong testified that he did not rely on any books, magazines, treatises, articles or other publications as a basis for the opinions he intends to offer in this case. (R.E. p. 14; R.V. 3, p. 318). Additionally,

Birdsong stated that he did not rely upon or even look at any documents from other experts or sources as a basis for the opinion he intended to offer in this case. (R.E. p. 15; R.V. 3, p. 319). Mr. Birdsong has neither reviewed nor is he even aware of any articles that address the use of wooden windows in a lake setting. (R.E. p. 25; R.V. 3, p. 329). During the *Daubert* hearing, in the presence of the trial court, Birdsong confirmed that he had not reviewed, and was not aware of, any literature that would supply a basis or support for the opinions he intended to offer. (R.E. pp. 38-39; R.V. 13, pp. 21-22). Furthermore, Mr. Birdsong has never been published regarding the personal standard that he chooses to employ and upon which his opinions are based. (R.E. p. 21; R.V. 3, p. 325).

After the extensive discovery process, all pertinent facts regarding this cause remained undisputed. The Appellants' only claim against Weather Shield is that it manufactured a "defective product" – wooden windows – and the Appellants' argument is that the product must be defective because the windows "leaked ever since they were placed in the house". (R.E. p. 3; R.V. 1, p. 18). The Appellants' sole support for their defective design theory was Bill Birdsong's personal opinion that no one in Mississippi ought to have wooden residential windows.

On or about November 25, 2008, the Appellee, Weather Shield, filed its Motion *In Limine* to Conduct a *Daubert* Hearing and Exclude Expert Opinion Testimony of Bill Birdsong and a Brief in Support of said Motion. (R.E. pp. 54, 56; R.V. 3, pp. 312, 363). In said Motion, Weather Shield demonstrated that Mr. Birdsong's opinion testimony failed to meet the stringent standards for the admissibility of expert testimony under the Mississippi Rules of Evidence. (R.E. p. 54; R.V. 3, p. 312). More specifically, Weather Shield argued that the evidence and testimony offered by Mr. Birdsong is irrelevant, unreliable and inadmissible. (R.E. p. 55; R.V. 3,

p. 313). In its Brief in Support of said Motion, Weather Shield outlined Mr. Birdsong's Opinions and their Basis. (R.E. 57-59; R.V. 3, pp. 364-366).

In March 2009, the Appellants' filed their Memorandum in Opposition to Weather Shield's Motion *in Limine* to Conduct *Daubert* Hearing and Exclude Expert Opinion of Bill Birdsong. (R.E. p. 60; R.V. 7, p. 910). The Appellants' sole argument in support of their position is that Bill Birdsong's testimony should not be excluded because of his extensive practice and experience as a home builder in Mississippi.

After an evidentiary hearing on the matter, including live testimony by Bill Birdsong, and having heard all evidence presented and arguments of counsel, on June 19, 2009, the trial court entered an Order Granting Weather Shield's Motion *in Limine* to Conduct *Daubert* Hearing and Exclude Expert Opinion of Bill Birdsong. (R.E. p. 61; R.V. 8, p. 1135). On the same date, Weather Shield filed its Motion for Summary Judgment, pursuant to Rule 56, Miss.R.Civ.P. (R.E. p. 62; R.V. 8, p. 1125). Weather Shield argued that the Appellants failed to set forth any set of facts that would tend to prove that it manufactured a "defective product" as required by the Mississippi Products Liability Act. (R.E. pp. 63-64; R.V. 8, pp. 1129-1130). As set forth by Weather Shield in its Brief in Support of its Motion for Summary Judgment, Mr. Birdsong was the only witness offered by the Appellants who would have submitted any evidence that the subject windows were defective and that such defect was the cause of any of the Appellants' damages. (R.E. pp. 65-66; R.V. 8, pp. 1129-1130). Thus, the trial court's Order Granting Weather Shield's Motion to Exclude the Testimony of Bill Birdsong provided additional support to Weather Shield's argument that summary judgment was appropriate.

On or about June 30, 2009, the Appellants' submitted their Response in Opposition to Weather Shield's Motion for Summary Judgment and Memorandum Brief in support of said Opposition. (R.E. pp. 67-68; R.V. 8, pp. 1142, 1146). The Appellants relied upon facts from an

unreported 1998 decision by the U. S. District Court for the Western District of Wisconsin (Weather Shield Mfg. Inc. v. PPG Industries, 1998 WL 469913 (W.D.Wis. 1998), in which Weather Shield had been a party, in an attempt to raise a fact issue regarding Weather Shield's use of an alleged defective wood treatment chemical known as PILT. (R.E. p. 68; R.V. 8, p. 1146). The Appellants' suggested, from the discussion in that case, that Weather Shield admitted that it sold what amounted to untreated, unprotected wood that was destined to rot within two years. (R.E. p. 68; R.V. 8, p. 1146).

In its Rebuttal, submitted on July 1, 2009, Weather Shield acknowledged its lawsuit against PPG Industries, Inc. (R.E. p. 69; R.V. 8, p. 1152). However, as stated by the Court in the case identified by the Appellants, Weather Shield ***discontinued its use of PILT in 1994***. The Appellants' windows were ordered by Bowers from Weather Shield on November 30, 1998, and Bowers was invoiced for the order on January 4, 1999. (R.E. pp. 71-74; R.V. 10, pp. 1401-1404). It is clear from the record that the windows used in the Appellants' home were manufactured in either late 1998 or early 1999, many years after Weather Shield had discontinued its use of the allegedly defective wood treatment known as PILT which was involved in the PPG case. (R.E. p. 70; R.V. 8, p. 1153). Appellants' citation to that case was nothing more than a 'red herring'.

On August 6, 2009, following a hearing in which the court heard the arguments of the parties, and having carefully considered the parties' motions and memoranda, the trial court granted Weather Shield's Motion for Summary Judgment. (R.E. p. 75; R.V. 8, p. 1183). At some point, prior to appeal, Appellants entered into a settlement agreement with their general contractor, Ellington Homes - the party identified by the Appellants as being responsible for ordering materials and supplies to be utilized in constructing their home and supervising and ensuring that the home was satisfactorily built. (R.V. 1, p. 13). Subsequently, on September 11,

2009, the Appellants filed their Notice of Appeal of the trial court's decision. (R.E. p. 76; R.V. 8, p. 1185).

SUMMARY OF THE ARGUMENT

The first issue before this Court and the Circuit Court of Madison County below, was whether to exclude the testimony of Appellants' "window expert" Bill Birdsong. The Trial Court ruled that the Appellants failed to demonstrate that the testimony of Mr. Birdsong met the standards adopted by Rule 702 of the Mississippi and Federal Rules of Evidence, articulated by the United States Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and applied by the Mississippi Supreme Court in cases such as Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34 (Miss. 2003), and Miss. Dept. of Mental Health v. Hall, 936 So.2d 917 (Miss. 2006).

The second issue before this Court and the Circuit Court of Madison County below, was whether a genuine issue of material fact existed which would allow the Appellants to survive a Motion for Judgment as a Matter of Law. In accordance with Miss. Code Ann. § 11-1-63, "the manufacturer... of the product shall not be liable if the claimant does not prove by *the preponderance of the evidence* that at the time the product left the control of the manufacturer...it was designed in a defective manner". § 11-1-63(a) (emphasis added). The Trial Court held that the Appellants failed to present "even a scintilla of evidence" to support the allegations that the windows used in the construction of their house were defective at the time they left the control of Weather Shield.

The Appellants have also not provided any additional persuasive Mississippi law, statutory or common, which would result in this Court reversing either the Order of the trial court to exclude the testimony of the Appellants' "window expert" Bill Birdsong or the trial court's Order granting Weather Shield's Motion for Summary Judgment.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN EXCLUDING BILL BIRDSONG'S "EXPERT" TESTIMONY.

A. Standard of Review

This Court reviews a Trial Court's admission or exclusion of expert testimony under the "abuse of discretion" standard. Hubbard ex rel. Hubbard v. McDonald's Corp., --- So.3d ---, 2010 WL 2521738, ¶ 14 (Miss. 2010)(quoting Franklin v. Tedford, 18 So.3d 215, 233 (Miss. 2009)(See also Poole ex rel. Poole v. Avara, 908 So.2d 716, 721 (Miss. 2005)(See also Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So.2d 1084, 1094 (Miss. 2007)). Absent an abuse of discretion, a trial judge's determination as to the qualifications of an expert witness to offer opinion testimony at trial will remain undisturbed on appeal. Townsend v. Doosan Infracore Am. Corp., 3 So.3d 150, ¶ 7 (Miss. App. 2009)(quoting Hubbard v. Wansley, 954 So.2d 951, 956 (Miss. 2007)). A trial court's decision constitutes an abuse of discretion only if the decision was arbitrary and clearly erroneous. Hubbard ex rel. Hubbard, 2010 WL 2521738 at ¶ 14 (Miss. 2010)(quoting Kilhullen v. Kansas City So. Ry., 8 So.3d 168, 172 (Miss. 2009)(See also Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34 (Miss. 2003)). The appellate courts will not reverse a ruling to admit or exclude evidence unless a substantial right of a party is adversely affected. Utz v. Running & Rolling Trucking, Inc., 32 So.3d 450, 456 (Miss. 2010)(quoting Robinson Prop. Group, L.P. v. Mitchell, 7 So.3d 240, 243 (Miss. 2009)).

B. Bill Birdsong's Testimony Was Properly Excluded Under Rule 702 of the Mississippi Rules of Evidence and the Daubert Standard

In McLemore, 863 So.2d 31 (Miss. 2003), the Mississippi Supreme Court adopted the standard of analysis introduced in Daubert, 509 U.S. 579 (1993), and the 2003 amendment to Rule 702, "for assessing the reliability and admissibility of expert testimony". McLemore, 863 So.2d at 39. The amended Rule 702 of the Mississippi Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. Thus, under Rule 702 and Daubert, "the trial judge is to act as a gatekeeper, ensuring that expert testimony is both relevant and reliable". Poole ex rel. Poole, 908 So.2d 716 at 723 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999)(See also Daubert, 509 U.S. 579 (1993)). As the gatekeeper, the trial court must ensure that expert testimony admitted at trial is ***both relevant and reliable*** as required by Rule 702. Daubert, 509 U.S. at 589 (emphasis added). The trial court in this case not only had the benefit of Mr. Birdsong's deposition testimony and the Appellants' responses to written discovery, but also got to see and hear Mr. Birdsong testify live at the Daubert Hearing; based upon all of that evidence, the trial court determined to exclude Birdsong's proposed expert testimony.

(1) Bill Birdsong Does Not Utilize Any Scientific, Technical or Specialized Knowledge in Reaching His Opinion

Appellants cite to Gen. Motors Corp. v. Pegues, 738 So.2d 746 (Miss.App. 1999), in support of their contention that Bill Birdsong is qualified to testify as an expert based on his extensive practice and experience as a residential contractor in Mississippi. The facts in Pegues reveal that on April 27, 1986, Jimmy Pegues, was involved in a motor vehicle accident. Mr. Pegues argued that a defective ball joint on his 1982 Chevrolet pickup truck broke, causing him to lose control of the vehicle, leave the roadway, and crash into a concrete box culvert resulting in severe disabling injuries, including but not limited to, the amputation of his left leg. Pegues, 738 So.2d at 748. The main issue that was presented to the jury was whether the ball joint broke before or after the impact occurred. Both sides presented expert testimony, and the jury

ultimately sided with the expert testifying on behalf of Jimmy Pegues, and unanimously awarded him damages. Pegues at 751. GM appealed, contending that Plaintiff's expert (Spencer) was improperly allowed to testify regarding matters about which only an accident reconstructionist would be qualified to testify. Id.

The Appellants herein are correct that, in reviewing the case on appeal, the Court of Appeals did not find that the trial court abused its discretion in allowing Pegues' expert, Benny Spencer, to testify as an expert in the field of automotive mechanics. In addition to the standard of review being an abuse of discretion (e.g. arbitrary and clearly erroneous), the Court noted that Mr. Spencer had been a professional auto mechanic for forty years. Furthermore, Mr. Spencer had received training by General Motors Corporation, worked as a mechanic at a General Motors dealership, owned his own automotive business for thirty-three years, and had "hands on, professional experience with the front end assembly and ball joints on General Motors vehicles," having worked on 50 to 100 ball joints over the years. Furthermore, Spencer's opinions were based on his personal examination of the pickup truck, its ball joint, and its front-end assembly. Pegues, 738 So.2d 746, 752 (Miss.App. 1999).

However, the factual scenario in this case is clearly distinguishable from what the court considered in Pegues. The distinguishing facts in this case all pertain to the purported expert's education, experience, training and ability to give an opinion based upon scientific, technical or other specialized knowledge. Unlike Benny Spencer, the Appellants' proffered expert, Bill Birdsong's professional achievements and experiences do not place him in the position to offer the opinions he has tendered in this case. Mr. Birdsong has never worked for Weather Shield nor for any other window manufacturer. (R.E. p. 23; R.V. 3, p. 327). Mr. Birdsong testified that he had never had any special education, training or experience specific to windows. (R.E. p. 24; R.V. 3, p. 328). Mr. Birdsong did not attempt to compensate for his lack of education, training

or experience by bothering to perform any research to substantiate his opinions. As was noted above, Birdsong never performed ***any*** research, through the internet or any other source, to learn about Weather Shield Windows. (R.E. p. 25; R.V. 3, p. 329); never reviewed Weather Shield's installation instructions or maintenance and care instructions for the windows that were sold and delivered to the Appellants (R.E. p. 19; R.V. 3, p. 323); and, admitted that he is unaware of any articles that address the use of wooden windows in a lake setting and that he did not rely on any books, magazines, treatises, articles or other publications as a basis for the opinions he intended to offer in this case. (R.E. pp. 14, 25; R.V. 3, pp. 318, 329).

Additionally, the Court in Pegues was careful to note that Spencer personally examined the pickup truck, its ball joint and front end assembly. Therefore, it is logical that he would be able to testify as to the conditions observed, and thus have some logical basis upon which to conclude there was some type of defect or problem in the ball joint. In this case, Bill Birdsong's entire opinion regarding what caused the Appellants' damages is based upon one (1) cursory visual inspection of the exterior of the Appellants' home in the Spring of 2002. Mr. Birdsong did not perform a detailed inspection or examination of the windows, and in fact was not even aware of whether any moisture barrier had been installed around the windows placed in the house (R.E. p. 17; R.V. 3, p. 321), nor whether the windows in the Appellants' home had any type of weather stripping, caulk or sealant present. (R.E. pp. 22-23; R.V. 3 pp. 326-327).

Mr. Birdsong's opinions, simply put, are not scientific, technical nor based on any type of specialized knowledge. They aren't even based upon an intensive inspection of the Appellants' residence, product research or other study. They are simply his personal opinions, based on one cursory visual observation of the house, which have no more relevance than any other layman's feelings about wood vs. metal vs. vinyl windows.

This case is very similar both factually and procedurally to the recent decision in Townsend v. Doosan Infracore Am. Corp., 3 So.3d 150 (Miss. App. 2010). In that case, Mike Townsend, a forklift driver, was injured during the course and scope of his employment at Central Pipe Supply, Inc., by the forklift he had been operating that day. A series of untoward events ultimately led to Mr. Townsend being hit on the head by the forklift, knocking him to the concrete below, at which time the forklift landed on top of him and severely injured his leg. Townsend, 3 So.3d at ¶ 1. Subsequently, Townsend filed suit against the manufacturer of the forklift, Doosan, and the retailer that sold the forklift to his employer, Burke Handling Systems, alleging, *inter alia*, defective design and breach of express and implied warranties.

The procedural history is also eerily similar to this case. The manufacturer, Doosan, filed a motion for summary judgment and a motion to exclude Townsend's expert, Thomas Berry. The trial judge granted Doosan's motion and excluded the testimony of Berry under Rule 702 of the Mississippi Rules of Evidence, Daubert, and McLemore, holding that Berry was "unqualified to render an opinion on the subject issues". Townsend at ¶ 3. On appeal, Townsend argued that, based upon Berry's extensive qualifications, background, experience, and training, the trial court should have denied Doosan's motion to exclude Berry's testimony – virtually indistinguishable from what the Appellants herein have argued on appeal. Id. at ¶ 7. The Court recognized that Berry was a licensed professional engineer with over twenty-four years of experience in his field, but the trial court's exclusion of Berry's testimony was based upon the methodology Berry used in obtaining his results, not on his resume. Id. Ultimately, the Court held that the trial court did not abuse its discretion in excluding the testimony of Townsend's witness because, despite Berry's obvious professional qualifications, the methodology he employed in that case failed to satisfy Daubert's clear standard for reliability of an expert's opinions. Townsend at ¶ 13.

In Townsend, the Court of Appeals did an excellent job of synthesizing and articulating the standards set forth by Rule 702 of the Mississippi Rules of Evidence, the United States Supreme Court and the Mississippi Supreme Court. It held that, "[a] party who offers expert testimony has to show that the expert's opinion is not based 'on opinions or speculation, but rather on scientific methods and procedures'". Townsend at ¶ 8 (quoting Webb v. Baswell, 930 So.2d 387, 397 (Miss. 2006)(citing McLemore, 863 So.2d at 36). Two important considerations that determine "whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested... [and] whether the theory or technique has been subjected to peer review and publication". Id. (quoting Daubert, 509 U.S at 593). The United States Supreme Court has also stated that the language of Rule 702 of the Federal Rules of Evidence "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge". Id. (quoting Kumho Tire Co., 526 U.S. at 147). However, this Court will only find an expert's opinion admissible when it is founded on data. Glenn v. Overhead Door Corp., 935 So.2d 1074, 1079 (Miss. App. 2006)(See also McLemore, 863 So.2d at 36. "Talking 'off the cuff' – deploying neither data nor analysis – is not an acceptable methodology. Glenn, 935 So.2d at 1079 (quoting Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 924 (7th Cir. 2000)(See also Knight v. Kirby Inland Marine Inc., 482 F.3d 347 (5th Cir. 2007)(applying Mississippi law held that "whether experts proffered testimony is sufficiently reliable to be admissible under Daubert is determined by assessing whether the reasoning or methodology underlying the testimony is scientifically valid").

As required by the Mississippi Supreme Court's ruling in Palmer v. Volkswagen of Am. Inc., 904 So.2d 1077 (Miss. 2005), the Court of Appeals held that "[t]he test for expert testimony is not whether it is fact or opinion... [but] whether it requires scientific, technical, or other specialized knowledge beyond that of the randomly selected adult". Townsend, 3 So.3d 150 at ¶

10 (quoting Palmer, 904 So.2d at 1092). "If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such". Id. (quoting Palmer at 1092). "Whether specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest 'upon an experience confessedly foreign in kind to [the jury's] own'". Id. (quoting Kumho Tire Co., 526 U.S. at 149). In Kumho, the Supreme Court said that an expert's testimony was properly excluded as there was doubt as to the reliability of his theory, plus there were no references to articles or papers that validated his approach. Townsend at ¶ 10 (quoting Kumho at 157). The Court of Appeals held that, while it recognized that the Supreme Court has stated that the Daubert analysis is flexible, our sole focus must be on the "principles and methodology, not on the conclusions that they generate". Townsend at ¶ 13. (quoting Daubert, 509 U.S. at 595).

Bill Birdsong clearly does not qualify as an "expert" just from reviewing his "resume", such as it is; he clearly lacks the "extensive qualifications, background, experience, and training" in a recognized field to qualify him as an expert. Weather Shield reiterates the fact that Mr. Birdsong has ***no*** documented curriculum vitae or professional resume from which to ascertain whether he has any such qualifications, background, experience and/or training. (R.E. pp. 14-15; R.V. 3, pp. 318-319). Additionally, Mr. Birdsong has admitted in his deposition testimony that he has never worked for a window manufacturer and has no education, training or experience specific to windows. (R.E. pp. 23-24; R.V. 3, pp. 327-328).

Even if Mr. Birdsong had some marginal qualifications to offer his personal opinions regarding the applicable standard for wooden windows in residential construction, Weather Shield would show that the "methodology" he testified to in his deposition fails to reach the standard for admissibility under the applicable standards recited above (since he, in fact, has ***no***

methodology, much less a scientifically recognized one!). Birdsong is clearly nothing more than the "randomly selected adult" prohibited from acting as an expert in litigation by the Court in Palmer, 904 So.2d at 1092. Neither "Birdsong common sense" nor his own personal standard applicable to the use of wooden windows in southern homes – which he admitted no one else follows or recognizes – qualifies Bill Birdsong to provide expert testimony in this case.

(2) Bill Birdsong's Testimony Is Not Relevant

In a recent case, Hubbard ex rel. Hubbard v. McDonald's Corp., --- So.3d ---, 2010 WL 2521738 (Miss. 2010), this Court seamlessly outlined the requirements of expert testimony offered as evidence to the trier of fact. The facts in Hubbard reveal that, during her pregnancy, Tiffany Hubbard slipped and fell during the course and scope of employment with McDonalds. Subsequently, Ms. Hubbard began having difficulties with her pregnancy and, ultimately, she prematurely gave birth to her daughter, Maliyah Hubbard. Ms. Hubbard alleged that her fall was the proximate cause of the premature birth of her daughter and her daughter's injuries from complications of prematurity. Ms. Hubbard offered the testimony of Dr. DeSalvo to support her theory of liability.

McDonald's filed a motion to strike Dr. DeSalvo's testimony and, in its brief in support of said motion, McDonald's argued that Dr. DeSalvo's opinions were wholly speculative, unreliable and inadmissible. After a hearing on the matter, the trial court granted McDonald's motion. Maliyah Hubbard filed a petition for an interlocutory appeal from the order striking Dr. DeSalvo's testimony. The Mississippi Supreme Court held that Dr. DeSalvo, based upon his experience, training, expertise, coupled with his treatment of Ms. Hubbard, and information contained in her medical records and medical literature, was able to form a "scientifically grounded theory of causation" as to whether Ms. Hubbard's fall at work was a significant

contributing cause to her premature labor which lead to Maliyah's premature birth. Therefore, the Supreme Court ruled in favor of Hubbard and reversed the trial court's decision.

The first prong of the Daubert analysis addresses relevance. According to the Court in Hubbard, "[r]elevance is established when the expert testimony is sufficiently tied to the facts of the case that it will "assist the trier of fact to understand the evidence or to determine a fact in issue". Hubbard, --- So.3d ---, ¶ 16 (quoting Daubert at 591). While the Mississippi Supreme Court ultimately ruled in Hubbard's favor and reversed the trial court's decision to strike Dr. DeSalvo's testimony, it did so for the following reasons: (1) Dr. DeSalvo is board-certified in obstetrics and gynecology; (2) Dr. DeSalvo, reviewed Hubbard's medical records; and, (3) based his opinion not only on his experience, training and expertise, but also cited medical literature supporting his opinions. When combining those factors, the Court held that "[Dr. DeSalvo's] opinions constituted a scientifically grounded theory of causation, not the 'junk science' which the Daubert Court sought to preclude from jury consideration. Hubbard at ¶ 29 (quoting Huss v. Gayden, 571 F.3d 442, 460 (5th Cir. 2009)).

Dr. DeSalvo, a board-certified physician board-certified in obstetrics and gynecology, based his opinion upon a thorough review of Tiffany Hubbard's medical records, prior to and following, the time she slipped and fell during the course and scope of employment with McDonalds. In the case *sub judice*, the issue is whether or not the windows installed in the Appellants' home were defective at the time they left the manufacturer's possession and whether that defective condition caused the Appellants' damages.

Similar to the experts in Pegues and Townsend, Dr. DeSalvo demonstrated that he in fact ***had*** education, experience and training in the area in which he was offering an opinion. In an attempt not to belabor the point, Weather Shield will not reiterate facts already established, but simply points out that Bill Birdsong does not have any such education, experience or training

with wooden windows. In addition, Bill Birdsong's entire opinion regarding what caused the Appellants' damages is based upon one (1) cursory view of the outside of the Appellants' house after he was retained to paint its exterior in the spring of 2002. (R.E. p 16; R.V. 3, p. 320). Mr. Birdsong did not perform any outside literature search, and can cite to no studies in support of his personal opinions. He in fact readily admits that the "standard" upon which he bases his opinion is simply "his standard", and also readily admits that, to his knowledge, no one else in the construction industry follows it. His unsupported opinions are thus clearly not relevant, and thus do not meet that prong of the Daubert analysis.

(3) Bill Birdsong's Testimony Is Not Reliable

The second prong in the Daubert analysis addresses reliability. The Court in Hubbard, --- So.3d --- (Miss. 2010), also very eloquently expressed its opinion regarding reliability, stating that "the court's focus... must be solely on principles and methodology, not on the conclusions they generate". Hubbard at ¶ 16 (quoting Daubert at 595). Expert testimony admitted at trial ***must be based on scientific methods and procedures, not on unsupported speculation or belief.*** Id. (emphasis added)(quoting Miss. Dept. of Mental Health v. Hall, 936 So.2d 917, 928 (Miss. 2006)(See also Utz, 32 So.3d at 457 (Miss. 2010)).

The Court in Daubert developed a nonexclusive list of factors to be used to assess reliability: (1) whether the theory or technique used can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a high known or potential rate of error respecting the technique; (4) whether there are standards that control the operation of the technique; and, (5) whether the theory or technique has been generally accepted within the relevant scientific community. Hubbard at ¶ 17 (quoting McLemore, 863 So.2d at 37; Daubert, 509 U.S. at 592-94). Rule 702 also provides three requirements that were added after Daubert and Kumho Tire. These requirements are that: (1) the expert testimony must be based

on sufficient facts or data; (2) it must be the product of reliable principles and methods; and, (3) the expert must have reliably applied the principles and methods to the facts of the case. Miss. R. Evid. 702. Hubbard at ¶ 18.

Recall that this Court ultimately ruled in Hubbard's favor and reversed the trial court's decision to strike Dr. DeSalvo's testimony. However, as outlined above, the Court clearly articulated the logical, rational and well-reasoned factors it considered in making that determination. When combining those factors, the Court held that "[Dr. DeSalvo's] opinions constituted a scientifically grounded theory of causation, not the 'junk science' which the Daubert Court sought to preclude from jury consideration. Hubbard at ¶ 29 (quoting Huss v. Gayden, 571 F.3d 442, 460 (5th Cir. 2009)). Applying that rationale to the facts in this case and without revisiting the factors that were addressed under relevancy, it once again becomes evident that the Court would reach a different result as it pertains to the reliability of Bill Birdsong's "expert" testimony.

The Appellants' herein designated Bill Birdsong as their only trial expert in the field of wooden windows and disclosed that Mr. Birdsong would testify that the wooden windows purchased from Bowers and installed into their house did not meet the industry standard for that location and caused rot and damage to the Plaintiffs' house. Mr. Birdsong testified that he has been a general contractor in the Central Mississippi and Jackson Metro area for twenty-three (23) years. (R.E. pp. 14, 18; R.V. 3, pp. 318-322). Unlike Dr. DeSalvo, beyond his "personal experience", Mr. Birdsong never received any education above that of receiving his high school diploma and he has no other special education, training or experience specific to windows.

In addition, Dr. DeSalvo based his opinion upon a thorough review of Tiffany Hubbard's medical records, prior to and following the time she slipped and fell during the course and scope of employment with McDonald's. In contrast, as previously established, Mr. Birdsong's entire

opinion is based upon one (1) cursory view of the outside of the Appellants' house after he was retained to paint its exterior in the spring of 2002. (R.E. p 16; R.V. 3, p. 320). Mr. Birdsong testified that no additional inspection, investigation or tests were ever performed in order to determine whether the windows installed in the Appellants' home were defective. Bill Birdsong did not even return to look at the Appellants' home until a total renovation had already been completed. (R.E. p. 22; R.V. 3, p. 326).

Furthermore, Dr. DeSalvo's opinions were based upon a scientifically grounded theory of causation. When questioned about the standard he was designated to testify about, Mr. Birdsong admitted there wasn't one. After admitting that there was no industry standard or building code restriction, Birdsong testified "there should be"... it is "just Birdsong common sense". (R.E. p. 20; R.V. 3, p. 324). Finally, Mr. Birdsong stipulated that all of the fifty-plus windows in the Appellants' house "don't meet *[his] standard*" (R.E. pp. 20-21; R.V. 3, pp. 324-325), and likewise admitted that, to his knowledge, no other contractor has adopted the "Bill Birdsong Standard" for wooden windows. (R.E. p. 21; R.V. 3, p. 325).

Finally, Dr. DeSalvo's opinions were supported by medical literature. In stark contrast, Mr. Birdsong is unaware of any articles that address the use of wooden windows in a lake setting and he did not rely any on books, magazines, treatises, articles or other publications as a basis for the opinions he intended to offer in this case. (R.E. pp. 14, 25; R.V. 3, pp. 318, 329).

The Mississippi Supreme Court has clearly held that a trial judge is vested with the "gatekeeping responsibility" concerning the admission of expert testimony and, as stated in Daubert and most recently applied in Hubbard ex rel. Hubbard, it ***must ensure*** that expert testimony admitted at trial is ***both relevant and reliable*** as required by Rule 702. The Appellants have failed to demonstrate that Mr. Birdsong's testimony is based upon any scientific, technical, or other specialized knowledge. In addition, it is neither relevant nor reliable. Birdsong's

opinions are precisely the type of "junk science" that the Daubert Court and Mississippi appellate courts have sought to preclude from jury consideration, they: (1) have not and cannot be tested; (2) have neither been the subject of peer review nor publication; (3) no "technique" is utilized by which to determine if there is a high known or potential rate of error; (4) articulate no standards that can be duplicated and tested; and, (5) as Birdsong admits, his theory has not even been adopted by anyone within the residential construction community.

Additionally, Mr. Birdsong's opinion and theory do not meet the requirements set forth in Rule 702 of the Mississippi Rules of Evidence, in that: (1) his testimony is not based on sufficient facts or data; (2) it is not the product of reliable principles and methods; and, (3) Mr. Birdsong had no principles and methods by which he could have reliably applied to the facts of the case in order to reach his opinion. The trial court's decision to exclude Bill Birdsong's testimony is substantially supported by the evidence. As such, it was not arbitrary or clearly erroneous and falls fundamentally short of what would be considered an abuse of discretion. It is for these very reasons that the Appellants were forced to cite legal authorities from other jurisdictions (e.g. 7th Circuit, Wyoming, Rhode Island and District of Columbia), in support of their argument that the trial court's order excluding Bill Birdsong's testimony should be reversed.

A wise Justice on the Mississippi Supreme Court once stated "the whole idea of an expert is to make a technical examination of the facts in the field in which he is qualified, and explain such facts to a jury, which they would not otherwise fully comprehend". Justice Hawkins recognized that "there is a difference between an expert, who makes his living in a special field, and an experienced layman who simply expresses a common-sense opinion that some, and perhaps all of the jurors already know" and there is a danger when permitting such opinions. According to Justice Hawkins, the danger is that "[the Court] remove[s] the levees to the river of

evidence, and permit any kind of speculative testimony the parties wish to be heard by the jury... [c]ommon sense ideas do not supply qualifications for specialty. Shade tree mechanics and quack doctors no doubt have an abundance of common sense. Yet *our* common sense also tells us not to seek one of them out for assistance if we have any alternative". Miller v. Stiglet, Inc., 523 So.2d 55, 61-62 (Miss. 1988)(Hawkins, J., Dissenting). Bill Birdsong's "shade tree mechanic" opinions were properly excluded by the trial court, which should be affirmed in that regard.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED

A. Standard of Review

This Court employs the *de novo* standard in reviewing a trial court's grant of summary judgment. Brown v. J.J. Ferguson Sand & Gravel Co., 858 So.2d 129, 130 (Miss. 2003)(citing O'Neal Steel, Inc. v. Millette, 797 So.2d 869, 872 (Miss. 2001)). In conducting its *de novo* review, this Court looks at all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So.2d 845, 847 (Miss. 2001)(citing Aetna Cas. & Sur. Co. v. Berry, 669 So.2d 56, 70 (Miss. 1996)).

The focal point in the *de novo* review is on "material" facts. Roebuck v. McDade, 760 So.2d 12, 14 (Miss. Ct. App. 1999)(emphasis added). In defining a "material" fact in the context of summary judgments, this Court has stated that "[t]he presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The Court must be convinced that the factual issue is a material one, *one that matters in an outcome determinative sense.*" Id. (citing Simmons v. Thompson Mach. of Miss., 631 So.2d 798, 801 (Miss. 1994))(quoting Shaw v. Burchfield, 481 So.2d 247, 252 (Miss. 1985))(emphasis added).

B. Appellants' Burden of Proof

This Appellee, Weather Shield, would reiterate that the Appellants' sole allegation against it is that the windows manufactured by Weather Shield and used in their home were "a defective product in that they have leaked ever since they were placed in the house". Therefore, this Appellee, Weather Shield, will not address those issues and averments which the Appellants have alleged against Appellee, Bowers Window & Door Company, Inc., as the seller, nor those which would have been more appropriately directed against Ellington Homes, the builder, if any.

(1) Weather Shield Did Not Manufacture a Defective Product

The Legislature adopted the "Mississippi Products Liability Act" in 1993, which provides, in pertinent part, that in any action for damages caused by a product:

> (a) the manufacturer [] shall ***not*** be liable if the claimant does not prove by the ***preponderance of the evidence*** that at the time the product left the control of the manufacturer []:...(3) the product was designed in a defective manner... ***and*** the defective condition rendered the product unreasonably dangerous to the user or consumer, ***and*** the defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

Miss. Code Ann. § 11-1-63(a)(i)(3),(ii) and (iii) (emphasis added).

Once the claimants have defined their claims according to section (a) and meet the proof requirements delineated therein, they must meet additional statutory requirements for their claim to proceed. Williams v. Bennett, 921 So.2d 1269, 1273 (Miss. 2006). In the case *sub judice*, the Appellants have defined their claim as falling under § 11-1-63(a)(i)(3). As such, their claim is subject to the additional statutory requisites codified in section (f) of the products liability statute, which states:

> In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)(3) of this section, the manufacturer []...shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product

> left the control of the manufacturer []: (i)...knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; ***and*** (ii) the product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm... without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

Miss. Code Ann. § 11-1-63(f)(See also Williams, 921 So.2d at 1274-1275).

Despite the Appellants alleging otherwise, this Court's decision in Moss v. Batesville Casket Co., Inc., 935 So.2d 393 (Miss. 2006), is directly on point. In Batesville Casket, the claimants filed suit against Batesville Casket due to cracks and separations found in the wood casket in which their mother was buried when her body was exhumed for an autopsy. The claimants proffered one expert in "wood rot, decay and degradation" to support their products liability claim for defective design, Dr. Ramsey Smith, a forest products consultant with the Louisiana Forest Products Development Center at Louisiana State University. Dr. Smith testified that "decay is a natural process in wood, but that wood is a proper material to use to manufacture a casket". The trial court excluded the testimony of Dr. Smith as it pertained to areas admittedly outside his area of expertise. Batesville Casket's motion for summary judgment was granted because the claimants failed to present an expert to demonstrate that there was a defect in the product, a deviation from the manufacturer's specifications, or a defective design.

The Supreme Court rendered its decision in Batesville Casket just six (6) months after its decision in Williams. Therefore, the Court reiterated the same process for successfully demonstrating a claim under § 11-1-63(a) and (f) of the Products Liability Act as outlined herein above. In addition to the language used in Williams, the Court in this case also emphasized § 11-1-63(b), Miss. Code Ann., which provides that:

> A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was

> caused by an ***inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.***

Batesville Casket Co., Inc., 935 So.2d at 402-403 (emphasis added)(See also Walker v. George Koch Sons, Inc., 610 F.Supp.2d 551, 559 (S.D. Miss. 2009)). Agreeing that the claimants failed to present the legally sufficient evidence necessary to maintain a products liability claim, the Supreme Court affirmed the trial court's decision to grant summary judgment.

According to the Mississippi Products Liability Act and this Court's decisions interpreting the same, Weather Shield ***shall not be held liable*** if the Appellants do not prove by a preponderance of the evidence that ***at the time the windows left the control of Weather Shield:*** (1) the windows were defective and the defective condition rendered the windows unreasonably dangerous; (2) the defective and unreasonably dangerous condition of the windows proximately caused the damages for which recovery is sought; (3) the danger that caused the damage for which the Appellants are seeking recovery was foreseeable; (4) the windows failed to function as expected; and, (5) there was a feasible design alternative that would not impair the utility, usefulness, practicality or desirability of the windows to consumers.

The Appellants have not introduced any testimony whatsoever that the windows used in their home were defective when they left Weather Shield. Based on the testimony offered by Appellants' expert, Bill Birdsong, it is clear that he is wholly unable to testify as to whether the windows were defective when they left Weather Shield, whether they were defective when they left Bowers, or whether they were defective at all. Mr. Birdsong testified that he did not inspect the windows while he was at the Appellants' residence, he was not present when the windows were removed and, the home had been completely remodeled when he returned a second and final time.

Furthermore, there is no evidence that any alleged defect proximately caused the damage to the Appellants' home. In fact, all evidence points to a contrary conclusion -- that the negligence of Ellington Homes, the contractor, proximately caused the damage. This is supported by the fact that the Appellants' neighbor's home, also built by Ellington Homes, had a significant water intrusion issue as well. The Appellants' neighbors had this issue despite the use of a different type of window from another manufacturer.

Finally, in accordance with § 11-1-63(b) and case law interpreting same, an "inherent characteristic" of wood is that it rots. Dr. Smith testified to as much in Batesville Casket, where he said "decay is a natural process in wood, but that wood is a proper material to use to manufacture a casket". The Appellants' expert, Bill Birdsong also testified that "wood rots" and, even though adequate maintenance will extend the life of wood, it will eventually rot. The Appellant, Ann McKee, testified that Bowers' employee, Mark McKee, warned her that "wood windows would need to be maintained because wood rots". Mrs. McKee also testified that she understood that inherent characteristic and that she had wood windows in her previous home. An ordinary person with ordinary knowledge common to the community knows that wood rots – it is not a secret that window manufacturers have been keeping from consumers. Rotting is a generic aspect of any wooden product, including windows, which cannot be eliminated without substantially compromising the product's usefulness or desirability. Despite that fact, Weather Shield and window manufacturers, in general, continue to make the wooden windows available to consumers because, like the Appellants herein, they want to purchase them for use in their homes (e.g. these windows are a "desirable product"). The Appellants testified that while they were at Bowers' showroom, they were shown a variety of window styles including, but not limited to, clad, wooden, metal and vinyl-styled windows, and that they preferred the wooden windows manufactured by Weather Shield.

(2) Weather Shield Did Not Fail to Satisfy An Implied Warranty

Appellants here have raised an issue for the first time in this Appeal – one which they never raised in the court below – not in their Complaint nor its several amendments, not in their responses to written discovery, not in their deposition testimony, their expert designations, nor their responses to the Daubert Motion nor the Motion for Summary Judgment. This issue, raised for the first time on this appeal, is thus not properly before this Court. It has long been settled by the Mississippi Supreme Court that "an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having the opportunity to address the alleged error". West v. West, 891 So.2d 203, 214 (Miss. 2004)(quoting Crowe v. Smith, 603 So.2d 301, 305 (Miss. 1992)).

Prior to filing the Brief herein, the Appellants have never asserted that the Appellee, Weather Shield, failed to satisfy an implied warranty. (R.E. p. 77-78). The Appellants have never alleged that the wooden windows, manufactured by Weather Shield and used in their home, failed to meet the standards and specifications of the purchase contract entered into between the Appellants and Bowers. Again, the only allegation ever made against Weather Shield in this case is that the windows manufactured by Weather Shield and used in the Appellants' home were "a defective product in that they have leaked ever since they were placed in the house". (R.E. pp. 1, 26, 40; R.V. 1, pp. 16, 83, 139). Such clearly makes no specific breach of warranty assertion.

Even if this Court addressed the "11th hour theory" espoused by the Appellants, such would prove unavailing for them. In Duett Landforming, Inc. v. Belzoni Tractor Co., Inc., 34 So.3d 603 (Miss. App. 2009), *cert. denied* 34 So.3d 1176 (Miss. 2010), the Court of Appeals addressed the issue of implied warranty. In Duett, Brookie Duett, a man in the business of dirt moving, leveling and building catfish ponds in the Mississippi Delta, negotiated with a Belzoni

Deere retailer to purchase four (4) John Deere Tractors. Within a couple of years after taking delivery of the tractors, Duett began experiencing various problems with them including, but not limited to: the transmissions running hot; axle seals leaking; the brackets holding the hydraulic lines would break; and, the pressure would cause the fuel cap to fall off and would cause the fuel to spray. Duett Landforming filed suit against seller, Belzoni, and manufacturer, Deere & Co. (hereinafter referred to as "Deere") for, *inter alia*, breach of implied warranty.

Under § 75-2-314(1), "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind". § 75-2-314(1), Miss. Code Ann. Furthermore, § 75-2-314(2) provides that for goods to be merchantable they "must be at least such as": (a) Pass without objection in the trade under the contract description; ... (c) Are fit for the ordinary purposes for which such goods are used; (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; (e) Are adequately contained, packaged and labeled as the agreement may require; and (f) Conform to the promises or affirmations of fact made on the container or label if any. Duett Landforming, Inc., 34 So.3d at 611.

The Court held that "the fact that the 9400 tractors experienced more problems than Duett Landforming's previously-owned 8970 tractors does not necessarily mean that they were not merchantable". Duett Landforming, Inc. at 611. According to the Court, "[t]he implied warranty of merchantability is not intended to guarantee that the goods be the best or of the brightest quality – the standard is measured by the generally acceptable quality under the description of the contract". Id. (quoting Johnsons v. Davidson Ladders, Inc., 403 F.Supp.2d 544, 551 (N.D. Miss. 2005)(quoting Beck Enters., Inc. v. Hester, 512 So.2d 672, 676 (Miss. 1987)). Where a product conforms to the quality of other similar products in the market, it will normally be merchantable. Id.

Just as Brookie Duett was faced with a variety of options and styles of tractors when he went to Belzoni Tractor Co., the Appellants herein were presented with variety of brands and styles of windows. (R.E. p. 8; R.V. 3, p. 439). Despite being warned that wooden windows would need to be maintained because wood rots, Ann McKee stated that she liked wooden windows and, ultimately, selected wooden windows that were manufactured by Weather Shield to be installed in the Appellants' home. (R.E. pp. 7-8; R.V. 3, pp. 437-438). The Appellants expressed their understanding of the additional maintenance associated with wooden windows and indicated that they had wooden windows before and they maintained them. (R.E. p. 9; R.V. 3, p. 439).

The Appellants, of their own free will and volition, made the decision to purchase wooden windows manufactured by Weather Shield. Prior to making their decision, the Appellants were fully aware and warned of wood's natural tendency to rot and the required maintenance associated with wooden windows. Their own expert testified that he is familiar with other manufacturers such as Anderson, Pella and Marvin, and admits that all of them manufacture and sell wooden windows throughout Mississippi. (R.E. p. 21; R.V. 3, p. 325).

In accordance with Mississippi Supreme Court precedent, as set forth above, this Court should hold that the manufacturer of a product does not fail to satisfy the implied warranty of merchantability even if the goods are not the best or brightest quality – so long as they meet the standards for generally acceptable quality under the description of the contract, conform to the quality of other similar products in the market, and are fit for the ordinary purposes for which such goods are used. Weather Shield's windows in this case clearly satisfy those criteria.

C. Appellants Have Failed to Demonstrate the Existence of Any Genuine Issue of Material Fact

On or about August 28, 1998, the Appellants entered into a contract with Ellington Homes, Inc., for the Construction and Supervision of a Residence to be located at 306 Deer Haven Drive, Madison, Mississippi. Sometime during the construction of their home, the Appellants went to Bowers' showroom to choose windows. Upon arrival, the Appellants were shown a variety of styles of windows including, but not limited to, clad, wooden, metal and vinyl-styled windows by Bowers' employee, Mark McKee. The Appellants could have chosen any style or brand of window but, after being fully informed regarding the special maintenance that would be necessary with wooden windows, and expressing an understanding of the maintenance requirements, they selected wooden windows that were manufactured by Weather Shield.

The windows selected by the Appellants were delivered to the construction site and installed by Ellington's subcontractors. The Appellants have failed to present any testimony whatsoever that the windows used in their home were defective at the time they left Weather Shield or that any alleged defect was the proximate cause of their damages. Absent Bill Birdsong's personal belief that no one in Mississippi should use wooden windows in their houses, the Appellants have absolutely no support for their claims against Weather Shield. Their citation to the 1998 decision from Wisconsin involving PILT is nothing more than a 'red herring', designed to try to distract the Court's attention from what is really at issue here – Weather Shield stopped using any product containing PILT in 1994 – as that case stipulates – and the windows incorporated in the Appellants' home were not even manufactured until late 1998 or early 1999. Finally, the "11th hour" attempt to bring breach of warranty into this case

likewise is unavailing to the Appellants – they never raised this question with the Court below, and should not be allowed to try to do so now.

CONCLUSION

For the above and foregoing reasons, Weather Shield's Motion to Exclude the Testimony of Bill Birdsong was properly granted, as Mr. Birdsong's proffered testimony is not based upon any scientific, technical, or other specialized knowledge. Additionally, Birdsong's testimony is neither relevant nor reliable. Furthermore, Weather Shield's Motion for Summary Judgment was properly granted as there were no genuine issues of material fact in dispute; as such, judgment as a matter of law was properly rendered in favor of this Appellee, Weather Shield Manufacturing, Inc. In addition, the Appellee respectfully requests that this Court find that all costs incurred in this appeal should be assessed to the Appellants, for which let execution issue.

RESPECTFULLY SUBMITTED, this the 12th day of August, 2010.

BY: **WEATHER SHIELD MANUFACTURING, INC.**
APPELLEE

BY: _____
TIMOTHY D. CRAWLEY
MITZI LEASHA GEORGE

ANDERSON CRAWLEY & BURKE, PLLC
TIMOTHY D. CRAWLEY (MB[redacted]
MITZI LEASHA GEORGE (MB[redacted]
ATTORNEYS AT LAW
216 DRAPERTON COURT
RIDGELAND, MS 39157
TELEPHONE: (601) 707-8800
FACSIMILE: (601) 707-8801
E-MAIL: TCrawley@ACBLaw.com
MGeorge@ACBLaw.com

CERTIFICATE OF SERVICE

I, TIMOTHY D. CRAWLEY/MITZI LEASHA GEORGE, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLEE, WEATHER SHIELD MANUFACTURING, INC., to the following persons at these addresses:

Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

Dennis L. Horn, Esq.
Shirley Payne, Esq.
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130-2754

J. Wade Sweat, Esq.
Marisa C. Atkinson, Esq.
Copeland, Cook, Taylor & Bush, P.A.
P.O. Box 6020
Ridgeland, MS 39158-6020

THIS the 12th day of August, 2010.

TIMOTHY D. CRAWLEY
MITZI LEASHA GEORGE

ANDERSON CRAWLEY & BURKE, PLLC
TIMOTHY D. CRAWLEY (MB[redacted]
MITZI LEASHA GEORGE (MB[redacted]
ATTORNEYS AT LAW
216 DRAPERTON COURT
RIDGELAND, MS 39157
TELEPHONE: (601) 707-8800
FACSIMILE: (601) 707-8801
E-MAIL: TCrawley@ACBLaw.com
MGeorge@ACBLaw.com