IN THE MISSISSIPPI SUPREME COURT
No. 2009-CA-01314

M. CURTISS McKEE and
ANN CRAFT McKEE — APPELLANTS

VS.

BOWERS WINDOW & DOOR COMPANY, INC. — APPELLEE

CONSOLIDATED WITH
No. 2009-CA-01315

M. CURTISS McKEE and
ANN CRAFT McKEE — APPELLANTS

VS.

WEATHER SHIELD MANUFACTURING, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY

BRIEF OF APPELLEE, BOWERS WINDOW & DOOR COMPANY, INC.

J. Wade Sweat (MSB# [redacted]
Marisa C. Atkinson (MSB# [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway
Post Office Box 6020 [39158]
Ridgeland, MS 39157
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

ATTORNEYS FOR APPELLEE
BOWERS WINDOW & DOOR
COMPANY, 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 judges of this Court may evaluate possible disqualification or recusal:

1. M. Curtiss McKee, underlying Plaintiff/Appellant
2. Ann Craft McKee, underlying Plaintiff/Appellant
3. Dennis L. Horn, Esq., attorney for underlying Plaintiffs/Appellants
4. Shirley Payne, Esq., attorney for underlying Plaintiffs/Appellants
5. Weather Shield Manufacturing, Inc., (hereinafter "Weather Shield") underlying Defendant/Appellee
6. Timothy Crawley, Esq., attorney for Weather Shield Manufacturing, Inc., underlying Defendant/Appellee

7. Bowers Window & Door Company, Inc., (hereinafter "Bowers") underlying Defendant/Appellee

8. J. Wade Sweat, Esq., attorney for Bowers Window & Door Company, Inc., underlying Defendant/Appellee

9. Marisa C. Atkinson, Esq., attorney for Bowers Window & Door Company, Inc., underlying Defendant/Appellee

Respectfully submitted, this the 12th day of August, 2010.

J. Wade Sweat, Esquire
Attorney of record for Bowers Window & Door Company, Inc.

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STATEMENT OF ISSUES

1. Whether or not the trial court correctly excluded the testimony of Plaintiffs' expert, Bill Birdsong.

2. Whether or not the trial court correctly granted Bowers' summary judgment motion.

STATEMENT OF THE CASE

I. Nature of Case

Plaintiffs allege that wood windows sold to the Plaintiffs by Bowers and manufactured by Weather Shield were defective. Plaintiffs further allege that Bowers was negligent in selling the windows to the Plaintiffs.

II. Course of Proceedings and Disposition Below

On September 9, 2002, Plaintiffs filed their initial Complaint. *R. 16-21.* Plaintiffs filed their First Supplemental and Amended Complaint on January 4, 2005. *R. 83-100.* The Plaintiffs filed their Second Supplemental and Amended Complaint on August 12, 2008. *R. 139-238.* Plaintiffs allege in pertinent part that the house was not "constructed in a workmanlike manner fit for habitation," (Count One); that the windows, bought from Bowers and manufactured by Weather Shield, were defective because they "leaked ever since they were placed in the house," (Count Two); and that the Defendants are jointly and severally liable for the leaking into the house and the damage caused to the structure itself (Count Three). *Id.* Accordingly, Plaintiffs assert a products liability claim of defective design and a claim of negligence against Bowers. Bowers responded to the defective design and negligence claims by denying liability/the allegations asserted by Plaintiffs. *R. 101-106.*

During the course of discovery, Plaintiffs designated Bill Birdsong ("Birdsong") as an expert in the area of windows. *R. 561.* Birdsong's anticipated testimony was that the wooden windows purchased from Bowers and installed in Plaintiffs' house did not meet the industry standard for that location (Mississippi) and caused rot and damage to the Plaintiffs' house. *Id.* Birdsong's deposition was also taken during the course of discovery. *R. 540-555.*

Weather Shield filed (and Bowers joined in) a *Motion in Limine to Conduct Daubert Hearing and Exclude Expert Opinion Testimony of Bill Birdsong* on November 26, 2008, and December 4, 2008, respectively. *R. 363-371.* Bowers also filed a Motion for Summary Judgment on December 17, 2008. *R. 382.* The trial court granted the Motion to Exclude Expert Opinion Testimony of Bill Birdsong on June 17, 2009. *R. Vol. 13, p. 40.* The trial court then granted Bowers' Motion for Summary Judgment by an Order dated July 15, 2009. *R. 1179.* From those judgments, Plaintiffs appeal. *R. 1185, 1202.*

III. Statement of Facts

On or about August 28, 1998, Plaintiffs entered into a contract with Ellington Homes for the construction of their residence located at 306 Deer Haven Drive, Madison, Mississippi. *R. 141.* Plaintiffs began residing in the home on or about August 20, 1999. *Id.* During the construction of the home, Plaintiffs ultimately decided what windows would be installed throughout the house. *R. 412.* Plaintiffs visited Bowers' store showroom and Mark McKee of Bowers showed them a variety of styles of windows including but not limited to clad, wooden, metal and vinyl style windows. *R.E. 2; R. 438*. While at Bowers, Plaintiff Ann McKee stated that she liked wooden windows and therefore ultimately selected wooden windows manufactured by Weather Shield to be installed in their house. *R.E. 1-2; R. 437-438.* Mark McKee told the Plaintiffs that if they wanted wooden windows, that they would have to maintain them because wood rots. *R.E. 3; R. 439.* Plaintiffs informed Mark McKee that they understood–that they had wooden windows before (in their previous residence) and they maintained the wooden windows. *Id.*

The wooden windows selected by the Plaintiffs were delivered to the construction site and installed by subcontractors. *R. 493.* Bowers was not involved in the installation of the

windows. *R. 439-440.* Bowers had no control or involvement in the manufacture of the windows. *R. 443, 504.* Bowers had nothing to do with the packaging or labeling of the windows after they were manufactured. *R. 443.* Bowers did not alter or modify the windows. *R. 505.*

Plaintiffs began experiencing problems with the construction of the house, only one of which included leaking windows. *R. 412.* Plaintiffs claim that the photographs contained in the record "show a ruined house." *Plaintiffs' Brief at p. 6.* The Plaintiffs' house was "ruined" by a number of problems unrelated to the windows, some of which include, but are not limited to: a leaking roof; sloping interior floors; improperly installed EIFS, Dryvit Outsulation; improper and/or no installation of flashing along/ around the stone roof line, windows, fascia boards, rear wall, doors, and brick mold; improperly sealed return air chases; improperly laid stone veneer on the front of the house; cracked marble; failed security system; and mold. *R.E. 4-6; R. 85-86, 142.* Plaintiffs have since settled with the builder of their home, Ellington Homes.

During the course of the investigation and/or remodeling/rebuilding of the Plaintiffs' house, Bill Birdsong was retained by the Plaintiffs to perform painting on the exterior of the house in the Spring of 2002. *R. 543.* Birdsong is a local general contractor. *Id. at pp. 5-6.* Plaintiffs designated Birdsong as an expert in the area of windows and disclosed that Birdsong would testify that the wooden windows purchased from Bowers and installed in the Plaintiffs' house did not meet the industry standard for the house's location and the wooden windows caused rot and damage to the Plaintiffs' house. *R.E. 7; R. 561.*

However, during his deposition, Birdsong testified that there was no industry standard with regard to installation of wooden windows in the Plaintiffs' house and/or in the State of Mississippi:

> Q: When you say that the wooden windows don't meet the standard in the industry, what standard are you talking about? I mean is there a building code that says don't use wooden windows in this location?
> A: No. There should be, **but there isn't**.
> Q: It's just Birdsong common sense?
> * * *
> A: Yes.
> * * *
> Q: All fifty-plus windows in the house?
> A: Yes.
> Q: Okay. Did not meet the standard in the industry?
> A: **Don't meet my standard.**
> Q: Don't meet **your** standard in the residential construction industry?
> A: Exactly.
> * * *
> Q: Have you ever done any publications of this standard that you employed?
> A: No. You would have to document then.
> Q: Are you aware of any standard in the Southern Building Code specifically addressing wooden windows and their application to residential construction in Mississippi?
> A: **No**.

R.E. 11-12; R. 548-549. (*Emphasis added.*) In formulating his opinions, Birdsong only conducted a visual inspection of the house and windows. *R.E. 15; R. 554.* He did not rely on any documents from other experts or sources to base his opinions. *R.E. 14; R. 553.* Nor is he aware of any articles in a periodical or treatise that address wooden windows in a lake setting. *Id.* Additionally, Birdsong has never previously served in the capacity as an expert. *R.E. 10; R. 542.*

SUMMARY OF ARGUMENT

The trial court was correct to exclude the proferred "expert" opinions of Bill Birdsong. Birdsong's opinions are not based upon sufficient facts or data, or the product of reliable principles and methods, and Birdsong did not apply the principles and methods reliably to the facts of the instant case. *Smith v. Clement*, 983 So.2d 285, 289 (Miss. 2008) (citing Miss. R. Evid. 702). Therefore he does not satisfy *Daubert* to qualify as an expert.

The trial court properly sustained Bowers' Motion for Summary Judgment. Plaintiffs failed to present evidence that the wooden windows selected by Plaintiffs, purchased from Bowers and manufactured by Weather Shield were defective and that any defect made the windows unreasonably dangerous. Plaintiffs further failed to present any evidence that Bowers, as the seller of the windows, was negligent. Accordingly, the trial court's award of Summary Judgment to Bowers and its exclusion of Birdsong's opinions should be affirmed.

ARGUMENT

I. The Trial Court was Correct to Exclude the Opinions of Bill Birdsong.

A. Standard of Review

The standard of review for a trial court's decision regarding the admission or exclusion of expert testimony is one of abuse of discretion. *Kilhullen v. Kansas City So. Ry.*, 8 So.3d 168, 172 (Miss. 2009). "Therefore, the decision of a trial judge will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous . . . .'" *Id.* (quoting *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31,34 (Miss. 2003)).

B. Bill Birdsong is not qualified to offer expert opinions on the subject windows.

Rule 702 of the Mississippi Rules of Evidence governs the admissibility of expert opinion evidence. That rule provides:

> [I]f 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. (*Emphasis added.*)

In order for expert testimony to be admissible, the expert testimony must be relevant and reliable; and the trial judge acts as the gatekeeper in determining whether that testimony "rests on reliable foundation and is relevant to a particular case." *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)). The Mississippi Supreme Court opined recently: "'To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue.'" *Investor Resource Services, Inc. v. Cato*, 15 So.3d 412, 415 (Miss. 2009) (quoting *Tunica Co. v. Matthews*, 926 So.2d 209, 213 (Miss. 2006)(citing *McLemore*, 863 So.2d at 26))). "The party offering the testimony must show that **the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures.**" *Moss v. Batesville Casket Co., Inc.*, 935 So.2d 393, 404 (Miss. 2006) (internal citations omitted). (*Emphasis added.*) Here, Birdsong only offered his unsupported and speculative opinions.

Plaintiffs' discovery responses disclosing their expert witnesses identify Birdsong as their expert on the general topic of windows. *R.E. 7; R. 561.* Birdsong's only purported qualification to offer an opinion on the topic of windows is that he is a general home building contractor with over twenty years experience as a general contractor. *R.E. 10; R. 542.* Plaintiffs now profess that Birdsong is an expert in the manufacture of windows due to "his own experience in manufacturing windows." *Plaintiffs' Brief at p. 19.* This is completely untrue and unfounded. Birdsong has not and has never been disclosed or qualified as an expert in window manufacture. *R.E. 10; R. 542.* He has no knowledge, experience, skill or training in the manufacture or design of windows, *R.E. 13; R. 551; Vol. 13, Tr. 10-20,* as the Plaintiffs lead the Court to believe in their brief. *Plaintiffs' Brief at pp. 13, 19.* While Birdsong may have "**worked** on windows thousands of times," there has been no evidence presented that he has any experience, skill or training with regard to the actual design and manufacture of the subject wooden windows–which Plaintiffs have alleged are defective.

Plaintiffs argue that Birdsong is "qualified to testify as an expert based on his extensive practice and experience" and incorrectly rely on the following cases: (1) *General Motors Corp. v. Pegues,* 738 So.2d 746 (Miss. Ct. App. 1998); (2) *Kilhullen v. Kansas City So. Rlwy.,* 8 So.3d 168 (Miss. 2009); (3) *Forbes v. General Motors Corp.,* 935 So.2d 869 (Miss. 2006); and *Calvetti v. Antcliff,* 346 F.Supp.2d 92 (D.C.Dist. 2004). These cases are distinguishable from the instant matter and they should not be relied upon.

In *Pegues,* the expert offered by Pegues to testify that the ball joint on a General Motors ("GM") pick-up truck broke causing an accident, was an "auto mechanic for forty years of professional experience, 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.'" *Pegues*, 738 So.2d at 752. The Mississippi Supreme Court affirmed the trial court's determination that Pegues' expert was qualified as an expert in auto mechanics and offer opinions regarding the ball joint of the GM truck. *Id.* at 753.

In this case, Birdsong has not had any specialized training with regard to wooden windows manufactured by Weather Sheild–their installation, design or manufacture (*R. 551*)–unlike the expert in *Pegues* who received specialized training from General Motors and who had worked at a GM dealership and was retained to offer expert opinions regarding a General Motors ball joint. Further, Birdsong does not have extensive professional experience with Weather Shield windows, nor has any evidence been offered that Birdsong has had any hands on professional experience with the Weather Shield wooden windows purchased and installed in the Plaintiffs' house, like the expert in Pegues and that expert's experience with GM products and ball joints. Although Birdsong my have over 20 years of experience as a **general building contractor**, he does not possess knowledge and/or experience with the design and/or manufacture of **windows** to qualify him as an expert on windows in this case.

The Mississippi Supreme Court in *Kilhullen* found that the trial court erred in rejecting the affidavit of plaintiff's expert, who was a professional engineer instead of an accident reconstructionist (that defendants argued that the plaintiff's expert should be) to testify about the visibility along a railroad crossing. *Kilhullen*, 8 So.3d at 174. The Plaintiff's expert was a licensed, professional engineer; examined photographs of the

accident site; reviewed relevant deposition testimony; visited the accident site where he studied the topography and obstructions at the railroad crossing and positioned his engineering instruments at the same location of the subject vehicle prior to the accident and conducted measurements and collected line-of-sight data using engineering instruments; and utilized engineering/physics principles in calculations utilizing a recognized line-of-sight equation. *Id.* at 173-174. All of these actions and steps were taken and utilized in order for plaintiff's expert to formulate his opinion. *Id.*

Unlike *Kilhullen*, whose expert used data, facts, and calculations to form his opinion, Birdsong has not used any data, facts or reliable/recognizable calculations to form his opinion. *R.E. 14-15; R. 553-54.* Birdsong bases his "expert" opinion on the mere visual inspection of the Plaintiffs' house when he was hired to paint the house, and his personal "Birdsong" standard with regard to wooden windows in Mississippi, which amount to speculation. His opinion is not based on scientific methods and/or procedures that would qualify him to offer expert testimony.

The expert at issue in *Forbes*, who was allowed to testify on air bags, (despite admitting he was not an expert on airbag design or conditions) "had extensive experience as an expert witness in cases involving questions which required engineering and mechanical knowledge and . . . had conducted research for his testimony . . . ." *Forbes*, 935 So.2d at 879. Birdsong has no experience as an expert witness in any cases – much less cases dealing with wooden windows. Further, Birdsong has not conducted any research to support his testimony like the expert in *Forbes*.

The expert in *Calvetti*, a general building contractor, was admitted to testify as an expert in the area of **general contracting** and the value and quality of work performed

based on his work experience including working on framing unfinished rooms, installation of dry wall, kitchen and bathroom fixtures, plumbing, electrical work, HVAC work, cabinets, flooring and carpeting, windows and doors, concrete, home additions, roofing and painting, and had been in the business for over twenty years. *Calvetti*, 346 F.Supp.2d at 111. In the instant case, Birdsong, as a general contractor, is **not** being offered as an expert in the broad area of general contracting or the value of work quality like the expert in *Calvetti*. Birdsong is being offered as an expert **specifically** in the area of windows–design, installation and/or manufacturing–in which he has no specific experience, training and/or knowledge and therefore is not qualified to offer expert testimony. He has only worked on windows.

In *Glenn v. Overhead Door Corporation*, 935 So.2d 1074 (Miss. Ct. App. 2006), the plaintiff brought a products liability claim against the manufacturer of an overhead garage door when his child died of carbon-monoxide poisoning as a result of the child being in the car while it was running parked in the garage with the garage door closed. 935 So.2d at1078. To rebut Overhead Door's expert's opinion that the child would have died of carbon monoxide poisoning even if the garage door had been opened, Glenn submitted an affidavit of an expert pathologist Dr. Michael Baden. *Id.* at 1079. The trial court held that Dr. Baden's affidavit was inadmissible because he did not explain what scientific methodology he used to form his opinions. *Id.* In affirming the lower court's discretion to disallow the affidavit of Dr. Baden, the Mississippi Court of Appeals opined:

> "**Talking 'off the cuff'**-deploying neither data nor analysis-is not an acceptable methodology." *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000). Dr. Baden merely offered an opinion, with no explanation of any methodology he employed in arriving at his opinion. He did

> not form his opinion based on his own testing or on statistical data gathered by others. "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 f.2d 1333, 1339 (7th Cir. 1989).

Id. at 1079-1080. (*Emphasis added.*)

Birdsong did not perform any testing on the windows, and he did not gather and/or collect any data concerning the windows in order to arrive at his opinion. He simply looked at the windows and Plaintiffs' house when he was hired to paint the house and offered a speculative "bottom line" conclusion–that the windows did not meet his standard. Such a "bottom line supplies nothing of value to the judicial process." *Glenn v. Overhead Door Corp.*, at ¶ 13.

Like the expert in *Overhead Door* that did not offer any explanation of methodology he used to form his opinions, Birdsong in this case does the same. Birdsong merely talks "off the cuff" to formulate his personal standard concerning wooden windows. His standard is not scientifically valid, nor is his opinion based upon scientific methods and procedures, as required by *McLemore*, *Daubert* and *Moss*, *supra*. Birdsong's opinion is simply unsupported speculation, which is inadmissible. *Smith*, 983 So.2d at 289 (citing *McLemore*, 863 So.2d at 40-42). Accordingly, he is not qualified as an expert in the field of windows as the Plaintiffs designated him. *Glenn v. Overhead Door Corp.*, 935 So.2d at1079. The trial court was correct in excluding the testimony of Birdsong and this Court should affirm the trial court's decision.

II. Plaintiffs Did Not Assert Claims of Breach of Implied Warranty of Habitability, Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose.

The Plaintiffs failed to ever, over the course of filing three complaints, plead claims for breach of implied warranties. The words "implied" or "warranty" never appear in any complaint. *R. 16-21, 83-100, 139-238.* As a result, Plaintiffs' argument concerning breach of implied warranties should not be considered. *Lenoir v. Anderson*, 12 So.3d 589, 597 (Miss. Ct. App. 2009) ("[T]he [appellate court] will not review matters on appeal that were not raised at the trial court level." *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss. 1992)). Further, the Plaintiffs in their argument concerning implied warranties vaguely and generally refer to "[b]oth window companies." Yet, the Plaintiffs spend their entire argument discussing an unrelated lawsuit from the 1990s that involved Weather Shield. *Plaintiffs' Brief at pp. 22-24.* The Plaintiffs fail to provide any evidence that Bowers had anything to do with this lawsuit or had any knowledge about anything concerning it. The Plaintiffs make reaching conclusions about admissions by Weather Shield. The Plaintiffs then try to loop Bowers in by saying ". . . Bowers as a matter of law were then on notice that the sealant was defective." *Plaintiffs' Brief at p. 23.* The Plaintiffs fail to support this claim with any legal authority or evidence of any notice. Finally, the Plaintiffs failed to cite any evidence indicating that the sealant in the *PPG Industries* case was even the same sealant involved with the Plaintiffs' windows. This argument is illustrative of the "reaching" and overall inadequate nature of the Plaintiffs' claims related to the windows and reflects why the trial court properly granted summary judgment on the claims.

Plaintiffs make a brief reference to breach of warranty of habitability. *Plaintiffs' Brief at p. 24.* A claim of breach of warranty of habitability is one that arises between a

tenant and landlord and/or a home builder and the first occupant of that newly built home. *Houston v. York*, 755 So.2d 495 (Miss. Ct. App. 1999). Plaintiffs mentioned habitability with regard to their claims against the home builder, Ellington Homes, but Plaintiffs did not assert such a claim against Bowers. *R. 16-21, 83-100, 139-238.* Bowers was not a landlord or builder. It is undisputed that Bowers did not build the Plaintiffs' home, nor did Bowers install the wooden windows in the Plaintiffs' home. Therefore, any reference to a claim of breach of warranty of habitability against Bowers, if it was ever made, is irrelevant.

III. The Trial Court was Correct in Sustaining Bowers' Motion for Summary Judgment.

A. Standard of Review

The standard of review of trial court's grant of summary judgment is *de novo. Williams v. Bennett*, 921 So.2d 1269, 1271 (Miss. 2006). Summary judgment "shall be rendered forthwith" when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56 (c); *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir. 1989). "Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate." *Fields v. City of S. Houston*, 922 F.2d 1183, 1187 (5th Cir.1991).

Further, once the initial burden is met, the opponent of summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (U.S. 1986)(citations omitted). "In the language of the Rule, the nonmoving party must come

forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing Fed. R. Civ. P. 56(e)).

More recently, the Mississippi Supreme Court noted, "[f]or summary judgment review, the mere existence of triable issues do not entitle one to a trial. This legal tenet has been clearly expressed by the Fifth Circuit Court of Appeals and the United States Supreme Court: '[t]he mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material.'" *Williams*, 921 So.2d at 1272, ¶ 10 (citing *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir.1986); (*See also Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986)).

The *Williams* Court also held, "[w]here the summary judgment evidence establishes that one of the essential elements of the plaintiffs' cause of action does not exist as a matter of law, or that plaintiffs' cause of action is barred by a statute of limitations, all other contested issues of fact are rendered immaterial." *Williams*, 921 So.2d at 1272, ¶ 10 (citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (U.S. Dist. Col. 1986)("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."); *Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir.1992).

In the present case, Plaintiffs fail to establish essential elements of their claims against Bowers. Therefore the trial court's award of summary judgment in favor of Bowers was correct and should be affirmed.

B. Bowers was not negligent by merely selling the windows.

Plaintiffs' argument on the issue of negligence is a generalized argument that fails to establish any possible claim against Bowers. Plaintiffs' argument begins by generally saying that the "seller" of a "home that has not been completed in a safe and workmanlike manner" is negligent. *Plaintiffs' Brief at p. 24.* Bowers did not have anything to do with the actual construction of Plaintiffs' house.

Plaintiffs go on to cite comments of Bill Birdsong. *Plaintiffs' Brief at p. 25.* Both cited comments include the term "generally" reflecting Birdsong's "off the cuff" unsupported opinions. These quotes are then followed by Plaintiffs' general unsupported statement "[f]or these windows to have rotted within a two year time frame, there was negligence involved." *Id.* However tellingly, the Plaintiffs cite no support for this general statement.

They also conclude their negligence argument by mentioning several speculative and unsupported points. First, "whether the wood was inferior." *Plaintiffs' Brief at p. 26.* They never brought forth any evidence about the wood to even create a dispute for a jury to decide this issue. They also raise the claimed point of "whether the product was inherently unsatisfactory in Southern/damp climates." *Id.* Birdsong himself acknowledged that wood windows are common in the "Southern" "damp" climate. Finally, they raise the point "whether the failure to pre-treat the windows was unreasonable." *Id.* Again, the Plaintiffs never offered any credible support to create a jury issue on this point. The Plaintiffs raise lots of questions about the windows but never have presented any credible evidence to support their claims or create an issue for a jury. The only support is a generalized claim

that simply because they claim the windows rotted in two years, the seller and manufacturer had to be negligent, but no real support for this point.

The Plaintiffs may argue that this claimed fact in and of itself supports negligence. However, this claim in and of itself does not support a negligence claim. This very type of contention was addressed by this Court in *Moss, supra.* In that case, the plaintiffs argued that the wooden casket deteriorated/rotted in two years, thus there was negligence. *Moss*, 935 So. 2d at 406. The Mississippi Supreme Court found that such a contention was not enough to support and prove a negligence claim. *Id.* at 407. The same claim is being made in this matter. Plaintiffs argue that the wooden windows rotted in two years, thus there is negligence. In accordance with *Moss*, that is not enough to prove a claim of negligence.

To prove negligence against Bowers the Plaintiffs must prove by a preponderance of the evidence: (1) a duty owed by Bowers to the Plaintiffs; (2) breach of that duty by Bowers; (3) that a breach of the duty was a proximate cause of damages they suffered; and finally (4) reasonable damages. *May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 375 (Miss. 1991). The existence of a duty depends on the relationship of the parties. *Skelton v. Twin County Rural Elec. Assn.*, 611 So. 2d 931, 935-936 (Miss. 1992). Negligence is an "abstract concept until such negligence results proximately in injury to one to whom the obligation of due care is owed." *Phillips v. Delta Motor Lines, Inc.*, 108 So. 2d 409, 415 (Miss. 1959). Proximate cause is the cause "which in the natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Delahoussaye v. Mary Mahoney's, Inc.*, 783 So. 2d 666, 671 (Miss. 2001). Further, negligence "which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are

inflicted, is not the proximate cause thereof." *Blackmon v. Payne,* 510 So. 2d 483, 487 (Miss. 1987). The duty owed by Bowers to the Plaintiffs was to act as a reasonable seller. Bowers' only actions and involvement with regard to construction of the Plaintiffs' house was selling wooden windows selected by the Plaintiffs, to the Plaintiffs. Bowers did not manufacture the windows. Bowers did not assemble the windows. The mere act of selling windows chosen by the Plaintiffs is not an act of negligence. As admitted by Plaintiffs' own proffered expert, Birdsong, wooden windows were sold throughout Mississippi. *R. 549.*

Bowers fulfilled its duty when the Plaintiffs visited Bowers' store showroom and were shown a variety of styles of windows. *R.E. 2; R. 438.* When Plaintiffs commented that they preferred wooden windows and wanted wooden windows to be installed in their house, Bowers showed the Plaintiffs wooden windows manufactured by Weather Shield. *R.E.1-2; R. 437-38.* Bowers' employee, Mark McKee, also stated to the Plaintiffs that if they wanted wooden windows, that the windows would have to be maintained because wood rots. *R.E.3; R. 439.* The Plaintiffs stated they understood that wooden windows would have to be maintained and ultimately selected those wooden windows. *R. 412, 439.* There was nothing unreasonable in Bowers' dealings with the Plaintiffs that could possibly support the Plaintiffs' claim of negligence.

Further, the case relied upon by Plaintiffs to support their negligence allegation, *George B. Gilmore Co. v. Garrett,* 582 So.2d 387 (Miss. 1991), is distinguishable from the instant matter. *Garrett* deals with an action against the actual home builder and concerning soil testing of the lot on which the house was built. *Garrett* does not pertain to the window seller and/or window manufacturer. Therefore, *Garrett* is not applicable to Bowers, the window seller, as Bowers **did not build** Plaintiffs' house. Bowers only sold

the wooden windows chosen by the Plaintiffs. Accordingly, the trial court was correct to grant Bowers' summary judgment motion.

C. Plaintiffs cannot prove the windows purchased from Bowers were defective as required by the Mississippi Products Liability Act.

Plaintiffs brought suit against Bowers premised on the contention that the wooden windows selected by the Plaintiffs and purchased from Bowers were defective because they turned cloudy, leaked and rotted. *R. 142, 443, 505.* In order to prove a product defective at the time this suit commenced, the Mississippi Products Liability Act ("MPLA"), MISS. CODE ANN. § 11-1-63 (Supp. 1993), provided in pertinent part:

> In any action for damages caused by a product except for commercial damage to the product itself:
>
> (a) The manufacturer or seller 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 or seller:
>
> (i) 1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or
>
> 2. The product was defective because it failed to contain adequate warnings or instructions, or
>
> 3. The product was designed in a defective manner, or
>
> 4. The product breached an express warranty or failed to conform to other express

factual representations upon which the claimant justifiably relied in electing to use the product, and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damage for which recovery is sought.

(b) 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.

* * *

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a) (i) 3 of this section, the manufacturer or product seller 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 or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused 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. A

> feasible design alternative is a design 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 (Supp. 1993).

In this case, Plaintiffs must prove by a preponderance of the evidence that at the time the wooden windows left the control of Bowers: that the wooden windows were defective and that the defect made them "'unreasonably dangerous.'" *Moss v. Batesville Casket Company*, 935 So.2d 393, 402 (Miss. 2006) (citing *Pickering v. Indstria Masina I Traktora (IMT)*, 740 So.2d 836, 843 (Miss. 1999) (other citations omitted)). Plaintiffs cannot prove and have not proved these elements and therefore, the trial court was correct in awarding Bowers judgment as a matter of law.

i. Plaintiffs cannot prove the wooden windows were defective.

Plaintiffs do not specifically allege, nor can they provide evidence to support contentions that the wooden windows were defective due to: (1) deviating from manufacturing specification, or (2) inadequate warnings or instructions, or (3) defective design, or (4) breach of an express warranty. Plaintiffs contend that the wooden windows they selected and purchased from Bowers were defective because they turned cloudy, leaked and rotted. *R. 443, 505.*

Plaintiffs have offered no evidence concerning the manufacturing specifications of the wooden windows or the warnings and/or instructions related to the wooden windows. Plaintiffs have also not presented any evidence that Bowers had any control over the

manufacturing process of the windows; and/or that Bowers altered or modified the windows. *R. 443, 504-504.* Nor have the Plaintiffs asserted allegations or provided evidence that they detrimentally relied on statements of Bowers with regard to the windows. *R. 139.*

Therefore, for the sake of argument, the only possible products liability theory of recovery remaining is that the wooden windows were defectively designed. Even under this theory of potential recovery, Plaintiffs cannot prove and have not provided a reasonable design alternative for the windows, nor can they prove that the purported defective condition of the wooden windows rendered them unreasonably dangerous and that the dangerous condition caused the damages Plaintiffs are seeking to recover.

Plaintiffs can only offer Birdsong to attempt to support their defective windows claim. Birdsong is of the opinion that wooden windows should not be used in Mississippi. This is a frankly ridiculous opinion in light of Birdsong's admission that wooden windows are not uncommon in Mississippi and sold throughout Mississippi by other window manufacturers including Anderson, Pella and Marvin. *R.E. 12; R. 549.* Birdsong testified at his deposition that there is no building code standard that says not to use wooden windows in this location (being on a lake). *R.E. 11-12; R. 548-549.* Specifically, Birdsong testified that the windows did not meet **his** standard in the residential construction industry– **not an industry standard**. *Id.* Birdsong only conducted a visual inspection of the house and windows. *R.E. 15; R. 554.* He did not rely on any documents from other experts or sources to base his opinions. *R.E. 14; R. 553.* Nor is he aware of any articles in a periodical that address wooden windows in a lake setting. *Id.* Birdsong has not and cannot offer a feasible design alternative to wooden windows. Birdsong's opinion is speculative and merely his own

unsubstantiated personal opinion unsupported by any standards or analysis making it an inadmissible opinion under Mississippi law. *Overhead Door*, 935 So.2d at 1079.

In *Coleman v. Danek Medical, Inc.*, 43 F.Supp. 2d 637 (S.D.Miss. 1999), Plaintiff brought a products liability action against the manufacturer of an orthopedic bone screw device alleging that the bone screw was defective due to its design, 43 F.Supp.2d at 645. In reiterating that in order to recover on the premise of defective design the plaintiff has to prove that the manufacturer or seller knew about the danger that caused the damage for which recovery is sought and that there existed a feasible design alternative that would have to a reasonable probability prevented the harm, the court concluded that the plaintiffs did not adduce any evidence of a product defect, but merely declared that the product was "defectively designed." *Id.* Nowhere did the plaintiff even generally identify the nature of the alleged design defect. *Id.* The court opined:

> [W]hile under Mississippi law, 'it is unnecessary to prove a specific, identifiable defect in a cause of action based on strict products liability' the plaintiffs 'must at least produce that minimal amount of circumstantial evidence that would allow a jury to infer a defective quality in the product . . . . Mere proof of damage following the use of a product is not sufficient to establish liability.'

Id. at 645 (quoting *Cather v. Catheter Technology Corp.*, 753 F.Supp. 634, 638-639 (S.D.Miss. 1991)). The court concluded that the plaintiff's proof, or lack thereof, was insufficient to establish the existence of a product defect. *Id.* at 646.

The Mississippi Supreme Court in *Williams v. Bennett*, 921 So.2d 1269 (Miss. 2006), affirmed the trial court's grant of summary judgment in favor of the seller of a Lorcin handgun because the plaintiff failed to offer proof concerning a feasible design alternative in support of his claim that the handgun was defectively designed. *Williams*, 921 So.2d at

1277. In that case, Williams brought a products liability action against the seller of a handgun because he suffered injuries when the handgun accidentally fell on the ground and discharged while the safety on the handgun was off. *Id.* at 1270.

The Mississippi Supreme Court noted that "a plaintiff establishes a design defect by proving a product could have been made safer by the adoption of a reasonable alternative design . . . If an alternative design could have been practically adopted at the time of sale, and if the omission of such an alternative design rendered the product not reasonably safe, then a design is defective." *Id.* at 1275 (citing Restatement (Third) of Torts: Prod. Liab. § 2 (1998)). "[D]emonstrating a feasible alternative design as proof of a design defect is elemental to a claimant's prima facie case." *Id.* The *Williams* court, relying upon *Jordan v. Isle of Capri Casinos, Inc.*, 2005 WL 1421758 (S.D.Miss. 2005) (summary judgment granted in favor of Isle of Capri when plaintiff offered no proof that a design defect existed in an escalator and plaintiff's expert offered no feasible design alternative to the escalator); and *Johnson v. Davidson Ladders, Inc.*, 403 F.Supp.2d 544 (N.D. Miss. 2005) (summary judgment found appropriate in favor of Davidson Ladders when claimant failed to offer any evidence relative to the effectiveness of the alternative design of a stepladder in reducing the severity or frequency of accidents); and other authority, concluded that Williams failed to provide any evidence: that Bennett, the seller of the handgun, had knowledge or should have had knowledge of the danger that caused the injury; of a feasible design alternative as required by statute; from his expert that a feasible design alternative could have, to a reasonable probability, prevented the harm; and therefore affirmed the trial court's determination that Williams failed to assert a claim under the Mississippi Products Liability Act and granting of summary judgment in favor of Bennett. *Id.* at 1276-1277.

Additionally, the court in *AllState Lloyds Company v. Marvin Lumber and Cedar Company*, 2006 WL 2506776 (Tex. App.-Corpus Christi), found that where the plaintiff failed to offer evidence of an alternative window design, it could not prevail on its design defect claim. *Id.* at *3. In *Marvin Lumber and Cedar Company*, the home insurer brought a subrogation action against the manufacturer of windows for negligence and defective design arising out of property damage to its insured's home. *Id.* at *1. Under Texas law, in order to recover under a design defect claim, a plaintiff must prove by a preponderance of the evidence that a safer alternative design existed. *Id.* at *6. Allstate did not provide any evidence of such an alternative design and the court affirmed the lower court's decision granting summary judgment in favor of Marvin Lumber and Cedar Company on the issue of defective product design. *Id.*

Just like the plaintiffs in *Coleman*, *Williams* and *Marvin Lumber and Cedar Company*, who merely asserted a defective product design claim and did not provide evidence that a reasonable/feasible design alternative design existed, so is the situation in the instant matter. In this case, Plaintiffs merely contend that the wooden windows they selected are defective. Plaintiffs do not offer any evidence, expert or otherwise, that Bowers knew or should have known of the alleged defect and that a feasible/reasonable design alternative to wooden windows exist. They do not even provide proof that the wooden windows actually caused the damages they are seeking to recover. In accordance with *Coleman*, *Williams* and *Marvin Lumber and Cedar Company*, Plaintiffs' proof is insufficient to establish a product defect, and thus the trial court's award of summary judgment to Bowers should be affirmed.

ii. Rot is an inherent characteristic of wooden windows.

The MPLA 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 . . ." MISS. CODE ANN. 11-1-63 (b) (Supp. 1993).

An inherent characteristic of wood is that it decomposes and/or rots. *Moss*, 935 So.2d at 405. The very characteristic that attracted the Plaintiffs to the windows and made the windows desirable to the Plaintiffs–the fact that the windows were wooden–is the very characteristic that the Plaintiffs now contend is defective. Wood rots. The manufacturer or the seller of such wooden windows cannot eliminate wood from a wooden window because if it did, there simply would not be wooden windows. Because an inherent characteristic of wood is that it rots, the wooden windows sold by Bowers are not defective. *Coleman*, 43 F.Supp.2d at 645-646. Accordingly, summary judgment was proper.

iii. Even if the wooden windows were defective, Plaintiffs cannot prove that they were unreasonably dangerous.

For the sake of argument, even if the Plaintiffs were some how able to prove that the wooden windows they selected from Bowers were defectively designed and that there existed a reasonable/feasible design alternative, the Plaintiffs cannot prove that the wooden windows were unreasonably dangerous. "[A] defect in design may not necessarily be unreasonably dangerous." *Williams*, 921 So.2d at 1274 (quoting Phillip L. McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Product's Liability, Part II*, 17 Miss. C. L. Rev. 277). Plaintiffs mention that the large picture windows in their home are defective

because they were unreasonably dangerous because they were not made of tempered glass. *Plaintiffs' Brief at p. 8.* Plaintiffs contend that if these windows broke, they could cause bodily harm. The undisputed fact is the windows did not break and never caused any damage whatsoever. Therefore, the trial court was correct in granting Bowers' motion for summary judgment as the Plaintiffs fail to establish elements of their defective product claim.

IV. Plaintiffs Have Not Asserted, Nor Can They Prove a Claim of Breach of Express Warranty.

For the first time throughout the course of litigation of this case, Plaintiffs assert the argument that Bowers breached an express warranty concerning the wooden windows and that Bowers knew about the danger of water intrusion through the windows. *Plaintiffs' Brief at p. 28.* No where is a claim for breach of express warranty or that Bowers knew about the danger of water intrusion through the windows found in any one of the three complaints. *R. 16-21; 83-100; 139-238.* Because such claims have never been asserted, they are without merit and should not be considered. *Lenoir*, 12 So.3d at 597. Nevertheless, this argument is without merit even if considered.

"'[A]n express warranty is any affirmation of fact or promise which concerns the product and becomes part of the basis for the purchase of such a product.'" *Forbes*, 935 at 876 (quoting *Austin v. Will-Burt Co.*, 232 F. Supp.2d 682, 687 (N.D.Miss. 2002) (internal citations omitted)). Plaintiffs fail to put forth any evidence that Bowers made any representations or affirmation of fact or promise concerning the windows which became the basis for the selection and purchase. Plaintiffs incorrectly and misleadingly argue: "Mark McKee [] represented that wood windows would not rot if properly maintained." *Plaintiffs'*

Brief at p. 10. In support of this contention, Plaintiffs cite to page 117 of Plaintiff Ann McKee's deposition, which is contained on page 439 of the Record. *Id.* In this part of her deposition, Plaintiff Ann McKee testifies as follows:

* * *

Q: Tell me what Mr. McKee, who worked for Bowers, told you about the particular windows that ultimately got selected.

A: **He said that if we wanted wood, we'd have to maintain them because wood rots, and I said – I remember saying, "Yes, we've had wood windows, and we maintain them." And he just sort of agreed that, you know, you maintain them; that's good.**

* * *

R.E. 3; R. 439. (*Emphasis added.*) This **is not** a representation or affirmation that the wooden windows would not rot if properly maintained. For Plaintiffs to twist and stretch Plaintiff Ann McKee's testimony is improper and disingenuine. The representation is in fact, simply a statement that the windows must be maintained because "wood [does] rot[]." Bowers made no representation to the Plaintiffs that the wood windows would not rot if maintained. To the contrary, Plaintiff Ann McKee testified that Mark McKee of Bowers in fact stated that "wood rots," and that because it rots the windows have to be maintained.

Further, Plaintiffs never argue that Mark McKee's claimed "representation" was the basis for their selection of the Weather Shield wooden windows; no r have Plaintiffs presented any evidence that Plaintiffs relied on such an alleged representation or any statement by Bowers' employee in deciding to select and purchase the wooden windows manufactured by Weather Shield. Plaintiffs admitted that they liked wooden windows and previously lived in a house that had wooden windows and knew how to maintain wooden

windows. *Id.* Plaintiff Ann McKee testified that she was impressed with the wooden windows manufactured by Weather Shield because she could easily clean them. *R.E. 2; R. 438.* No where have the Plaintiffs stated or provided any evidence that Bowers made an express warranty concerning the wooden windows Plaintiffs selected or that the Plaintiffs made their selection of the Weather Shield wooden windows based on such a representation.

Plaintiffs cite authority from the State of Arkansas concerning crop herbicides and a Mississippi case for the premise that express warranties can be verbal. *Plaintiffs' Brief at p. 29.* While this may be true, Plaintiffs fail to put forth any evidence that Bowers made any verbal representations or affirmations that constituted an express warranty. Bowers simply instructed the Plaintiffs to maintain the windows because wood rots. Even if there was evidence that Bowers made the representation that the wood windows would not rot if properly maintained (as the Plaintiffs now contend), Plaintiffs still fail to prove that the alleged representations were the basis of their selection of the wooden windows; were false or untrue; and/or that the Plaintiffs were damaged by relying upon the alleged representations.

Additionally, Plaintiffs haphazardly assert the claim that Bowers knew of the danger of water intrusion through the windows. *Plaintiffs' Brief at p. 28.* But Plaintiffs provide no evidence or discussion, nor can they provide any evidence that Bowers knew or should have known of the alleged danger of water intrusion through the windows. Therefore, Plaintiffs' claim for breach of express warranty fails and the lower court decision should be affirmed.

CERTIFICATE OF FILING

I, J. WADE SWEAT, do hereby certify that I have this day caused to be delivered, via courier, the original and four true and correct paper copies and a diskette of the Brief of Appellee Bowers Window & Door Company, Inc., to:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
Office of the Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Jackson, MS 39201

THIS the 12th day of August, 2010.

J. WADE SWEAT

CERTIFICATE OF SERVICE

I, J. Wade Sweat, do hereby certify that I have this day forwarded by U. S. mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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

Timothy Crawley, Esq.
Anderson Crawley & Burke, PLLC
P.O. Box 2540
Ridgeland, MS 39158
Attorney for Appellee, Weathershield Manufacturing, Inc.

Honorable Marcus D. Gordon
Special Appointed Judge
P.O. Box 220
Decatur, MS 39327

THIS the 10th day of August, 2010.

J. Wade Sweat