IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 2000 Session

CYBILL SHEPHERD v. WEATHER SHIELD MANUFACTURING, INC.

Appeal from the Chancery Court for Shelby County
No. 106636-1 Walter L. Evans, Chancellor

No. W1999-00508-COA-R3-CV

The plaintiff brought suit against a manufacturer of windows and doors for allegedly supplying defective products which allowed substantial leaks into her dwelling and caused rotting because of excessive moisture. Following a nonjury trial, the trial court denied the plaintiff's claim pursuant to the Tennessee Consumer Protection Act but awarded judgment to the plaintiff on her claim that the defendant supplied defective doors and windows. Based upon our review, we affirm the trial court's denial of the Tennessee Consumer Protection Act claim. Finding that the plaintiff did not provide notice to the defendant of its allegedly defective product within the applicable statute of limitations, we reverse the award of damages to the plaintiff and dismiss her complaint.

Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

ALAN E. GLENN, SP. J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Kenneth R. Shuttleworth and William C. Sessions, Memphis, Tennessee, for the appellant, Weather Shield Manufacturing, Inc.

Jeffrey A. Land and Timothy P. Harrison, Atoka, Tennessee, for the appellee, Cybill Shepherd.

OPINION

The plaintiff, Cybill Shepherd, brought a complaint against the defendant, Weather Shield Manufacturing Inc., because it allegedly supplied defective windows and doors for a residence which was constructed for the plaintiff at a development on the bluff overlooking the Mississippi River in Memphis, Tennessee. Following a bench trial, and judgment awarded to the plaintiff, the defendant timely appealed, presenting the following issues:

I. Is an exclusion of consequential damages unconscionable or invalid as a matter of law if a warranty fails?

II. Is a buyer barred from any remedy for breach when the buyer does not notify the seller of any defect within the warranty period?

III. Should a claim for damages to a home be dismissed when there is no evidence that plaintiff owns the home?

IV. Does an agreement that expressly releases all persons from "any and all claims" resulting from an architect's services and advice release a window manufacturer from water-damage claims when the architect selected windows that were inappropriate for the type of exterior finish used and then refused to allow proper installation?

V. The trial court's findings of fact and conclusions of law regarding damage calculations are unsupported by credible evidence in the record and, therefore, based on speculation and conjecture.

VI. The trial court erred in awarding the plaintiff $4,000 in discretionary costs.

The plaintiff raised an additional issue on appeal:

I. Did the trial court err in not finding that the defendant had violated the Tennessee Consumer Protection Act?

FACTS

In 1991, the plaintiff, Cybill Shepherd, entered into a contract for construction of a residence on lots 3 and 4 of South Bluff, Magnolia Mound Drive, in Memphis, Tennessee. Walton Watson Construction Company, with whom the plaintiff contracted on August 5, 1991, was to be the general contractor. The plaintiff contracted with Francis Mah to be the architect. Mr. Mah had graduated from Yale University in 1952, receiving both a bachelor's degree, as well as a master's degree in architecture. He was employed as an architect with the Memphis architectural firm Jones, Mah, Gaskill and Rhodes from approximately 1955 until 1990. For the past five years, Mr. Mah had taught architectural design at the University of Memphis.

As originally designed, the house was to have an "exterior insulating finishing system (FFIS), commonly referred to as Dryvit drywall." A stipulation of the parties was that Dryvit construction detail "includes a rain barrier which is designed to function as a weatherproof membrane to keep rain from penetrating the interior of the walls." Subsequently, change order no. 3, dated April 3, 1991, provided that the exterior of the plaintiff's house was to be natural stucco, rather than Dryvit, as first intended.

There were numerous defects in the house, consisting primarily of rotting wood around windows and doors and water leaks in various parts of the house. An additional stipulation of the parties was that "[no] moisture barrier [was] installed between the structure and the stucco application causing water penetration throughout the residence." Based upon the numerous defects during the construction, the plaintiff brought this action against the general contractor, the architect, the subcontractor which had applied the stucco finish to the house, the material supplier which had furnished the doors and windows for the house, the electrical subcontractor, and Weather Shield, the manufacturer of some of the windows and doors incorporated into the house. Before the trial of the complaint against Weather Shield, the claims as to all of the other defendants had been resolved. Following the trial in this matter, the trial court awarded the plaintiff a judgment against Weather Shield in the amount of $108,882.00.

Francis Mah, the designer of the house, decided to utilize wood windows which he intended to purchase from Schaefer Sash and Door, a Memphis company which sold windows from several different manufacturers. He reviewed warranty information from Weather Shield, and decided to utilize their windows rather than those made by Pella, another window manufacturer, because, although the Pella windows were more expensive, the windows were similar in appearance. As Mr. Mah requested, Schaefer ordered for the house Weather Shield wood windows with standard brick molds. The windows were shipped by Weather Shield to Schaefer on January 12, 1992, which, in turn, delivered the windows on January 29, 1992, to the site where the plaintiff's house was being constructed. The windows were installed by Watson, the general contractor

At some point, in an attempt to determine what was causing the leaking problems, contact was made, first apparently, with Schaefer Sash and Door. According to the testimony of Jim Watson, there were a "couple of conversations with Schaefer Sash and door [sic]," who came to the site once. Watson and Mah were then "put in touch with some representatives from Weather Shield, and we had a couple of phone conversations." Later, two Weather Shield representatives met with Mah and Watson at the plaintiff's residence. Watson testified that he did not recall when this meeting took place. The trial court found that it occurred in March 1993. There was no testimony which established the date upon which Weather Shield was notified of the alleged defective nature of its product.

In June 1996, the plaintiff employed Dan Wilkins, a structural engineer from Boulder, Colorado, to assist with the problems she was having at her residence. Wilkins spent a substantial amount of time investigating the matter and testified at the trial as the plaintiff's expert witness in this regard.

ANALYSIS

Since this case was tried by the trial court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Tenn. R. App. P. 13(d), ***State v. Levandowski***, 955 S.W.2d 603, 604 (Tenn. 1997).

I. Exclusion by Warranty of Consequential Damages

II. Statute of Limitations

Each Weather Shield window delivered to the site where the plaintiff's house was being constructed had affixed a sticker which set out the warranty:

> The warranties described below are subject to the limitations and requirements described in the warranty provisions themselves and under "Specific Limitations" and "General Provisions."
>
> **GENERAL WARRANTY (ONE YEAR)**
>
> Weather Shield warrants that its products shall be free from defects in material and workmanship for a period of ONE (1) YEAR from the date of purchase.
>
> . . . .
>
> **SPECIFIC LIMITATIONS**
>
> . . . .
>
> Weather Shield's Obligation. Except as otherwise more specifically provided in this Limited Warranty and Adjustment Policy, Weather Shield's obligation under this Limited Warranty and Adjustment Policy shall be limited to, at its option and expense, its repair of or provision of a comparable new Weather Shield replacement part for any part which Weather Shield determines to be covered by this Limited Warranty and Adjustment Policy.
>
> . . . .
>
> **GENERAL PROVISIONS**
>
> THERE ARE NO OTHER WARRANTIES EXCEPT AS SET FORTH HEREIN. ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE LIMITED IN DURATION TO THE PERIOD OF COVERAGE OF THESE

> EXPRESS WRITTEN WARRANTIES. WEATHER SHIELD SHALL NOT BE LIABLE FOR APPLICABLE TAXES OR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, DAMAGE OR LOSS TO PERSONS OR OTHER PROPERTY. Some states do not allow limitation on how long an implied warranty lasts and some states do not allow the exclusion or limitation of incidental or consequential damages, so these limitations or exclusions may not apply to you. These warranties give you specific legal rights, and you may also have other rights which vary from state to state. NO DISTRIBUTOR, SALESPERSON, DEALER, RETAILER OR OTHER REPRESENTATIVE OF WEATHER SHIELD HAS THE AUTHORITY TO MAKE WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR TO ALTER OR CHANGE THESE WARRANTIES EITHER ORALLY OR IN WRITING.
>
> To obtain service under these warranties, contact Weather Shield Mfg., Inc., P.O. Box 309, Medford, WI 54451, telephone 715-748-2100, giving the model and identification numbers of the product, the date of purchase and the nature of the claimed defect or problem. In addition, Weather Shield reserves the right to inspect, or designate a person to inspect, any part that is claimed to be defective and covered by these warranties.

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Based upon this warranty, the defendant argues that the plaintiff is not entitled to recover any damages because of the plaintiff's alleged failure to notify the defendant of the defective product within one year of the date of sale. Additionally, the defendant contends that, even if notice were timely, the plaintiff's recovery cannot include consequential damages resulting from the allegedly defective windows.

The plaintiff contends that timely notice was given of the defects and that she is entitled to consequential damages because the contractual exclusion of consequential damages was unconscionable. Additionally, she contends that the circumstances surrounding the transaction created unequal bargaining positions of the parties.

The question of whether terms limiting consequential damages should be judicially enforced is a question of law. In ***Moore v. Howard Pontiac-American, Inc.,*** 492 S.W.2d 227 (Tenn. Ct. App. 1972), cert. denied (Tenn. 1973), this court addressed the issue of whether the plaintiff was entitled to the remedy of a rescission of a contract for the sale of an automobile. We addressed the ability of a party to limit remedies in a contract stating:

> The seller of personal property may specifically limit the buyer's remedies for breach of warranty to the repair and replacement of non-conforming goods or parts by the seller; however, where the

> circumstances cause such a limited remedy to fail of its essential purpose, the buyer no longer is limited to the remedy provided in the agreement but has available the remedies provided by the Uniform Commercial Code. See T.C.A. 47-2-719(1)(a), (2) and (3). ***See also*** 17 A.L.R.2d 1010 et seq.

Moore v. Howard Pontiac-American, Inc., 492 S.W.2d at 229.

According to the foregoing, the full range of remedies under the Uniform Commercial Code, as adopted by Tennessee, would be available where a warranty failed of its essential purpose pursuant to Tenn. Code Ann. § 47-2-719(1)(a), (2) and (3). However, the interpretation of § 47-2-719 (2) and (3) has received specific attention.

Section 47-2-719 provides:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages:
>
> > (a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
> >
> > (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chapters 1-9 of this title.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

There has been a distinction made by Tennessee courts between a warranty failing of its essential purpose, and a term excluding consequential damages being unconscionable. Notes to Tennessee Code Annotated § 47-2-719 (3) cite ***Aquascene, Inc. v. Noritsu Am. Corp,*** 831 F. Supp. 602 (M.D. Tenn. 1993), for the proposition that "[a] consequential damages exclusion is waived only

if the exclusion was itself unconscionable; a finding that a warranty failed of its essential purpose would not automatically waive a consequential damages exclusion."

Aquascene, Inc. v. Noritsu Am. Corp, supra, addressed the issue of the relationship between subsections (2) and (3) of § 47-2-719. In ***Aquascene,*** the plaintiff brought a products liability action against a photographic minilab alleging that the limited warranty provided by the defendant failed of its essential purpose, and that breach of warranty and consequential damages were therefore recoverable. In deciding this issue, the ***Aquascene*** Court looked to the Sixth Circuit case ***Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage***, 709 F.2d 427 (6th Cir. 1983) for guidance. That Court anticipated how the Washington Supreme Court would handle the interpretation of those subsections. After an analysis of legislative intent and the rules of statutory construction, the ***Lewis Refrigeration*** Court concluded that Washington courts would hold that in order for a consequential damages exclusion to be waived, the exclusion itself must be found unconscionable. ***Aquascene,*** 831 F. Supp. at 604. Thus, a finding that the warranty has failed of its essential purpose does not automatically waive an exclusion of consequential damages. ***Id.*** The ***Aquascene*** Court followed the reasoning of the ***Lewis Refrigeration*** Court and held that "the Tennessee Supreme Court is likely to interpret subsections (2) and (3) of section 47-2-719 independently." ***Id.***

Accordingly, a plaintiff seeking to show waiver of an exclusion of consequential damages must prove that the exclusion itself is unconscionable. ***Id***. at 605 (citing Tenn. Code Ann. § 47-2-719(3)).

> Whether a contract term is unconscionable is a question of law, and a presumption of permissible dealings exists between commercial parties. ***See Lewis Refrigeration,*** 709 F.2d at 435 & n. 12. Under Tennessee law, a contract term is unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so repressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. ***Haun v. King,*** 690 S.W.2d 869, 872 (Tenn. Ct. App.1984) (citations omitted).

Aquascene, 831 F. Supp. at 605. The Court held that the defendant's motion for summary judgment should have been granted on the issue of consequential damages, as the damage exclusion was not unconscionable. ***Id.*** In so holding, the Court reasoned that the plaintiff had not rebutted the defendant's proof on summary judgment that the bargaining between the parties was relatively equal and fair, and found that both parties were sophisticated and intelligent. ***Id.***

In ***Arcata Graphics Co. v. Heidelberg Harris, Inc.,*** 874 S.W.2d 15, 29 (Tenn. Ct. App. 1993), ***perm. appeal denied*** (Tenn. 1994), this court clarified the concern of U.C.C. § 2-719(2), permitting contractual limitation of remedies and codified in Tennessee as Tennessee Code Annotated § 47-2-719(2). The plaintiff in that case argued that the limitation on remedies failed of its essential

purpose, thereby entitling him to remedies sought under breach of contract and/or warranty. ***Id.*** [1] The court stated that in order for the plaintiff to be entitled to the remedy sought for breach of contract and/or warranty, he must qualify under the exception to the general rule that parties may limit contractual remedies. This court disallowed the plaintiff to utilize the exception allowed pursuant to Tennessee Code Annotated § 47-1-719, explaining:

> U.C.C. § 2-719(2) provides that "an exception arises when circumstances cause an exclusive or limited remedy to fail of its essential purpose." Tenn. Code Ann. § 47-2-719(2).
>
> Here, Hawkins has argued a failure of essential purpose. However, we are of the opinion that this argument is without merit in view of the adequate remedy provided in the contract, and offered by Harris, which allowed Hawkins to receive at no cost the type of dampening system it desired or to return the presses and receive a refund of the purchase price. These are fair and adequate remedies and were never invoked by Hawkins. The contractual remedy did not fail as a matter of law. U.C.C. § 2-719, per comment 1, requires only a "minimum adequate remed[y]." Section 2-719(2) is concerned with the essential purpose of the remedy chosen by the parties, not with the essential purpose of the code or of contract law, or of justice and/or equity. 1 White and Summers, *Uniform Commercial Code* § 12-10 (3d ed. 1988). U.C.C. § 2-719(2) is concerned only with novel circumstances not contemplated by the parties and does not contemplate agreements arguably oppressive at their inception. ***Id.***

Arcata Graphics, 874 S.W.2d at 29.

It does not appear that Weather Shield's warranty, limiting remedies to "repair of or provision of a comparable new Weather Shield replacement part" fails of its essential purpose as a matter of law. Even if there were a showing that Weather Shield's contractual replacement remedy failed of its essential purpose, that would not automatically waive the consequential damages exclusion. In order to be waived, the exclusion of consequential damages must be shown to be unconscionable in and of itself. The facts of this case do not indicate that the contractual term is unconscionable as a matter of law pursuant to the definition set forth in ***Haun v. King, supra.*** Additionally, we note that the defendant's products were selected by Francis Mah, an architect of long and substantial experience. Thus, we conclude that the limitations of the Weather Shield warranty are effective to exclude liability for consequential damages. We will next consider whether notice was given to Weather Shield of the alleged defects within the limitations period established by the Weather Shield warranty.

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[1] The plaintiff had alleged tortious misrepresentation along with breach of contract and/or warranty seeking both compensatory and punitive damages.

Regarding the defense that the plaintiff failed to notify the defendant of the allegedly defective windows before expiration of the statute of limitations, the trial court orally ruled:

> The first issue to be resolved by the Court is whether the plaintiff's action for a breach of warranty is barred by the one year limited warranty provision or the statute of limitations. This Court concludes that it is not barred. Exhibit Number 10, being the invoice from the Schaefer Sash And Door Company to the Walton Watson Construction Company regarding the windows and doors in question, shows that the said items were ordered apparently by the contractor on December the 6th of '91 and was shipped to the contractor or the site on January the 29th, 1992.
>
> The defendant in its memo claims that January the 8th of '92 when Weathershield [sic] apparently delivered the items to Schaefer, which is referenced in Exhibit Number 30, was or should have been the start date for the running of the warranty. This Court disagrees.
>
> This Court is of the opinion and so holds that Schaefer Sash And Door Company was the distributor for and the agent of the defendant Weathershield [sic] Manufacturing Company and that Walton Watson Construction Company and Francis Mah were agents of the plaintiff, Ms. Shepherd, in connection with the purchase of said windows and any notice requirements flowing therefrom.
>
> Under the Weathershield [sic] limited warranty and adjustment policy, which is marked as Exhibit Number 3, I believe, it states that the Weathershield [sic] – that Weathershield [sic] warrants that its products shall be free from defects in material and workmanship for a period of one year from the date of purchase. One year from January the 29th of '92 would have been January the 29th of '93.
>
> Mr. Jim Watson testified that the notice of leaking and water problems with the windows and doors were given to the defendant Weathershield [sic] within the one year period. There is also in the record that Mr. Joseph Downing apparently in the field engineering division of Weathershield [sic] Corporation wrote a letter dated March the 22nd, 1993 to Watson Construction Company regarding the water leakage in the plaintiff's home which means that advance notice prior to that date had to have been received -- had to have been given to and received by Weathershield [sic]. Nowhere in the said letter or in other contacts with the Walton Watson Construction Company or with Mr.

> Mah or with Mr. Dan Wilkins prior to 1998 did Weathershield [sic] ever raise the issue of no proper notice within the one year period of time; therefore, there is support in the record that proper notice was given by [sic] Weathershield [sic] by the plaintiff's agents within the one year period.
>
> This lawsuit was filed by the plaintiff on November the 22nd, 1995. The items were purchased by the defendant on January the 29th of '92. Tennessee Code Annotated Section 47-2-725 provides that an action for the breach of any contract for sale, being the sale of goods, must be commenced within four years after the cause of action has accrued. Clearly the plaintiff's filing date was within this period of time.

Although we agree with the trial court that the record shows that the Weather Shield one-year limited warranty began running on January 29, 1992, the date of the purchase, and expired on January 29, 1993, we disagree that the record demonstrates that Weather Shield received timely notice of the alleged defect.

Regarding the giving of notice to Weather Shield, Jim Watson testified:

> Q. You just testified a moment ago that Walton Watson Construction Company gave notification to Weathershield [sic] prior to November 26, 1992, regarding the window leaking problems. How was that notification made?
>
> A. As best I remember, we had a couple of conversations with Schaefer Sash and door [sic]. I think we met on the site once. They put us in touch with some representatives from Weathershield [sic], and we had a couple of phone conversations. And at a later date two of the Weathershield [sic] engineers, reps, came down from the plant and met with us on the site.
>
> Q. Do you happen to recall their names?
>
> A. No, I do not.
>
> Q. What happened at the site during the meeting or meetings?
>
> A. We met on the front street, Magnolia Drive, introduced each other, and we went in the house. We looked at some windows and sliding doors. We looked at certain aspects of the overall window and how it related to the interior drywall finish and the stucco outside.

> And then we went back outside, and we were asked if there had been any flashing or felt put on the sheathing. Our answer was no. One of the two reps from Weathershield [sic] said something to the effect "We can't help you." This part of the meeting is vivid because at that time Mr. Mah spun on his heels, got in his car, and left the site immediately.
>
> Q. All of this took place before November 26, 1992?
>
> A. Well, it took place after -- I don't remember the date, but it took place after a letter from myself and two or three phone calls with Schaefer and a few phone calls with the plant where Weathershield [sic] is made.

Watson also testified that, in his opinion, the leaking problems did not result from the Weather Shield windows. He stated "[t]hose [Weather Shield] windows didn't cause the defects in the house. They're on a par with Marvin, Pella, Anderson. The same thing would have happened with those windows."

Regardless of the accuracy of Watson's belief that the leaking problems were not caused by the defendant's windows, it appears highly unlikely that he would have advised Schaefer or Weather Shield that its windows were defective when he did not believe this to be the case.

This is the plaintiff's proof both as to the timing of notice to the defendant regarding the alleged defective product, as well as the content of that notice. The plaintiff has failed to show that Weather Shield was given notice at its location in Medford, Wisconsin, of the alleged defective product, as was required by the warranty. In fact, the plaintiff did not show when, how, or by whom Weather Shield was notified or the contents of that notice. Even if the plaintiff could have shown that she contacted Weather Shield within the notice period, it appears from the testimony of Watson that the contact was to seek advice about leaks in the house, not to complain about rotting of Weather Shield windows.

The plaintiff has contended that "notice to Schaefer was the same as notice to Weather Shield" and that both received notice within limitations period of the alleged defects. We have already concluded that there is no proof that Weather Shield received timely notice, and the record is equally deficient as to the giving of timely notice to Schaefer. Even if we were to find that Schaefer had received timely notice, the nature of which was adequate under the warranty to establish a claim, the

plaintiff would still not prevail as to this issue. Although the trial court held that Schaefer was the "agent" of Weather Shield, we conclude there is no proof in the record to establish that Schaefer was authorized to receive warranty claims on Weather Shield products. Rather, the Weather Shield warranty clearly requires that it must be notified at its Medford, Wisconsin, location of warranty claims.

No witness from Schaefer Sash and Door testified during the trial of this matter, and the proof is very sketchy as to the nature of the relationship between Schaefer and Weather Shield. The plaintiff had the burden of proof to establish that Schaefer had the authority to accept claims of defective products on behalf of Weather Shield:

> The burden of proving an agency relationship falls on the person alleging its existence, and the scope and extent of an agent's real and apparent authority are questions to be determined by the trier of the fact from all of the facts and circumstances introduced as evidence. *Sloan v. Hall*, 673 S.W.2d 548 (Tenn. App. 1984).

Southland Express, Inc. v. Scrap Metal Buyers of Tampa, Inc., 895 S.W.2d 335, 340 (Tenn. Ct. App. 1994), ***perm. appeal denied*** (Tenn. 1995).

Therefore, even if the plaintiff had proven that timely and legally sufficient notice of a warranty claim was given to Schaefer, the plaintiff's proof would still be insufficient because of the lack of proof that Schaefer had authority to accept such a claim on behalf of Weather Shield.

Thus, based upon our review of the record, we find that the plaintiff failed to prove that Weather Shield was notified of its allegedly defective windows and doors within one year of the date of purchase, as required by the terms of the warranty. As a result, the plaintiff's claim against Weather Shield is barred for failure to give notice of the alleged defects prior to expiration of the notification period established by the Weather Shield limited warranty. Accordingly, this matter is remanded to the trial court for entry of dismissal as to those claims.

In view of our finding that the plaintiff's claim is barred because the defendant was not given notice of the alleged defects within one year of the date of sale, the remaining issues raised by the defendant are pretermitted.

Plaintiff's Tennessee Consumer Protection Act Claims

As an issue on appeal, the plaintiff contends that the trial court erred in denying recovery pursuant to the Tennessee Consumer Protection Act, Tennessee Code Annotated § 47-18-101, et seq. Regarding this claim, the trial court orally ruled:

> The next question to be resolved by the Court is what damages are the plaintiff entitled to as a result of the purchase and installation of the

> defective Weathershield [sic] windows and doors. But before we answer that question, it is necessary to deal with the plaintiff's contention that Weathershield [sic] violated the Tennessee Consumer Protection Act of 1977 and should be entitled to treble damages plus attorney fees.
>
> This Court is of the opinion and so holds that the proof and evidence is insufficient to establish that the defendant Weathershield [sic] engaged in certain unfair deceptive acts or unlawful practices which would constitute a violation under Tennessee Code 47-18-104 (B) in connection with the sale of said windows and doors. The proof does not show the extent or the prior knowledge of the defendant Weathershield [sic] as to the defective design and construction of their products where they met – apparently met industry standards in past laboratory tests. The Admiralty Condominium case in 1989 in Port Clinton, Ohio, which was cited by Mr. Wilkins and plaintiff's attorney only showed that the same types of windows and doors were involved in that proceeding and that Mr. Wilkins faulted the design and manufacture in his conversations with a Mr. Lemke who was a Weathershield [sic] representative.

The basis for the plaintiff's Consumer Protection Act claim is the alleged fact that Weather Shield had known since 1989 that windows of the same type sold to her were defective. As proof of this contention, the plaintiff cites the testimony of Dan Wilkins regarding his knowledge of a project in Port Clinton, Ohio, for which he had been hired as an expert in 1989. However, the proof is sparse regarding this project and the basis for linking the 1989 Ohio project and the construction of the plaintiff's house. Regarding the Ohio project, Mr. Wilkins testified:

> Q . What did that investigation reveal?
>
> A. That the windows had a glazing detail comprised of an interior plastic or vinyl receiver at the wood stop and the exterior snap-in metal glazing bead very similar to what I described for Cybil [sic] Shepherd's house.
>
> Q. What was the effect of those details back in '89, on the problem back in '89?
>
> A. Essentially, as I've described today, they let water in and trapped water against wood and the wood rotted.

> Q. And in your expert opinion is there any difference in those details that you discovered in 1989 as opposed to the details in the window and door design in this litigation?
>
> A. Functionally, they're identical.

We agree with the trial court that this and related testimony of Mr. Wilkins is insufficient to establish a claim that Weather Shield had prior knowledge that the products installed in the plaintiff's house were defective. Accordingly, we concur with the trial court's denying the plaintiff relief pursuant to the Tennessee Consumer Protection Act.

CONCLUSION

Based upon our review, we affirm the trial court's finding that the plaintiff failed to state a claim against the defendant pursuant to the Tennessee Consumer Protection Act. We reverse the finding of the trial court that the plaintiff is entitled to recover damages against Weather Shield and remand for the dismissal of those claims. Costs of the appeal are assessed against the plaintiff, Cybill Shepherd.

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ALAN E. GLENN, SPECIAL JUDGE