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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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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.

1. Bowers Window & Door Company, Inc., Appellee herein, is the Defendant company that transferred and installed the allegedly defective windows.

2. Weather Shield Manufacturing, Inc., Appellee herein, is the Defendant company that manufactured the allegedly defective windows.

3. M. Curtiss McKee and Ann Craft McKee, Appellants herein, are the homeowners whose factual contention is that the windows leaked and their newly constructed house began to rot shortly after they moved in.

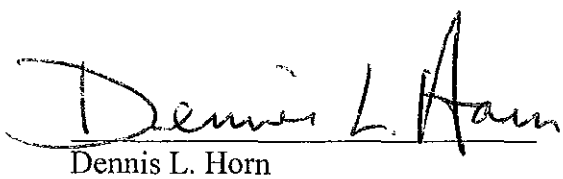
4. Timothy Crawley, Esq., Anderson Crawley & Burke, PLLC is attorney for Appellee, Weather Shield Manufacturing, Inc.

5. Wade Sweat, Esq., Copeland, Cook, Taylor & Bush, PA, is attorney for Appellee, Bowers Window & Door Company, Inc.

6. Dennis L. Horn, and Shirley Payne, Horn & Payne, PLLC, are attorneys for the Appellant homeowners.

7. Honorable Marcus Gordon is the Circuit Judge who entered the summary judgment and *Daubert* orders here appealed.

Respectfully submitted,



Dennis L. Horn

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES RELIED UPON

IN THE MISSISSIPPI SUPREME COURT

No. 2009-CA-01314

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STATEMENT OF THE ISSUES

1. Whether a proffered expert can be excluded under *Daubert* despite his twenty-four years of practical experience and familiarity with the usages of the trade?

2. Whether summary judgment must be reversed where extensive factual issues must be decided by a jury, including:

– whether seller breached an express warranty when the windows failed despite maintenance,

– whether finger-jointed windows should have been recommended as suitable for a lakefront home,

– whether windows that failed to exclude water from the house met expectations or would pass as adequate under usage in the trade,

– whether high humidity was factored into to the window companies' choice of windows,

– whether large pictures windows should have been recommended to be made of tempered glass,

– whether the window companies were negligent in their choice, manufacture, or assembly of the subject windows,

– whether windows that leaked immediately after the homeowners moved into their new house and which rotted through the window frames and surrounding walls, all within two years, would breach express warranties and warranties of merchantability and suitability for particular purpose, and

– whether an explanation that the windows would be satisfactory with proper maintenance operates as an express warranty?

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BRIEF OF APPELLANTS

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a home construction defects case. It involves issues of products liability, negligence, and breach of express and implied warranties.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Curtiss and Ann McKee commenced this action in the circuit court of Madison County, R. Vol. 1, 000016, after their newly constructed home revealed serious water damage and rot under the window frames throughout the interior of the walls. R. Vol. 3, 000320, p. 14. Their

discovery followed their having witnessed water flowing from and through the windows during the first rainstorms immediately after they moved in. R. Vol. 3, 000412, p. 12.

After several different judges recused themselves, R. Vol. 1, 000007, RE 12, the case was assigned to Honorable Marcus Gordan, who granted the summary judgment orders and an order excluding the homeowners' expert, which orders are appealed here. R. Vol. 13.

The current defendant appellees, Weather Shield and Bowers Window & Door, had filed motions for summary judgment and joined together in motions to strike the testimony of the McKees' expert witness building contractor, William A. Birdsong, Jr. Judge Gordon granted all defense motions. First, the court's bench opinion granted the *Daubert* motions to strike the homeowners' expert. R. Vol. 13, p. 39, RE 25. Next, the court granted summary judgment by two successive orders, first granting summary judgment for Bowers, R. Vol. 8, 001179, RE 35, and then for Weather Shield, R. Vol. 8, 001183, RE 37.

With regard to the expert witness, the circuit judge opined, "I sat here and I listened to all of you. A Judge has a difficult time separating his own personal beliefs and knowledge from the evidence of a case oftentimes. Uh - - I, as a grown person, a property owner, have an opinion myself about the - - uh - - effectiveness of wooden window and the finger-joints and - - you know, I'm familiar with finger-joints. I know what that is. Whether or not - - uh - - that - - uh - - is the proper joints that's - - would be utilized by the industry knowing that - - uh - - many homes today are still standing with wooden windows - - with finger-joints, perhaps my home may be one of those... I feel it very difficult to find that William Birdsong, under the decisions of the Kuhmo trial, the McLemore trial, and even the criminal case that was tried up in - - uh - - Columbus not too long ago, would qualify him under the facts of this case and with his testimony to give testimony as an expert, so that is the ruling of the Court." R. Vol. 13, p. 39-40, RE 25-26.

With regard to the summary judgment motions, the circuit judge ruled: "I think common knowledge of all of us who live in this area is that we have as state that - - uh - - unfortunately has a lot of humidity that - - uh - - causes wood to be subjected to rot and deterioration. All of us who are adult owners of homes with - - frame homes with windows would recognize that the great majority of the homes in this state have wooden windows. The Plaintiffs in this case should have known that in the location of their home near a lake near the water would be more susceptible to rot and deterioration than a home located somewhere else; yet they chose the site of their home. The Plaintiff, in my opinion, has to - - has failed to show a material matter to be developed. I'm going to sustain the motion....." R. Vol.13, p. 59. RE 28.

Meanwhile, the homeowners entered into a settlement with the general contractor who had supervised the building of their home. R. Vol. I, 000013. The contractor then dismissed its cross-claims against Defendant, Bowers Window & Door Company, Inc. R. Vol. 8, 001181, RE 33. The court below certified the first summary judgment decision as to Bowers for a Rule 54(b) appeal. R. Vol. 8, p. 1179, RE 35. After the court granted the second summary judgment as to Weather Shield, R. Vol 8, p. 1183, RE 37, the 54(b) certification became unnecessary. There were no issues remaining for decision in the court below.

The homeowners timely filed their appeals of both summary judgments. R. Vol. 8, 001185, and R. Vol. 9, 001202, RE 44 and 39. The Mississippi Supreme Court granted their motion to consolidate the appeals of the separate summary judgment orders, both of which had incorporated the circuit court's evidentiary *Daubert* ruling excluding the homeowners' expert.

FACTS

The photographs in this record show a ruined house. *E.g.*, R. 695, RE 52, and R. 722, RE 53.[1] The rot under and around the window frames can clearly be seen. *E.g.*, RE 51, 52, 54, and 55; R. 694, 695, 761 and 771. When the damaged walls were pulled apart, the underlying structures were rotten. R. 770. There were mushrooms growing from the window sills. R. Vol. 3, 424-425, pp. 60-61, R. Vol. 3, 433, p. 96. Insect infestation followed. R. 683, RE 49. Pictures showing the damage are included in the record excerpts. Further pictures appear in the record at Vol. 5, p. 638 through Vol. 6, p. 777, including pictures of the house as it was designed to look, Vol. 6. pp. 775 and 776.

The problems became obvious soon after the McKees moved into their new home. After "the first really heavy rain, we had water that went from the window near Curtiss's desk area in our keeping room to the door of our pantry - - the door to our utility room. We were standing in water." R. Vol. 3, 000412, p. 12.

Weather Shield and Bowers Window & Door, are the manufacturer and local seller, respectively, of the allegedly defective windows causing the extensive damage to the home. The windows were the first place that leaks and rot appeared in the ruined new house. R. Vol. 6, 777a. The homeowners, Ann and Curtiss McKee began, began construction on their new home in 1998. R. Vol. 3, 420, p. 42. They moved into the house in late 1999. R. Vol. 3, 412, p. 12. Immediately they saw that all of the windows, not only the windows in the kitchen area, were beginning to leak. R. Vol. 3, 413, p. 16. Shortly thereafter the home began to rot. Vol. 3, 414,

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[1] All photographs are authenticated by affidavit appearing at R.Vol. 5, 635-636, and by deposition at Vol. 6, 790, 43.

p. 20. The sashes in "movable" windows around the house leaked, causing the double panes to become cloudy. R. Vol. 5, 684, RE 50; R. Vol. 3, 000443, p. 135-136.. The windows rotted from and through the sills and the frames of the windows themselves. R. Vol. 6, 795, p. 64 and Vol. 5, 646, 690. When it rained you could see water standing on the window sills. R. Vol. 3, 415, p. 24. As Ann McKee said, "I actually saw water coming in from those windows onto the floor." R. Vol. 3, 415, p.23-24. "Mold was terrible in our house, where we actually had mushrooms growing out of windows...." R. Vol. 3, 424-425, pp. 60-61, R. 695, RE 52; R. 709. There are at least material issues of fact as to whether the windows were properly chosen, or sealed, or assembled[2], or preserved, to prohibit water intrusion and rot, as required by industry standards and common sense.

The Plaintiffs' building contractor witness, William A. Birdsong, Jr., is competent by experience to testify as an expert in the present case. He is a resident of Bolton, Mississippi. He is a general contractor who has worked in the Jackson, Mississippi, area on residential and commercial structures for 24 years. R. Vol 13, p. 5. He has worked on windows "thousands" of times. R. Vol. 13, p.6.

In the spring of 2002, the McKees contacted Mr. Birdsong. *Id.*, 13. At the time he examined the house, Mr. Birdsong noticed that windows were rotting and the fascia boards were rotting. R. Vol. 13, p.10, *Id.*, p. 14. Mr. Birdsong was of the opinion that the bulk of the problem with the house was water that came through the bottom seal of each window, the sash, went from there to and behind the stucco and thereby lead to termite problems and rot. R. Vol.

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[2] Some of the windows, the "composite" windows, were in all probability put together by the dealer, Bowers. R. Vol. 11, 001615-001617.

13, p. 8, *Id.,* 17-18.[3] The window company's expert agreed that the rot was extensive. "I'd call it severe. Extensive, yes. Q. And the house basically had to be rebuilt, didn't it? A. It had to be rebuilt." Vol.11, 001603, p. 77.

The entirety of Mr. Birdsong's 23+ years of experience have been in central Mississippi, the Jackson metro area. R.Vol. 3, 318, 6. Mr. Birdsong's opinion is that wooden windows in Mississippi eventually, even with maintenance, all are going to rot. *Id.*, pp. 26 -27. He testified in his years as a residential building contractor he only used wooden windows when the owners "were just hell bent on having them." R. Vol. 3, 323, pp. 24-27. If the homeowner has to have a wooden window, Birdsong counsels them not to use a "finger joint" (pieces of wood glued together to form the window frame, R. Vol. 10, 001460), which rot faster than a regular piece of wood. He recommends a solid type of mahogany or equivalent type of wood. Metal or vinyl clad windows would have been a better application in the McKee house. R. Vol. 3, 324, p. 30. If those windows had been installed in the McKee house, "We wouldn't be here today...." *Id.* The finger-jointed wooden windows were not suitable for the McKee home. R. Vol. 13, p. 8.

The large plate-glass windows in the back of the house overlooking the lake were large enough so that they should have been "tempered." R. Vol. 3, 324, pp. 31-32. The main reason for tempered glass is for safety so that if the window breaks it will not shatter into sharp pieces. *Id.*. p. 43. The windows initially placed in the McKee house were not tempered; that fact is verified because the windows did not have a stamp on them. R. Vol. 3, 329 p. 52. Equally, the large picture windows needed to be made of tempered glass, because, "it's just too big. Anything

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[3]For example, R. Vol. 5, 640, 641, 741 and 716 are photographs showing rot beneath the window sills. In the photographs at R. Vol. 6, 790 and 803, water is shown coming in through the window.

that size has to be tempered." R. Vol. 3, 327, p.42. Bowers failed to so inform the McKees, but let them rely on Bower's implicit warranty that the plate glass chosen by Bowers would be safe.

Mr. Birdsong observed that the finger joint on all of the windows where the water hits the stool (sill) started "the rot" "there and goes up." "It would rot." R. Vol. 3, 325, p. 36. It follows that in response to the question, "What should you do to keep water from getting around the sill like you described," Mr. Birdsong answered "don't use a wooden window on the outside." *Id.*, p. 37. Mr. Birdsong is of the opinion that metal clad or vinyl clad windows are appropriate because in central Mississippi those windows will not rot. R. Vol. 3, 328, p. 48.

Weather Shield's promotional literature states that "Weather Shield products are designed to perform under adverse weather conditions. Additional product options are available for extreme weather conditions such as seacoast climates... and higher humidity areas." R. Vol. 10, 001362, #6. Weather Shield's proffered expert Phil Drake purported not to know what that quoted passage from their own literature meant. R. Vol. 11, 001565, p. 28. His colleague Will Smith, however, explained that there were a number of options, including particular materials to be provided for certain environmental conditions, different stops, different weather strips, and closed sill versus open sill, double or triple glass and insulated glass. R. Vol. 11, 001614, pp. 18-20.

Weather Shield's expert Phil Drake admits "...you could change the materials to make it less maintenance in a high humidity area. ... For example, you could chose a vinyl window because vinyl is relatively unaffected by water and humidity." R. Vol. 11, 001566, p. 32. The windows ordered by Bowers in this case were made of pine. R. Vol. 11, 001571, p. 53 and 001613, p. 15. When asked again about using vinyl, "Q. Would it also be true you'd have less

rot with a vinyl window?" Phil Drake answered, "They – I've never seen vinyl rot yet." Vol. 11, 001581, p. 90.

The windows used in the McKee home apparently were designed for a less humid environment. Big picture windows such as the ones chosen under Bower's direction for the back wall of the great room, overlooking the lake, are commonly seen in the arid mountains of Colorado or Nevada, not over a lake in Mississippi. The windows did not meet specifications for Bower's own guidelines in the local climate. R. Vol. 10, 001362, #6. The product was designed in a defective manner because the windows were not sealed or treated to make them water resistant.

The windows failed to meet the express factual representations of Bower's salesperson, Mark McKee, who represented that wood windows would not rot if properly maintained. The McKees reasonably relied upon his representation. R. Vol 3, 000439, p. 117. There was an express verbal warranty. This conversation took place before windows were chosen for the house. The homeowners had described their proposed building specifications and plans. R. Vol. 3, 437-440. They were seeking the agent's advice. *Id.* They were clear that they had no independent knowledge of windows or window construction. *Id.* The agent speaking for the window companies was familiar with the homeowners' proposed location. In fact, he came out often to fish in the homeowners' lake, the very lake next to which the house was constructed, where the picture windows framed its view. R. Vol. 3, 440, p.122-123, Vol. 4, 499, p. 53. He chose the large picture windows and specifically recommended Weather Shield. R. Vol. 3, 439, p. 118. He told them that the wooden windows were reliable, that they would not rot if properly maintained. R. Vol. 3, 439, p. 117. The homeowners relied on this representation, much to their detriment.

Upon questioning by the Court, Bill Birdsong also expressed an opinion concerning the suitability of the windows and their price. He said, "I feel like that type of house there was probably an allotment of - - you know, they had so much money they could spend on windows. I may be wrong, but I would say that they probably were charged for the most expensive and got the cheapest. Now, that's my opinion." R. Vol. 13, p. 23. The Court then asked, "The finger-joint is cheaper?" and Mr. Birdsong replied, "Yes, sir. It's the cheapest made. I mean, it's just a - - it's as cheap as you can get." *Id.*

The homeowners were never advised that they were purchasing finger jointed windows. R. Vol. 3, 437 - 440. They assumed, based on the representations from the agent, that they were purchasing windows that were at least as reliable as the ones they had maintained next to the Pearl River swamp. *Id.*

The homeowners, however, had made it clear to the window dealer that they wanted their house to "be built in a very nice way" on a "cost plus contract" R. Vol. 3, 000436, p. 108, and that they wanted the windows that were "the best that they had." R. Vol. 3, 000438, p. 115.

There is at least a material issue of fact as to how the Plaintiffs came to make their selections of the windows. There is deposition testimony from both parties that Mark McKee, an employee of Bowers Window & Door Company, Inc.(no relation to the Plaintiffs), R. Vol. 3, 000412, p. 10, discussed the options available, made suggestions, and described the long term effects of the choices in terms of maintenance and reliability. R. Vol. 3, 000439, p. 117. He said that if we wanted wood windows 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." *Id.* The homeowners had previously lived close to the Pearl river and had wooden windows which they maintained and which did not rot. R. Vol. 3, 438, p. 113. The fact that Ann McKee had wooden

windows in her past home did not relieve Bowers of its duty to chose windows that would not immediately rot in her lakeside home. A jury could conclude that Mark's comments served as an express warranty as to the windows and that the express warranty was breached by the companies' derelict performance.

The seller, Bowers Window & Door, (not just Mark McKee) was apprised of the particular requirements of the McKee home. The company knew that the house was intended for a lakeside lot in a high moisture area. R. Vol. 3, 000412, p. 10. The company knew that synthetic stucco was to form part of the exterior shell. R. Vol. 3, 000431, p. 88. They 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. R. Vol 3, 000439, p. 117. The defects complained of 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.

The windows began to rot within a two-year period, indicating that they were not preserved at all. Additionally, Bowers sold large picture windows which were glazed and not tempered placed in the house within 18 inches of the floor and dangerous. R. Vol. 3, 324, pp. 30-31. The windows were contrary to the Madison County, Mississippi, building code because glazed windows which are not tempered are subject to shattering and causing serious bodily injury. R. Vol. 5, 611 - 612; Vol. 4, 561. Regardless of the structural failure and rot in the other windows of the house, these three very large, expensive, non-tempered windows in the back of the house overlooking the lake had to be replaced.

Mr. Birdsong has also supplemented his opinion with the results from Consumer Reports (Oct. 2007) which gave a poor rating to Weather Shield window products. R. Vol. 6, 864

(Weather Shield scored "1," "1" meaning "poor." R. Vol 6, 864). It is the testimony of the Plaintiffs' expert that, in his experience, "generally, that when you receive wooden windows like this, they are preprimed by the manufacturer..." "Generally they are." Deposition of Bill Birdsong, p. 56. The Weather Shield literature so states, representing that "...it is not necessary to reprime these surfaces. R. Vol. 10, 001357.

Bill Birdsong testifies that the windows would have to be replaced by tempered glass and that, based on his experience as a construction contractor in Mississippi, the rot to the windows, and consequent rot to the surrounding walls, was a proximate result of improper manufacture. Mr. Birdsong made his assertions based on his own experience in manufacturing windows, and his own observation that the windows should have been metal clad, or mahogany, and should not have had finger joints that allowed moisture invasion. R. Vol. 3, 000323-000324. The company's expert Will Smith agreed that mahogany was more water resistant than pine. R. Vol. 11, 001615, p. 22.

Problems with Weather Shield's water resistant coatings were laid out by Weather Shield itself when it sued the supplier of the wood treatment chemical. *Weather Shield Mfg., Inc. v. PPG Industries, Inc.*, 1998 U.S. Dist. LEXIS 22489 (W.D. Wisc. 1998). There, on a motion for summary judgment, the court set out the facts most favorably to Weather Shield, adopting the company's position as follows:

> Plaintiff [Weather Shield] is a manufacturer of wood windows and doors. Wet wood will rot, that is it will be attacked by wood decay fungi, unless it is treated with a preservative which kills wood fungi. Untreated wood products can fail due to decay within two to ten years depending upon geography, wood species, and other factors. Because it is virtually impossible to design windows and doors so that the wooden components are never exposed to moisture, manufacturers often treat the wooden components with a preservative designed to repel water and kill fungi. Plaintiff has been using wood preservatives since it began manufacturing in the 1960's.

Since about 1980 defendant has sold a wood preservative product known as PILT for use by millwork manufacturers. PILT, whose principal active fungicidal ingredient is tributyl-tin-oxide, was developed and promoted as being less toxic and more paintable than products using pentachloraphenol as the active fungicide. In 1986 the U.S. Environmental Protection Agency implemented severe restrictions on the use of pentachloraphenol.

Beginning in 1984 plaintiff began purchasing PILT from defendant for use in its window and door manufacturing operations. It purchased PILT for some of its manufacturing facilities between 1984 and 1994. During that period it also purchased wood preservatives**[*3]** from defendant's competitors but it used only one type of preservative at a time at each of its facilities and its use of PILT was substantially greater than other preservatives.

> During the same period plaintiff also purchased "high performance" coatings from plaintiff including Polyurea primer and Polycron and Flexatron topcoats for use on factory painted windows and doors. Defendant provided a 10 year film

integrity warranty on the high performance coatings provided, among other things, that PILT was used as the preservative prior to painting. The warranty did not extend to PILT.

In its promotion of PILT defendant distributed three brochures and made numerous oral representations extolling PILT's high quality and effectiveness. Among these representations were that PILT was comparable to or better than pentachloraphenol products, repels water and resists rot, was appropriate for use on exterior windows and doors, met industry standards for preservation and water repellence, defendant knew more about wood preservatives than its competitors, had performed well in extensive long term exposure testing and had been used successfully by other American and European window manufacturers. **[*4]**Defendant also represented that its system of preservatives and coatings was superior to other systems and suitable for use by plaintiff. Defendant offered application recommendations and quality control test procedures for its PILT customers and provided such advice and services to the plaintiff.

Plaintiff sells its windows and doors with an exclusive limited one year warranty on materials and workmanship from the date of purchase for the millwork components. The applicable warranties disclaim all other express or implied warranties and exclude incidental or consequential damages. Based upon its limited warranty plaintiff has denied warranty claims based upon rot complaints more than one year after sale. As a matter of business judgment plaintiff has, on a case by case basis, responded to thousands of rot complaints outside its warranty by offering replacement products at reduced or no charge.

> For units treated with PILT from 1983 to 1997 the complaint rate for rot is .076% of units sold, while the complaint rate for units treated with other preservatives is .039%. In early 1993 plaintiff suggested to defendant its belief that PILT was not properly controlling rot. Defendant maintained that plaintiff's rot problems were unrelated to PILT and that other window manufacturers were not experiencing problems. In 1994 plaintiff discontinued its use of PILT. Subsequently the parties entered a written agreement tolling the statute of limitations on all claims effective August 1, 1995.

Id. The McKee homeowners ordered their windows from Bowers in 1998, with the written orders stamped "Received" by Weather Shield in January, 1999. R. Vol. 10, 001401-001404..

SUMMARY OF THE ARGUMENT

There are material issues of fact that preclude summary judgment in this case. The homeowners have evidence that rain was running into their house through the windows when they first moved into the dwelling. There was an express warranty, or at least a material issue of fact concerning there being an express warranty that the windows would be satisfactory if maintained. The companies were on notice of the particular needs of the homeowners yet the product failed to satisfy implied warranties of merchantibility and fitness for a particular purpose. There are issues of fact as to the companies' negligence in choosing the windows, advising the homeowners concerning their choice, and manufacturing and assembling the windows. Undeniably alternative designs would have been available instead of the faulty windows installed that failed to perform as expected. The testimony of the homeowners' proffered expert was reliable, based on his experience in the building trade for over 24 years, and should not have been excluded.

Summary judgment must be reversed and the case remanded with instructions to permit the expert testimony of the homeowners' building contractor witness.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

The question of whether an injury was caused by a manufacturer's failure to properly equip a product is a fact question to be resolved by a jury. *Betts v. GMC*, 2008 U.S. Dist. LEXIS 54350, 15 - 16 (N.D. Miss. July 16, 2008). A grant of summary judgment will be upheld only when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact. *Miss. R. Civ. P. 56(c)*; *Northern Elec. Co. v. Phillips,* 660 So.2d 1278, 1281 (Miss. 1995), *Forbes v. GM*, 993 So.2d 822, 823, P5 (Miss. 2008). Only when the moving party is entitled to judgment as a matter of law is summary judgment appropriate. *Id.* This Court's well-established standard of review for a trial court's grant or denial of summary judgment is *de novo*. *Covington County Sch. Dist. v. Magee,* 2010 Miss. LEXIS 45 (Miss. Jan. 28, 2010).

In a nearly identical fact situation, summary judgment entered for a windows company in a home construction defects case was reversed and remanded for trial. *Winkel v. Windsor Windows and Doors*, 983 So.2d 1055 (Miss. 2008). There, Bernie and Rachel Winkel had filed suit against a window manufacturer, a synthetic stucco producer, and a contractor who installed the stucco exterior at their residence. They alleged several causes of action, virtually identical to the case here at hand. The window manufacturer, Windsor Windows and Doors, moved the circuit court for summary judgment in its favor. The circuit court granted that motion, only to have summary judgment overturned by the Mississippi Supreme Court.

Although the legal arguments in *Windsor Windows* differ from the arguments here, the summary judgment standard is the same. As stated by the Supreme Court in *Windsor Windows*:

"This Court conducts a de novo review of matters on summary judgment. Its familiar standards when reviewing summary judgment orders can be found within the rules of civil procedure as well as in this Court's previous opinions. *Miss. R. Civ. P. 56*; *Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988).*" *Windsor Windows*, at 1056, P3.

The burden is on the moving party to establish that there is no genuine issue of fact.... When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment has been sought should be given the benefit of every reasonable doubt. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983).

II. THE HOMEOWNERS' EXPERT WITNESS WAS QUALIFIED THROUGH YEARS OF EXPERIENCE IN THE TRADE.

The Plaintiff homebuilders' expert, contractor Bill Birdsong, is qualified to testify as an expert based on his extensive practice and experience. *General Motors Corp. v. Pegues,* 738 So.2d 746, 751-53 (Miss. Ct. App. 1998) (trial court did not abuse discretion in allowing local mechanic to offer expert testimony for the plaintiff in products liability case as to the cause and nature of the accident due to what the mechanic felt was a defectively designed automobile ball joint). See also *Hollingsworth v. Bovaird Supply Co.,* 465 So.2d 311, 314 (Miss. 1985); *Ford Motor Co. v. Dees,* 223 So.2d 638, 641 (Miss. 1969); and *Ford Motor Co. v. Cockrell,* 211 So.2d 833, 838 (Miss. 1968).

Under *Daubert,* Bill Birdsong, the Plaintiffs' expert, is qualified by his experience of over 20 years in the building trade. The Supreme Court points out that "relevant evidence" is that which has "any tendency" to make the existence of any fact more or less probable. Birdsong, as a contractor, would testify that metal clad windows would have been the appropriate choice for the McKee home. He would refuse to use wood at a location abutting a lake. Why he prefers

metal and why he would not use wood in the context of the McKee family home should be of assistance to the trier of fact. The gatekeeper (judge) should allow an experienced contractor to state his learned practices and give his reasons for those practices. Birdsong must be allowed to give his opinions concerning the windows.

The Fifth Circuit has determined that an expert assists the trier of fact when (s)he can "bring to the jury more than the lawyers can offer in argument." *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986). The focus of *Daubert* is not on qualifications, but on reliability. "As long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function." *Betts v. GMC, supra.*[4]

These Mississippi cases apply the standards for expert testimony established by the United States Supreme Court in the *Daubert* trilogy: *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Mississippi codified this evidentiary approach in its adoption of the amended Mississippi Rule of Evidence 702. According to the U.S. Supreme Court, the general approach of the Federal Rules of Evidence was "of relaxing the traditional barriers to opinion testimony." The Court referred to the preceding *Frye* standard as an "austere standard, absent from and incompatible with, the Federal Rules of Evidence." *Daubert*, 509 U.S. at 589. Under *Kumho Tire* the Supreme Court placed the gatekeeper function in the trial judge to rule on the admissibility of experts other than those in the exact sciences. It is generally held that no particular credentials are required for an expert. For example, one court has said, "anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury

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[4] Mississippi looks to federal interpretation of the Rules of Evidence for guidance. *Austin v. State*, 605 So.2d 14 (Miss. 1992).

may qualify as an expert witness." *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000). The Fifth Circuit is in accord, e.g., *U.S. v. Simmons*, 470 F.3d 1115, 1122 (5th Cir. 2006), as is the Mississippi Supreme Court, "a witness need not be a specialist in any particular profession to testify as an expert . . . . The scope of the witness's knowledge and experience, and not any artificial classification, governs the question of admissibility." *Kilhullen v. Kansas City Southern Railway,* 2009 Miss. LEXIS 87, 8 (Miss. February 26, 2009*). Kilhullen* reversed an order finding an experienced engineer not qualified, under *Daubert*, to testify. The Mississippi Supreme Court ruled that the expert's affidavit should not have been excluded and was sufficient to establish the existence of a material issue of fact that precluded summary judgment. *Id.*

Bill Birdsong testifies that the windows would have to be replaced by tempered glass and that, based on his experience as a construction contractor in Mississippi, the rot to the windows, and consequent rot to the surrounding walls, was a proximate result of improper manufacture and placement of wooden windows. Mr. Birdsong made his assertions based on his own experience in manufacturing windows, and his own observation of windows installed in Mississippi construction over the years of his construction career, thereby explaining the methodology he employed in arriving at his opinion, his own testing and data gathered by him, satisfying the requirements enumerated in *Glenn v. Overhead Door Corp.,* 935 So.2d 1074 (Miss. Ct. App. 2006). Contrary to Defendant's argument, it is not a necessary condition of wooden windows that they rot. Wood does not rot if it is protected, treated, or metal-clad in accordance with Mr. Birdsong's testimony.

As the Mississippi Supreme Court held in *Forbes v. GM*, 935 So.2d 869, 877, P13 (Miss. 2006)(products liability action), "No legal authority exists to require expert testimony in this

case, and we do not want to encourage such a rule," but further explained that the Plaintiff's "expert witness who, despite admitting that he was not an expert on air bag design or the various factors or conditions of air bags, had extensive experience as an expert witness in cases involving questions which required engineering and mechanical knowledge" nevertheless was adequate as an expert to give opinion testimony " ... and we cannot today find, based on lack of evidence, that the Forbeses did not meet their burden on this issue to show any defective condition of the air bag." *Id.*, at 879, P17. By the same reasoning, the testimony of Bill Birdsong meets the Plaintiffs' burden on summary judgment.

In *Alexander v. Meduna,* 47 P.3d 206 (Wy. 2002) a young engineer was found suitable to testify as an expert on water intrusion based, *inter alia*, on his "experience designing and inspecting residential buildings," and his "self-practice" for approximately eight years in the local area. *Id.*, at P23. Another court has recognized building contractors as among group of experts who routinely testify, observing "Like so many other experts who routinely testify before the court - - physicians, auto mechanics, psychiatrists, engineers, architects, computer scientists, building contractors, and the list goes on and on..." *State v. Motyka*, 2001 R. I. Super. LEXIS 3 (Rhode Island 2001)(emphasis added).

Calvetti v. Antcliff, 346 F. Supp. 2d 92 (D.C. Dist. 2004) specifically held that a building contractor such as Bill Birdsong was to be deemed an expert witness based on "intense practical experience" in the particular field. The defendants in that building defects case moved to strike the expert on the ground that his opinions were not based on articulable facts, similar to the grounds of the Defendants' motion in the present case. The court rejected that motion. The expert was admitted to testify as an expert in general contracting and in particular concerning the value and quality of work performed on the plaintiff's homes by the defendants, based on his

experience in 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 having been in the business for over twenty years. *Id.*, at 112 - 113.

In *GM v. Pegues, supra*, at 752-753, the plaintiff Pegues argued that the sole proximate cause of the collision and his resulting injuries was the unreasonably dangerous, defective design and manufacture of the front end ball joint assembly by GM. His expert witness testified to support this fact. The defendant objected. GM argued that plaintiff's expert had no formal education beyond high school to qualify him as an expert. *Id.*, at P11. The plaintiff responded that his expert had been a professional auto mechanic for forty years, owned his own business, 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, Pegues contended that the expert's opinions were based on his personal examination of the pickup truck, its ball joint, and its front-end assembly. *Id.*, P12. It was the Court's opinion that the plaintiff's expert was fully qualified to testify as an expert in auto mechanics. *Id.*, P15.

The *Pegues* case is similar to the court's holding concerning the expert in *Ford Motor Co. v. Cockrell,* 211 So.2d 833, 838 (Miss. 1968), where a mechanic was qualified as an expert and testified about a defect in a truck's electrical system, and in *Ford Motor Co. v. Dees,* 223 So. 2d 638, 641 (Miss. 1969), where a part owner and manager of a large automotive repair shop was qualified to testify as an expert on construction and working of a steering mechanism of a pickup truck. In *Pegues* the plaintiff's witness was qualified as an expert and testified that it was his opinion that the accident occurred because of a defected front-end ball joint that broke as Pegues was driving the vehicle. "An expert's qualifications and the basis of his conclusions are open to

cross examination. The jury, as is their province, may reject the expert's testimony as they might any other witness." *Hollingsworth v. Bovaird Supply Co.,* 465 So.2d 311, 314 (Miss. 1985). Similarly, in *Ford Motor Co.* the Supreme Court stated, "He did aid the jury with his expert knowledge, but he did not invade the province of the jury and furnish them with the ultimate answer." *Ford Motor Co.,* 223 So.2d at 641.

Rule 702 of the Mississippi Rules of Evidence provides, on its face, that expert testimony is admissible from "a witness qualified as an expert by knowledge, skill, experience," all qualities met by Mr. Birdsong.

The Mississippi Supreme Court has ruled it an abuse of discretion to exclude an expert and reversed and remanded a case where the expert's formal qualifications were missing, but where the pertinent testimony was based on education and years of experience. "A witness need not be a specialist in any particular profession to testify as an expert. The scope of the witness's knowledge and experience, and not any artificial classification, governs the question of admissibility." *Investor Res. Servs. v. Cato,* 15 So.3d 412 (Miss. 2009). Further, nothing in the amendments to Rule 702 is intended to suggest that experience alone - or experience in conjunction with other knowledge, skill, training or education - may not provide a significant foundation for expert testimony. Fed. Rule Evid. 702 advisory committee note, quoted in *Betts v. GMC, supra.*

III. BOTH WINDOW COMPANIES FAILED TO SATISFY THEIR IMPLIED WARRANTIES.

"*Untreated* wood products can fail due to decay within two to ten years depending upon geography, wood species, and other factors." (Emphasis added.) *Weather Shield Mfg., Inc. v. PPG Industries, Inc.*, 1998 U.S. Dist. LEXIS 22489 (W.D. Wisc. 1998). This admission was made by Weather Shield itself in its pleadings against a faulty wood preservative distributor.

Clearly Weather Shield was on notice, and admitted it was on notice, of its own defective products. Since the McKees' windows rotted within two (2) years, Weather Shield is admitting that it sold what amounted to untreated, unprotected wood that was destined to rot within two years. Under the Defendant's own statement, rot within two years is what occurs when windows are improperly made of untreated wood. Summary judgment must be denied on this case against Weather Shield.

Problems with Weather Shield's water resistant coatings were laid out by Weather Shield as a plaintiff when it sued its supplier of the wood treatment chemical. *Weather Shield Mfg., Inc. v. PPG Industries, Inc.*, 1998 U.S. Dist. LEXIS 22489 (W.D. Wisc. 1998). There, on a motion for summary judgment, the court set out the facts most favorably to Weather Shield, adopting the company's position as follows:

> Plaintiff [Weather Shield] is a manufacturer of wood windows and doors. Wet wood will rot, that is it will be attacked by wood decay fungi, unless it is treated with a preservative which kills wood fungi. Untreated wood products can fail due to decay within two to ten years depending upon geography, wood species, and other factors. Because it is virtually impossible to design windows and doors so that the wooden components are never exposed to moisture, manufacturers often treat the wooden components with a preservative designed to repel water and kill fungi. Plaintiff has been using wood preservatives since it began manufacturing in the 1960's.

Id., * 1 - 2. The Plaintiffs in the present case purchased their windows in 1998.

PPG Industries, Inc., was filed the same year Weather Shield manufactured the windows placed in the McKees' home. Weather Shield and Bowers as a matter of law were then on notice that the sealant used was defective.

The windows companies breached both their implied warranty of merchantability and fitness for a particular purpose. Under contract law, the vendor/suppliers are liable even in the absence of negligence and in the absence of express warranty because of the implied warranties

that the work would be acceptable in the trade without objection. *Southland Enters. v. Newton County*, 838 So.2d 286 (Miss. 2003).

The implied warranty of merchantability may not be waived or disclaimed in Mississippi. § 11-7-18 Miss. Code Ann. (Supp. 1972); § 75-2-719 (4) Miss. Code Ann. (Supp. 1972); *Beck Enterprises, Inc. v. Hester*, 512 So.2d 672, 676 (Miss. 1987). Although the Mississippi Products Liability Act creates a cause of action for breach of express warranty, it does not preclude the breach of implied warranty claims under the Mississippi Uniform Commercial Code in products liability actions. *Bennett v. Madakasira,* 821 So.2d 794, 808 (Miss. 2002).

Parker v. Thornton, 596 So.2d 854 (Miss. 1992) was a ruling by the Mississippi Supreme Court that overturned a jury verdict and remanded in favor of a home buyer's action for negligence and breach of express and implied warranties on the couple's newly constructed home. Although the contractor knew of problems, he failed to warn the home buyers. Here, Weather Shield knew of problems but failed to warn the McKees. "The failure to give notice was a failure to meet his obligations in a workmanlike manner and a breach of the implied warranties of fitness and habitability." *Id.*, at 858.

Our Mississippi Courts have held that an implied warranty of habitability warrants "the house has been built in a safe and workmanlike manner. *Houston v. York*, 755 So.2d 495, 502 (Miss. Ct. App. 1999).

IV. THE COMPANIES WERE NEGLIGENT IN CONSTRUCTION OF WINDOWS.

Regardless of the applicability of warranties, for a house that has not been completed in a safe and workmanlike manner, the seller "is negligent, in any event." *Houston v. York, supra.*

It is the testimony of the homeowners' witness, Bill Birdsong, that, in his experience,

"generally, that when you receive wooden windows like this, they are pre-primed by the manufacturer..." "Generally they are." Deposition of Bill Birdsong, p. 56. For these windows to have rotted within a two year time frame, there was negligence involved. There are fact questions on negligence which require a decision from a jury, thereby precluding summary judgment.

Mississippi has adopted a general definition of actionable negligence based upon duty arising from a contract such as the contract to purchase the windows involved here.

> Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty by the other, and such duty must be imposed by law.... The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basis rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to govern his actions as not to endanger the person or property of others.... Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract ....

George B. Gilmore Co. v. Garrett, 582 So.2d 387, 391 (Miss. 1991)(award for home damage resulting from negligence); adopting 65 C.J.S. Negligence, § 4, pp. 494, 496 (1966), and further held those in the building trades responsible for workmanlike performance:

> One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill and ability, with reference to matters relating to such calling, which others engaged therein ordinarily possess. He also represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of work for which his services are engaged, within the limits of such calling.

Id., at 392.

These issues present several questions of fact: whether the wood was inferior, whether the product was inherently unsatisfactory in Southern/damp climates, especially alongside a lake, and whether the failure to pre-treat the windows was unreasonable.

V. THE WINDOWS WERE DEFECTIVE UNDER A PRODUCTS LIABILITY ANALYSIS.

Under Mississippi law, a product is defective by design, if, at the time the product left the control of the manufacturer, (a) the seller knew or should have known about the danger that caused the damage for which recovery is sought; (b) the product failed to function as expected; and (c) there existed a feasible design alternative that would have to a reasonable probability prevented the harm. Miss. Code Ann. § 11-1-63; *Betts v. GMC, supra.*

Weather Shield must be concerned that its products repel and exclude water, necessary to make a house impervious to the weather. That purpose defines the usefulness of their product for its intended purposes. This fact distinguishes the present case from *Moss v. Batesville Casket Co., Inc.*, 935 So.2d 393 (Miss. 2006). Ordinary purposes include both those uses which the manufacturer intended and those which are reasonably foreseeable. *Id.*, at 401, P 28. The ordinary purpose of a wooden casket is to house the remains of the departed until interment. Thus, the ordinary purpose for which the casket was designed ceased once the pall bearers bore the casket from the hearse to the grave site for burial. *Id.*, at 402, P 30. The casket was guaranteed to be "manufactured from solid hardwoods, and [to be] free from defects in materials and workmanship. If, at any time prior to the interment of this casket in an initial place of interment, it is found to be defective in materials or workmanship..." the casket would be replaced. *Id.*, at 396, P 9. In contrast, Weather Shield was producing a product offered as merchantable in a house, and fit for that purpose. There was no discussion whatsoever in the

Moss v. Batesville Casket case about whether or not the wood was sealed or chemically treated or otherwise preserved. That case is not on point.

Under detailed scrutiny, the Mississippi Products Liability Act, § 11-1-63 Miss. Code Ann. (Supp. 1993), allows a claimant to make out a prima facie case of products liability by showing that (1) a product is defective, (2) that the defect causes the product to be unreasonably dangerous, (3) that the unreasonably dangerous defect causes the harm complained of, and (4) that the defective condition exists at the time the product leaves the control of the manufacturer or seller. *Williams v. Bennett,* 921 So.2d 1269 (Miss. 2006). The first step under the Mississippi Products Liability Act contains four possible sub-parts.

> (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;

§ 11-1-63(a)(i) Miss. Code Ann.

§ 11-1-63(a)(ii) requires that the defective condition render the product unreasonably dangerous to the user or consumer. § 11-1-63(a)(iii) requires that the defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought. *Glenn v. Overhead Door Corp.,* 935 So.2d 1074 (Miss. Ct. App. 2006).

There was no warning from the windows companies that the windows would leak and ruin the house. Whether any form of communication is a warning or a reasonable warning under the circumstances is a question to be resolved by the trier of fact. *Bennett v. Madakasira, supra,* 821 So.2d at 805 (Miss. 2002).

This history of rotting windows satisfies § 11-1-63(f)(I) that "the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition" under the Mississippi Products Liability Act. *See, Coleman v. Danek Medical, Inc.*, 43 F. Supp.2d 637 (S.D. Miss. 1999).

VI. THERE IS A MATERIAL ISSUE OF FACT ON THE BREACH OF EXPRESS WARRANTY.

There is a material issue of fact as to whether the sellers' representations about the wooden windows created an express warranty and whether the sellers' knew or should have known about the danger of water intrusion through the subject windows that would render them liable for their defective products. § 11-1-63 (a)(i)(4) Miss. Code Ann. "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." § 75-2-313 (1)(a) (Supp. 1972).

A product is in breach of an express warranty where it has failed to conform to express factual representations upon which the claimants have justifiably relied in electing to use the product. *Williams v. Bennett,* 921 So.2d 1269 (Miss. 2006).

A reasonably prudent person, such as either of the McKees, would believe the agent, Mark McKee, to have authority to speak about the suitability of the windows. They did not have any basis to think otherwise. The question of Mark's authority to speak about the windows is

also a question for the jury to decide as trier of fact. *Ciba-Geigy Corp. v. Murphree*, 653 So.2d 857, 872 (Miss. 1994).

In *Ciba-Geigy Corporation v. Alter,* 309 Ark. 426, 834 S.W. 2d 136 (Ark. 1992) the court enforced an express warranty issued verbally by a salesperson. In that case, two Ciba-Geigy sales representatives met with several Arkansas County farmers to promote the use of a product called "Dual." Plaintiff Alter was present at the meeting. Alter testified the salesmen told him Dual would control weeds longer at a cheaper price than other herbicides. They also said Dual was safe and would not injure a corn crop. Although the salesperson knew that Dual could damage a corn crop if the crop received heavy moisture after planting, he did not tell Alter about that possibility. Hazards associated with Dual use were not mentioned. The farmer purchased Dual in reliance on the representations made by the salesmen. He began planting his 997.8 acre corn crop on March 19th. A week and a half later Alter applied Dual to the crop. Midway through the Dual application, a heavy rain fell. Alter noticed severe injury to his corn crop in early May. Some corn was simply not coming up, and other plants looked twisted and "buggywhipped." The crops treated with Dual nearest the time of the rainfall were severely injured, but those treated with Dual after the rainfall were not injured. The Supreme Court there held that the verbal representations were enforceable.

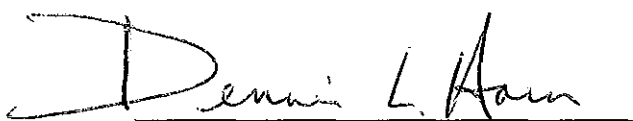
Similarly in *Nichols v. American Cyanamid*, 2007 U.S. Dist. LEXIS 56063 (E.D. Ark. 2007), relying on *Ciba-Geigy Corporation v. Alter*, the court there held that the characterization of the alleged warranty by the salesperson was an issue that must be determined by a jury and reversed a summary judgment. Mississippi has similarly acknowledged that "[s]uch a warranty may be verbal as well as written." Cf., *Fitzner Pontiac-Buick-Cadillac v. Smith*, 523 So.2d 324, 326 (Miss. 1988).

In the present case, the McKees reasonably relied upon the representations of the window salesman, whom they reasonably believed to be knowledgeable and authorized to speak as to the suitability of the windows. They made their choice in accordance with his representations. There is at the very least an issue for the jury to decide as to the express warranty that the windows would be serviceable if maintained. The McKees discovered the extent of the damage to their house as a direct result of their attempt to perform maintenance above and beyond what would normally be sufficient. The question of whether the defendants breached this express warranty must go to the jury.

CONCLUSION

This Court must reverse the summary judgment entered below as to both defendant window companies, the manufacturer and the dealer/assembly agent. The testimony of the homeowners' expert witness should not be excluded under *Daubert*. This case must be 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 Brief of Appellants, M. Curtiss McKee and Ann Craft McKee, to the following:

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This the 21st day of May, 2010.

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