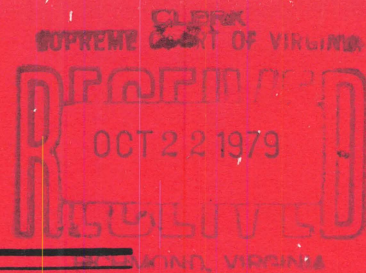


221VA1139



IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 790596

TED LANSING SUPPLY COMPANY, INC.,

Appellant

v.

ROYAL ALUMINUM & CONSTRUCTION CORPORATION,

Appellee

Appendix

Daniel S. Brown
Hazlegrove, Dickinson & Rea
P. O. Box 1218
Roanoke, Virginia 24006
Counsel for Appellant

Fergus B. Norton
4334 Brambleton Avenue, SW
Roanoke, Virginia 24018
Counsel for Appellee

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COUNTERCLAIM

COMES NOW the defendant, Royal Aluminum and Construction Corporation, and for his counterclaim against the plaintiff and deposes and says:

1. Defendant Royal Aluminum and Construction Corporation (hereinafter Royal) is a corporation organized under the laws of the State of Virginia.

2. That in and about from approximately January, 1975 to April 5, 1976 Ted Lansing Supply Company, (hereinafter Lansing) as a distributor for Replacement Products Industries Corporation (hereinafter REPCO) sold to Royal certain replacement windows to be installed in the residences of Royal's customers.

3. That the windows sold to Royal by Lansing as seller were warranted and represented to be "Draft Free" and "Condensation Free".

4. That the windows sold to Royal, by seller, Lansing, contrary to their warranty, were not draft free and the windows allowed moisture to condense on the inside of the windows, creating a condensation problem inside the homes in which they were installed by Royal.

*Filed in the Clerk's office
Circuit Court of Roanoke County*

Oct 1 1976

Tested ELIZABETH W. STOKES, Clerk

Elizabeth W. Stokes, Clerk

5. That because of this defect in the windows Royal has received complaints, demands, and litigation from customers, concerning the windows purchased from Lansing and manufactured by REPCO.


6. That because of such defects in the windows and customer dissatisfaction Royal has suffered loss of reputation and its business has suffered financial loss.

7. That replacement and reinstallation of the defective windows will cost approximately \$25,000.00.

WHEREFORE the defendant moves this Court to enter judgment against the plaintiff Ted Lansing Supply Company and in the amount of \$125,000.00 together with attorney's fees and taxable Court Costs and for other and further relief as to this Court deems just and proper.

ROYAL ALUMINUM AND CONSTRUCTION
CORPORATION

By


Of Counsel

FERGUS B. NORTON
4334 Brambleton Ave., S.W.
Roanoke, VA 24018

Counsel for John B. Royal, Jr. and
Royal Aluminum and Construction Corporation

INTERROGATORIES TO THE
DEFENDANT, ROYAL ALUMINUM
& CONSTRUCTION CORPORATION

Law Action No.: ¹²²~~276~~-1976

Comes now the plaintiff, Ted Lansing Supply Company, Inc., by counsel, and files the following Interrogatories to be answered under oath by the defendant, Royal Aluminum & Construction Corporation.

1. State the names and addresses of all customers of Royal Aluminum & Construction Corporation (hereinafter Royal) in whose residences Repco Replacement Windows purchased through Ted Lansing Supply Company, Inc. were installed.
2. State the full contract price for each such customer, including materials, installation and all other charges.
3. State which of such customers, if any, have not paid the full contract price, and if any have paid only a portion of such price, state how much has been paid.
4. State with particularity the complaints, if any, made by each such customer concerning Repco Replacement Windows, and whether such complaints, if any, were made orally or in writing.
5. If you will do so without a Motion to Produce, furnish a copy of each such complaint given in writing.
6. If any suits have been filed by any of such customers against Royal, state the full names of all parties thereto, the amount sued for, and the court in which such suit was brought.
7. State which customers, if any, had storm windows installed in their residences prior to entering into their contracts with Royal, and whether such storm windows were removed

*Received in
Clerk's Office*
SFP 27 1976

by Royal pursuant to such contracts.

8. State with particularity any representations made to Royal or any of its officers, employees or agents by representatives of Replacement Products Industries Corp., Ted Lansing Supply Company, Inc., or its Windjammer Division, at any time, regarding the capabilities of Repco Replacement Windows or aluminum replacement windows in general. Include in such statement the name and position of the person making such representation, the nature of the representation made, the time and place at which it was made, and the name and position of the person to whom it was made.

9. State whether any Repco Replacement windows purchased from Ted Lansing Supply Company, Inc. have ever been returned to Ted Lansing Supply Company, Inc., and if so, the date and quantity returned.

10. State the name and position of the person providing the information used in answering these interrogatories.

TED LANSING SUPPLY COMPANY, INC.

By

Of Counsel

Eugene E. Derryberry
GENTRY, LOCKE, RAKES & MOORE
Suite 300, Shenandoah Building
P. O. Box 1018
Roanoke, Virginia 24005

Counsel for Plaintiff

CERTIFICATE

I hereby certify that on the 24th day of September, 1976, I mailed a true copy of the foregoing Interrogatories to James W. Jennings, Jr., Esquire, Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W., Roanoke, Virginia 24011, counsel of record for all defendants herein.

Of Counsel

122
At Law No. ~~276~~-1976
ANSWERS TO
INTERROGATORIES
BY DEFENDANT, ROYAL
ALUMINUM & CONSTRUCTION
CORPORATION

Comes now the defendants, John B. Royal, Jr., et al, by
counsel, and answers the following Interrogatories under oath:

1. George Collins
P.O. Box 97
White Sulphur Springs, WV

Don Saville
Rt. 2, Box 353
Blacksburg, VA

Floyd Loan
513 Jackson Ave.
Vinton, VA

Samuel H. Hubble
2017 Twelve O'clock Knob Rd.
Salem, VA

Edwin C. Selander
Rt. 2, Box 240
Troutville, VA

Loring R. Alstadt
1934 Maylian Drive...
Salem, VA

Marion W. Smith
Rt. 1, Box 336
Lexington, VA

William H. Tuggle
730 S. E. Clay St.
Blacksburg, VA

May Graham
207 Goodwin Ave.
Salem, VA

Hubert Spencer
1514 Syracuse Dr.
Roanoke, VA

Filed in the Clerk's office
Circuit Court of Roanoke County
NOV 1 1976
Teste
Clifford H. Stoker
Clerk

I. M. Wigington
600 Marshall St.
Salem, VA

Dr. Keith Holmes
501 E. 11th Street
Greenville, NC

Keith Hairfield
911 3rd St. S.W.
Roanoke, VA

Louis Branchetti
831 Moran Ave.
Salem, VA

E. A. Sumner
801 Piedmont Ave.
Salem, VA

Ida Sutherland
Bedford, VA

2. Defendant does not keep records that would enable him to state the amount used for price of materials, installation, and other charges.

3. Defendant's records indicate all customers have paid the full contract price.

4. George Collins - Ice, condensation, and they have verbally threatened a law suit.

Floyd Loan - verbal complaint of windows sweating and drafts.

Samuel H. Hubble - verbal complaint of windows sweating and drafts.

Edwin C. Selander - verbal complaint of windows sweating and drafts.

Loring R. Alstadt - all of Repco's representatives, Mr. Royal, and attorney's went to this man's home and witnessed his complaints concerning the windows (ice on inside of windows and wind blows right through).

Marion W. Smith - verbal complaint of windows sweating and drafts.

William H. Tuggle - complaints of ice, wind, and has written to the Better Business Bureau.

Hubert Spencer - verbal complaint of windows sweating and drafts.

Glenn C. Hall, Jr. - verbal complaint of windows sweating and drafts.

Louise Butts - verbal complaint of windows sweating and drafts.

Charles D. Messinger - verbal complaint of windows sweating and drafts.

Laura Fitzsimmons - verbal complaint of windows sweating and drafts.

Maynard Zimmerman - verbal complaint of windows sweating and drafts.

G. E. Overstreet - verbal complaint of windows sweating and drafts.

William Pope - verbal complaint of windows sweating and drafts.

Mrs. J. R. McCray - verbal complaint of windows sweating and drafts.

J. R. Gilmore - verbal complaint of windows sweating and drafts.

Harold Stump - verbal complaint of windows sweating and drafts.

Katherine J. Eaton - verbal complaint of windows sweating and drafts.

Merrill A. Nuttycombe - verbal complaint of windows sweating and drafts.

William E. McGregor - verbal complaint of windows sweating and drafts.

James R. Newman - verbal complaint of windows sweating and drafts.

Leon Saunders - his attorney has contacted Mr. Royal by phone that a law suit will be taken if windows are not replaced. He complains of ice, condensation, and wind.

Calvin J. Gray - verbal complaint of windows sweating and drafts.

William Marshall - verbal complaint of windows sweating and drafts.

Joseph H. Philpott - verbal complaint of windows sweating and drafts.

Carlton M. Arthur - verbal complaint of windows sweating and drafts.

William P. Wall - verbal complaint of windows sweating and drafts.

Hazel M. Greene - verbal complaint of windows sweating and drafts.

Larry Ward - verbal complaint of windows sweating and drafts.

Elmer V. Lawhorn - verbal complaint of windows sweating and drafts.

W. G. Hayes - written complaints at Better Business Bureau of condensation, sweating, and icing.

Edwin M. Jones - verbal complaint of windows sweating and drafts.

Mikel B. McMillion, Jr. - verbal complaint of windows sweating and drafts.

Francis Dove - verbal complaint of windows sweating and drafts.

Julius K. Caldwell - verbal complaint of windows sweating and drafts.

Louise Becker - verbal complaint of windows sweating and drafts.

Alva Hale - verbal complaint of windows sweating and drafts.

J. C. Mountcastle - verbal complaint of windows sweating and drafts.

Hazel M. Greene - verbal complaint of windows sweating and drafts.

Wave E. Kirk - verbal complaint of windows sweating and drafts.

George H. Akers - verbal complaint of windows sweating and drafts.

Helen Bower - verbal complaint of windows sweating and drafts.

Elmer L. Linkous - verbal complaint of windows sweating and drafts.

Guy Walters - verbal complaint of windows sweating and drafts.

Merle Willis - verbal complaint of windows sweating and drafts.

I. M. Wigington - verbal complaint of windows sweating and drafts.

Dr. Keith Holmes - verbal complaint of ice, condensation, and extreme drafts.

Keith Hairfield - verbal complaint of windows sweating and drafts.

Louis Branchetti - verbal complaint of windows sweating and drafts.

E. A. Sumner - has written to the Better Business Bureau. They will bring a law suit against Royal if something is not done before weather gets cold. Repco's representatives, Windjammer representatives, and Royal representatives, and all representing attorney's went to Mr. Sumner's house, and were witnesses to all of his complaints concerning his windows. His complaints were: ice on inside of windows, and wind.

Ida Sutherland - verbal complaint of windows sweating and drafts as well as writing to the Better Business Bureau. All representatives from Repco, Windjammer, and Royal and attorney's went to her home and listened to her complaints. She also complained of greater fuel cost and ice.

5. Written complaints to Better Business Bureau can be obtained from Better Business Bureau, defendant does not have copies

6. Defendant has been sued by William H. Tuggle and Annie Tuggle. Suit was brought in the General District Court of Roanoke County and a petition for removal was filed. The amount sued for was \$858.00.

7. Defendant does not have records or means to determine the number of residents who had storm windows in their homes prior to entering into contracts with Royal. Defendant believes approximately 60% had such windows.

8. At a meeting held at Windjammer in Richmond, Virginia, in March, 1975, Repco's representative, Ron Mategaski, stated the new insulated glass window would be a cure all. He stated the window was draft free and would eliminate the need for storm windows, which is advertised in their brochures.

9. There has been no return of any Repco replacement windows purchased from Ted Lansing Supply Company Inc., because the cost of tearing out the windows and reinstalling them would be prohibitive without some guarantee by Ted Lansing or Repco to bear the burden of the cost.

10. Defendant answers the above interrogatories through its' agent and President, John B. Royal, Jr.

JOHN B. ROYAL, JR.

011

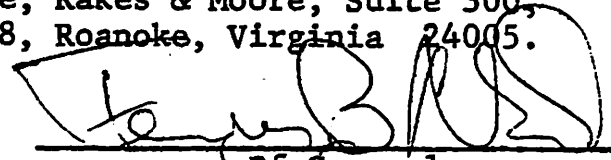
By


Of Counsel

FERGUS B. NORTON
4334 Brambleton Ave., S.W.
Roanoke, Virginia 24018

CERTIFICATE

I hereby certify that on the 1st day of November, 1976,
I mailed a true copy of the foregoing Interrogatories to Eugene E.
Derryberry, Esquire, Gentry, Locke, Rakes & Moore, Suite 300,
Shenandoah Building, P.O. Box 1018, Roanoke, Virginia 24005.



Of Counsel

STATE OF VIRGINIA)
) TO-WIT:
COUNTY OF ROANOKE)

This day personally appeared before me, Pamela S. Wertz,
a Notary Public in and for the County of Roanoke, State of Virginia,
aforesaid, John B. Royal, Jr., the defendant herein, who, after
being duly sworn according to law, deposed and said that the state-
ments contained in the foregoing Interrogatory are true to the best
of his knowledge and belief, except insofar as they are stated to
be on information, and that insofar as they are therein stated to
be on information, they believe them to be true.



JOHN B. ROYAL, JR.

INSTRUCTION NO. 1

The Court instructs the jury that there is an implied warranty on the part of the seller that the articles sold are free from defects and are of the standard quality of similar goods in the trade, and if the jury finds from a preponderance of the evidence that the replacement windows were defective and that as a direct and proximate result of such defects, Royal Aluminum and Construction Corporation sustained damages, then you should find your verdict in favor of said corporation against Ted Lansing Supply Company in such amount as you find just and proper from the evidence.

Lansing
P. L. H.

CONSOLIDATED LAW ACTIONS
NO. 122-1976
NO. 276-1976

O R D E R

Ted Lansing Supply Company, Inc. and John B. Royal, Jr., and Royal Aluminum & Construction Corporation, appeared before this Court by counsel at 9:00 A.M. on the morning of January 2, 1979, pursuant to Motion of counsel for Ted Lansing Supply Company, Inc.

At that time, counsel for Ted Lansing Supply Company, Inc., moved the Court to set aside the verdict of the jury returned on November 2, 1978, and to enter final judgment in favor of Ted Lansing Supply Company, Inc., or in the alternative to either resubmit the claim of Royal Aluminum & Construction Corporation against Ted Lansing Supply Company, Inc., for a new trial on all issues or on the issue of damages alone on the grounds set forth more fully in the transcript of the proceedings. After hearing the arguments of counsel, the Court being of the opinion that the Motions of Ted Lansing Supply Company, Inc., should be denied, it is accordingly ORDERED that said Motions be denied and that Royal Aluminum & Construction

Corporation do have and recover judgment against Ted Lansing Supply Company, Inc., in the sum of \$25,000.00, together with interest from the date of the entry of this Order.

The Court also heard arguments of counsel with respect to the personal liability of John B. Royal, Jr. The Court being of the opinion that the evidence failed to establish any such personal liability, it is accordingly ORDERED that no judgment be recovered by Ted Lansing Supply Company, Inc., against John B. Royal, Jr., individually.

The Court, being advised that Ted Lansing Supply Company, Inc., may seek an appeal to the Supreme Court of Virginia, it is ORDERED and DIRECTED that the transcript of all proceedings occurring in this action be and become part of the record.

The Court, being further advised that Ted Lansing Supply Company, Inc., may seek an appeal to the Supreme Court of Virginia, the Court does establish that the execution of a judgment awarded hereby is suspended, pursuant to Section 8.01-676 of the 1950 Code of Virginia as amended, provided that Ted Lansing Supply Company, Inc., timely prosecutes any appeal and thereafter so long as the matter is under consideration by the Supreme Court of Virginia, provided however that Ted Lansing Supply Company, Inc., or someone in its behalf, file an appeal bond with the Clerk of this Court within 10 days from the entry of this Order with corporate surety approved by the Clerk of this Court and the penalty of \$35,000.00. This bond shall be conditioned in accordance with Section 8.01-676 of the 1950 Code of Virginia, as amended.

ENTER:

January 17-1979

015

F. L. Hoback

Judge.

We request the entry of
this Order:

Seen and objected to
GENTRY, LOCKE, RAKES & MOORE

By Charles R. Lurie, Jr.
Of Counsel for Ted Lansing
Supply Company, Inc.

ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to strike Royal's evidence on the counter-claim and in submitting the liability issue to the jury on the theory of breach of implied warranty of merchantability or fitness for ordinary purposes, no question of breach of implied warranty having been raised by the pleadings.

2. The trial court erred in submitting the counter-claim to the jury because Royal had offered no competent evidence of damages sufficient to support a jury verdict.

3. The trial court erred in allowing Royal to introduce evidence of attorneys' fees incurred in this action as an element of its damages.

4. The trial court erred in giving, over the objection of Lansing, Instruction No. 1 setting forth the theory of breach of implied warranty.

* * *

JOHN B. ROYAL, Jr.

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Royal, please state your name.

A John B. Royal, Jr.

* * *

018

* * *

Q Let me ask you this: You did get into the replacement window business and aluminum siding business, is that correct?

A Yes.

Q When did you first start that business?

A I believe it was in the Spring of '75.

Q In the Spring of '75?

A Yes, February, March, something like that.

Q February or March of '75 and what was your trade name or what did you trade as?

A When I first opened the business, it was simply Royal Aluminum Products, myself operating under that name as an unincorporated business at that time which lasted about two months before I incorporated Royal Aluminum Products, Incorporated which then was amended into Royal Aluminum & Construction Corporation, not a new business.

* * *

019

* * *

Now would you admit that Royal Aluminum Products, Incorporated -- that was the name, wasn't it after incorporation?

A Yes.

Q -- that was incorporated on May 6th of 1975?

A Yes, sir.

* * *

* * *

Q Mr. Royal, you have admitted purchasing windows from Ted Lansing Supply?

A Yes, sir.

Q Repco windows?

A Yes.

Q Three Rivers windows?

A Yes, sir.

Q And you admit today not that you owe the money but that the accounts are not paid?

A Yes.

Q You sold windows to approximately how many customers?

MR. NORTON: Do you want this?

THE WITNESS: Yes.

BY MR. WILLIAMS:

Q What document are you referring to? I want you to identify it for the purposes of the Jury.

A The number that is on this is "At Law Number 122-1976."

Q No, the number of people that you sold windows to.

A I would have to count them, they are not numbered. This list indicates 40 to 50 names.

Q Is that an accurate list?

A As accurate as I could get it.

Q All right, and do you admit today that you have been paid by every one of those customers or Royal Aluminum & Construction Corporation was paid for every one of those products?

A Within a few dollars, yes, sir.

* * *

* * *

JOHN B. ROYAL, JR.

was recalled as a witness and testified further on his oath
as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Mr. Royal, you have already been sworn and
you have already testified as an adverse witness on behalf
of the Ted Lansing Corporation.

1
2 Would you advise this Jury the nature of
3 the first aluminum-type business that you entered into in
4 this Roanoke Valley?

5 A The type of business?

6 Q Yes.

7 A In the Spring of '75 I entered into the
8 replacement window business as an individual person trading
9 as Royal Aluminum Products.

10 Shortly after that, I incorporated because
11 of the influx of business, the product was in demand. As
12 business continued, I amended the name from Royal Aluminum
13 Products, Incorporated to Royal Aluminum & Construction
14 Corporation simply due to the fact that there was a lot of
15 demand from people wanting their kitchens, bathrooms and
16 so on remodeled.

17 The business was not seven different
18 businesses, it was one business and I incorporated and I
19 simply amended the name in order to more or less attract
20 the bathroom and kitchen remodeling business using the name
21 Royal Aluminum & Construction Corporation, it was all one
22 business.

23
24 * * *

* * *

BY MR. NORTON:

Q Now let's take it from your first dealing with the Ted Lansing Corporation up until the time that you, for the first time, did not make a timely payment on your bill.

When did that happen?

A As I previously stated, I entered into business in the Spring of '75 and we started installing these replacement windows, I would imagine, in June or July of '75.

At that time everything was fine with the windows because it was still Summertime so business was good, I was installing the windows and there was no problem with the windows, no problem with my credit, everything was going fine.

Then the Fall got here and cold weather got here and I think the first complaint that I got was from Mr. Leon Saunders who is here today.

He stated that he was having an ice buildup on the inside of his sash. Of course I was completely ignorant of the situation because I didn't know what he was talking about.

My first cost to me in this situation was when I went up to see Mr. Saunders. I took the day off to go to Glasgow, Virginia to see Mr. Leon Saunders to see what his problem was.

Of course by the time I got up there, the ice was gone because I got up there in the afternoon. What happened was that during the night when it got cold, the

025

ice would form on the inside of the window and when the temperature rose at 10:00 or 11:00 o'clock in the morning, the ice that had formed on the inside of the window would melt and plus that the air would come in around the window to where it would blow through the sash and you could actually see the curtains moving back and forth.

Q Explain to the Jury or define as best you can what the sash is.

A The sash is the actual glass part with the frame around it that you would normally raise up and down, there are three parts, the upper sash, the lower sash and then the frame that these two sashes are encased in.

Q Now if you will go back for a moment: When you purchased these replacement windows, what, if any, warranties were made to you by the seller, the Plaintiff in this case, Ted Lansing?

MR. WILLIAMS: May I interrupt just so that I will understand: Is it the Court's understanding and Mr. Norton's understanding that we are going to proceed at this point through all of the evidence of Mr. Royal with respect to the defense of the claim and with respect to his claim against my client?

Are we going all the way through?

THE COURT: I don't know, I supposed that we were. We certainly don't want to go through it twice.

MR. WILLIAMS: Certainly not, I just wanted it understood.

THE COURT: I presume you are not only going by way of defense but by way of the counterclaim, is that correct?

MR. NORTON: Absolutely.

THE COURT: That is what I assumed. Go ahead.

MR. NORTON: Can you recall my last question?

(Thereupon the Court Reporter read back the pending question.)

MR. WILLIAMS: With respect to the question, Your Honor, I am going to object to the use of the word "warranty" that is a legal question but I would not object as to what statement or what representations were made.

THE COURT: All right.

BY MR. NORTON:

Q What, if any, representations were made to you with respect to these windows, the Repco windows?

A The representation was through Ted Lansing as well as Repco - - in other words do you mean how was the window presented to me?

Q Yes.

A I was interested in going into the replacement window business. My first, initial contact, let's say, on the schooling or the mechanics of the window and what it was supposed to do in replacing the old window, and so on, was in Richmond, Virginia where Ted Lansing's home office is.

At that time the Repco people or their agent was there in Richmond for something like a sales seminar and they had a lot of dealers like myself that they were presenting the window to and explaining what the window could do and the effectiveness of it and the amount of sales that this particular type of window would create in the next few years.

I think you need to know this to understand because you are going to hear a whole lot of ifs and buts in the future so let me try to explain what the window did.

We would go in and take out the old window,

2 there is little wooden strips that go down each side
3 of the window and you would pop those off and pull the
4 sash out and then all we did was to take out the window
5 that was in there and then in most cases the replacement
6 window would fit right back in that same frame.

7 Okay, what this window was supposed to do -
8 and we are talking about two units, the actual framing
9 system of the unit which would consist of insulation and
10 then you would have the glass and these are two panes of
11 glass that are completely sealed off by one of several
12 methods, usually with a rubber strip placed around it so
13 that no air could pass through it which is a great design
14 idea and it works well but the representation that I
15 received at that sales seminar in Richmond was that it
16 would replace your old windows as well as your storm
17 windows.

18 Now as to the Y of the window, most people
19 do not like the idea of having to clean two different
20 windows, they don't like having to take off the storm
21 window to get to the actual window and so this was a way
22 to eliminate the storm window and also you could clean
23 the back side of the sash in just a few seconds because of
24 the way that the replacement window comes in so it was
25 excellent for the housewife as well as insulating the house.

The representations that were made to me were that they were at least 40 times more effective in insulating your house than all the normal windows.

The insulating glass would prevent the heat inside the house from going out through the window because of the insulating glass so basically when I left Richmond, the impression that I had was that I had a good product that should sell, the lady of the house will like it and it is going to save them money on their fuel bills.

That is the impression that I left with, that I had a good window that would reduce the amount of fuel, that is the impression that I left with.

I had the impression that I had a good product and I was ready to present it to the public here in Roanoke.

Q This meeting was held at Ted Lansing?

A In Richmond.

Q At whose office?

A In Lansing's office.

Q Did you actually purchase these Repco windows?

A No, not at that time.

Q When did the purchases begin?

A Let's see, I started advertising and the

sales started and I would say in around June or July of '75 the actual installation of these windows started.

Q How many windows, on an average, did you install in a house?

A If I can remember correctly, I think about six, seven or eight, usually.

Q Per house?

A Yes, an average of eight would be a proper amount.

Q Then you are indicating that you were averaging approximately eight windows per house, is that correct?

A Yes, sir.

Q When, for the first time, did complaints in a substantial number come to you?

A As soon as it started getting cold.

Q And you have indicated that Mr. Leon Saunders, I believe - -

A Was the first complaint.

Q - - was the first complaint that was received. He lives, I believe you indicated, in Glasgow?

A Yes, sir.

Q How many times, approximately, did you or some mechanic from your corporation visit Mr. Saunders'

home?

A Both myself as well as the mechanic?

Q Yes.

A To the best of my knowledge, I think I must have gone up there at least three, four or maybe five times and, you know, when you go to Glasgow, it is a full day and so I could not schedule anything else.

Again, Leon Saunders was the first problem that we had and we did not know what to do with the problem.

In other words it was a brand-new problem that had never existed before so several calls were necessary just in trying to figure out what was wrong.

I would say with the service calls and all, I would say that in Leon Saunders' case we spent at least, in work days, at least two or at least three weeks in work days.

Q Now I presume that others that you sold and that you installed these windows for were in the local area, the Salem and Roanoke Valley area?

A We made service calls in an attempt to clear up the problem of condensation and ice buildup on the inside of the window in a three-State, Virginia, West Virginia and North Carolina area.

Q The 45 names that you have down, is that an

entire list of the Repco windows that were installed?

A I did not keep any records to indicate whether they were Repco windows or Three Rivers windows or something like that.

Now as to the 40 or 45 names down here, when I would write a sales contract I would not write "Repco window" I would write "replacement window" so these are the ones that I can recall.

Q And those are complainants or people who rose up to say, "Hey, something is wrong with my windows", is that correct?

A I don't understand the question?

Q Well, this list that you have here - -

A This list?

Q Yes, are these the people that had several complaints?

A No, out of this list, these 40 or 50 people, I believe that this is the list of the entire amount of windows that I installed including Repco, Three Rivers and whoever else it was when we dropped Repco because of the faulty product and then we picked up Windjammer, I mean Three Rivers, that is what I am saying and that list compiles, from what I can understand, most of the Repco customers.

Q Of all of the windows that you installed from the products that were sold to you by Ted Lansing, how many of these raised complaints with you?

A In the Repco situation, I would say it was at least 50 to 75 percent of the clients that I installed the windows for that had a complaint in one form or another.

In other words there were some people that were totally dissatisfied and disgusted and there were some other ones that, well, in an average case there would only be one window or two windows that had given problems and of course the problem, as we will get into, was the manufacturing quality of the window.

Q With regard to the complaints, to what extent did the complaints take?

Were there any complainants that initiated litigation against you?

A There was actually one that I received a suit from, I think it was a man in Blacksburg and that was the first one that actually brought suit against me.

For the most part, the clients understood, after attempting many, many times to resolve the problem, they realized that I could not resolve the problem and they just did not want to sue me but they were put in a position to either sue me because they had no one else to

sue or just sit there and suffer the consequences of the bad windows.

There were at least a dozen people that when I would go to bed at night and I knew that it was cold, I knew that the phone was going to ring all the next day and it did every time.

It got to the point that with the phone call and the complaints, I could see that it was just a matter of time, I could see it coming, that my business was in trouble due to the complaints.

Q What besides your own personal efforts and the efforts of your mechanic, what efforts were made by any others to correct the problems with these windows?

A After complaining to Ted Lansing Supply for over four months that I was having serious problems as well as possible legal repercussions from the situation, I think the first step, well, he had went out with me on several of these local calls or local problems himself and so they obviously realized that there was a problem and they called the representative from Repco down from Pennsylvania.

He flew down one day and we went to several of the houses.

Q When you say "we" who do you indicate?

A Myself, Ed Weatherly from Ted Lansing Supply

and the Repco representative and I don't know his name but he is here.

We went out in an attempt to see what was wrong and, as usual, there was something wrong but nobody was willing to pay for what was wrong, they wanted me to pay for it all.

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Royal - Direct

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Q How much did the window cost you?

A Each window, installed?

Q Go through your cost, what did the window cost you and what did it cost you to have your installer install it and what were your office expenses, give us the whole ball of wax?

A I would say that the window would probably cost me \$125, \$130 apiece and figuring in my overhead which it cost me to sell it, I don't know, probably \$140, in other words before I got paid I had the cost of the phones and, of course I had the cost of the installer's time, the insurance on the truck and so on so what we are talking about is about \$140 a window times, I would say, I don't know what to say, well, around \$200 a window and plus that there was probably two or three times that money which I was looking at in possible suits.

Q And your cost of installation on a per-window basis, what would you approximate that to be?

A The gross cost would be \$130, \$140 a window.

Q What other problems have you incurred as a result of these windows?

A Well, I said, "Okay, that is it, I am not paying for any more," and at that time I had probably lost --

MR. WILLIAMS: Your Honor, I would object to this on two grounds: One, that the counterclaim is filed on behalf of Royal Aluminum and not him personally and, therefore, any evidence of personal loss is not admissible for that reason; secondly, if he is going to speculate or say "probably" --

THE WITNESS: I have got it written down.

MR. WILLIAMS: - - Mr. Royal has got to be able to establish, with a degree of certainty rather than just a speculative guess, as to what his losses are.

THE COURT: I believe the counterclaim is on behalf of the corporation and not you individually so you will be restricted to the corporation's loss.

MR. NORTON: We agree that this is a claim which the corporation has but I think always when you have an individual who solely owns a corporation, there is a misidentification in its legal context, legally he was the corporation and when he responded as to what the corporation's losses were, they were, I guess, his losses.

THE COURT: Use your definite figures, if you have them, instead of approximations because he is entitled to that.

THE WITNESS: The losses that I incurred due to this are the following: The loss of time as the executive of the company; the loss of time on my installation, anytime I installed a window, anytime that I went back on a service call I could not be installing other windows so it cost me double and so my damages came out to be roughly

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\$32,500 in actual cost in the loss of time and in the loss of new business as well.

BY MR. NORTON:

Q Now what out-of-pocket expenses have you incurred directly as a result of this situation with the replacement windows?

A Out-of-pocket expenses due to, again, loss of time because my men were working with these windows instead of installing the new windows that we had to install.

Q You have told us that but you have indicated that you had prior counsel, is that correct?

A Yes, sir.

Q Were you required to pay counsel fees to the prior counsel?

A I have a bill.

MR. WILLIAMS: I object to that, that is not damages in this respect.

MR. NORTON: It is quite to the contrary, the Statute says specifically that anything that is - -

THE COURT: Go ahead, I will overrule that for the present.

BY MR. NORTON:

Q What bills have you received from your first counsel?

THE COURT: Or what bills has the corporation received?

MR. NORTON: I apologize, Your Honor, let me rephrase that.

BY MR. NORTON:

Q What bills has the corporation received?

A Presently pending there are just about \$2,000 in bills.

Q And have you, since your first attorney, have you retained other counsel?

A Yes, sir.

Q And have you had to pay other counsel on the case specific fees?

A Approximately \$2,000.

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Q Is Royal Aluminum & Construction Corporation now a viable business, an active business?

A I did not renew my corporate charter in 1977.

Q And why was that?

A The one lawsuit that had already been filed against the corporation was there and there were at least a-half dozen to ten other pending lawsuits as far as the client saying, "Okay, unless you do something, we will sue you for damages."

Under those pressures, there was no way that I could continue to operate because there was nothing done to replace the faulty product by either Lansing or Repco.

Q So you were then effectively out of business

A Yes, sir.

Q Now let me ask you this: The nature of that type of business, the replacement or construction business, does it depend upon advertisement, a great deal, and, if so, what advertisement?

A At first, being an unknown, needless to say, what you have to do is to get exposure to get your name around and then you have got to offer a good price and a good product and I felt I had a good product and I knew I had a good price and I knew I had a good installation man and it was just a matter of being able to build up a business

The way to build up a good business is to get many satisfied customers telling other people about it and then going from there.

Q Were the customers satisfied?

A Well, since I had several that were getting ready to sue me, I don't think I could have gotten many referrals from them.

Q Did you get any referrals at anytime?

A Yes, there are two or three people in this Courthouse right now that, during the time that I installed their windows which would have been through the Summer, they were satisfied and I did get repeat business, not repeat business but referral business from them but when the Winter came and all the problems started, I not only

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2 did not get referral business but some of the people that
3 had been referred, they said then that they did not want
4 them.

5 MR. NORTON: All right, thank you. You
6 may examine.

7 THE COURT: Let's let the Jury have a recess
8 at this point, gentlemen.

9 MR. WILLIAMS: Fine.

10 (Thereupon a short recess was taken.
11 Following the recess, the parties returned to the
12 room and the proceedings continued before the
13 Court and Jury.)
14

15 THE COURT: All right, Mr. Williams, you
16 may go ahead.
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18 CROSS EXAMINATION

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20 BY MR. WILLIAMS:
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20 Q Okay, how long have you been in the replace-
21 ment window business? For how long were you in it?

22 A Like I have stated, my first, initial
23 contact was in the Spring of '75.

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1 Royal - Cross

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16 Q You mentioned a meeting in Richmond that
17 was conducted at the Ted Lansing office, is that correct?

18 A Yes, sir.

19 Q You also testified that present there were
20 a number of other dealers, are you sure of that? Could you
21 be mistaken?

22 A I did not comingle with them to give you
23 a specific answer as to names and so on, no, I did not.

24 Q Are you sure that you were not, in fact,
25 the only dealer present?

A I could have been but there were a lot of people there. They were introducing the window, that was the gist of the meeting.

Q If someone with Ted Lansing should testify that you were the only customer-dealer there, could you disagree with that?

A No, I could not.

Q Do you recall who the representative of Repco was at that meeting?

A It has been a long time but actually I think I saw the gentleman here from Repco.

Q And he was the man?

A He was the man that came down to see about the problem situation.

Now as far as that meeting, I don't, I would not recognize anybody from that, it has been too long ago for me to say that he was the one that was showing me the windows initially.

Q All right, but you only went to Richmond on one occasion to have the lecture for the introduction of the Repco windows?

A I believe so, yes.

Q You testified that you came away from that meeting with the impression that you had a good window?

2 A Yes, sir.

3 Q I recall that you testified specifically
4 that the only representation, as such, that was made to
5 you was that the Repco window will replace old windows
6 together with storm windows, is that, in fact, the only
7 representation that was made to you at that meeting in
8 Richmond, Virginia?

9 A I did not say "with storm windows."

10 Q Well, tell me what you did say.

11 A It is on the Record.

12 Q I will ask you then what was told to you
13 and by whom?

14 A Okay, I don't know how the storm-window
15 deal got in there but the replacement window was, in fact,
16 to replace the storm window so that when you were describing
17 the window to the client, you could say that the window was
18 designed with the housewife in mind for easy cleaning and
19 so on.

20 I guess I answered your question?

21 Q But the question was: Was that the only
22 specific representation that was made to you at that time?

23 A As far as replacing storm windows?

24 Q Yes.

25 A By no means was it the only representation

or statement.

Q It was not?

A It was not the only representation, it was part of about an-hour-and-a-half meeting the best I can remember, timewise, as to how great the windows were.

To go into detail, the window was supposed to stop draft, the window frame system was going to be at least 40 times more successfull in insulating my customer's house than storm windows were and it was easy to clean, it would tilt in, it was draft free and so on.

Q Did you, in turn, make representations to your customers regarding these windows?

A Yes, I did.

Q What did you represent to your customers?

A I represented exactly what had been represented to me through Repco.

Q And what was that?

A That they were 40 percent more effective in insulating their house than normal windows were, that they would tilt in for fast and easy cleaning, that they didn't have to worry about caulking the windows in that they were draft free, the basic design was for easy cleaning and better installation and that is what I passed on to my clients.

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Q All right, you have referred to a document which is to your immediate right, would you pick that up?

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A (Witness complies.)

21

Q You have referred to that document several times during this trial, what is that document?

22

23

A I believe this is the list that Ted Lansing -- I don't know the legal wording but they insisted that I give them a list of the customers that I installed window

24

25

for.

Q What is that document entitled?

A "Interrogatories - - " is that what you are asking?

Q Up here (indicating).

A "Answers to Interrogatories by Defendant, Royal Aluminum & Construction Corporation."

Q Mr. Royal, I hand you this document right here, is this a precise copy of what you are referring to absent some notations and it looks like some personal marks on it?

A I don't know, is it?

Q Well, if you will compare, take your time to go through all the pages.

MR. NORTON: Go ahead, John. I can probably do it a lot faster, John, let me do it.

BY MR. WILLIAMS:

Q While Mr. Norton is reviewing that, I think we can proceed. Mr. Royal, you have indicated that there was some information supplied to Ted Lansing Supply as a result of some questions that were asked to you, is that correct?

A What questions are you referring to?

Q Legal Interrogatories that were directed to you that you answered and that is the document that you have been referring to all morning?

A I guess, I don't really fully understand the question.

MR. WILLIAMS: For the Record - -

THE COURT: The original is in the file, it was filed November 1, 1976 but you can go ahead and file it.

BY MR. WILLIAMS:

Q All right, Mr. Royal, I show you this and ask you to turn to Page, well, whatever number that is but anyway to Numbered Paragraph Four of the document which is in entitled "Answers to Interrogatories," which has been filed with the Court in this action.

A George Collins, is that Number Four?

Q Yes.

A This one right here (indicating)?

Q Yes.

A Okay.

Q I ask you, if you will, to review the names appearing in the Answers to the Interrogatory Number Four.

A Read them?

Q No, just look at them right now, please, and tell us whether or not they are the names of the individual customers of yours who complained to you or at least, according to your testimony, complained to you about the windows?

A I would imagine it is. Again it has been two years ago. George Collins' name does not ring a bell but I am sure, well, I put "George Collins - ice, condensation and he has verbally threatened a lawsuit."

So I would have to agree with whatever your question is.

Q You have answered these Interrogatories under oath?

A Yes, but with most of them, due to the time lapse, I was going only by my records so I don't really remember.

Q Well, you answered these Interrogatories at that time under oath that all of the people whose names appear in those Answers complained to Royal Aluminum Construction Company about the windows?

A Is that a question?

Q Yes, is that true?

A Yes.

Q Is it your testimony this morning on the

witness stand that those individuals registered complaints with Royal Aluminum & Construction Company?

A You are using the word "registered" what do you mean by that?

Q Made complaints, communicated complaints.

A Most complaints were by telephone. In other words the complaints were made by telephone to - -

THE COURT: Mr. Royal has sworn to the Answers in these Interrogatories under oath, they speak for themselves, why go into all of that?

THE WITNESS: Yes, I said that I did swear to them.

THE COURT: Let's don't take time to go over something that has already been answered.

MR. WILLIAMS: Can we stipulate that it will be admitted as evidence in the case?

THE COURT: The Court so directed that, let's don't stipulate to anything, let's go ahead.

MR. WILLIAMS: Thank you, Judge.

(Thereupon the document entitled "Answers to Interrogatories by Defendant, Royal Aluminum & Construction Corporation" dated November 1, 1976 was marked as Lansing Exhibit Number Four and

entered into the Record.)

* * *

BY MR. WILLIAMS:

Q Mr. Royal, you testified that your expenses
or your damages consist of loss of time as an executive,

2 as and I understood, there was some duplication with
3 respect to installation time, but that collectively
4 that item of damages totaled \$32,500.

5 Tell us exactly how you computed that?

6 A Based on an average sales month, the amount
7 of time as the executive of the company because I was not
8 only selling but managing, the amount of time that I lost
9 from that in trying to go out and find out, you know, what
10 was wrong which was at the beginning, basically but that
11 is what I was doing before I realized that, to save a long
12 story, that the windows were defective.

13 I must have lost at least, in the year and
14 a-half, two months, maybe even three months in time going
15 between the customers themselves and meetings with Ted
16 Lansing representatives and meetings with the Repco attorneys
17 and just going back and forth with installers, that was
18 just the time that I spent in trying to rectify the
19 problems.

20 I would say that it was at least a three-
21 month period of time that was actually lost to me as the
22 executive of the company.

23 Q Now how do you attach a dollar value to
24 that?

25 A That was simply done by the average amount

of business that we were doing at the time, not after the problem started but before the problem started so we are saying that it was \$10,000 a month to operate a corporation with four or five people involved that is a very low and conservative estimate.

Q Do you have any records?

A I can provide them, I can work up some figures for you.

Q Well, is that an estimate?

A When you are dealing in a sales situation -

THE COURT: Just answer the question, is it based on concrete figures or an estimate?

THE WITNESS: Your Honor, it is based on an estimate of the sales volume.

BY MR. WILLIAMS:

Q All right, with respect to the installation cost, you said that you incurred damages because of overhead, is that also an estimate?

A Again based on the sales volume, it is an estimate.

Q It is an estimate?

A Yes.

* * *

Q I think that you have said that the replacement business is largely based on repetitive business?

A Any business is a repetitive business.

Q Are you guessing that you lost business because of bad publicity?

A I think that I can put enough witnesses on the witness stand to answer that question.

Q Did I understand you correctly to say that 50 to 75 percent of the customers that purchased Repco windows complained?

A At least.

* * *

MR. NORTON: I will call Mr. McHugh as my
next witness.

THOMAS P. MCHUGH
was called as a witness and after having first been duly
sworn to tell the truth, the whole truth, and nothing but
the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Mr. McHugh, you have been sworn?

A Yes.

Q Would you state your name and address for the Record, please?

A Thomas P. McHugh, Route 2, Box 26, Hurt, Virginia.

Q If you would, try to project your voice to the Judge, speak directly to him so that he can hear you.

A Okay.

Q Mr. McHugh, do you know Mr. Royal?

A Yes, I do.

Q Were you employed by Royal Aluminum & Construction Corporation?

A Yes, sir.

Q What was your position with the corporation?

A I was an installer.

Q What did you install?

A I - -

THE COURT: You are going to have to speak so that we can hear you or else you are wasting our time, speak to me.

THE WITNESS: I was an installer.

BY MR. NORTON:

Q And what did you install?

A Windows and siding.

Q Excuse me?

A Replacement windows and siding.

Q Now prior to your employment with Royal Aluminum & Construction Corporation, by whom had you been employed?

A Just before that I was working with Nu-Sash Window Corporation.

Q And what was your position with Nu-Sash?

A I was installation manager.

Q Now is Nu-Sash a small, local corporation or - -

A No, they are nationwide.

Q And what do they specialize in?

A Replacement windows.

Q And for how long had you been employed by Nu-Sash?

A I believe it was about a year and a-half.

Q Prior to that, what was your occupation?

A I worked as a carpenter for Nelson Boothe

out of Vinton.

Q For how many years?

A About a year and a-half.

Q And prior to that, what was the type of occupation that you enjoyed?

A I have always done carpentry work.

Q Now during the course of your employment with Royal Aluminum & Construction Corporation, did you install Repco windows?

A Yes.

Q What is a Repco window?

A It is a replacement window made by Repco Manufacturing Company.

Q And did you experience any difficulties with these windows?

A We had some problems with them, yes.

Q All right, would you explain to this Jury and to the Court what the nature of the problems were?

A Well, the main problem was a sweat problem.

Q Explain that in detail. I know you are a little nervous but there is nothing to be nervous about, just explain the sweating of the windows to the Jury.

A Moisture would condense on the window framing that was the whole thing.

Q And where on the window frame?

A Along the metal edges around the glass.

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Q All right, now what other problems did you have that resulted in complaints and what did you find after you investigated those?

A They said there was air blowing between the meeting rails.

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Q Now what, if anything, did you, as the mechanic, the man in charge, try to do to correct that fault?

A When we realized that that was the problem, we went back and put a little bit heavier gauge, well they call it like a weather stripping.

Q Now had that been originally part of the unit when it was delivered to you, the heavier gauge?

A No.

Q Now there were certain problems, as I understand it, encountered with the individual sashes themselves, was there anything that you could do to correct those defects?

A We sometimes, well, after we installed the windows, we used a tube and tile cement to fill in the crack

Q And that would be on the corners where the aluminum sides met the panes of glass?

A Yes, sir.

Q Mr. McHugh, after these windows were installed, for how long a period of time did you and other mechanics revisit various homes in an attempt to correct the defects that were found?

A We had to go back on quite a few several times that I can remember.

Q All right, and for how long a period of time did that continue?

A Well, it was during the cold weather season that we had to go back on them but I only did it when there was a convenient time for me to be there.

Q When did you start, if you can recall, your visits for repair work or the revisits to these homes to handle the complaints of the consumers?

A It was naturally when the weather turned cold.

Q And that is when the complaints came in?

A Right.

Q After you made your first visit - - well, was Mr. Saunders the first place that you went back to with respect to repairing or correcting the defects?

A Is that the man that lives near Glasgow?

Q Yes.

A No, he is not the first one, no.

Q Who was the first one in your recollection that you at least went to visit?

A It was one of the first sets of windows that I installed somewhere in Salem, I can't recall the name.

Q Now when did you first go back, would it have been in September or October of 1975 during the first onset of cold weather?

A Yes.

Q All right, and for how long a period of time did you continue to visit various houses to attempt to correct the defects?

A As long as we continued to put Repco windows in.

MR. NORTON: Respond to any questions that Mr. Williams may have for you.

CROSS EXAMINATION

BY MR. WILLIAMS:

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Q To how many customers did you return, was it two or three or four?

A There was quite a few but I can't recall exactly how many there were.

Q Was it approximately five?

A There were about five that I returned to several times.

* * *

Q You had installed how many different kinds of windows before you started working for Mr. Royal's corporation?

A Before I started working for him, just Nu-Sash and Repco windows, those two.

Q Nu-Sash windows?

A Yes.

Q You did not install Nu-Sash for Mr. Royal's corporation, did you?

A No, sir.

Q How long did you install Nu-Sash windows?

A Approximately a year and a-half.

Q And you had, on occasion, had trouble with Nu-Sash windows sweating, hadn't you?

A Yes, but very rarely.

Q But they did sweat on occasion?

A Yes.

Q In the industry is a Nu-Sash window a higher quality window than a Repco window?

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2 MR. NORTON: Objection, Your Honor.

3 THE COURT: I don't know, are you familiar
4 enough to answer that or not?

5 THE WITNESS: Pardon?

6 THE COURT: Let him answer it if he can.
7 Go ahead.

8 THE WITNESS: In my opinion, a Nu-Sash
9 window is a higher-quality window, yes.

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J. LEON SAUNDERS

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Mr. Saunders, would you please state your name and your address and would you throw your voice right on up to the Judge?

A John Leon Saunders, Route 1, Box 226, Glasgow, Virginia.

Q Now Mr. Saunders, during the Year 1975, did you have the Royal Aluminum & Construction Corporation install replacement windows at your home?

A Yes, sir.

Q Do you recall the actual date of installation?

A No, not right offhand, I don't, sir.

Q And after they were installed, was there any problem that you noticed that you communicated to Mr. Royal?

A Yes, sir.

Q What was the problem?

A Well, the windows did not have the felt running all the way around them. They installed them and it came a rain and then in the corner of each window, water run in and my wife and I was up half the night mopping water and now the windows are sweating.

Q Now did you communicate this to Mr. Royal?

A Yes, sir.

Q What, if anything, did he do?

A He came quite a few times and he had men from the factory and they said that the windows had a defect in them.

Q When you said "they said" who was that?

A That was the boys from the factory.

Q From the manufacturer?

A Yes.

Q Where did he say that?

A He said that in my dining room.

Q Now what suggestions, if any, did they have for curing these defects?

A Well, Mr. Royal came back and he put some kind of caulking in the corners, all four corners of the window, the upper window and the lower window of all the windows I had put in and they said that they would send some felt to go around the windows which I have never

received nothing.

Mr. Royal came and he did put two storm windows on my bedroom to see if that would help and keep them from sweating and keep the cold air from coming in around them.

Q Did it help?

A Yes; it helped those two. They told me that my basement - - my basement is not dug, it is just a dirt floor - - they told me to put plastic underneath my house and I tried that and they told me that I needed a dehumidifier and I got that and I tried that but nothing ever happened.

Q These storm windows that were put up, did Mr. Royal charge you for these windows?

A Yes, sir.

Q Now they were paid out of his pocket or out of your pocket?

A I paid him.

Q You paid him extra for the storm windows?

A No, I had a contract.

Q So when I asked you who paid for the two storm windows, who did pay for those?

A I guess Mr. Royal paid for those, I didn't pay for the two storm windows that was put on my house.

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12 J. LEON SAUNDERS

13 was recalled as a witness and testified further on his oath
14 as follows:
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16 DIRECT EXAMINATION

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18 BY MR. NORTON:

19 Q Mr. Saunders, during the course of these
20 problems with the windows that you have had, what, if
21 anything did you do with respect to threats of litigation
22 against Mr. Royal and Royal Aluminum & Construction Company

23 A Would you repeat that again, please?

24 Q Let me rephrase the question: Did you
25 threaten John Royal's company with litigation?

2 A Yes, I did.

3 Q Did you actually go to an attorney at one
4 time?

5 A Yes, sir.

6 Q As a result of the difficulties that you
7 had with these windows, did you have an opportunity to
8 refer any business to a third party for Mr. Royal?

9 A Yes.

10 Q To whom was that?

11 A To John Kimball.

12 Q And was that before you had the problem
13 with the windows?

14 A Yes, sir.

15 Q And then what happened?

16 A Well, I was not pleased with them - -

17 Q And then what happened?

18 A I called Mr. Royal and talked to him and I
19 told him that I had somebody that was interested and then
20 after he found out how I had these problems, he told me to
21 just drop it.

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E. A. SUMNER

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Sir, would you state your name and address for the Court, please?

A Earl A. Sumner, 801 Piedmont Avenue, Salem.

Q And Mr. Sumner, did there come a time in 1975 when you purchased replacement windows from Royal Aluminum & Construction Company?

A Yes, sir.

Q Were you pleased with these windows?

A No, and I am still not.

Q Would you tell the Court and Jury what the problems have been?

A The air comes in around them and they ice up and water runs down off of the windows down on the carpet.

Q What, if anything, did Mr. Royal do, or his corporation, to correct this defect?

A Well, Mr. Royal come two or three times to look at them and he had the company representatives there to look at them.

Q Was anything done?

A No, they promised to but they never did do anything about it.

Q Did the mechanics, the men that actually put the windows in, did they also come?

A Yes, they was there.

Q And did they do anything at all to the windows to try and fix them?

A Not that I remember.

Q Did you refer third parties to Mr. Royal to have windows installed, did you give him more business?

A He had a guy to come there one time to look at the windows but after I found out about the windows, then

I could not recommend them to anybody.

I had the windows installed in April and I didn't know that they were defective until the first cold spell struck.

Q And after the first cold spell with the wind blowing in and the condensation and icing, did you recommend Mr. Royal or his corporation to anybody?

A No, sir.

Q Would you have?

A No, sir.

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Sumner - Cross

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LORING R. ALSTADT

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Mr. Alstadt, did you at one time in 1975

purchase replacement windows from Royal Aluminum & Construction Corporation?

A I did.

Q And were you satisfied with those windows?

A No, sir.

Q Would you tell this Court and Jury what was the matter with those windows?

A Well, the windows gapped, they were double hung windows and where they come together they gapped at the side.

We purchased the windows primarily to protect against the weather and the windows that we replaced were on the north and the west side of our house and as a result, my wife would stick tissue paper in them to prevent the air from coming in.

We had spoken to Mr. Royal a couple of times about it and that was the real problem that we had.

Since that time, there is one of the windows that has collected dirt on the inside of the insulating windows. Basically the complaint that we had with those windows was that they were not sealed properly where the strip comes together where the windows meet.

Q Is that on the window itself or is that on the frame around the window?

A No, it is not the frame around the window, it was the frame of the window, as a matter of fact at anytime you can look through and see the outside light at that location.

Q Have you had occasion since the time that you found the defect in these windows to refer other business to Mr. Royal?

A No, we have not.

Q Would you have referred other business for these windows to Mr. Royal?

A Well, the window that he showed us for a demonstrator looked like a pretty good window but I will admit that I was a little bit embarrassed to show it to our friends when they came over.

We liked the window, we liked the fact that you could take them out because we had an inaccessible stairwell above the window and so it is easier to then take it out and clean it that way and that is one of the reasons why we got the windows in the first place.

MR. NORTON: Respond to any questions that Mr. Williams may have.

* * *

CROSS EXAMINATION

BY MR. WILLIAMS:

Q How many windows did you have installed?

A We had six.

Q Did they all have the same problem?

A Yes, they did.

Q And where were the holes that you described in the frames?

A Where were the holes?

Q Yes.

A It was, like I say, it was a double-hung window and on the side of the aluminum framing where the two met, there was a gap right in there.

Q You say where the two met?

A The two gaps?

Q No, what two things are you talking about?

A The upper and lower half of the double-hung window, it raises up and down.

Q So if the window works like this - -

A Yes, they go up and down.

Q - - was it at this point (indicating)?

A It was at that point on the two sides.

Q On here and here (indicating)?

1
2 A Yes, that is correct.

3 Q You could see through?

4 A Yes.

5 Q And you could see light?

6 A Oh, yes, in other words there wasn't no
7 piling or insulation there whatsoever.

8 As a matter of fact I had called Mr. Royal
9 to offer a suggestion that I had to alleviate this problem.
10 I suggested that he settle the problem by just giving me a
11 strip that would fit in there and I could take it out and
12 put it in as needed but he didn't particularly want to do
13 that because it wasn't a standard product from the company.

14 This past Winter, while I have been waiting
15 on an adjustment of this claim, I have installed inside
16 storm windows myself, I put them on the inside of these
17 windows because we are on a little hill and we get an awful
18 lot of wind up there and so just to save the fuel bill a
19 little bit, I did that.

20
21
22 * * *

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CHRISTINA ROYAL

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NORTON:

Q Christina, try to project your voice, try to get your voice all the way back to the Judge. Now what was your function with respect to the corporation? What were your duties?

A Secretary, I handled the book work for John.

Q You are speaking to me, try to project your voice all the way back.

A I did the secretarial duties that needed to be done in the office and I handled the books.

Q What was your title with the corporation?

2 A I was secretary-treasurer.

3 Q And you were a shareholder?

4 A Yes, I was.

5 Q Now when was that corporation formed, if
6 you can recall?

7 A May of '75.

8 Q And what was the original name of the
9 corporation?

10 A Royal Aluminum Products, Incorporated.

11 Q And was there a new corporation formed at
12 anytime after that?

13 A No.

14 Q How did the name come to be Royal Aluminum
15 & Construction Corporation?

16 A The name came to be Royal Aluminum &
17 Construction because of the fact that we had started doing
18 room additions, adding rooms and rennovating kitchens and
19 bathrooms and so on and with the name of "Royal Aluminum
20 Products" the public was not aware that construction was
21 a part of the business, therefore, we amended the name of
22 Royal Aluminum Products to Royal Aluminum & Construction to
23 portray to the public that that was, in fact, what we were
24 capable of doing and what we were, in fact, doing.

25 Q With respect to replacement windows, did

certain problems arise as a result of the Repco windows, replacement windows?

A Several.

Q Would you describe the nature and extent of these problems as they came to you in your capacity as the secretary-treasurer of the corporation?

A I handled most of the telephone calls that came into the office, if not all of them.

The major complaint was that the draft and the ice in the Wintertime was terrible. That was the major thing, that is what really started the whole thing because all of the people were having ice form during the night and then it would melt on the seal inside the window during the day.

Q As the secretary-treasurer of the corporation, how much time did the corporation spend in response to the complaints, that being the meetings with the attorneys, the trips of the mechanics, everything that was entailed in the attempt by the corporation to fix or to repair the defects?

A Over a period of several months, I would say a minimum of three months' time was involved.

Q When you say "three months" is that from the starting point to the concluding point of the efforts made by the corporation?

A Right, that is not all at one time, that is from the beginning of the complaints, when the complaints actually started coming into the office, until the time that we actually had to go out of business because of all of this mess.

Q All right, so what you are saying then, if I understand you correctly, is that you are taking all of the time expended by the corporation and compacting it into a period of time?

A Exactly.

Q And that period of time you indicate is what?

A Three months.

Q Would you, for the benefit of the Court and Jury, tell us the specific amount of money, due to these window defects, that was a direct expense to the corporation?

Give us a breakdown if you would.

A During the course of our normal business, all right, our salaries totaled - - do you want every individual's salary or just a total?

Q Just the total.

A Okay, the total per-month salaries paid from the corporation was \$12,300 a month.

Q Twelve thousand?

2 A Twelve thousand three hundred dollars.

3 Q That was for the three-month period, is
4 that how you are giving it to us?

5 A Okay, yes, that is right.

6 Okay, the truck payments and the, well,
7 all right, just the truck payment was \$366 for three months

8 Q Now the breakdown there would be - -

9 A One hundred and twenty-two dollars a month.

10 Q One hundred and twenty-two dollars a month?

11 A Yes, that was the payment on the truck.

12 Q All right, continue, if you would.

13 I Insurance and gas and upkeep and tires and
14 so on for the truck was \$400 per month so, okay, that would
15 have been a total of \$1,200.

16 Q All right, continue if you would.

17 A Advertising, we were advertising in the
18 "Spectator" on an every-other week basis which was - total
19 of \$1,800 in advertising, \$600 a month was advertising.

20 Q What was your per-week expense for adver-
21 tising?

22 A I don't have the exact figure, I have the
23 figure that I know which was \$300 a week every other week.

24 Q That is what I am trying to get at.

25 A Every other week we spent \$300.

Q What you are saying is that you spent \$300, that was your billing for advertising?

A Correct.

Q All right, and insofar as you only did it on an every-other-week basis, you then come to a \$600-per-month expenditure?

A That is correct.

Q And then for the three months, that would be \$1,800, is that correct?

A That is correct.

Q All right, are there any other direct expenses?

A The average of our sales volume.

Q Are these direct expenses?

A Those are direct expenses that I can account for.

Q What was the sales volume of business that you were doing at the time just prior to the initial complaints coming in?

A Twenty-five thousand dollars a month.

Q And what was the profit ratio that the corporation enjoyed?

A Eighteen percent.

Q Do you have the figures then for the net

loss of profit for that three- month period?

A No, I don't.

Q You are going to leave that to me?

A Yes.

Q I will come back to that. Are there any other direct expenses?

A There would be approximately a \$3,600-per-month profit margin. That is not right, no.

Q Christina, do you want to work it out yourself? I am not supposed to give you the answers.

A Can you give me the calculator and I can do it real quickly. Forty-five hundred dollars.

Q All right, that is \$4,500 per month?

A That is right.

Q And for the three-month period would your figures agree that it would be \$13,500?

A Right.

* * *

C. Royal - Direct

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Q Okay, you have brought to mind one thing: You had given us previously the breakdown on the salaries for that period of time?

A Yes.

Q The truck payments, the upkeep of the vehicle and your advertising expenses, was your business operated out of your house?

A No.

Q What was the amount of your rent, the rental expenses?

A One hundred and seventy-five dollars a month was the rent that we paid.

Q So for three months that would be \$525?

A Okay, right.

Q And are there any other expenses that you had in the office for that three-month period of time or what would your expenses on a monthly basis be other than for salary and for rent?

A Insurance and the Workmen's Compensation.

Q Do you know what the expenses would be?

A I would have to go back to the books, I don't recall any exact amount.

Q Do you recall what they might have been?

A As far as insurance goes, I would say approximately \$200 a month.

Q Now when you say "insurance" is that the Workmen's Compensation insurance?

A That is the Workmen's Compensation insurance.

MR. NORTON: Respond to any questions that Mr. Williams may have for you.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Mrs. Royal, you said that you have computed that the time spent collectively by the corporation to handle these matters was three months, what do you base that on?

A I base that on the amount of time that I, myself, put into it; on the service calls that had to be made; on the time that Mr. Royal himself had to be with attorneys and had to go back to these individual clients.

I cannot count the endless hours that we spent on the telephone with clients. I am telling you three months but it could be like 24 hours a day for three months, I am just counting business days for three months.

Q It could be less?

A No, I would definitely say not, there was too much time involved for all of us.

Q Do you have any written records?

A As to what?

Q As to the time you spent.

2 A I don't understand the question?

3 Q Well, did you keep any written records to
4 document the amount of time that was spent by you and
5 Mr. Royal or did the corporation keep any such records of
6 time spent by officers of the corporation to deal with
7 these problems?

8 A Not as such. We did not keep records for,
9 you know, where we were at what given hour of every day, no.

10 Q During the time that you were fielding
11 complaints, were you also installing more windows?

12 A We were trying to.

13 Q Did you - -

14 A We had several that were backlogged, yes,
15 that we did install.

16 Q That you did?

17 A Yes.

18 Q And do you have any records to show any
19 decrease in profits or earnings of the corporation prior to
20 the time that you stopped doing business altogether?

21 A I am sure we could provide you with that
22 information.

23 Q But you don't have them now, do you?

24 A I don't have them with me.

25 MR. NORTON: I object, Counsel had an

opportunity to ask for that during pre-trial discovery and he did not ask for them.

THE COURT: I overrule the objection, they should come here ready for trial and they should have all the proper records that might be necessary.

Go ahead, Mr. Williams.

BY MR. WILLIAMS:

Q Mrs. Royal, did you continue paying salaries while you were fielding these complaints?

A Yes; we did.

Q You had the money then to pay the salaries?

A Yes, we did.

Q Did you continue making your truck payments?

A Yes, we did.

Q And you continued, obviously, buying gas for them?

A Yes, we did.

Q And you paid your rent and you paid your advertising and you paid your insurance premiums, right?

A Right.

Q And the income was coming in to pay all of those expenses from the customers?

A I don't know what you mean by "income from

the customers" the corporation had so much in it and what we were doing was taking out of the corporation to pay the bills.

Q The corporation was paying all of those bills that you have testified to here today?

A Right, that is correct.

Q So there was not a loss to the corporation, as such, you did not lose the salaries, you did not lose the payments on the trucks, you did not lose all of the things that you just itemized, you had the money to pay them?

A I don't understand what you are saying?

Q You did pay the bills, you have admitted that on the witness stand?

A That was not coming - - let me rephrase that. The money that was paying that was not allotted to pay those items, we had to do that because of the time that we were spending on the same business that, under all normal circumstances, would have been completed and we would never have had to go back on again so we spent double and triple time doing one job, in other words.

Q Are you trying to tell us then that if you had not been servicing claims, you would have been doing new jobs?

A Absolutely.

Q Are you sure of that?

A Absolutely.

Q How are you sure?

A Because of the volume that we had done up to that point.

Q You are assuming that the volume would have continued?

A No, I am positive that it would have continued because of all of the other businesses in town that were doing that type of business at that time, none of them seemed to decline like we did.

Q So you say since they didn't decline, if things had gone on the way you had hoped, you would not have declined either?

A You see the Wintertime is the prime time, it is the prime season for this business and we had no reason in the world not to do the kind of business that we had been doing.

Q You were the official of the corporation in charge of keeping the books, were you?

A That is correct.

Q And you were the bookkeeper-accountant as well?

A No, what I did was I kept all of the records, all of the bills and everything that came in and we had a separate accountant who did all of the bookkeeping or the accounting work.

Q All right, you would agree with your husband that you were paid on all of your jobs, would you not?

A Paid from what?

Q From the customers.

A From the clients?

Q That is true.

A Yes, I would say so.

MR. WILLIAMS: Thank you.

MR. NORTON: I have no further questions.

(The witness was excused.)

MR. NORTON: Mr. Royal and Royal Aluminum & Construction Company rests.

MR. WILLIAMS: May we see the Court?

THE COURT: You want to see the Court?

MR. WILLIAMS: Yes.

THE COURT: All right, members of the Jury, go to your room.

(Thereupon Court and Counsel retired to the Court's Chambers and the following took place

1
2 before the Court in Chambers.)
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2 MR. WILLIAMS: For the Record, I would move
3 the Court, with respect to the claim of Royal
4 Aluminum & Construction Corporation against
5 Ted Lansing Supply requesting damages by reason
6 of breach of warranty, to strike the evidence and
7 to enter summary judgment on behalf of Ted Lansing
8 Supply on the following grounds: One, that the
9 Plaintiff has failed to sustain its burden of
10 proof in proving by preponderance of the evidence
11 that, in fact, the expressed warranties were made;
12 Two, the Plaintiff has failed to prove, even if the
13 Court believes that explorations were made, that
14 they formed the basis of bargaining as is required
15 by the Uniform Commercial Code; Thirdly, we move
16 the Court to strike the claim of the Defendant
17 Royal Aluminum & Construction Company for damages
18 by reason of breach of warranty on the ground that
19 the evidence produced thusfar in support of damages
20 would require the Jury to engage in speculation
21 which the Jury cannot do and even if the Court
22 believes that there was evidence to support the
23 making of the warranty, that the Record is still
24 absent of evidence to support damages and, therefore,
25 the claim by Royal Aluminum & Construction Corporation

1
2 for damages should be stricken and a summary judgment
3 entered in favor of Ted Lansing Supply.

4 THE COURT: All right sir, the Court would
5 comment that there is an implied warranty of
6 fitness for any product that is sold in the course
7 of trade and the evidence before the Court at this
8 stage by witnesses who have purchased the product
9 is that it was absolutely defective.

10 Now let's proceed.

11 MR. WILLIAMS: For the Record, we would
12 point out at this time that there has been no
13 allegation that there has been an implied warranty
14 or the breach thereof.

15 The Pleadings on the face show the allegation
16 of an expressed warranty and a breach thereof and,
17 therefore, the issues in this case are limited to
18 that and, therefore, the Court's ruling with
19 respect to this motion on the grounds that there is
20 an implied warranty is incorrect and we, therefore,
21 except to the Court's ruling.

22 THE COURT: All right sir, now where are we?
23 You have further witnesses and you are going to
24 proceed with those?

25 MR. WILLIAMS: Yes.

(Thereupon Court and Counsel returned to the Courtroom and the following took place before the Court and Jury.)

THE COURT: All right, Mr. Williams, you may proceed.

MR. WILLIAMS: I will call Mr. Wigington as my next witness.

I. M. WIGINGTON, JR.
was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Please state your name.

A I. M. Wigington, Jr.

Q And your address, Mr. Wigington?

A 600 Marshall, Salem, Virginia.

Q Are you employed?

A I am self-employed.

Q Where do you work?

A Fleet Service.

Q Did you have occasion to enter into an agreement with Royal Aluminum & Construction Corporation for the installation of replacement windows in your home?

A I certainly did, not at this address but at a former house down in Botetourt County.

Q Were they installed?

A Yes, they were.

Q Did you make any complaints to anyone about those windows?

A I did not.

Q Were you, in fact, satisfied with them?

A Very much so.

MR. WILLIAMS: Thank you.

MR. NORTON: No questions, thank you very much.

(The witness was excused.)

MR. WILLIAMS: Your Honor, at this point, since this relates to Lansing Exhibit Number Four which was introduced into evidence wherein it was stated that these were Mr. Royal's responses to the Interrogatories wherein he stated that these were customers that had registered complaints, I

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would like to direct this document to the Jury for them to recall that Mr. Wigington was one that was listed in this document, under oath, as being one who complained.

THE COURT: The witness who has just testified?

MR. NORTON: Mr. Wigington, yes.

THE COURT: All right.

MR. WILLIAMS: I would call Mr. Stump.

HAROLD STUMP

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, please.

A Harold Stump.

Q And your address, Mr. Stump?

A 207 Craig Avenue.

Q Where, Salem?

A Salem.

Q Are you employed, Mr. Stump?

A Yes, sir.

Q Where?

A Sav-A-Stop.

Q And have you had occasion to deal with
Royal Aluminum & Construction Company for the purpose of
having installed aluminum replacement windows?

A Yes, I did.

Q Were they, in fact, installed - -

A Yes.

Q - - in your home?

A Yes.

Q Did you have occasion to complain about
those windows to Mr. Royal or to Royal Aluminum & Construction
Company?

A No, I did not.

Q The windows are satisfactory?

A Sir?

Q Are the windows satisfactory?

A Satisfactory.

MR. WILLIAMS: All right, thank you.

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CROSS EXAMINATION

BY MR. NORTON:

Q Let me ask you this: Are you married, Mr. Stump?

A Yes, sir.

Q Do you know whether or not your wife has made any complaint?

A I don't think she has, in fact I know that she hasn't because we talked about it the other day and she didn't know why I was coming down here.

Q Have you ever had any sweating - - do you know what sweating is on windows?

A Yes.

Q What is that?

A It is where water comes down.

Q Well, sweating can also be where moisture collects in between the two panes, has that ever happened?

A As far as I know, it has not.

Q As far as you know?

A Yes.

Q Do you know whether or not your wife has observed any of that?

A If she has, she hasn't said anything about

it.

MR. NORTON: Okay, I thank you very much.

(The witness was excused.)

MR. WILLIAMS: I would call Mr. Hubble as
my next witness.

SAMUEL H. HUBBLE

was called as a witness and after having first been duly
sworn to tell the truth, the whole truth, and nothing but
the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name.

A Sam Henry Hubble.

Q And your address, Mr. Hubble?

A I can't hear too good.

Q Your address, sir, what is your address?

A 2017 Twelve O'Clock Knob Road.

Q Salem?

A Yes.

Q Is that your home, your residence?

A That is my home.

Q Did you have occasion to deal with Mr. Royal or Royal Aluminum & Construction Corporation?

A Yes, he put me in five windows.

Q Did you complain about those windows?

A No.

Q In fact were you pleased with those windows?

A Yes, the wife even sat down and wrote him a letter because she appreciated the work and everything.

Q She liked them?

A Yes.

Q Did you agree to have a sign put in your yard to advertise the windows?

A Yes, he asked me could he do it and I said to go ahead and do it.

Q You liked the windows?

A Well, I gave him permission to do it.

MR. WILLIAMS: I have no further questions.

CROSS EXAMINATION

BY MR. NORTON:

Q Mr. Hubble - -

A Yes.

Q - - do your windows ever sweat?

A No.

Q Do they ever have beads of water that collect in them?

A No.

Q They don't at all?

A No, they do just exactly what I bought them for, they are good.

Q Do you ever get a draft from the windows?

A No.

Q Are you married?

A Sure I am married.

Q And do you know whether or not your wife has ever complained about them?

A No, she is the one that wrote him the letter. She wrote him a letter telling him how she appreciated the windows, that they was nice and she told him that she was able to raise them and take them out and put them back and that they weren't any trouble.

Q There was no problem with the installation?

A No.

MR. NORTON: Thank you very much.

(The witness was excused.)

MR. WILLIAMS: We will call Mr. Reed as our next witness.

LESTER G. REED

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Have you been sworn, sir?

A Yes, sir.

Q Your name?

A Lester Reed.

Q Your address?

A 2427 VanCouver Drive, Roanoke, Virginia.

Q And is that your residence?

A Yes.

Q Did you reach an agreement with Royal Aluminum & Construction Corporation to install in your residence certain replacement windows?

A Yes.

Q And did you complain about those windows?

A Yes.

Q What was your complaint?

A I had a glass cracked when they were installed.

Q The window pane itself?

A Yes.

Q Is that the only complaint that you had?

A Yes.

Q And did you actually make that complaint to Mr. Royal or the corporation?

A Yes.

Q You communicated that to them?

A Yes.

MR. WILLIAMS: Your witness.

CROSS EXAMINATION

BY MR. NORTON:

Q Your name again, sir?

A Lester Reed.

Q Mr. Reed?

A Yes.

Q When you made the complaint about the cracked window, was it to Mr. Royal personally or to someone

in his office?

A It was someone, well, it was the person that installed the windows and then the person in the office also.

Q And somebody in the office?

A Yes.

Q Now do the windows sweat at all?

A No.

Q They don't?

A No.

Q Do you have any drafts?

A No.

Q None whatsoever?

A No, sir.

MR. NORTON: I have no further questions, thank you.

(The witness was excused.)

MR. WILLIAMS: We would call Mr. J. R. Gilmore as our next witness.

* * *

J. R. GILMORE

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, please sir.

A J. R. Gilmore.

Q And your address?

A 4827 Eden Drive, Northwest.

Q The City of Roanoke?

A The City of Roanoke.

Q Did you have occasion to enter into an agreement with Royal Aluminum & Construction Corporation?

A I did.

Q What were they going to do for you?

A They put in seven insulated glass windows.

Q Did you complain about those windows?

A No.

Q Did you like them?

A I liked them.

MR. WILLIAMS: Thank you, sir.

MR. NORTON: No questions.

(The witness was excused.)

MR. WILLIAMS: J. R. Newman is our next witness.

J. R. NEWMAN

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Please state your name.

A J. R. Newman.

Q And your address, sir?

A 1043 Woodrow Avenue, Southeast.

Q Did you enter into an agreement with Royal Aluminum & Construction Corporation?

A Yes.

Q To do what?

A To put some windows in.

Q To replace some windows?

2 A Yes.

3 Q Did you complain about those windows?

4 A We called them and they said that they would
5 be over but they never did come.

6 Q What is the matter with them?

7 A One of them has got an air hole in it and
8 it gets air all the way across in it.

9 Q And you tried to get in touch with them?

10 A We got in touch with them and they said
11 that they would come over but they never came.

12 Q They never came?

13 A No.

14 MR. WILLIAMS: All right, thank you.

15

16 CROSS EXAMINATION

17

18 BY MR. NORTON:

19 Q You complained?

20 A No, I am not complaining but the window - -

21 Q You were dissatisfied with the window?

22 A Well, I was satisfied with all but one.

23 MR. NORTON: Thank you.

24

25

WAVE E. KIRK

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, please.

A Wave E. Kirk.

Q And your occupation?

A I am retired.

Q Your address?

A 2415 Overlook Road, Northeast.

Q Did you have occasion to enter into an agreement with Royal Aluminum & Construction Corporation?

A Yes.

Q To do what?

A We bought some windows and a storm door.

Q Were they replacement windows?

A Yes, I guess so, we had some windows in but not that kind.

Q And how many windows did you have put in?

A Seventeen.

Q Did you complain about those windows?

A No, sir.

Q Did you like those windows?

A We couldn't find anything wrong with them.

Q Did you have a complaint about a door?

A Well, the door sagged on us but when we tried to call them, they had already gone out of business.

MR. WILLIAMS: Okay, thank you.

MR. NORTON: I have no questions, thank you.

(The witness was excused.)

MR. WILLIAMS: We would call William McGregor.

WILLIAM E. MCGREGOR

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, please sir.

A William McGregor.

Q What is your address?

A Route 4, Box 465, Salem, out in the County.

Q And your occupation?

A I am a retired meteorologist, I worked in social services.

Q Did you have occasion to enter into an agreement with Royal Aluminum & Construction Corporation to install replacement windows in your home?

A Yes, 1974, 1975.

Q Did you complain about those windows?

A I had one very minor complaint.

Q What was that?

A That was in the track on the side where the window goes into the frame, there was a long piece of felt that had come out and I called the Royal Company and they came out and fixed it and it has been satisfactory ever since.

MR. WILLIAMS: Thank you.

MR. NORTON: I have no questions, thank you very much, sir.

(The witness was excused.)

MR. WILLIAMS: John Whitt.

JOHN A. WHITT

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, sir.

A John Whitt.

Q And your occupation?

A LPM.

Q Where do you live, Mr. Whitt?

A 1311 Hamilton Terrace.

Q In the City of Roanoke?

A Yes.

Q Did you engage or enter into an agreement with Mr. Royal or Royal Aluminum & Construction Corporation to install replacement windows in your home?

A Yes, I did.

Q And were they installed?

A Yes, they were.

Q Have you complained about them?

A No, I have not.

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Q Do you like them?

A Yes, they are fine.

MR. WILLIAMS: Thank you very much.

CROSS EXAMINATION

BY MR. NORTON:

Q Is this your home, sir?

A Yes, it is.

Q And does anybody else live in the house
with you?

A My wife and my son.

Q Now do you know whether or not there have
been any complaints by your wife with respect to these
windows?

A No, I don't, but she hasn't said anything
about it.

MR. NORTON: You have had no problems, okay,
thank you.

THE COURT: You are excused, sir.

(The witness was excused.)

MR. WILLIAMS: I would call Louise Becker.

LOUISE BECKER

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, please.

A Louise Becker.

Q And your occupation and address, please

ma'am.

A My address is 1326 - 22nd Street and my occupation is with the Dietetic Service.

Q Where is that?

A At the VA Hospital.

Q Did you enter into an agreement with Mr.

Royal or Royal Aluminum & Construction Corporation to install replacement windows in your home?

A Yes, I did.

Q Were they installed?

A Yes, they were.

Q Have you complained about those windows?

A No.

2 Q You are satisfied with them?

3 A Yes.

4 MR. WILLIAMS: Thank you.

5

6 CROSS EXAMINATION

7

8 BY MR. NORTON:

9 Q Is it Mrs. Becker?

10 A Yes.

11 Q Are you satisfied with the insulation of
12 those windows?

13 A Yes, I am.

14 MR. NORTON: All right, thank you.

15 THE COURT: You are excused.

16 (The witness was excused.)

17

18 MR. WILLIAMS: I would call Mr. Loan as my
19 next witness.

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21 FLOYD T. LOAN

22 was called as a witness and after having first been duly
23 sworn to tell the truth, the whole truth, and nothing but
24 the truth, was examined and testified as follows:

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2 DIRECT EXAMINATION

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4 BY MR. WILLIAMS:

5 Q Please state your name.

6 A My name is Floyd T. Loan.

7 Q And what is your address, Mr. Loan.

8 A 513 Jackson Avenue, Vinton, Virginia.

9 Q Did you enter into an agreement with Mr.
10 Royal of Royal Aluminum & Construction Corporation to
11 install replacement windows in your home?

12 A Yes.

13 Q Were they installed?

14 A Yes.

15 Q Did you complain about them?

16 A Yes.

17 Q What happened?

18 A No response.

19 Q They never responded to you?

20 A No response.

21 MR. WILLIAMS: Thank you.
22
23
24
25

CROSS EXAMINATION

BY MR. NORTON:

Q What is your complaint?

A My complaints?

Q Yes.

A Water forming on the inside of the glass.

MR. NORTON: I am sorry to hear that, thank
you very much, sir.

(The witness was excused.)

* * *

Mr. Selander.

E. C. SELANDER

was called as a witness and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Please state your full name.

A E. C. Selander.

MR. NORTON: I am sorry, I can't hear you, sir?

THE WITNESS: E. C. Selander.

MR. WILLIAMS: This is not the witness we had called.

MR. NORTON: Excuse me one moment, sir, could you sit down for a moment.

MR. WILLIAMS: Do you want to call him as your witness?

MR. NORTON: You called him.

MR. WILLIAMS: He is not the witness that I called.

THE COURT: He is on the list.

MR. WILLIAMS: But that is not the one that I called.

THE COURT: Well, let Mr. Norton examine him.

CROSS EXAMINATION

BY MR. NORTON:

Q Did you buy any replacement windows from Royal Construction?

A Did I what?

Q Did you buy any replacement windows from Royal Aluminum & Construction Corporation?

A No, well I have got it here where I got them, in other words my wife done all of the dealings so I didn't have much to do with that.

She wanted it done and I told her to go ahead and do it and here is the paper here that I got where I paid for them.

Q Are you satisfied with the windows?

A Yes.

Q Do they sweat or are they broken?

A Well, they haven't so far, no.

Q Has your wife had any complaints about them?

A Not yet, no.

MR. NORTON: Fine, thank you very much.

THE COURT: You are excused.

(The witness was excused.)

* * *

The following is the motion and the argument thereto presented in the above-styled case presented before the Honorable F. L. Hoback on November 2, 1978.

MR. WILLIAMS: May it please the Court, on behalf of Ted Lansing Supply Company we would also renew our motion to strike the evidence of the Counter-Claimant, Royal Aluminum & Construction Company, against Ted Lansing Supply and to enter summary judgment on behalf of Ted Lansing Supply on the grounds as follows: One, Plaintiff's counter-claim alleges the existence and breach of an express warranty.

There is no evidence of the existence or breach of an express warranty.

Secondly, in the event that the Court should properly decide that there is an express warranty, there is no evidence that that warranty would form a basis of the bargain which is required by Virginia statute and therefore, on that ground, the motion to strike should be sustained.

Thirdly, as grounds for the motion to strike, we would contend that the Counter-Claimant, Royal Aluminum & Construction Company, has failed

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2 to prove damages and therefore, damages being an
3 essential element of any recovery, there is
4 insufficient evidence to permit this case to be
5 submitted to the Jury.

6 Next, in the event that the Court is
7 inclined or feels that the motion for judgment is
8 sufficient to put into issue the existence or non-
9 existence of an implied warranty, we would move
10 the Court to strike that claim on the grounds there
11 is insufficient evidence to support an implied
12 warranty, and particularly we represent to the
13 Court that there is no evidence in this case that
14 the goods in question, one, were tendered to the
15 Counter-Claimant in a defective condition; secondly,
16 that there is no evidence that the goods in ques-
17 tion pass without objection under the contract, and
18 there is no evidence whatsoever that the goods in
19 question would pass within the trade of business
20 as regarded by statute.

21 Particularly, we are referring with
22 respect to our contentions of express warranty,
23 Virginia Code Section 8.2-313 as amended to date
24 and Section 8.2-314 of the Virginia Code as amended
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5 THE COURT: Do you wish to reply?

6 MR. NORTON: I prefer you to rule.

7 THE COURT: As far as the motion concerning
8 express warranties is concerned, the Court sustains
9 the motion. There is no evidence before the Court
10 that the Court recalls dealing with express warran-
11 ties.

12 The rest of your motion is overruled, the
13 Court being of the opinion it is a jury issue and
14 that there is an implied warranty in every sale
15 unless expressly negated, and I have heard nothing
16 about negating the warranties of any kind in the
17 particular case.

18 So the issue will be submitted to the jury
19 on the basis of defective materials and concerning
20 implied warranties of fitness in the trade.

21 As far as damages are concerned, that is
22 an issue for the jury on the evidence heard by the
23 jury and you except the overruling of your motions?

24 MR. WILLIAMS: Yes, sir.
25

* * *

(Instruction Number 1 was
offered by the Court.)

MR. WILLIAMS: On behalf of the Ted Lansing
Supply Company we would note our objections to the
Court's Instruction Number 1 as given on the follow-
ing grounds: The instruction is not consistent in
wording with Section 8.2-314 of the Code of Virginia.

Further, the instruction does not charge
the Jury or instruct the Jury that in order to find
in favor of Royal Aluminum and Construction Company
they must further find by a preponderance of the
evidence that the goods in question were delivered
by Ted Lansing Supply Company in a defective condition.

THE COURT: All right, sir. This will be

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Instruction Number 1.

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