IN THE MISSISSIPPI SUPREME COURT

No. 2009-CA-01314

M. CURTISS MCKEE AND
ANN CRAFT MCKEE — APPELLANTS

V.

BOWERS WINDOW & DOOR COMPANY, INC. — APPELLEE

(CONSOLIDATED WITH)

No. 2009-CA-01315

M. CURTISS MCKEE AND
ANN CRAFT MCKEE — APPELLANTS

V.

WEATHER SHIELD MANUFACTURING, INC. — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
MADISON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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This is a case where all witnesses, expert and lay witnesses alike, all agree that the homeowners' house was ruined and that the windows were rotted. The testimony was that the windows were delivered from Weather Shield, through the agency of Bowers, without any visible protections of paint or sealants or instructions for special treatment. R. 606 - 607 (Plaintiffs' Itemization), R. 830-831, and the uninstalled windows were kept carefully stored by the

homeowners until installed. R. 636. Because the wooden windows rotted within two years, it is apparent, from the companies 'own representations, R. 1146-1147, R. 605, R. 835-836, that the windows were unfit for normal use, were untreated and therefore defective in design. All testimony agreed that reasonable alternatives, in the form of sealed, coated or treated wood, were available. See, Appellants' opening brief at pages 9-10. No one has suggested that the extensive photographic evidence of the damage, rotted windows, rot surrounding the windows, and broken seals on windows causing cloudy panes, R. 638-777, is in any way inaccurate. The record in this case supports the homeowners and requires that summary judgment be reversed.

There is a material issue of fact as to whether the window companies had chosen to palm off on the homeowners the company's old, defective windows that had remained in their inventory from the time the PILT seasoned windows that had failed in innumerable homes and had been the subject of extensive litigation. The defendants' discovery responses, including the responses of their own experts, were unaccountably vague or non-existent as to when the windows had been manufactured or by what methods the windows had been treated or preserved. R. 606.

Citing absolutely no authority, the appellee Bowers errs in claiming the warranty issues were raised for the first time on appeal. The issues presented on this appeal, including the implied warranty issue, were all raised below.[1] R. 602, R. 139-150, R. 897-898. The

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[1]Specifically, the homeowners' Memorandum in Opposition to Defendant Bowers Window and Door Co., Inc.'S Motion for Summary Judgment provided argued the following: "One requirement of the implied warranty of merchantability is that the product "pass without objection in the trade." § 75-2-314(2)(a) Miss. Code Ann. (Supp. 1998). It is the testimony of Plaintiffs' expert, Bill Birdsong, that the subject windows do not, based on his 26 years experience in the trade, pass without objection.

Similarly, the implied warranty of fitness for a particular purpose applies "where

homeowners satisfied Rule 8 by pleading the facts and damages on their claims for relief and the briefs of the parties to the trial court specifically addressed the implied warranty issue. *Upchurch Plumbing, Inc. v. Greenwood Utils. Com'n*, 964 So.2d 1100, 1117 (Miss. 2007). In Mississippi, an action for an implied warranty in construction is co-extensive with an action in negligence. *George B. Gilmer Co. v. Garrett*, 582 So.2d 387 (Miss. 1991). The quote from the McKee

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the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose." § 75-2-315 Miss. Code Ann. (Supp. 1998). The seller, Bowers Windows and Doors, was apprised of the particular requirements of the McKee home. Bowers knew that the house was intended for a lakeside lot in a high moisture area. It knew that synthetic stucco was to form part of the exterior shell. It knew that the McKees had maintained wooden windows in their past home and were familiar with maintenance on those former windows which had offered no problems. The McKees lived in houses (two) with wooden windows for a total of 25 years and none of the wooden windows rotted.

Such knowledge would bind a seller under a theory of implied warranty of fitness as was explained in an early Mississippi case about a Fridigaire refrigerator, *Christenberry v. Saik,* 191 Miss. 148, 2 So.2d 142 (Miss. 1941), where the defects complained of, like those here, were latent, and the seller would know that the buyer has not relied on his own judgment, but on that of the seller, who knew or might have known of the existence of the defects, especially since Weather Shield had a previous lawsuit against it and had not disclosed the lawsuit to the homeowners until two weeks before trial. The McKees would not have purchased the windows had they known this fact unless it was proven to them that Bowers had used a different sealant which it still has never done. This has to be one of the main points that homeowners were never informed of this problem. The McKees believe this was on purpose. Would you buy a car where brakes were proven not to work? *Id.* at 150. In *Magee Laundry & Cleaners, Inc. v. Harwell Appliance Co.*, 184 Miss. 435, 185 So. 571 (Miss. 1939) the salesman assured the purchaser that the unit would air condition its office where the purchaser knew nothing and relied solely on the judgment and assurance of the salesman. The customer's reliance invoked the implied warranty of fitness for a particular purpose. Emotional distress damages can follow from a breach of contract, breach of implied warranties and negligence on the faulty construction of a home. *Harrison v. McMillan,* 828 So.2d 756 (Miss. 2002)."

Memorandum in Opposition to Summary Judgment included in footnote 1 clearly demonstrates the panoply of warranty issues presented to the Court below. Bowers' claim is without merit.

The homeowners' expert, Bill Birdsong, made trips to the house and personally inspected the faulty windows. He reviewed the discovery, the exhibits, and the extensive photographs. R.544-546. As far as conducting tests, the companies' own expert stated that testing was not necessary. Deponent Will Smith said, "As far as testing, that is not a requirement of standard. That is a requirement for factory testing." R. 830. There is nothing in this record that supports the companies' attempt to characterize this inspection as "cursory" or otherwise inept. No representatives of these Defendants were present on any occasion when Birdsong inspected. Windows that had clearly rotted, and the rot that surrounded them, were immediately apparent on visual inspection, which was noted by their own experts.

I. THE EXPERT TESTIMONY BY THE MISSISSIPPI CONTRACTOR ABOUT THE ROT AND DAMAGE SURROUNDING THE WINDOWS WAS IMPROPERLY EXCLUDED.

The Mississippi Supreme Court has always held respect for experts who learned by doing. In the case *Cain v. Mid-South Pump Co.*, 458 So.2d 1048, 1050 (Miss. 1984) the Mississippi Supreme Court held that "Obviously, a water well driller with 20 years of experience would qualify as an expert in the field and should be able to estimate how much it costs to replace a water well pump or motor. " The witness's qualifications evidenced his expertise in his business and were sufficient to establish his opinion based upon his knowledge and experience. *Id.*, at 1051.

Similarly, in *Schoppe v. Allied Chemical Division*, 418 So.2d 833 (Miss. 1982) this Court held that formal education is not the only means of becoming an expert in a field. There, the railroad had sprayed pesticides along its tracks that traveled through the plaintiff's farmland. The railroad offered expert testimony from highly educated chemists and engineers, while the plaintiff offered the testimony of three farmers to support his claim. Although none of the plaintiff's witnesses had any formal education in agriculture, they all had numerous years of experience in farming. The Mississippi Supreme Court affirmed the admission of the plaintiff's opinion testimony, holding that a witness may qualify to give an expert opinion through his experience only. See also, *Merritt v. Dueitt*, 455 So.2d 792 (Miss. 1984) where the Mississippi Supreme Court allowed expert testimony as to the number of cords of pulpwood at issue and its value, saying "For a Mississippi pulpwood hauler, he gave a pretty good standard as to the measure." *Id.*, at 793. *Early-Gary Inc. V. Walters*, 294 So.2d 181 (Miss. 1974) ruled that a Mississippi State professor on glassware could testify as an expert that the Heinz catsup bottle was defective, over an attack against his lack of professional credentials. The defense experts had opined that the Mississippi State professor's tests were in reality no tests at all. *Id.*, at 184. In response this Court held that the professor was an expert entitled to give opinion testimony because he had worked with glass, holding, "In order for one to qualify as an expert in the field, one must be shown to have acquired a special knowledge of the subject matter about which he is called to testify. This knowledge may be obtained by a study of recognized authorities or through

practical experience." *Id. Daubert*,[2] incorporated into Rule 702 of the Mississippi Rules of Evidence, does not change this law.

Rule 702 expressly allows expert testimony regarding non-scientific matters, so long as the witness's knowledge, skill, experience, training, or education qualify him as an expert in a given field, and (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. *Ross v. State*, 954 So.2d 968, 997 (Miss. 2007). The briefs of the window manufacturer and seller seem to want to put the rotten window frames into a test tube or under a microscope before a Ph.D. before acknowledging that the windows were rotten. Windows do not fit into a test tube any better than broken water well pumps can be fitted into a test tube or failed crops in the field can be fitted under a microscope.

There is reliable knowledge in traditional occupations. In a case such as this one, it is appropriate for the trial court to consider factors other than those listed in *Daubert*. *Zarling v. Seeling*, 2009 U.S. Dist. LEXIS 68547 (S.D. Miss. July 21, 2009). Here, the window experts, both for the homeowners and the window companies, relied mainly on their personal observations and professional experience. The Advisory Committee notes to Rule 702 specifically endorse this approach. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002).

"If the opinion satisfies the statutory requirements the witness has extensive experience and the witness's inference is more likely to be reliable than the trier's conclusion on the issue the non-scientific expert opinion qualifies for admission." Imwinkelried, Edward J., 50 *Case W.*

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[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Res. 19, 32, "Article: Should the Courts Incorporate a Best Evidence Ruling into the Standard Determining the Admissibility of Scientific Testimony?: Enough Is Enough Even When it Is Not the Best." Fall, 1999. As the United States Supreme Court held in *Kumho Tire v. Carmichael*, 526 U.S. 137, 156 (1999), "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."

When this Court adopted *Daubert* through its *McLemore* opinion, the Court emphasized the "the trial court's role as gatekeeper is not intended as a replacement for the adversary system." *Mississippi Transportation Comm. v. McLemore*, 863 So.2d 31, at 39 (Miss. 2003). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id,* at 36 (quoting *Daubert*, 509 U.S. at 595-96). These traditional tests, rather than the wholesale exclusion of testimony are the appropriate and time-honored safeguards for ferreting out the truth. *Gillett v. State*, 2010 Miss. LEXIS 337, *57-*58, P65 (Miss. July 1, 2010).

The Mississippi Supreme Court has consistently held that "Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one." *Denham v. Holmes*, 2010 Miss. App. LEXIS 148 (Miss. Ct. App. Mar. 23, 2010) (reversed and remanded for admission of expert testimony). The opinion in *McLemore* clearly states that "it is important to note . . . that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination: *Daubert's* 'list of factors was meant to be helpful, not definitive.'" *Poole v. Avara*, 908 So.2d 716, 723 (Miss. 2005).

In a case virtually identical on its facts, a general contractor was held competent to testify concerning windows in a damaged house. In *Bardley v. Kryvicky*, 577 F. Supp. 2d 466, 469 (D. Me. 2008) the state Supreme Court there held that a window expert's testimony was both relevant and reliable, and therefore admissible. The proffered expert had worked in the building trades for over 20 years. The expert, a Mr. Mercer, was:

> an expert in the construction industry, in which he has more than 37 years of experience as a builder and contractor. ...
>
> [The] testimony is predicated on Mr. Mercer's direct observation of the windows during two site inspections, as well as his review of various discovery documents, pleadings, photographs, inspection reports, expert reports, and extensive experience in the construction industry. ...
>
> In short, the Court is satisfied that the proposed testimony is both relevant and reliable, and that Mr. Mercer is qualified, based on his experience and direct observation of the relevant windows, to offer such testimony.

Id. Any remaining concerns would go to the credibility and weight of Mr. Mercer's testimony, and would therefore be best resolved via "the adversary process" at trial. *Id.* The Court specifically held the expert to be "qualified, based on his experience and direct observations of the relevant windows, to offer such testimony." *Id.* A more exactly parallel state of facts could hardly be found. The Court's ruling in the *Bardley* case offers compelling reasons for an identical decision from the Court on the facts here at hand.

As an analog to *Bardley*, the United States Court of Appeals for the Fourth Circuit has ruled that it was error for a plaintiff to fail to identify a witness as an expert supporting her claims to damage to her house resulting from faulty windows. *Brendrel v. Marvin Lumber and Doors*, 30 Fed. Appx. 221 (4th Cir. 2002). The witness testified as to the windows having leaked and rotted and having caused deterioration in the home requiring rebuilding. Since the sum of the

witness's testimony had been made available to the window company, the error was ruled harmless and the jury verdict for the plaintiff homeowner was affirmed. *Id.* This decision would show that it was required for the Plaintiff homeowners here, Curtiss and Ann McKee, to designate Bill Birdsong as an expert and would show that it was error for the circuit judge below to exclude his testimony.

The window company cites to the recent case *Hubbard ex rel. Hubbard v. McDonald's Corps.*, 2010 Miss. LEXIS 316 (Miss. June 24, 2010) where this Court reversed the trial court on expert witness qualifications and remanded requiring the court to admit the testimony of the plaintiff's expert. The trial court had disallowed the plaintiff's expert because his interpretation conflicted with the reading typically given to a test of pH in the birth canal. One typical reading was that a low value on the test meant that there was no leakage of amniotic fluid, but the plaintiff's doctor knew, from years of practice, that a high leak could be intermittent so that the test readings were invalid. The Mississippi Supreme Court ruled that the plaintiff created a jury issue on causation. The expert was permitted to testify because, based on his experience, he could read through the misinterpretations offered by that specific test. The expert's knowledge, gained from experience, triumphed over mere baseline mechanics. The homeowners in the present case offer the same sort of practical knowledge, gained from experience, to let their witness show the defects in the windows and the resulting damage to their house.

There are no tests of the windows that would add information. Learned studies would not be of aid to the jury. The window companies' own experts performed no tests and offered no studies to refute the conclusions reached by Bill Birdsong for the Plaintiff homeowners. The window companies could not show any material facts on which their experts differed from Bill

Birdsong as to the rot in the windows. The companies' experts never refuted the fogginess of the double-paned windows, or the danger from the large picture windows that were not made of tempered glass, or the rot.

Bill Birdsong was designated as a contractor with experience producing and installing wooden windows, R. 384, R. 561, with much more practical experience than the experts in bulk manufacturing and sales offered by the window companies. Birdsong and the Madison County Building inspector, together, were designated as experts who would testify that the large picture windows were not up to industry standards because those windows had not been built of tempered glass. R. 561. This testimony would be of aid to the jury and must be admitted under Rule 702 of the Mississippi Rules of Evidence. 702 (allowing expert testimony when it will "assist the trier of fact to understand the evidence or to determine a fact in issue"). Just as in the case *Rhaley v. Waste Management of Mississippi, Inc.*, 2010 Miss. App. LEXIS 228 (Miss. Ct. App. May 11, 2010), the expert opinion of an experienced witness is admissible based on his personal observations, review of photographs and deposition testimony, and comparisons showing that the problem observed was sufficient to be a substantial factor in causing the damage. In *Rhaley*, the Court reversed the trial court's grant of summary judgment and remanded the case for further proceedings consistent with its reversal allowing expert testimony.

II. THERE IS A MATERIAL ISSUE OF FACT CONCERNING THE DEFECTS IN THE WINDOWS AND THE RESULTING DAMAGE TO THE HOUSE PRECLUDING SUMMARY JUDGMENT.

A builder may be liable for construction defects under various legal theories - - contract, warranty, negligence, and strict liability in tort. *Anderson v. Fred Wagner & Roy Anderson, Jr.,*

Inc., 402 So.2d 320, 323 (Miss. 1981). In some cases, such as this one, proof of a malfunction will in and of itself be proof of a defect in manufacture. *BF Goodrich, Inc. v. Taylor*, 509 So.2d 895, 903 (Miss.1987). Public policy would require this result, because otherwise, a company's feigned ignorance, or willing failure to discover the defect, would be rewarded and additional consumers would face the same continuing damages. The failure to warn cause of action can be based on negligence or strict liability in tort, since the two theories, while conceptually different, often merge into a single breach of duty. *O'Flynn v. Owens-Corning Fiberglass*, 759 So.2d 526, 535 (Miss. Ct. App. 2000).

In the present case, Bowers made express representations to the homeowners, and there is direct evidence that the homeowners relied upon his recommendations, allowing the Bowers agent to choose their windows. There are therefore factual and legal bases for a breach of express warranty under the Mississippi Products Liability Act. *Cf., McSwain v. Sunrise Med., Inc.*, 689 F. Supp. 2d 835, 848 (S.D. Miss. 2010).

The implied warranty of merchantability establishes a jury question on the issue of whether there is substantial impairment in performance of the materials sold. *North River Homes, Inc. v. Bosarge*, 594 So.2d 1153, 1163 (Miss. 1992). The factfinder's resolution of this issue should entail a subjective *and* objective review of the evidence. The subjective component of the factfinder's review involves consideration of the "unique circumstances" of the purchaser. The objective component involves consideration of whether the defect would substantially impair the value of the good to a reasonable person whose unique circumstances are similar to the purchaser's, there, the homeowners. Further, an implied warranty of merchantability may not be waived or disclaimed. *Id.*, at 1159.

Additionally, the implied warranty of fitness for a particular purpose requires that where the seller at the time of contracting has reason to know any particular purpose for which the goods are required, or not required, and that the buyer is relying on the seller's skills and judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose. *Id*. The homeowners in this case relied, to their detriment, on the sellers' expertise to furnish suitable windows for the needs and location of their prospective house. *Id.* There are material issues of fact which preclude summary judgment on these questions.

III. RECUSAL OF THE TRIAL JUDGE WOULD BE APPROPRIATE ON REMAND.

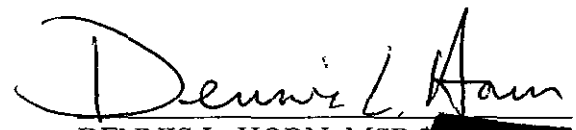
Judge Marcus Gordon, of the trial court below, did not confine himself to the qualification of Bill Birdsong, the homeowners' proffered expert. He went further to picture himself as an expert, based on his own experience, contrary to the position of the Plaintiffs. The trial judge graphically exhibited a predisposition on the facts. He testified in this case as to what he perceived the facts to be, and experienced a consequent conviction, on his part, that neither Defendant could possibly be liable in this action. This judicial testimony is far more than an error in the law, *e.g.,* a misconstruction of *Daubert*. It is a direct expression of judicial preference in favor of a factual issue and in favor of the Defendants against the Plaintiffs.

On remand, a suggestion of recusal from this case would be appropriate. *In Re: Burrow*, 2010 Miss. LEXIS 338 (Miss. July 1, 2010).

CONCLUSION

For these reasons, the decision of the trial court to exclude the testimony of the Plaintiffs' expert witness must be reversed and this case remanded for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis L. Horn, do hereby certify that I have this date served via United States Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellants, M. Curtiss McKee and Ann Craft McKee, to the following:

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This the 27th day of September, 2010.

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