

EXHIBIT I

**11/16/16 Plaintiffs' Memorandum in Opposition
to Defendant Builders FirstSource-Southeast
Group, LLC's Motion for JNOV, New Trial
Absolute, or, in the Alternative New Trial
*Nisi Remittitur***

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL PROPERTY
OWNERS ASSOCIATION, INC. and
MARVIN T. MEEK and FRANCIS E.
HILL, individually, and on behalf of all
others similarly situated,

Plaintiffs,

vs.

Builders First Source—Southeast Group,
LLC

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-7594
)

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT
BUILDERS FIRST SOURCE—
SOUTHEAST GROUP, LLC'S MOTION
FOR JNOV, NEW TRIAL ABSOLUTE,
OR, IN THE ALTERNATIVE NEW
TRIAL *NISI REMITTITUR***

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Plaintiffs submit this Memorandum in Opposition to Defendant Builders First Source—Southeast Group, LLC's (hereinafter "BFS") Motion for Judgment Notwithstanding the Verdict, New Trial Absolute, or, in the alternative, for New Trial *Nisi Remittitur* (hereinafter "Second JNOV Motion" or "New Trial Motion"), and pursuant thereto, state as follows:

SUMMARY OF ARGUMENT

BFS's Second JNOV Motion is procedurally precluded for three, distinct reasons: (1) BFS failed to renew its directed verdict motions at the close of all evidence, thereby waiving its ability to move for JNOV; (2) BFS already moved for JNOV, rendering its Second JNOV Motion successive; and (3) BFS never requested ten days to file post-trial motions, including its Second JNOV Motion. In addition to these procedural flaws, BFS's Second JNOV Motion raises grounds BFS failed to raise at trial; and, none of these grounds warrant JNOV given the jury's verdict is supported by at least some evidence.

Like BFS's Second JNOV Motion, BFS's New Trial Motion is procedurally precluded because BFS never requested leave to file this Motion. BFS's New Trial Motion is also substantively without merit given BFS failed to object to practically anything during the trial of this matter and the jury's verdict falls within the range of evidence unchallenged by BFS.

In sum, BFS has nothing to complain about given (1) the consensual manner in which the trial was conducted; (2) its lack of objections to evidence, testimony or jury charges; and, (3) its improperly raised and unsupported arguments. Each of the foregoing reasons independently warrant this Court's denial of both BFS's Second JNOV and New Trial Motions.

PERTINENT BACKGROUND

A.) Trial Specifics

1. Plaintiffs incorporate, by reference, the Pertinent Background section included in Plaintiffs' Memorandum Opposing BFS's Motion to Compel filed simultaneously herewith.

2. Most, if not all, matters related to the four-day trial of this case were consensual in nature. Plaintiffs and BFS submitted a joint voir dire, joint factual statement, joint witness list and joint exhibit list, the majority of which were stipulated to by both Plaintiffs and BFS.

a.) Pre-Trial Motions and BFS's Opening Statement

3. On the first day of trial, August 29th, jury selection occurred followed by the arguing of various trial-related motions presented by both Plaintiffs and BFS.

4. One of these Motions included BFS's Motion for Summary Judgment seeking the dismissal of Plaintiffs' claims based upon the applicable statute of limitation. Finding a question of fact existed as to when Plaintiffs "discovered" their claims, the Court denied BFS's Motion. BFS failed to request the Court reconsider its ruling or otherwise renew its statute of limitation argument at the close of the case.

5. During BFS's opening statement, BFS's counsel proceeds to tell the jury "its side of the story", describing BFS as "a building material supply company [which sells] everything from nails and tile to lumber and, of course, windows" to "larger home builders" including "Trammell Crow Residential,"¹ the developer of OBH and "225,000" similar residential complexes. (Tr. Transcr. 22:7-24:4).²

6. BFS's counsel next informs the jury that "the [OBH] homeowners after moving in sometime in 2007. . .began to experience some problems;" and, as a result, "hired Mr. Lucey's firm who then hires some engineers and experts to come in and really drill down and figure out what is wrong with [OBH]." (Tr. Transcr. 23:4-10).

7. BFS's counsel continues by describing the "myriad of problems found" by Plaintiffs' experts at OBH (including "roof," "stucco," "siding", "wall", "brick", "waterproofing", "window", "flashing", "sealant" and "clearance" problems) and the "14 million dollars [sic] fix" for these problems. (Tr. Transcr. 24:13-25:22).

8. BFS's counsel then explains "as a result of all these findings" and the "cost to fix [OBH]," Plaintiffs "[brought] a lawsuit [in which BFS] is the last defendant left, but there were over 40; over 40 people that [Plaintiffs] blamed for the problems [at OBH] and today [BFS] is the only one left to point the finger to." (Tr. Transcr. 25:24-26:5).

9. BFS's counsel proceeds to "get a little bit further into what [BFS] did with respect to the project", explaining to the jury its "middleman" theme:

You're going to hear about this guy named Larry Bratten [sic]. Now Larry is an independent sales agent. . . .He wasn't actually a [BFS] employee, but he brought business to them and was able to kind of broker deals through his customers and [BFS] and one of those customers was [TCR]. So [TCR in 2006] comes to Larry. . .and says we're building a project. The architect has told us we need 324 vinyl ESP [windows]. . .for this project. [We need Larry to] contact the manufacturer and tell

¹ Trammell Crow Residential is hereinafter referred to as "TCR".

² The portions of the Trial Transcript referenced herein are attached as Exhibit "A".

them we need them and we need them sent to this address period; just the middle man. The sophisticated national home builder comes in and says I need 324 of these specific windows and these sizes and I want them [from] the manufacturer and I need them on my job site. Can you get them there? And that's exactly what [BFS] did.

(Tr. Transcr. 26:10-27:8).

10. BFS's then tells the jury BFS's "notice" of the window problems was its receipt of Plaintiffs "lawsuit" and asks the jury to consider "three questions" that "might instruct [it]. . .as to what the right thing to do is:" (1) whether BFS did "anything unreasonable that led to damage to the plaintiffs and, if so, what was that;" (2) whether "BFS [made] a promise that they didn't keep;" and (3) whether "the windows [were] unreasonably dangerous to the buildings." (Tr. Transcr. 27:8-25).

11. BFS concludes its opening statement by (1) listing out multiple parties "who aren't here today" (including "two [window testing] agencies," "the architect," "the general contractor", "the manufacturer," "the framing contractor," and "the delivery guy"); (2) criticizing Plaintiffs' experts' window testing; (3) pointing to OBH's other problems; and (4) repeating its "multiparty" and "middleman" defenses. (Tr. Transcr. 28:22-32:14). As claimed by BFS:

There is too much else going on [at OBH]. These windows don't exist in isolation. These windows exist in buildings that are bad from top to bottom. So if the windows contributed at all to the damage no one is ever going to be able to tell you jurors this is how much damage they caused. So to recap [BFS] they sell the buildings materials. In this particular instance they sold a window package of 324 vinyl ESP windows to a sophisticated national builder [TCR]. [TCR] comes in and says I need this particular window, this many in this size, and I want you to ship it to my job site. That's exactly what [BFS] does. . .[BFS] didn't load them up, they didn't ship them, they didn't deliver them, they didn't unload them. They certainly didn't manufacture them. . . .And they certainly didn't install them. . . .So they are just the middle man. . .

(Tr. Transcr. 31:18-32:14).

b.) Plaintiffs' Case in Chief

12. On August 30th and August 31st, Plaintiffs called OBH POA President, Len Terradista, and BFS employee, Bob Lanier, both of whom testified as to BFS's contractual obligations to One Belle Hall. These contractual obligations, encompassed within a purchase order BFS admittedly agreed to (Jt. Ex. 44(a)) and an express warranty BFS admittedly provided (Jt. Ex. 188), state:

[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee for any costs or expenses attributable to errors in [BFS's] performance.

Jt. Ex. 44(a) (emphasis added).

Should any defects develop during the warranty period due to improper workmanship and/or arrangement, the same shall, upon notice, be made good by this Subcontractor at no expense to the Contractor, Owner or Owner's Representative.

Jt. Ex. 188 (emphasis added).

13. POA President, Len Terradista, also testified each of the 59 OBH homeowners assigned their individual claims to the POA and the POA formally resolved to represent all homeowners in this matter. (Jt. Exs. 699, 700).

14. Additionally, Plaintiffs called their window expert, Dr. Rhett Whitlock ("Dr. Whitlock"), and BFS's original window expert, David VanDommelen ("VanDommelen"), who opined that the windows supplied by BFS to OBH are leaking and such leakage is "abnormal". Dr. Whitlock elaborated on the windows' defective condition, describing the multitude of water infiltration tests he performed in connection with the windows (all of which failed) and pointing to defects in the manufacture process (lack of continuous seal and cracked miter joints)³ as well as defects in the third-party testing and certification process (different window tested and certified).

³ VanDommelen and TCR's expert, Craig Rogers, also opined the windows contained manufacturing defects. (See VanDommelen Trial Testimony; Jt. Ex. 305).

Both Dr. Whitlock and VanDommelen further opined as to the windows' unreasonably dangerous condition and the damages caused by the leaky windows.⁴

15. Plaintiffs also called Gary Moore ("Moore") as their damages expert. Moore's cost estimate was admitted into evidence and published to the jury. The total repair cost at One Belle Hall is \$14,451,023.34. Moore testified that a "windows-only" replacement cost would total \$3,500,000; the cost to remove and replace the cladding around the Windows, as well as replace the Windows, would be \$4,700,000; and, the cost to repair all consequential damage related to the Windows, remove and repair the cladding around the Windows, and replace the Windows would total approximately \$5,000,000.

16. At no point did BFS object to Dr. Whitlock's, VanDommelen's or Moore's qualification as experts in their respective fields.⁵ BFS also did not object "to evidence of window testing" or "pitting witnesses". (New Trial Mot. at 8).⁶

17. Following Moore's testimony, Plaintiffs called OBH homeowner, Mark Galvin, who testified as to systemic window leaks and extensive termite damage existing throughout OBH, damage particularly localized below windows.

c.) Close of Plaintiffs' Case and Directed Verdict Motions

18. Thereafter, Plaintiffs rested their case⁷ and BFS moved for directed verdict on each of Plaintiffs' claims. (Tr. Transcr. 36:6-39:19).

⁴ BFS's Area Vice President, Bob Lanier, also testified leaky windows are not "quality products" and acknowledged BFS promised to provide "quality products" to OBH. Additionally, Lanier and BFS's 30(b)(6) witness, Richard Woodward, also agreed leaky and non-code compliant windows pose a danger to persons and property.

⁵ Notably, Dr. Whitlock was qualified as an expert as to windows and window testing.

⁶ In fact, Plaintiffs objected to BFS pitting its expert, Drake, against Plaintiffs' expert, Dr. Whitlock. See Plaintiffs' Motion to Exclude Drake.

⁷ By the close of Plaintiffs' case, Whitlock's report outlining all "problems" affecting OBH and Moore's repair estimate itemizing the cost to fix each of these problems were jointly stipulated into evidence. In addition, a section of TCR's expert report describing the windows' "manufacturing defect" was jointly stipulated into evidence, along with the results of multiple experts' window testing, expert and homeowner photographs of the windows and resulting

19. As to Plaintiffs' strict liability claim, BFS moved for directed verdict as follows:

[BFS moves for] directed verdict on the cause of action of strict liability. Under the statute code section 15-17-30 it's our position that there has been a failure of proof by the evidence that the windows were in fact unreasonably dangerous. The windows have been in operation for ten years. If they have contributed at all to damage it is only one small component of the damage and the buildings are certainly habitable. There has been no injury to life or limb. Those are the grounds of our motion. . ."

(Tr. Transcr. 38:15-25).

20. The Court denied BFS' Motion because "taking the evidence in the light most favorable to [Plaintiffs]. . .there is evidence in which the jury can make that determination that these windows pose an unreasonable danger." (Tr. Transcr. 39: 1-6).

21. As to Plaintiffs' breach of warranty claim, BFS moved for directed verdict as follows:

The breach of warranty cause of action we would move for a directed verdict. . .in that there has been insufficient evidence and proof to establish that the windows are in fact a defective condition which would constitute breach of warranty.

(Tr. Transcr. 39:10-15).

22. The Court also denied this Motion, after which BFS indicated it had "no further motions" and proceeded with its case in chief. (Tr. Transcr. 39:16-19).

d.) BFS's Case in Chief and Events Leading Up to Closing Arguments

23. BFS's case in chief consisted of two, newly named expert witnesses: (1) window expert, Phillip Drake ("Drake"), and (2) repair estimator, J.R. Steve Watkins, Jr. ("Watkins"). Drake, who performed no window testing, essentially opined the leaky windows, themselves, minimally contributed to the damage existing at OBH and most were not in need of full

water/termite damage, BFS's signed warranty, BFS's signed purchase order, all homeowner assignments, and the OBH POA's accompanying resolution. (Jt. Exs. 44, 129, 130, 179, 300, 301, 302, 304.3, 305, 699, 700).

replacement. Watkins testified as to a "window-only" estimate he prepared just prior to trial which totaled \$12,000 and only encompassed the removal and resealing of the windows' sill insert.

24. Following Watkins' testimony, BFS rested its case and the Court informed the jury that it had heard all the witnesses and received all the evidence, noting the only items remaining including counsel's closing arguments and jury instructions. (Tr. Transcr. 44:3-44:5).

25. Thereafter, the jury was dismissed and the Court requested the parties proceed with making motions, beginning with Plaintiffs. (Tr. Transcr. 45:6-7).

26. Plaintiffs moved for a directed verdict on each of its three claims, all of which the Court denied. (Tr. Transcr. 46:2-59:10). Notably, when responding to Plaintiffs' directed verdicts motions, BFS's counsel indicated:

And the breach of warranty we would argue that there has been sufficient evidence the windows are defective by manufacturing purposes as opposed to having some kind of damage that the windows arrived on site until the time that they currently exist. We feel that there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination. There is also a question as far as damages go and the damages would be applicable to all three of those causes of action. There is a question on [if] the windows have caused damage then how much damage have the windows caused. . So we believe there is a question of fact and plenty of evidence that could be weighed either way as to damages which would be applicable to all three causes of action.

(Tr. Transcr. 49:18-51:1) (emphasis added).

27. The Court then requested BFS proceed with its motions to which BFS responded that it had none. (Tr. Transcr. 59:10-11).

28. Prior to recessing for lunch, the Court asked the parties to consider the verdict form and indicated an informal charge conference would occur after the lunch break. (Tr. Transcr. 60:1-25).

29. During this informal conference, the parties agreed to most of the Court-proposed jury charges as well as the submission of an agreed upon general verdict form.⁸

e.) Closing Arguments, Jury Instructions and Verdict

30. Subsequently, both parties gave closing arguments to the jury. Plaintiffs' closing argument highlighted each element of Plaintiffs' claims, reiterated the evidence and testimony demonstrating BFS's liability under these claims, and asked the jury to return a verdict for \$4,700,000.00. (Tr. Transcr. 63:3-99:12).

31. In BFS's closing argument, BFS's counsel repeated its "middleman" and "multiparty" defenses by referencing the "40 plus" defendants no longer in the case, discussing the "comprehensive problems outside window units," and comparing itself to "a pharmacist" merely filing "a prescription." (Tr. Transcr. 94:13-95:7).

32. BFS's counsel also (1) referred to "illegal" windows (Tr. Transcr. 103:2-3) ("If [Dr. Whitlock] is honestly concerned the windows are illegal. . ."); (2) affirmed Dr. Whitlock's expert qualifications (Trial Transcr. 111:17-19) ("Dr. Whitlock is an engineer. He has a very impressive resume. I don't think anybody in the courtroom would question that."); and (3) discussed Dr. Whitlock's window testing (Tr. Transcr. 106:6-14) ("Dr. Whitlock tested 14 windows. . ."); (Tr. Transcr. 109-13:14 ("The leakage at the sill dam we've seen pictures of that.")).

33. BFS's counsel then asked the jury to decide each and every issue BFS now complains about in this Motion:

So as far as the plaintiff with a breach of warranty did [BFS] provide a defective window? Have you seen enough evidence to get as the Judge said past the 50 yard line in this case? Have they met their burden of proof that the window product a) leaks naturally due to rain storms, that the window products, the leaks that were produced during the testing by Dr. Whitlock were traced back directly to the window, the unit itself and not perhaps the surrounding construction – did they

⁸ The parties were given an additional opportunity to read the Court's proposed jury charges and object to any specific charges/modifications they disagreed with after read to the jury.

meet their burden of proof that the leaks at the sill dam were a manufacturing defect? I don't think they did? But you've got all the evidence to consider.

(Tr. Transcr. 110:19-111:5) (emphasis added).

As far as strict liability now this one the words are unreasonably dangerous. That's a pretty extreme classification for a window especially. But strict liability so that's where the product is found to reach the consumer in a condition that was unreasonably dangerous and caused harm. So there has to be damage as well. Now Mr. Woodward in his deposition Mr. Lucey point that out to you, he actually said windows that leak can be unreasonably dangerous. But the question here is are the windows at [OBH] unreasonably dangerous. . .

(Tr. Transcr. 111:6-16) (emphasis added).

Now lets talk about damages because that's really what we are here to talk about. At the end of the day it is all about money in this lawsuit. So each cause of cation requires that you make a direct connection between what [BFS] did wrong, what was unreasonable. Did they break a promise and were the windows delivered in an unreasonably dangerous condition. So what did [BFS] do on this side of the column and can they directly correlate a line, can they draw a line from this side to side saying that whatever [BFS] did or didn't do caused damage.

(Tr. Transcr. 112:13-24) (emphasis added).

Now it is fair to ask [BFS] to bear the cost of a multimillion dollar repair. . . Is there enough proof that the windows are defective using any element that has been demonstrated to you? Did [BFS] in selling the product that their sophisticated customer came to them and asked for did they do anything unreasonable?

(Tr. Transcr. 117-21:118:6) (emphasis added).

34. Prior to handing the case over to the jury, the Court asked each party if it had any exception to the charge as given as well as the verdict form. BFS counsel made no objections to the jury charges⁹ and made no objection to the format or content of the final verdict form.¹⁰

36. The Court then read the jury charge, after which Plaintiffs objected to two charges of note: (1) the charge related to any "notice" required for breach of warranty; and (2) the charge

⁹ Notably, the jury charges included charges relating to (a) the Statute of Limitations; (b) Proximate Causation; (c) Concurrent Causation; (d) Intervening Acts of Third Parties; (e) Damage Mitigation; and (f) Expert Witnesses, all without BFS objection. Plaintiffs' copy of these charges are available for review.

¹⁰ BFS's e-mail consenting to the general verdict form is attached hereto as Exhibit "B".

related to the applicable statute of limitations as to implied warranties. The Plaintiffs informed the Court that no notice was required for purposes of breach of warranty and that the applicable statute of limitations for breach of implied warranty is six years opposed to three years. The Court agreed to amend these charges and instructed the jury accordingly. BFS made no objection.

36. Following the reading of the amended jury charges and several hours of deliberation, the jury returned a general verdict in favor of Plaintiffs in the amount of \$2,163,493¹¹ on Plaintiffs' breach of warranty and strict liability causes of action.¹²

C.) Post-Trial Motions

38. Following the jury's verdict, BFS made a Motion for Judgment Notwithstanding the Verdict ("First JNOV Motion") which was subsequently denied. (Tr. Transcr. 129:6-12).¹³ BFS presented no other post-trial motions at the conclusion of trial.

39. On September 7, 2016, BFS filed its Motion to Compel.

40. On September 12, 2016, following the denial of its First JNOV Motion and without seeking leave of Court, BFS filed a Second JNOV Motion as well as a Motion for a New Trial. (See Second JNOV Motion and New Trial Motion).

41. On September 22, 2016, this Court issued a Form 4 Order¹⁴ ending the case and entering judgment against BFS in the same amount the jury generally awarded (\$2,163,493) on Plaintiffs' breach of warranty and strict liability claims.

¹¹ The verdict form is attached hereto as Exhibit "C".

¹² The jury found that BFS was not liable in negligence.

¹³ After making its JNOV Motion immediately following the return of the jury's verdict, BFS attempted to "renew [its] grounds for the directed verdict motion previously head by the Judge." (Tr. Transcr. 129:3-5). BFS's attempt to renew its directed verdict motions after the verdict is erroneous – BFS should have renewed its directed verdict motion at the close of all evidence, which BFS did not do.

¹⁴ The Court's Form 4 Order is attached hereto as Exhibit "D".

42. On September 27, 2016, this Court mailed a notice informing all parties of the entry of its Form 4 Order.¹⁵

43. To date, BFS has yet to file a Motion to Alter or Amend this Order or any other decree issued by the Court before or during trial.

APPLICABLE LEGAL PRINCIPLES

A.) Judgment Notwithstanding the Verdict

A properly made directed verdict motion is a necessary precursor to any JNOV Motion. In other words, a JNOV Motion allows the Court to reconsider its ruling on a directed verdict motion, but the Court's consideration is limited to the grounds argued for directed verdict. Rule 50(b), SCRPC. Thus, where no directed verdict motion is made at the close of all evidence, no JNOV motion can follow. *RFT Mgmt. Co., LLC v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) ("When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV."). Moreover, issues not raised or not ruled upon by the Court may not be later raised in a post-trial motion for JNOV or otherwise. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (noting a party may not use a post-trial motion to raise an issue that could have been raised at trial).

In otherwise ruling on a properly-made JNOV Motion, the Court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the Court must view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the non-moving party. *Gilliand v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004); *Small v. Pioneer*

¹⁵ The mailed notice regarding the entry of the Court's Form 4 Order is attached hereto as Exhibit "E".

Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). The Court is only concerned with the existence of evidence, not its weight, and the Court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Thus, the Court must deny a motion for JNOV when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Similarly stated, the Court should uphold a jury's verdict if there is any evidence to sustain it. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

B.) New Trial Absolute and New Trial Nisi Remittur

Unlike motions for JNOV, new trial motions assume the existing evidence presents questions reserved for the jury's determination; but, ask whether, in light of all the evidence, the jury reached the appropriate result. Thus, in ruling on new trial motions, the Court, as the "thirteenth juror", has the discretionary power to deny a new trial absolute or *nisi remittitur* if the Court agrees with the jury's verdict based upon the law and the facts, evidence and testimony presented at trial. Rule 59, SCRPC; *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975); *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (noting the trial court's discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them. . ."); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (noting the grant or denial of new trial motions rests within the trial court's discretion, and the court's decision will not be disturbed on appeal unless

the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law).

A Court may grant new trial motions only when there is prejudicial error in the admission of evidence or if the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993); *see also O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (finding new trial motions can only be granted when the verdict is grossly inadequate or excessive "so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence"); *Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (For a trial court to order a new trial based on erroneous admission of testimony, "the record must show not only error but also prejudice."). However, the jury's determination of damages is entitled to substantial deference, and therefore, a jury's verdict should be upheld when it is possible to do so in order to effectuate the jury's express intentions. *Vinson v. Hartley*, 324 S.C. at 404, 477 S.E.2d at 723.

ARGUMENT¹⁶

I. BFS's Second JNOV Motion is Procedurally Precluded Because BFS Never Renewed Its Directed Verdict Motions at the Close of All Evidence

BFS waived its right to bring its Second JNOV Motion by not renewing its directed verdict motions at the close of all evidence. *See* Rule 50(b), SCRPC ("Whenever a motion for a directed verdict made at the close of all the evidence is denied. . . . [a party] may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict") (emphasis added); *RFT Mgmt. Co., LLC v. Tinsley & Adams, L.L.P.*,

¹⁶In further support of Plaintiffs' Opposition to BFS's Second JNOV and New Trial Motions, Plaintiffs incorporate all grounds cited in their various motions, responses, and memoranda previously filed in this action as well as all grounds referenced in their motion in opposition to summary judgment filed prior to trial or otherwise made during motion hearings or during the trial of this matter.

399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) *quoting Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (“When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.”) (emphasis added); *see also Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37 446 S.E.2d 440, 442 (Ct. App. 1994) *aff’d in result*, 320 S.C. 218, 464 S.E.2d 112 (1995) (noting when a defendant moves for a directed verdict at the close of the plaintiff’s case, he must renew that motion at the close of all evidence); *State v. Bailey*, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006) (“If a defendant presents evidence after the denial of his motion for a directed verdict at the close of the [plaintiff’s] case, he must make another motion for a directed verdict at the close of all evidence in order to appeal the sufficiency of the evidence.”). Confronted with the same situation in *Wright versus Craft*, our Court of Appeals explained as follows:

Initially, we address several procedural matters, noting that a number of Craft’s issues on appeal are not preserved for our review. When a defendant moves for a directed verdict. . .at the close of the plaintiff’s case, he must renew that motion at the close of all evidence. . .Otherwise, this court is precluded from reviewing the denial of the motion on appeal. . .Craft moved for a directed verdict at the close of Wright’s case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft’s motion is not preserved for our review. Concomitantly, a motion for JNOV is a renewal of a directed verdict motion. When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV. Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review.

Wright, 372 S.C. at 20, 640 S.E.2d at 496 (emphasis added) (citations omitted).

- II. Here, like in *Wright*, BFS moved for directed verdict at the close of Plaintiffs’ case, but did not renew its motion at the close of all the evidence. (Tr. Transcr. 59:10-11). In fact, this Court asked BFS if it had any motions at the close of the evidence, and BFS responded with an unequivocal “No.” *Id.* BFS’s failure to renew its directed verdict motions procedurally bars BFS from now seeking JNOV. **BFS’s Second JNOV Motion is Procedurally Precluded Because It Is A Successive Motion**

BFS's Second JNOV Motion is also precluded because it is a successive, misplaced attempt to preserve unpreserved issues for appeal. BFS already moved for JNOV and this Court already denied BFS's First JNOV Motion. (Tr. Transcr. 129:6-12). BFS did not file a Rule 59(e) Motion asking the Court to reconsider any aspect of its denial.¹⁷ Following the Court's denial of BFS's First JNOV Motion, the only motion BFS could have filed was a Rule 59(e) Motion. *See Elam v. SCDOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (finding a Rule 59(e) Motion is the proper motion to follow a party's oral JNOV trial motion). BFS's Second JNOV Motion is not such a motion and BFS did not otherwise timely move to reconsider the Court's Form 4 Order entering judgment. Rather, without requesting leave of Court, BFS filed a Second JNOV Motion requesting this Court again rule on issues already ruled upon and rule on issues never raised. This is the definition of a successive motion and South Carolina Courts are clear such motions are improper.

In *Quality Trailer*, for example, our Supreme Court confronted a similar situation involving successive JNOV Motions. *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002). *Quality Trailer* involved a dispute among trucking companies wherein, following trial, the jury found against defendant trucking company ("I-Corp") on plaintiff trucking company's ("Quality Trailer") promissory estoppel and successor liability claims.¹⁸ *Id.* at 218, 562 S.E.2d 615. Following the jury's verdict, I-Corp made a timely, post-trial motion for JNOV and a new trial ("First Motion") which the Court denied. *Id.* Subsequently, I-Corp filed a Second Motion substantively identical to its First Motion, only altering "form" to make the Second

¹⁷ BFS failed to file a Rule 59(e) Motion within ten days after the Court's denial of BFS's First JNOV Motion (September 1, 2016) or within ten days after written notice of the Court's Form 4 Order of Judgment (September 27, 2016). *See* Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the Order.").

¹⁸ During trial, I-Corp moved for directed verdicts against each of Quality Trailer's three claims (violation of bulk transfers act, promissory estoppel and successor liability), one of which was granted (bulk transfers act) and two of which were not (promissory estoppel and successor liability).

Motion appear as if it were a Rule 59(e) Motion.¹⁹ *Id.* at 218, 562 S.E.2d 615-16. The trial court, recognizing the duplicity between the two motions, denied the Second Motion. *Id.* On appeal, our Supreme Court affirmed the trial court, finding:

Despite its caption, I Corp.'s second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion. . . . Notwithstanding its caption, the second motion did not ask for relief available pursuant to Rule 60, SCRCP. Rule 60 allows a motion for relief from the judgment based on a number of specific grounds, including clerical mistake, other mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. The second motion raised none of these grounds. . . I Corp. argues on appeal that the second motion was required to preserve issues raised, but not ruled upon, in the trial court's order denying JNOV and new trial. The second motion did not, however, identify a single issue raised but not ruled upon. . . The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.

Id. at 220-21, 562 S.E.2d 617-18 (emphasis added); see also *Elam*, 361 S.C. at 21, 602 S.E.2d at 778 ("affirming principles set forth in *Coward Hund*, *Quality Trailer*, and *Collins Music*" and noting "[w]e view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's 'single bite at the apple' in presenting his case.") (emphasis added); *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (finding written post-trial motion, which followed post-trial motion made at the end of the trial, was an improper successive motion); *Coward Hund Construction Company v. Ball Corporation*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (finding post-trial motion successive because it "did not challenge a new ruling") (emphasis added).²⁰

¹⁹ I-Corp captioned its Second Motion as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for [JNOV] and Motion for New Trial". The caption of the Second Motion indicated it was made pursuant to Rules 52, 59 and 60, SCRCP, and the relief requested was tailored to match; however, in all other aspects, I-Corp's Second Motion duplicated its First Motion. Unlike I-Corp, BFS's Motion is not re-captioned to appear as a Rule 59(e) Motion, and further, does not mention the words "reconsider," "alter" or "amend" anywhere in its ten-plus pages.

²⁰ To the extent BFS relies on the case of *Fields versus Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005) to somehow argue its Second JNOV Motion is not successive, Plaintiffs note the circumstances at issue in *Fields* are distinguishable from those here because: (1) BFS did not renew its directed verdict motions whereas *Fields* did; (2) BFS did not request ten days to file a written JNOV Motion whereas *Fields* did; and (3) BFS did not support

Quality Trailer, and its progeny, “clearly stand for the proposition that a successive post-trial motion” is only proper in a limited context – it must arise “as a result of an order following an initial post-trial motion that alters or amends the judgment.” *Collins*, 353 S.C. at 564, 579 S.E.2d at 526 (emphasis added); *Coward Hund*, 336 S.C. at 3, 518 S.E.2d at 58 (“A second motion. . . is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion. . .”) (emphasis added).

Here, however, there is no order altering or amending judgment. There is only this Court’s denial of BFS’s First JNOV Motion and this Court’s Order entering an unaltered judgment. (Tr. Transcr. 129:6-12); (Exhibit D). At this point, all JNOV issues are resolved – and they will forever remain resolved because BFS’s Second JNOV Motion is a successive JNOV motion. *See, e.g., Collins*, 353 S.C. at 565, 579 S.E.2d at 526-27 (“Here, IGT requested JNOV. . . in its first post-trial motions. . . The circuit court denied these motions. The court made no alterations or amendments to the judgment. At that point, all issues regarding JNOV. . . were resolved by the circuit judge. . .”).

III. BFS’s Second JNOV Motion is Procedurally Precluded Because BFS Failed to Timely Request Leave to File The Motion

BFS’s Second JNOV Motion is further precluded by BFS’s failure to request leave to file this or any other post-trial motion following the dismissal of the jury. *See* Rule 50(e), SCRCP (“The [JNOV Motion] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter”) (emphasis added); Rule 59(b), SCRCP (“The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court

its First JNOV Motion with any specific ground whereas Fields did. Notably, the *Fields* Court also did not find the entirety of the Second JNOV Motion at issue there proper; rather, the *Fields* Court found only certain grounds, relating to the Court’s evidentiary rulings, were properly raised because only these grounds were stated in support of the original JNOV Motion. Where, like here, no specific grounds are raised in support of an initial JNOV Motion, it follows that all grounds newly raised in a subsequent JNOV motion are improper.

not later than 10 days thereafter.”) (emphasis added); *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (noting “a request to file post-trial motions must be made promptly after the jury is dismissed”) (emphasis added). The Official Notes accompanying the 1986 Amendment to Rule 59 further clarify this point: “In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them.” (emphasis added).

Here, BFS made one post-trial motion (JNOV) “promptly after the end of trial” and did not “move” for additional time to file any other post-trial motions. (Tr. Transcr. 129:2-12). Because BFS did not request leave to file any post-trial motions, its Second JNOV Motion is improper under the rule BFS relies upon to bring the Motion in the first place. *See* Rule 50(e), SCRPC. This rule required BFS request leave to file and BFS did not request leave to file. As such, BFS’s Motion violates the rule and is not properly before this Court.

IV. BFS’s JNOV Motion Improperly Relies on Grounds Not Raised by BFS

Although the foregoing is dispositive, BFS’s JNOV Motion is procedurally flawed for another reason – it relies on a host of grounds not asserted by BFS in its Motions for Directed Verdict. In South Carolina, it is well established that “only the [specific] grounds raised in [a] directed verdict motion may properly be reasserted in a JNOV motion.” *RFT Mgmt.*, 399 S.C. at 331, 732 S.E.2d at 170-71; *Roland v. Palmetto Hills*, 308 S.C. 283, 286-87, n. 2, 417 S.E.2d 626, 628, n. 2 (Ct. App. 1992) (stating “[a] motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict” motion); *see also* Rule 50(a), SCRPC (“A motion for a directed verdict shall state the specific grounds therefor.”); *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (finding JNOV

claim unpreserved because counsel "made only a general directed verdict motion" without stating "specific grounds" supporting the motion).

Here, BFS's non-renewed directed verdict motions include only one "ground" as to both Plaintiffs' breach of warranty and strict liability claims.²¹ As to strict liability, BFS claimed "a failure of proof. . . that the windows were, in fact, unreasonably dangerous." (Tr. Transcr. 38:15-25). As to breach of warranty, BFS claimed "insufficient evidence and proof to establish that the windows are, in fact, in a defective condition." (Tr. Transcr. 39:10-15). Since these grounds are the only grounds raised by BFS in support of its directed verdict motions, these grounds are the only grounds BFS could assert in support of any JNOV Motion. (See BFS Grounds 5 and 6). Consequently, all other grounds asserted by BFS in its JNOV Motion are improper – period. *Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37 446 S.E.2d 440, 442 (Ct. App. 1994) (finding a JNOV Motion, standing alone and without having raised the same grounds in a prior directed verdict motion at the close of the evidence, is insufficient to preserve the issue for appeal) *aff'd in result*, 320 S.C. 218, 464 S.E.2d 112 (1995). These "other grounds" include:

- BFS's Grounds 1, 2 and 3 concerning the statute of limitations and equitable estoppel;²²
- BFS's Ground 4 concerning allegedly inadequate expert testimony or other record evidence;²³

²¹ Plaintiffs note BFS also moved for directed verdict on Plaintiffs' negligence claim; however, since the jury did not find BFS liable in negligence, this is a moot issue.

²² Regarding equitable estoppel, this Court did not submit the "issue of equitable estoppel" to the jury as BFS maintains. Rather, the Court let the jury decide the question of fact concerning the timing of when Plaintiffs "discovered" their claims after the Court denied BFS's summary judgment motion on "the statute of limitation issue." A ruling BFS, again, failed to challenge. Additionally, BFS was not precluded from asserting the statute of limitations as an affirmative defense (which if equitably estopped BFS could not do) and BFS argued the statute of limitations throughout the entirety of trial. Finally, BFS cannot complain about the jury deciding the statute of limitation issue as charged by the Court when BFS did not object to this charge.

²³ Plaintiffs note BFS stipulated to the qualification of Plaintiffs' experts and the entry of "other record" evidence, including Plaintiffs' expert reports. Further, Plaintiffs did establish BFS breached its own "standard of care" by failing to honor its contractual obligations.

- BFS's Ground 7 concerning the feasible alternative design requirement;²⁴
- BFS's Grounds 8, 10, 19, 20, 22, 23, and 24 concerning the jury's award;²⁵
- BFS's Ground 9 concerning notice of breach of warranty;²⁶
- BFS's Ground 11 concerning a purported lack of standing;²⁷
- BFS's Grounds 12, 13, 14 and 21 concerning the existence of evidence supporting Plaintiffs' claims;²⁸
- BFS's Grounds 15, 16, 17 and 18 concerning the existence of evidence supporting "any verdict";²⁹
- BFS Ground 25 concerning expert testing;³⁰

²⁴The jury found BFS liable on warranty and strict liability. As such, a feasible alternative design is not required. Even if required, BFS's newly named window expert, Drake, as well as Plaintiffs' expert, Dr. Whitlock, discussed other feasibly designed window products.

²⁵Plaintiffs note these "JNOV" grounds speak directly to "the jury's verdict". BFS did not know "the jury's verdict" prior to the jury rendering its verdict, and thus, it's impossible for BFS to somehow have raised these grounds in any directed verdict motion.

²⁶ Plaintiffs note there is no notice requirement for breach of implied warranties and BFS did not object to the jury charge indicating this is exactly the case. Further, BFS placed the "notice" issue squarely before the jury by describing this lawsuit as the first "notice" BFS received concerning OBH's "window problems". (Tr. Transcr. 27:8-25).

²⁷ BFS claims Plaintiffs "had no standing to claim damages as to [the] windows" because the "windows are not common elements" and "no class was certified." Although this ground was never raised at trial, Plaintiffs acknowledge "standing" is a unique issue which typically may be raised at any time. However, South Carolina courts have also recently held a party may not attempt to raise standing when the issue was not properly before, and ruled upon by, the trial court. *See James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) ("However, when a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review when the trial court was not given the first opportunity to rule on the issue."). Even assuming BFS can procedurally raise "standing", the result remains the same because, substantively, these windows are "common elements" of the Association and all OBH homeowners assigned their individual window claims to the Association. (Assignments and Board Resolution, Jt. Exs. 699, 700) (complete collection of 59 OBH homeowner assignments and OBH Board Resolution accepting assignments); (Master Deed, Jt. Ex. 69) (defining "area of common responsibility" as an area which, by agreement or otherwise, the homeowners agree to allow the Association to manage).

²⁸ These grounds are generally duplicative of those already argued by BFS in its pre-trial motions, and thus, already ruled upon by this Court. *See* Argument II, *supra*.

²⁹ Plaintiffs refer the Court to the Pertinent Background Section above which outlines ample evidence supporting the jury's verdict, including Moore's trial testimony and repair estimate. (Jt. Ex. 304.3); *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989) ("A competent estimate of the cost of repair to a building creates a factual issue regarding damages.").

³⁰ BFS's "testing" ground is bogus. During trial, this Court correctly recognized that it is the jury's job to weigh the evidence (including expert testimony and record evidence relating to testing) and warned BFS that it could not pit its expert against Dr. Whitlock. BFS's "testing" ground ignores all of this and, again, erroneously argues it is somehow entitled judgment as a matter of law based upon unsupported assertions regarding the properness of Dr. Whitlock's

- BFS Ground 26 concerning purportedly damaged windows; and³¹
- BFS Ground 27 concerning setoff.³²

V. Even Assuming Certain Grounds in BFS's Second JNOV Motion are Somehow Properly Before this Court Despite the Motion's Obvious Procedural Flaws, these Grounds Are Without Substantive Merit

All "grounds" considered, this Court must deny BFS's Second JNOV Motion because the record supports the jury's verdict. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict.") *citing Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (emphasis added); *see also Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994) (a trial court can only be reversed when there is no evidence to support its ruling) (emphasis added).

In fact, there is ample evidence supporting the jury's verdict as well as Plaintiffs' claims leading to the verdict – and BFS agrees. During its argument against Plaintiffs' directed verdict motions made at the close of evidence, BFS maintained:

. . . [T]here has been sufficient evidence the windows are defective by manufacturing purposes as opposed to having some kind of damage that the windows arrived on site until the time that they currently exist. We feel that there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination. There is also a question as far as damages go and the damages would be applicable to all three of those causes of action. There is a question on [if] the windows have caused damage then how much damage have the windows caused. . . So we believe there is a question of fact and plenty of evidence that could be weighed either way as to damages. . . .

window testing. The incredulity of BFS's testing-related attacks is compounded by the undisputed fact that its expert, its client, and its counsel never observed a single window test performed by Dr. Whitlock. Additionally, BFS did not challenge Dr. Whitlock's qualification as an expert in the field of windows and window testing. If BFS had concerns regarding the standards, testing, or methods employed by Dr. Whitlock, the time and place for challenging those issues was during the expert qualification stage.

³¹ Plaintiffs note the evidence showed the window products delivered and installed at OBH were in substantially the same condition as when they left BFS. Contrary to BFS's misplaced contention, there is no evidence supposedly demonstrating the window products were somehow materially altered by the general contractor, the Association or any OBH homeowner.

³² Plaintiffs separately address setoff in their Memorandum Opposing BFS's Motion to Compel.

(Tr. Transcr. 49:18-51:1) (emphasis added).

Thus, even if BFS JNOV's Motion and all its grounds are properly before this Court, it still must be denied because there is "sufficient evidence" sustaining both the jury's verdict and BFS's liability for the verdict. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 S.E.2d 272, 274 (2003) (For purposes of JNOV, the court is only concerned with the existence of any evidence supporting the jury's findings and does not have the authority to resolve conflicts purportedly created by the jury's disregard of other evidence).³³

VI. BFS's Motion for New Trial Absolute, or, in the Alternative New Trial Nisi Remittitur is Untimely

Like BFS's JNOV Motion, BFS's Motion for New Trial Absolute, or, in the alternative New Trial *Nisi Remittitur* ("New Trial Motion") is procedurally precluded because BFS did not follow the rules. As previously mentioned, Rule 59(b), SCRCF, requires that a party move for a new trial promptly after the jury is discharged or request ten days to make the motions. *See* Rule 59(b), SCRCF; *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (holding a trial court has no discretion to hear a motion for new trial where no request for ten days to file the motion was made); *Person v. Carolina Pines Reg'l Med. Ctr.*, 2010 WL 10085618 (S.C. Ct. App. Nov. 4, 2010) (finding a new trial motion untimely when the request for ten days to file the motion was made the day following the jury's verdict).

Here, BFS neither moved for a new trial after the jury was dismissed nor requested ten days to file such a motion. (Trial Transcript 129:6-12). Instead, BFS served its New Trial Motion

³³ Further, as to BFS Grounds 5 and 6, there is evidence establishing (1) the fact that these windows contained a "manufacturing defect"; (2) the damages proximately caused by the windows' "defective" condition. (*See also* Whitlock, VanDommellen, Terradista and Galvin Trial Testimony; Jt. Exs. 129, 130, 300, 301, 302, 304.3, 305).

on the Monday following the tenth day after the jury's verdict³⁴ and did not file the Motion until two later. BFS's failure to request ten days to file this Motion renders the Motion untimely under Rule 59(b). *See Boone, supra*.

VII. This Court Should Deny BFS's New Trial Motion Because it is Meritless

While BFS's New Trial Motion asserts a number of grounds in an attempt to circumvent its liability, these grounds ignore South Carolina law which clearly indicates (a) new trial motions cannot rely on purported "trial errors" not raised at trial; and, (b) courts must deny new trial motions when the jury's verdict is justified by evidence. *See, e.g., Southern Ry. Co. v. Coltex, Inc.*, 285 S. C. 213, 329 S. E. 2d 736 (1985) (denying new trial motion due to failure to object to omission of jury instruction); *State v. Robinson*, 238 S. C. 140, 119 S. E. 2d 671 (1961) (denying new trial motion due to failure to object to testimony or request that it be stricken or disregarded by the jury); *Brown v. Singletary*, 226 S. C. 482, 85 S. E. 2d 738 (1955) (denying new trial motion due to failure to object to remarks by the trial judge); *Lloyd v. Monpoe*, 11 S. C. L. (2 Nott & McC.) 446 (1820) (denying new trial motion due to failure to object to evidence during trial); *see also Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (noting a Court may grant new trial motions only when there is prejudicial error in the admission of evidence or if the verdict is excessive or inadequate).

Here, the thirty-plus grounds stated in BFS's New Trial Motion boil down to five categories: (1) jury charge grounds; (2) evidentiary grounds; (3) testimony grounds; (4) conduct grounds; and (5) verdict grounds. But, as demonstrated below, BFS did not object to any jury charges; BFS did not object to any evidence in the record; BFS did not object to any expert

³⁴ Plaintiffs note the timing of BFS's New Trial Motion is questionable. Despite the internal postage meter date of Monday, September 12, 2016, Plaintiffs did not received the Motion until Friday September 16, 2016, several days after one would expect a letter mailed from Columbia to arrive in Charleston. In fact, the Motion was received on the same day that the September 13, 2016 transmittal to chambers was received.

testimony; BFS did not object to Plaintiffs' counsels or this Court's conduct; and, BFS did not object to the verdict form. Moreover, the jury's verdict is not grossly excessive,³⁵ and the jury's determination of damages is entitled to substantial deference. Accordingly, BFS's New Trial Motion is wholly without merit and warrants denial.

VIII. BFS Cannot Challenge Jury Charges it Failed to Challenge at Trial, and Even if it Could, this Court's Charges Corrected Stated the Law

BFS's New Trial Grounds 2, 3, 4, 5, 6, 15, 16, 20, 21, 24, and 26 all challenge the sufficiency of the Court's jury charges; however, BFS failed to object to any of these charges, and thus, cannot complain as the properness of these charges now.³⁶ Rule 51, SCRPC ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 494 (1999) (noting a party is required to object to jury charges either during the charging of the jury or at the pre-charge conference); *Hope Petty Motors v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992) ("The failure to object to a jury instruction makes the charge the law of the case.").

Even if BFS could challenge these jury charges, the result is the same given the charges were neither erroneous nor prejudicial. *State v. Perry*, 410 S.C. 191, 200, 763 S.E.2d 603, 6067 (2014) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

³⁵ In fact, the jury awarded millions of dollars less than the amount the Plaintiffs requested at trial.

³⁶ Here, BFS never objected to any charge at any time, and further, failed to make any allegedly objectionable or omitted charges as exhibits for preservation. As such, BFS has zero grounds upon which to base an argument that any jury charge or legal instruction was improper (BFS New Trial Grounds 2-6, 15, 16, 20, 26) or that the jury's verdict was contrary to or inconsistent with the law. (BFS New Trial Ground 21, 24).

XI. BFS Cannot Challenge Evidence, Testimony or Conduct It Did Not Challenge At Trial

BFS's New Trial Grounds 7, 8, 9, 10, and 20 challenge evidence, testimony or conduct which, again, BFS failed to challenge at trial. For example, BFS Grounds 7 and 10 seek a new trial because the jury considered "repair amounts" and "window testing" jointly stipulated into evidence by both parties.³⁷ (Jt. Exs. 304.3, 325). BFS Ground 8 seeks a new trial because Plaintiffs' counsel referred to the windows as "illegal" when BFS's counsel did not object to this reference, and further, mentioned "illegal" windows in closing argument. (Trial Transcr. 103:2-3) ("If [Dr. Whitlock] is honestly concerned the windows are illegal. . ."). BFS Ground 9 seeks a new trial because this Court "failed to prevent the pitting of witnesses" when this Court did prevent pitting after the issue was raised by Plaintiffs' counsel as to BFS's counsel – not vice versa.³⁸ Finally, BFS Ground 20 challenges the sufficiency of unspecified "evidence" and "testimony" when BFS, itself, maintained "there has been sufficient showing of evidence on all three causes of action to allow the jury to make the final determination." (Tr. Transcr. 49:18-51:1) (emphasis added). See *Robinson, Brown and Lloyd, supra*.

IX. BFS Cannot Challenge an Unchallenged Verdict Form or Seek to Specify a General Verdict After its Rendered

BFS's New Trial Grounds 11 and 25 challenge the general verdict and the associated verdict form. However, BFS cannot challenge the verdict form because it was provided to both parties prior to its submission to the jury, and BFS offered no edits or objection to its form or contents. (Exhibit B); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form); *see also*

³⁷ See also Footnote 29, *supra*.

³⁸ See also Footnote 32, *supra*.

Ambruso v. Lee, 2010 S.C. App. Unpub. LEXIS 148, *10, 2010 WL 10079451 (Ct. App. Feb. 23, 2010) (unpublished) (holding that trial court did not err in finding defendant waived any objection to verdict form when it failed to do so prior to submitting form to jury).³⁹

Even if BFS could challenge the verdict form, it does not imply that judgment is “mandated against BFS”. The form itself is short, beginning with a line that reads “We the jury find for the Plaintiffs on the following causes of action,” the word “OR” emboldened below, and then ending with a line that reads “We the jury find for the Defendant.” Each of these lines appears on the first page of the verdict form and contains no other indicia mandating the jury find for either party. (Exhibit C).

Additionally, BFS cannot request any clarification as to the verdict the jury generally awarded when BFS failed to request an interrogatory inquiring into any aspect of the verdict before the jury was excused. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) (“Appellants waived appellate review [trial court’s failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter.”).

Even if BFS could seek clarification as to “what damages were awarded as to each named party and the amount awarded to each named party” there is no clarification needed because the damages were awarded as to the named Plaintiffs and the OBH POA represents all named Plaintiffs. (Jt. Exs. 699, 700).

X. BFS Cannot Challenge the Jury’s Verdict When the Verdict Falls Within the Damage Range Established by the Evidence

BFS’s remaining New Trial Grounds challenge the jury’s verdict as “grossly excessive,” and influenced by “matters outside the evidence.” Yet, BFS offers no “compelling reasons” as to

³⁹ *Ambruso* attached hereto in Appendix “A”.

why the Court should disturb the jury's verdict and ignores the fact BFS asked the jury to render its verdict based upon "matters in evidence". (Tr. Transcr. 111:5) ("[Y]ou've got all the evidence to consider.") (emphasis added); *see also Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (The thirteenth juror doctrine may be invoked only when "the evidence does not justify the verdict."); *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) ("Compelling reasons, however, must be given to justify invading the jury's province in this manner.").

This evidence, jointly stipulated to by BFS, provided the jury with a "damage range" between \$12,000 and \$5,000,000 – the jury's \$2,163,493 verdict falls well within this range, and thus, is not "excessive". *Wright*, 372 S.C. at 36, 640 S.E.2d at 505 ("When a verdict falls within the range of the evidence, the courts will not disturb it on the ground of excessiveness."); *Collins Music*, 332 S.C. at 148, 503 S.E.2d at 482 (refusing to alter an award because the verdict was within the range of amounts given during testimony at trial); *Hawkins*, 328 S.C. at 601, 493 S.E.2d at 883 (finding damages award was proper because it was within range of evidence presented during trial). As such, this Court should uphold the jury's verdict in order to effectuate the jury's express intentions.

XII. This Court Should Deny BFS's Motion Because Any Error Purportedly Committed is Harmless

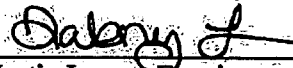
Finally, even assuming this Court did "err" as BFS suggests, such error is harmless because the ultimate outcome remains the same – BFS is liable to Plaintiffs on at least one of Plaintiffs' claims (strict liability, breach of express warranty, or breach of implied warranty); and, BFS's liability as to any one of these claims amounts to \$2,163,493. *State v. Byers*, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of trial"); *Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App.

1985) (Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury, the verdict stands).

CONCLUSION

Based upon the foregoing, This Court should deny BFS'S Second JNOV Motion and New Trial Motion.

JUSTIN O'TOOLE LUCEY, P.A.



Justin Lucey, Esquire
Dabny Lynn, Esquire
415 Mill Street (29464)
Post Office Box 806
Mount Pleasant, SC 29465
jlucey@lucey-law.com
dlynn@lucey-law.com
Attorneys for Plaintiffs

November 16, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Plaintiffs' Memorandum of Law in Opposition to Builders First Source-Southeast Group, LLC's Motion to Compel and Motion for Setoff* upon all counsel for Defendant BFS by delivering the same via Hand Delivery and electronic mail as addressed below:

Davi Dyer, Esq.
Trent Kernodle, Esq.
Kernoodle Root & Coleman
914 Folly Road, Suite 2
Post Office Box 13897
Charleston, SC 29422
ddyer@kernodlelaw.com
tkernodle@kernodlelaw.com

Attorneys for Builders First Source – Southeast Group, LLC

C. Mitchell Brown, Esq.
William C. Wood, Jr., Esq.
Michael J. Anzelmo, Esq.
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Mitch.brown@nelsonmullins.com
Bill.wood@nelsonmullins.com
Michael.anzelmo@nelsonmullins.com

Attorneys for Builders First Source – Southeast Group, LLC


Annette M. Mixson, Paralegal

November 16, 2016
Charleston, South Carolina

FILED
2016 NOV 16 AM 8:36
JULIE J. ARMSTRONG
CLERK OF COURT

Exhibit "A"

EXCERPTS OF TRIAL TRANSCRIPT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL HOA, et al

Plaintiffs

vs.

BUILDERS FIRST SOURCE

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-10-7594

EXCERPT OF
TRANSCRIPT OF RECORD

August 30, 2016
Charleston, South Carolina

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

JUSTIN O. LUCEY, ESQ.
DABNY LYNN, ESQ.
Attorneys for the Plaintiff

CATHERINE D. DYER, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter



One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

OPENING STATEMENT

BY MS. DYER:

Good morning ladies and gentlemen. My name is David Dyer and I work in a law firm over on James Island called Kernodle Coleman. My client is Builder's First Source Southeast Group, LLC, which we refer to as BFS for short. You've heard a little bit about them. Here with me and you met yesterday is Darryl Ward and he is a representative of the company.

We're here today because I can't come to an agreement with Mr. Lucey and our clients thereby can't come to any agreement as well; it's all kind of part and parcel. So we've spent several years trying to work through this process and come to a conclusion that we might be able to live with and unfortunately we haven't been able to do so, so that's why you're here.

We are going to show you over the next few days evidence and you're going to hear from different witnesses. And we need you to just decide what's fair, what's the right thing to do in this situation. This is kind of a search for justice at its core so we need your help. Now a lot of that and some of what you've already heard is technical. There is some standards and you're going to hear from engineers and you're going to see a whole bunch of pictures. That can be boring. We live it

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 Well that wasn't installed right; the water proofing --
2 The windows which of course we're going to talk a lot
3 about windows, but one of the big problems is that the
4 windows weren't installed right. So there is supposed to
5 be some flashing and some material installed around the
6 wood framing; the hole where the window goes, and that
7 either wasn't there as it was drawn or it wasn't put in
8 there right. You put the window in and then you have to
9 seal the window to make sure that it's all one in the
10 same. And you've got stucco or siding, you've got a
11 window, there is a joint there so there has to be some
12 sealant applied.

13 And Mr. Whitlock admitted that the sealants were bad
14 or they've since failed. So there is all sorts of
15 components down to the grading. Doctor Whitlock has
16 opined that the actual level of the ground as it comes
17 into contact with the building is too high. Maybe that's
18 where some of the termite problems come from. But we've
19 got a myriad of problems with the buildings and Mr. Lucey
20 has already told you that to fix all those problems is a
21 14 million dollars fix. In fact more than 14 million;
22 that's a really big number.

23 So what does that have to do with Builder's First
24 Source? Well as a result of all these findings and
25 figuring out exactly how much it was going to cost to fix

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 these four buildings they bring a lawsuit. Now Builder's
2 First Source is the last defendant left but there were
3 over 40; over 40 people that they have blamed for the
4 problems out there. And today my client is the only one
5 left to point the finger to. But how much of that damage
6 can possibly be related to the windows? We know that
7 there are all these other sources of water intrusion.
8 That's one of the things that I'm going to ask you to
9 listen for.

10 But let's get a little bit further into what
11 Builder's First Source did with respect to the project.
12 You're going to hear about this guy named Larry Bratten.
13 Now Larry was an independent sales agent. He was kind of
14 an outside consultant and he had a number of customers.
15 He wasn't actually a Builder's First Source employee but
16 he brought business to them and was able to kind of
17 broker deals through his customers and Builder's First
18 Sources and one of those customers was Trammell Crow
19 Residential.

20 So Trammell Crow in this case in 2006 comes to Larry
21 in some way shape or form by calling him, email,
22 conversation and says we're building a project. The
23 architect has told us that we need 324 vinyl ESP so the
24 manufacturer the brand is ESP the model number 2031
25 windows for this project. And what we need you to do

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 Larry is contact the manufacturer and tell them we need
2 them and we need them sent to this address period; just
3 the middle man. The sophisticated national home builder
4 comes in and says I need 324 of these specific windows
5 and these sizes and I want them for this guy, the
6 manufacturer and I need them on my job site. Can you get
7 them there? And that's exactly what Builder's First
8 Source did. So we don't happen to hear anything else
9 from 2006 basically until 2014 when low and behold they
10 get served with a lawsuit; the first notice that there is
11 a problem with these windows.

12 Now there are three things, again questions that I
13 think you should listen for answers to it that might
14 instruct you at the end of the week or whenever we get
15 done as to what the right thing to do is. You heard Mr.
16 Lucey say that they have alleged Builder's First Source
17 was negligent in some way. Well the question you have to
18 ask yourself in order to find negligence is really did
19 Builder's First Source do anything unreasonable that led
20 to damage to the plaintiffs and if so what was that.

21 The next cause of action is breach of warranty. So
22 that is did Builder's First Source make a promise that
23 they didn't keep. And the last question is related to
24 the strict liability and that question is were the
25 windows unreasonably dangerous to the buildings. And

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 the legal standard is exactly that; unreasonably
2 dangerous. Now as far as the evidence that you are going
3 to see, the certification of the windows, so before a
4 window can be sold it has to be certified. And there is
5 a battery of tests that it undergoes by a third party as
6 the window manufacturer doesn't do its own tests. They
7 go to a certified lab and have those tests done.

8 And there is another third party independent guy who
9 says this is the way the tests should be done and yay or
10 nay it was done correctly. And if it passes all that
11 then it gets in this case a gold sticker from the
12 industry leader AAMA, which you'll hear all kinds of
13 stuck about them, but there is a sticker on the window.
14 You saw pictures of it; it's a gold sticker. So in order
15 to certify a window you have to pass this battery of
16 tests. This independent person has to say yes the test
17 was done properly before you get that label.

18 So while you're watching and listening to evidence
19 the question I'd like for you to ask yourself is is there
20 any indication truly that the window didn't earn that
21 gold sticker. The gold sticker is clearly on. There
22 were two independent agencies involved in the testing and
23 the approval of the testing. They aren't here today.
24 They haven't been brought in to testify or to tell you
25 that they did something right or wrong. This is a theory

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 now and has the theory been proven. And if it has been
2 proven still what does that have to do with Builder's
3 First Source. All we did was place an order. We didn't
4 have anything to do with certifying the window to be able
5 to sell it in the first place. Again looking at that
6 window label the architect in this case said this is the
7 window you want to use. It's the 2031; it's a DP-50 and
8 you'll hear about that. It's an impact rated window and
9 you'll hear about that.

10 Well that label that anybody who is looking at it
11 from the delivery guy to the general contractor to a
12 supplier such as ourselves could look at that window and
13 see it's exactly what it was purporting to be on the
14 label; it's a 2031 model which the architect asked for,
15 it's a DP-50, which the architect asked for, and it's an
16 impact rated window which the architect asked for.

17 Now again Builder's First Source never saw those
18 windows though. They placed an order with the
19 manufacturer and the manufacturer sent them directly to
20 the site so they never saw the windows. And even if they
21 did the windows are labeled what they were supposed to
22 be. Is there any extra stuff that a reasonable sales
23 building supplier seller should go to to make sure that
24 the label is correct? Or can they take it on its face
25 that it is what it purports itself to be. And as far as

1 the tests go these are eight year old windows then Doctor
2 Whitlock is doing his testing on. Can you adequately
3 test an eight year old window? What does the standard
4 say about that? The damage that you saw on the windows
5 that actually looked to be leaking during the middle of
6 the testing now is that window leakage that is happening
7 as a result of the window itself or is that leakage that
8 could be coming from that outside sealant that is bad or
9 the existence or bad flashing; maybe there is no
10 flashing.

11 What else is around the window that hasn't been
12 excluded from those tests that could be allowing water to
13 get in that we could take a picture of in the middle of
14 the test? Again, eight years and none of those pictures
15 of the inside that Mr. Lucey called the stool; that's
16 just the piece of window trim the ledge of a window or
17 sill that we usually call it in layman's terms. So there
18 might be some staining there.

19 Well, do we know if that is dirt from just wiping
20 the window off but not wiping it very well or cat hair or
21 dander or whatever accumulates on all of our windows. I
22 don't clean mine enough. I mean is this evidence of
23 water intrusion first of all or could it be dirt or some
24 other substance. Is it evidence that the water intrusion
25 is coming from the window itself or could it be something

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 else around it? And was the test that was performed
2 performed correctly and is it fair to test an eight year
3 old window? So all those are kinds of questions that you
4 should be asking yourself while you're seeing the test
5 results how it was performed and those kinds of things.

6 And then damage. Okay, so it's my belief that there
7 is not going to be anybody that is going to be able to
8 come in here, anybody that I can provide ---

9 MR. LUCEY: --- objection, Your Honor.

10 [Whereupon, an off the record bench conference is
11 held]

12 MS. DYER: You're not going to be able to hear from
13 anybody during this trial who can tell you exactly how
14 much of the damage regardless of all the pictures,
15 regardless of what is out there on site you're not going
16 to be able to hear from anybody who can definitively say
17 this much damage was caused by this window unit or all of
18 the window units. There is too much else going on out
19 there. These windows don't exist in isolation. These
20 windows exist in buildings that are bad from top to
21 bottom. So if the windows contributed at all to the
22 damage no one is ever going to be able to tell you jurors
23 this is how much damage they caused.

24 So to recap Builder's First Source they sell the
25 building materials. In this particular instance they

One Belle Hall Homeowners Association, et al v Builders First Source
Opening Statement-Remarks by Ms. Dyer
August 30, 2016

1 sold a window package of 324 vinyl ESP windows to a
2 sophisticated national builder Trammell Crow. Trammell
3 Crow comes in and says I need this particular window,
4 this many, this many in this size and I want you to ship
5 it to my job site. That's exactly what Builder's First
6 Source does.

7 What don't they do? You're going to hear that those
8 windows were direct shipped. Builder's First Source
9 didn't load them up, they didn't ship them, they didn't
10 deliver them, they didn't unload them. They certainly
11 didn't manufacture them; Energy Saving Projects did. And
12 they certainly didn't install them. There was a framing
13 contractor on the job who installed them. So they are
14 just the middle man. They're just placing an order.

15 We'd ask for you to give us as much of your
16 attention as you can this week. And at the end of it
17 we're trusting you to tell us what's fair. Thank you.

18 THE COURT: Very well.

19 *****END OF EXCERPT OF TRANSCRIPT OF RECORD*****
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL HOA, et al

Plaintiffs

vs.

BUILDERS FIRST SOURCE

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-10-7594

EXCERPT OF
TRANSCRIPT OF RECORD

September 1, 2016
Charleston, South Carolina

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

JUSTIN O. LUCEY, ESQ.
DABNY LYNN, ESQ.
Attorneys for the Plaintiff

CATHERINE D. DYER, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

1 MOTION FOR DIRECTED VERDICT

2 BY MS. DYER:

3 Our position is that we have provided evidence that
4 not only are the windows -- plaintiffs have put up
5 evidence that the windows, the DP windows the
6 certification test reports to prove that they are DP-50
7 haven't been found. We have -- the fact that the
8 evidence doesn't exist doesn't mean that the windows were
9 illegal. We haven't heard from a Mount Pleasant building
10 official; we haven't heard from an architect.

11 But moreover there is evidence, there is testimony
12 and documentation in evidence that there are alternative
13 causes for the windows to leak. Supposing and providing
14 the jury with alternates is an acceptable alternative in
15 this case.

16 As far as the strict liability cause of action Mr.
17 Woodward's testimony is that windows can be unreasonably
18 dangerous. We would argue that there isn't actually
19 testimony here that the windows at One Belle Hall are
20 unreasonably dangerous.

21 As far as the negligence cause of action there is a
22 failure to prove what duty Builder's First Source had
23 with regard to the inspection of the certifications
24 supporting the windows. And the breach of warranty we
25 would argue that there has been sufficient evidence that

1 the windows are defective by manufacturing purposes as
2 opposed to having some kind of damage that's occurred
3 from the time that the windows arrived on site until the
4 time that they currently exist. We feel that there has
5 been a sufficient showing of evidence on all three causes
6 of action to allow the jury to make the final
7 determination.

8 There is also a question as far as damages go and
9 the damages would be applicable to all three of those
10 causes of action. There is a question on whether or not
11 the windows -- if the windows have caused damage then how
12 much damage have the windows caused. There is an element
13 of speculation there. We've heard Doctor Whitlock wasn't
14 able to quantify for the jury what percentage or what
15 share of the damage at the buildings he would attribute
16 to the windows.

17 We've also heard that Mr. Moore who provided the
18 estimate would defer to Mr. Whitlock as far as how much
19 damage the windows have caused and how much damage needs
20 to be repaired as to the window elements themselves. He
21 was unable to testify or was yesterday in providing
22 documentation as far as what is actually necessary in the
23 field for repair. So we believe there is a question of
24 fact and plenty of evidence that could be weighed either
25 way as to damages which would be applicable to all three

One Belle Hall Homeowners Association, et al v Builders First Source
Motion for Directed Verdict-Reply by Ms. Dyer
September 1, 2016

1 causes of action.

2 THE COURT: You haven't mentioned although it was
3 in your pleadings about intervening negligence and
4 reliability with regards to third parties. You did not
5 mention that in your argument now.

6 MS. DYER: Correct. Well, clearly there were a
7 number of other parties involved in the litigation. The
8 windows are incorporated into a wall system and there is
9 clear evidence there is defects from both sides. There
10 are defects with multiple elements within the wall system
11 that could contribute to and have contributed to the
12 damage and to compromising the window's ability to
13 perform essentially. And for those reasons we believe
14 that the liability of Builder's First Source as the
15 supplier of the windows is unclear as it is muddled by
16 the intervening negligence of other parties who aren't in
17 court today.

18 THE COURT: Okay. Yes sir, anything further?
19
20
21
22
23
24
25

1 THE COURT: Now we've got to get us a charge, we've
2 got to get some lunch, and we got to be back by 2:30. So
3 y'all go get some lunch. Can you do that in just a short
4 period of time? I'm finishing the charge as we speak and
5 meet me back about a quarter to 2. Give some thought to
6 the verdict form because this is going to be a little bit
7 different and the reason is there is a request for
8 punitives and I know what their decision is based upon.
9 So y'all will have to help me with that one.

10 MS. DYER: I'm sorry, Your Honor?

11 THE COURT: Verdict form; I'm just going to need
12 your help with that.

13 MR. LUCEY: On our last couple of trials, Your
14 Honor, we just did an interrogatory at the bottom of the
15 sheet do you find the conduct ---

16 THE COURT: --- if you've got it bring it with you
17 or if y'all can reproduce it bring it.

18 MR. LUCEY: Yes, ma'am. Thank you.

19 THE COURT: That would be lovely. Thank you.
20 I'll see you in about 30 or 40 minutes. Thanks. Let me
21 know because I want to have an informal charge
22 conference. When y'all both get back y'all come on back.

23 [Whereupon, court is in recess from 1:16 p.m. until
24 2:26 p.m.]

25 THE COURT: Thank you so much.

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 Bratten prepared the P-0 because he was doing what he was
2 supposed to do according to his manager Bob Lanier he was
3 bird dogging that sale and doing everything necessary to
4 close and bring that sale in and close that sale.

5 You also heard in plaintiff's case from plaintiff's
6 damage estimator and we'll discuss that in a moment when
7 we look at the estimate. And you heard from Mark Galvin;
8 that was the last deposition that was published. That
9 was the homeowner that has termites all over his dining
10 room table that the kids wake up to termites at night.

11 In Builder's First Source case you heard from two
12 hired hands Mr. Drake and Mr. Watkins; Mr. Drake who
13 performed no testing and Mr. Watkins who did eight, nine,
14 ten, eleven estimates and never estimated the repair of
15 the actual damage underneath the windows.

16 The Judge told you at the beginning of this case
17 when she gave you an introduction and I suspect she might
18 repeat it when she instructs you again before closing but
19 she had told you that the burden of proof works like
20 this. At the beginning of trial One Belle Hall and
21 Builder's First Source in the eyes of the law were like
22 this [indicates]; we were perfectly balanced on the
23 scale. Plaintiff's duty in part my duty in plaintiff's
24 behalf was to tilt that scale. And if plaintiff
25 succeeded in tipping that scale ever so slightly then

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 they have proved their case by a preponderance of the
2 evidence. Well frankly we think the scale is more like
3 this [indicates]. This is all we had to do and
4 plaintiffs believe they have proved their case to you.
5 The greater weight of the evidence has shown that
6 Builder's First Source holds themselves out to be a
7 leader, a leader in the industry with a specialized
8 knowledge of building products which they resell for a
9 living.

10 We showed you that latently defective windows, in
11 other words windows with defects that you wouldn't be
12 able to see on your first observation were supplied to
13 One Belle Hall. We showed you through the words of
14 Builder's First Source 30(b)(6) witness Woodward that in
15 fact he conceded the windows had leaked. The windows had
16 leaked into a wall and caused or contributed to
17 degraded sheeting damage by -- growth and in the case
18 of One Belle Hall termites is an unreasonably dangerous
19 product.

20 We showed you that the injury occurred at all
21 buildings. We showed you many, many windows in many,
22 many condominiums. And I apologize. I apologize in
23 advance for showing you so many pictures during
24 plaintiff's case but it was important for us to show you
25 what's actually at One Belle Hall, and what you see if

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 you do actually do a water test. And what you see when
2 you go in and you look at that nicely painted stool and
3 that nicely painted drywall down below what you really
4 see when you take the sill off and when you take the
5 drywall out. And we had to show that to you in many
6 condominium units.

7 We showed you that no alternations had been made to
8 the product. In other words the product was installed in
9 the manner in which it was sold by the supplier. And we
10 showed you that because we believe that the Judge at the
11 close of the case will instruct you that that was an
12 element that we had to show you for one of our causes of
13 action.

14 We showed you the termite water damage below and we
15 proved plaintiffs proved that the implied warranties and
16 the express warranties especially those contained in
17 exhibit 44-A and those contained in the homeowner's
18 manual signed by Builder's First Source that the express
19 warranties have been breached.

20 And we showed you that Builder's First Source failed
21 to use care, due care, reasonable care in their conduct.
22 They used no care whatsoever. All they cared about is
23 for Larry Bratten to bird dog that sale and bring it home
24 and to maintain that relationship with TCR. What did
25 they tell you during opening that TCR has now built

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 225,000 units and they want every bit of it and that was
2 Larry Bratten's job. And that job bird dogging that sale
3 and keeping TCR as a client and helping them build
4 225,000 more units didn't require Builder's First Source
5 in their minds to look at the specifications or to look
6 at the test reports, or to look at the certifications.
7 There was absolutely no care exercised.

8 And you were asked by Builder's First Source counsel
9 at the very commencement of this case they sat up here
10 and they said we've got three questions for you. We
11 think it might have turned out to be more but the first
12 line was we got three questions for you. One of the
13 questions was was there any broken promise? Was there
14 any failure to fulfill a promise?

15 Well, plaintiff showed you some of the promises.
16 They were paragraphs 3, 4, and 9 on the back of exhibit
17 44-A that these windows would not just be suitable they
18 would be of the highest quality for that type of good.
19 That's what the paragraph says; the highest quality. Not
20 even just suitable but by making that promise they
21 obligated themselves. They now have to do what they say
22 they're going to do. And it's overwhelming that that did
23 not occur.

24 So once you got into the evidence you've got this
25 big national company who is a self described product

1 industry leader that literally knows nothing about the
2 products themselves. It does not care. They advertise
3 themselves on their webpage as a leader, a leader in the
4 industry and that their goal is to provide outstanding
5 products and services. They advertise these are products
6 that you can count on and that they will meet the
7 selection needs of their customers.

8 But then we showed you the deposition of Richard
9 Woodward, the 30(b)(6) one I was talking about that got
10 published; the corporate representative. He said I don't
11 know 90 times in his testimony. I don't recall 29 times.
12 How do y'all vet your product? I don't know. You have
13 to have a SKU, a product number to be in your computer
14 right? Yes. Okay, so to sell a product and bill for it
15 and collect your money you need a SKU. Well, what does
16 it take to get a product into Builder's First Source's
17 SKU system? What do you have to show? What gets vetted?
18 How does that work? I don't know. Y'all heard that
19 yourselves; I don't know.

20 He went on to tell you that he had not performed any
21 performance testing, never witnessed a performance
22 testing and couldn't tell us anything about how the
23 windows were vetted at Builder's First Source. But he
24 conceded he did concede that consumers have a right to
25 expect a window that will not leak and that hidden water

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 in walls causes rot and damage and that situation in his
2 own words poses an unreasonable danger to both the
3 structure and the people that occupy them.

4 Now why do I use the words unreasonable danger? Why
5 have we focused on that several times over the last
6 couple of days? Because the plaintiffs understand that
7 the Judge at the close of the case when she instructs you
8 on the law she will probably instruct you that for one of
9 the claims plaintiffs made, at least one, that the
10 plaintiffs needed to show that the defect posed an
11 unreasonable danger, an unreasonable danger to the
12 property or the structure or to the people in the
13 structure. Well, we did that. Builder's First Source
14 did it for us. We came and we brought their witness here
15 and he said yes. And then we showed you the pictures
16 that showed that the structures are hardly habitable with
17 that rot and those termites.

18 We've already talked about exhibit 44-A signed by
19 Bob Lanier that they did not comply with the requirements
20 on the back of the purchase order to verify the window
21 quality, to review the test report to check applicable
22 law and they did not consider the project documents and
23 they did not consider anything. I would have to check
24 and pull out 44-A and I don't want to keep you any longer
25 than I need to but it's the very bottom requirement, the

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 very bottom requirement on the back of the purchase order
2 on the left hand side that says the defendant, Builder's
3 First Source shall be responsible for making sure all
4 applicable federal state laws and regulations are
5 complied with. And everybody in this courtroom conceded
6 that the building code has the force of law. Yes, we've
7 got it up there now.

8 The building code has the force the law. And it is
9 undisputed that the twin windows, the majority of the
10 windows two thirds of the windows at One Belle Hall do
11 not comply with the building code. They are not legal
12 for use in this state. Clearly item 9 was not complied
13 with by Builder's First Source. The best Builder's First
14 Source could do is get Mr. Drake up here to say well,
15 there might have been one once. Who knows maybe it got
16 lost.

17 But you got to judge the creditability of that
18 answer against what he was forced to concede; the
19 manufacturer, at the beginning of this case the
20 manufacturer was his client. He asked the manufacturer
21 for all their documentation relating to windows. He
22 never got the twin test report. The only logical
23 conclusion using common sense, every day common sense
24 that we all employ in our lives the only logical
25 conclusion when you ask the people who are supposed to

1 have it for something and they don't give it to you and
2 they don't have it, it doesn't exist. And there's 44-A.
3 I'll put 44 on the board that was signed on April 14.
4 This is the addendum that went with that 44. And you'll
5 notice and we talked about this in the trial this
6 addendum from April has four paragraphs.

7 And it's important because paragraph 3 in this first
8 addendum attempted to limit the Builder's First Source
9 warranty to one year. It also attempted to disclaim
10 implied warranties. Well, that was removed and the
11 addendum was reexecuted in May of 2006 and now there is
12 three paragraphs and the one year limitation is gone.
13 And so what you're left with is you are left with the
14 warranties on the back of a purchase order and the
15 warranty that was in the homeowner manual from Builder's
16 First Source. And the warranty in the homeowner's manual
17 we're going to take a look at here in just a second.

18 You heard from Len the first witness and saw his
19 purchase contract when he testified that the time he
20 purchased his unit and for all the other homeowners at
21 One Belle Hall in the purchase contract was an assignment
22 by the developer, an assignment by TCR to the homeowners
23 of the developer's warranty rights from every component
24 manufacturer. That included Builder's First Source
25 warranty. We show you that and we believe that the Judge

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 will instruct you on the law at the close of this case
2 but that assignment the way she will instruct you is that
3 this assignment would not even be necessary anyway that a
4 warranty would flow to the next user of the product.

5 However, to make it absolutely clear there is your
6 assignment. And this is on the board now plaintiff's
7 exhibit 179 this is the warranty agreement that is in the
8 One Belle Hall owner's manual. They were handed this
9 document when they closed on the purchase of their units.
10 At the top of it you'll see handwritten in Builder's
11 First Source. At the bottom of it you will see the
12 signature of William DeHaas [phonetic]. He is the general
13 manager of the Columbia location of Builder's First
14 Source. And it provides that they once again they
15 warranty and guarantee that all labors and materials,
16 etcetera are in accordance with the plans and
17 specifications, subcontract and authorized modifications
18 and shall be free from defect. And that's their words;
19 not mine. Free from defect due to defective materials
20 and or workmanship.

21 And it goes on to provide you'll see up there for a
22 period of one year unless otherwise stated in the
23 subcontract agreement. Well the subcontract agreement in
24 his case goes back to exhibit 44-A where they removed the
25 one year limitation on the warranty. So you now have a

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 general warranty both through the builder and directly to
2 the homeowner without a temporal limitation on it
3 warranting the products to be free from defect.

4 On the screen is Len. He's the first witness, the
5 homeowner, the president of the association, the current
6 president who testified first in this case regarding his
7 reliance on the assignment of warranties by the builder,
8 how that imputed to being that a purchase of a quality
9 product that you're getting this new condominium and
10 you're getting all the original warranties that come with
11 it.

12 He further testified about how Builder's First
13 Source has failed to keep its promise. What promise?
14 The same promise that Builder's First Source was
15 presumably referring to in their opening but at least the
16 plaintiff knows what the promise is; the promise is in
17 the warranty. The promise is the product is going to be
18 free of defect and it's going to be of the best quality
19 of that type of product.

20 Builder's First Source itself admitted in this
21 courtroom that leaky products are not quality products.
22 Leaky windows are not quality products. What should the
23 suppliers do? What should resellers do? Well, let's go
24 back to David VanDommelen sitting right up here;
25 Builder's First Source architect. Their witness, their

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 architect; not plaintiff's. He says supplier should be
2 familiar with their products and the environment that the
3 products are intended for. He basically said that they
4 needed to be checked out. You can't just go reselling
5 products.

6 Richard Woodward didn't know how products are vetted
7 by Builder's First Source. He assumes that they are but
8 concedes that the material should be reviewed; the
9 technical literature should be reviewed. Robert Lanier,
10 the area vice president Builder's First Source should not
11 supply products which are not code compliant.

12 In fact he was asked if a customer ordered a product
13 from Builder's First Source which was not code compliant
14 would Builder's First Source sell it. He said no. He
15 said no because we had already established that the
16 reseller shouldn't do that and then Builder's First
17 Source everywhere but including on their webpage asserts
18 that it does, in fact, customize it's products for the
19 geographical areas in which they are being sold.

20 Builder's First Source supplied them with leaky
21 windows, they supplied an inferior product. They
22 promised to provide products free from defect and they
23 guaranteed that they would be free from defect, none of
24 which happened. These 2031 windows have water leakage.
25 They are a defective product and we've shown that they

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 are improperly certified. Just a couple of photos from
2 the water testing from Doctor Whitlock showing the water
3 coming through the windows onto the stools during
4 testing. We reviewed with Doctor Whitlock and again I
5 know I spent some time on this and I apologize for the
6 amount of time that we spent on this but that's an
7 important exhibit up there 300.5-A. That's his chart of
8 the 16 E 1105 tests he performed and the results and it's
9 also his chart of the eight sill dam tests he performed
10 in that chart. We have a second sill dam chart I want to
11 show you in a second. And actually when I'm say 16 it's
12 really a bit of an understatement because about half of
13 the windows were twins so if you test 16 openings you're
14 actually testing 24 or 26 windows okay.

15 Additionally while he tested all 16 openings at zero
16 pressure originally -- I may be misspeaking; I think
17 maybe its 14 -- at zero pressure originally he went on
18 and retested three or four of them at one third pressure
19 and he retested two or three of them at two thirds
20 pressure. So he actually performed closer to 30 window
21 spray back tests if you count all windows and all level
22 of pressure. As you've heard so many times this week all
23 windows failed at zero pressure. They could not
24 withstand regular rain without even considering the issue
25 of wind driven rain. And there [indicates] are some of

1 the pictures from his testing. These are the five areas
2 that Doctor Whitlock testified leaked on the screen, one
3 two and three have to do with the horizontal joints, the
4 vertical joints on the window. And number two
5 additionally has to do with the mullion in the middle.
6 Remember that's the illegal window; it's a twin.

7 And when you put a mullion down the middle it
8 changes the size of the opening as explained by Doctor
9 Whitlock. It changes the test parameters and the window
10 has to be retested. And that didn't happen and you see
11 a lot of your leaks occurring at the corners immediately
12 adjacent to that mullion. And the windows are also
13 leaking at areas four and five which is the meeting rail.
14 While four and five are put in the middle of those
15 photographs you might recall during trial that the
16 meeting rail splatter that you would see on the back of
17 the screen during testing actually more often occurred at
18 each end of the meeting rail and it would just splatter
19 onto the protective, the pressure chamber behind the
20 test.

21 There is an example right there the left corner of
22 the meeting rail splattering onto the pressure chamber
23 behind the test. Here's another one of his test
24 photographs with water dripping out of the window. Here
25 it's quite a bit of water sitting down there on the sill

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 and the test is no longer in process. It's already
2 arrived and is just sitting there. Here is the chart of
3 the sill dam testing, the eight sill dam tests performed
4 by Doctor Whitlock. And five of the sill dams tested
5 failed immediately. The sixth was in 30 seconds and
6 seven and eight were within two minutes. They all
7 failed; it was just a question of how quickly. And
8 please recall in evidence in several manners including
9 the admission of Doctor Drake -- excuse me Mr. Drake.

10 The last couple of questions I asked him the
11 developer TCR had their own engineering firm. And of
12 course remember they are on the opposite side of the
13 plaintiffs when they were a defendant in this suit. They
14 don't want to prove window leaks. They're just like the
15 window defendant now that doesn't want to prove window
16 leaks. The developer brought their own engineers in.
17 They tested more locations than the plaintiffs for sill
18 dam leaks and all their tests failed too.

19 On the screen now is one of the four or five cracks
20 that Doctor Whitlock showed the jury that he found in his
21 destructive testing. And he explained how almost all
22 these cracks in all the different windows originated in
23 the same place; they originate at the top of the lower
24 miter, the top of the lower miter. And I think the
25 defendant was trying to suggest that each one of these

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 windows got dropped in the same place when there is no
2 evidence of impact damage whatsoever. You don't see any
3 evidence of impact damage up there. And by the way if
4 Mr. Drake wants to testify about this window being too
5 close to the rough opening this one is not too close to
6 the rough opening. You can see the crud growing out of
7 the rough opening from all the water damage. There's
8 plenty of room in there; we've got growth going on in
9 there.

10 Look underneath the window. You can see the space
11 between the window product and the black rough opening
12 flashing. There is no crowded openings at One Belle
13 Hall. We already talked about the Rimkus [phonetic]
14 testing. Again Builder's First Source architect conceded
15 the test results. Builder's First Source the most
16 knowledgeable corporate representative had no evidence to
17 dispute the test results.

18 Doctor Whitlock talked to you for a long time about
19 his investigation, the original formation of the
20 hypothesis based upon seeing manifestation of leakage
21 inside the structures and the steps that he took to
22 confirm or refute his hypothesis through ASTM recognized
23 testing. He spent over a 100 hours on site over 14 days
24 issued all his original findings, his preliminary
25 findings in a lengthy report and included documentation,

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 charts, graphs, photographs everything else so that
2 anybody in the world could go behind him and confirm or
3 reject everything he did. Builder's First Source had
4 that opportunity. They had that opportunity. The report
5 they put into evidence one of the reports was from 2014
6 you recall. It was published eight months before he gave
7 five days of depositions in February of 2015.

8 So Builder's First Source had that report since at
9 least June of 2014. And here we are now into September.
10 September 2016 two years later -- four years later and
11 they haven't checked any of his work and they haven't
12 gone behind any of his work and they didn't do any
13 testing in two and a half years. They have nothing to
14 show you to contradict Doctor Whitlock's work.

15 He testified to you to a reasonable degree of
16 certainty in his field of expertise as to the number of
17 findings. But let's talk about his field of expertise
18 first and his experience. A consultant for -- well, he's
19 got his doctorate from Clemson that we've talked about.
20 He's represented the state of South Carolina in the
21 investigation of a window leakage at the Strom Thurmond
22 Gazes building right over here across town. He's
23 represented USC in investigations, Clemson in
24 investigations, William and Mary, the United States
25 federal government at the Capital, UVA; impressive,

1 impressive list of projects where he has spearheaded the
2 forensic leakage investigation or a structural
3 investigation; an impressive list. And he applied that
4 experience to his investigation here and performed it in
5 the same way that he'd perform any other investigation
6 using his ASTM standards. And he testified for you to a
7 reasonable degree of certainty in his field of expertise
8 that the windows are defective, they are not DP-50. They
9 leak at multiple locations. They leak at zero pressure.
10 They're causing damage to all the buildings. They're
11 illegal for use over at One Belle Hall and that they must
12 be removed and replaced.

13 This is the on the screen now is the test report
14 that the defendant wanted to reply upon to prove that
15 these windows were fine, they're good, they're DP-50,
16 they are impact resistant and everything else. You don't
17 even need to get to the issue of the different sealants
18 being used in testing. And those are technical issues
19 and y'all probably got that that they were tested with
20 different sealants; that the structural specimen never
21 passed testing with the proper sealant. But you don't
22 even need to get there because you just look at the face
23 of the report and it's talking about interior glazed
24 windows. Nobody denied this week that the sashes on
25 these windows are exterior glaze and nobody denied it.

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 And regardless of that you heard Mr. Drake concede that
2 the drawings attached to his report don't match the
3 signed and sealed engineer drawings. Something is wrong;
4 they are both wrong. And we know they are wrong because
5 we have exterior glazed windows.

6 And Doctor Whitlock explained to you all why that
7 change alone by itself was making a material difference
8 in the leakage at One Belle Hall. If a window is glazed
9 from the exterior, in other words if you're glazing it at
10 the house or condo which you don't do you do it in a
11 factory mostly but if you were you'd be standing on the
12 outside of the building and you would press that glass
13 against the sash frame to put it in place. Actually
14 before you press the glass against the sash frame you'd
15 put a bed of sealant around the sash frame that you are
16 going to press the glass to. So now that sealant is
17 going to be on the inside of the glass; between the glass
18 and the sash frame.

19 And then you're going to lock that IGU, that glass
20 into place with the glazing beads again from the exterior
21 of the structure. You just put these pieces of vinyl in.
22 What that means is that you are exterior glazed. You've
23 moved the glaze in the back bedding, the sealant, to the
24 inside of the structure. The exterior of the sash no
25 longer has any water resistant capability. There is no

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 sealant between the bottom glazing bead and the glass. A
2 vinyl to glass joint cannot resist water intrusion. By
3 them switching the sash from an interior glaze to an
4 exterior glaze doubled the amount of water that was
5 getting dumped into the sill that couldn't handle the
6 water anyway. And as testified by Doctor Whitlock it
7 contributed to the damage that was being done here.

8 Also on his test report higher up you see the label
9 HC-50. The test specimen size is wrong for HC-50; it
10 doesn't work. Behind the blow up on the glazing is
11 another paragraph which describes the size of the sashes.
12 Take a look at them in the jury room if you get a moment.
13 You'll see the sashes are about this high [indicates] and
14 this high [indicates]. And the window is this high
15 [indicates]. Nothing makes sense in this report. And
16 for somebody to suggest that it is a third party
17 validation is just frankly ridiculous when it doesn't
18 even match the specimens.

19 Even Mr. Drake eventually conceded that there were
20 multiple errors in the report. Here's another example of
21 a typical condition at One Belle Hall you can see with
22 your own eyes you can see the vertical joint at the end
23 of the sill dam and you can see it is discolored. And
24 you can see a discoloration down below it and the
25 discoloration in the corner. And Mr. Drake wants to tell

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 you that even though you can see the water line at the
2 joint in the vertical joint that the water came from
3 somewhere else and besides this is pretty much just dirty
4 anyway in his opinion.

5 More pictures of the damage on the inside. This was
6 one of the half dozen or so condominiums that is infested
7 by termites. The termites are below the window. You're
8 looking at the bottom of a window trim right there.
9 They've eaten through the drywall and they swarm just as
10 Mr. Galvin testified as the last witness for the
11 plaintiffs.

12 And these we looked at these termite tracks during
13 the trial. These are directly behind the apron; the trim
14 on the drywall under the stool immediately adjacent to
15 the drywall -- excuse me to the window. We looked at the
16 moisture testing on the wood how it's all disintegrated
17 in the walls and as I mentioned to you earlier Mr. Galvin
18 testified about the termite infestation.

19 The fix recommended by Doctor Whitlock is the
20 removal of all windows and the replacement of the
21 windows, the removal of all damaged wood and the
22 replacement of all damaged wood, the inspection of the
23 adjoining structural members for termite damage.

24 Now the Judge is going to instruct you on the law at
25 the close of the case; we talked about that and in the

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 opening we discussed briefly the three causes of action
2 that the plaintiff has brought and what the plaintiff
3 thinks they need to prove to satisfy the law that the
4 Judge will charge you. We think we've done that as to
5 strict liability. Obviously if Builder's First Source
6 claims it's an industry leader that it is in the business
7 of reselling these goods so this is their business, which
8 is a criterion. They sold these windows and there can be
9 no dispute about that. They themselves concede that
10 these windows are unreasonably dangerous and the windows
11 have caused damage.

12 We believe that satisfies the criteria that the
13 Judge will give you for deciding that strict liability
14 claim. On breach of expressed warranty very similar;
15 very similar. There is a representation and there is a
16 non-conformance; a breach of the representation, a
17 defect, and damage resulting from that non-conformance.
18 Implied warranty; again very similar but a duty that
19 gives rise by operation of law.

20 And that duty in the simplest terms is to sell a
21 product that is suitable, a usable product, a product
22 that is useful for its ordinary purpose and for its
23 intended purpose. Its plaintiff's position that as to
24 windows the ordinary purpose keeping the weather out
25 merges with its particular purpose which is having light

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 in and keeping the weather out and therefore we have
2 satisfied the elements required for both of those causes
3 of action.

4 The defenses that we've seen by Builder's First
5 Source are several. One is the middle man defense. I
6 sometimes call it the see no evil, hear no evil, do no
7 evil defense. Hey, we're just in it for a buck; don't
8 hold us accountable; that's how it is. We don't believe
9 that the law you will hear from the Judge will include
10 within it a middle man defense the hey we just sold the
11 product defense.

12 The plaintiffs do not believe that the defendants
13 have shown you that this is a maintenance issue. In fact
14 you will recall we put on some of the testimony from
15 Builder's First Source that it's not a maintenance issue.
16 Not only did we put it on through Builder's First Source
17 but if I can again remind you of Mr. VanDommelen
18 Builder's First Source architect. He said it's not a
19 maintenance issue. He said it's a manufacturing issue;
20 their architect.

21 Builder's First Source may also argue what is called
22 a mitigation defense that somehow the homeowners once
23 they realized they had a problem should have done a
24 better job of keeping it from getting worse.
25 You heard from Doctor Whitlock there was nothing they

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 could do short of a complete reclad of the building.
2 Slapping more caulk on this is not going to change it.
3 They need to fix their stucco which is not at issue here
4 today but they also need to fix these windows which is at
5 issue today and you can't just slap some more sealant on
6 these windows. It won't do any good. And you can't even
7 find the cracks in these windows unless you do what
8 Doctor Whitlock did which is to go cut open the
9 interiors.

10 As we believe as part of the Judge's instructions
11 she'll instruct you that plaintiffs in mitigating their
12 damages only have to do what is reasonable and we don't
13 think it's reasonable that homeowners should be asked to
14 go cut out all their drywall just to find the rest of the
15 cracking windows just to find the rest of the leaking
16 windows. And if you find them then what do you do? They
17 can't be fixed. They still have to replace them. You
18 need to do the complete job.

19 The multiple party defense. What we've heard about
20 that is somehow this is caused by the architect, caused
21 by somebody else; not us. What we've already seen they
22 never looked at the specs. They can't show it's caused
23 by the architect and they didn't comply with the specs.
24 The model numbers don't match. The law does not insulate
25 the middle man. They are responsible we'll believe

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 you'll see under the law as the Judge gives it to you.
2 They are responsible for products they sell. It doesn't
3 matter if they manufacture them or not. They sold them.
4 You put into commerce the defective product you can be
5 held accountable for it.

6 We believe the Judge will also instruct you on a
7 concept at law called proximate cause, which is that when
8 you consider the damages caused by a defective product
9 you must decide whether or not the product proximately
10 caused the damage. It's kind of a legal term that she
11 will explain but it's kind of a common sense term too,
12 you know causation.

13 And what we would like you to listen to when she
14 instructs you on that is an instruction that I'll call
15 concurrent cause. In other words when you consider
16 proximate cause you have to be -- you have to consider
17 whether or not the defect was a proximate cause not the
18 proximate cause. You can have two or more proximate
19 causes. And any participate who participates in causing
20 in proximately causing that damage in the eyes of the law
21 can be held liable for that resulting damage. So the key
22 question is are the windows a proximate cause not the
23 proximate cause. So in summation on this issue on the
24 issue of the defect we believe we've answered the
25 questions posed by Builder's First Source during its

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 opening. Did they make a promise they did not keep?
2 Yes. Did it supply a dangerous product? Yes. Do the
3 windows leak? Yes. Do those leaky windows result in
4 damage? Yes. And what is that damage?

5 Well, you heard from J.R. Watkins and you heard from
6 him and you heard its 12,000 dollars. There is no rot
7 and he proposes to do the same thing that the
8 manufacturer did originally, which is install more
9 sealant. I hope, I hope we can all remember that last
10 exchange with Mr. Watkins and he's a good guy but he
11 first told the jury why his sealant fix was going to work
12 and how it was going to differ from the manufacturer
13 because he told you all that he had seen gaps or he
14 thought he had seen gaps in each end of the sealant in
15 the joint, the horizontal joint. And when he put that
16 sealant back there wouldn't be any gaps there.

17 Well if his original testimony was correct that
18 means he was testifying that these windows were
19 inherently defective. They had gaps in the corners of
20 the sealant at the time they were manufactured and then
21 sold and delivered at One Belle Hall. And that would be
22 the only way that his sealant would be any different and
23 better because he would have no gaps. But when
24 questioned on that he said oh well you know maybe the
25 sealant got stuck up above and I just didn't see it. So

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 maybe it was there and maybe I shouldn't testify that
2 they were defective originally. And I asked him I said
3 Mr. Watkins you can't have it both ways. Either there is
4 a defect in that sealant job that you're going to do a
5 better job of or you're going to do the same thing the
6 manufacturer did and it's going to fail the same way
7 because the windows are just bad windows and you just
8 can't fix it. Which is it? And we really didn't get an
9 answer out of him.

10 But you can be sure that there is only one answer to
11 that catch 22. There is only one answer. The only way
12 he can do a better job of sealing those windows the
13 second time is if in fact they were defective before and
14 there were gaps. And if there weren't any gaps before if
15 it was completely sealed then he's just going to go back
16 and do the exact same thing that the manufacturer did,
17 which we've already shown the jury does not work.

18 He did not include any cracking. He did not include
19 any rot repair. This is in contrast to Gary Moore,
20 plaintiff's damage estimator, damage expert and
21 contractor and you heard and saw Gary Moore and frankly
22 he pretty much did seem like a contractor. He spoke of
23 hammering nails all his life. And he got up there and he
24 told you his experience and he showed you his detailed
25 estimate. Now at the time he prepared that estimate the

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 entire buildings were an issue, the entire buildings and
2 so it contains lots of things that don't apply to a case
3 just about windows. So what he did was he backed out the
4 components that related to windows into a smaller number.
5 He testified that repairing the windows by themselves
6 would be 3.5 -- to replace them would be 3.5 million
7 dollars. Repairing the damage associated with the
8 windows it would be 5 to 5.2 million dollars. And if you
9 took off the cladding work that needs to be done to
10 repair a window because you've got to replace your stucco
11 anyway then it would be reduced down to 4.7 million
12 dollars.

13 Now BFS wanted to make a little hay with some of Mr.
14 Moore's numbers on the front page. When you look at that
15 estimate in the jury room you'll see that every line on
16 that front page has a detailed supporting page attached
17 to it. You'll see pages in this estimate were Mr. Moore
18 actually estimated a number of fasteners he needed to
19 utilize to replace each window.

20 You'll see more detail in fact if you get a second
21 compare it to the Watkins depositions. What he's got at
22 60 pages Watkins can get done in a page and I'm not
23 criticizing that but it's a compliment to Mr. Moore the
24 extent of the detail to which you can find in his
25 estimate as to what is included and what is not included

1 in his estimate. And you'll see the sections, the top
2 sections on his repair estimate that were removed because
3 they did not relate to water damage or added in because
4 it did relate to the window damage. And he allocated the
5 general conditions at the bottom. He reduced the amount
6 of time the job would take and he detailed it in the
7 attached.

8 Now the defendant made hay a little bit with how
9 expensive Mr. Moore is. I think they got him to
10 calculate that his per window cost was something close to
11 11,000 dollars and if you subtract the product cost out
12 it was 10,000 dollars and they thought that was really
13 high. And I can't recall if that's just all windows or
14 if that is twins or how he drew them out. But those are
15 the numbers they came up with.

16 Well plaintiffs concede Gary Moore is a top quality
17 window mechanic. He told you about the churches he has
18 restored; he's told you about all the Charleston historic
19 buildings he has restored. He's the top quality; he's a
20 Cadillac, we get that. But he knows what he is doing and
21 he told you about his experience. And he does this for a
22 living; he estimates jobs and does jobs for a living and
23 guess what? Defendants if they thought his estimate was
24 too high they had the opportunity to come in here and
25 show you what it would really cost to replace the

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Mr. Lucey
September 1, 2016

1 much replacement costs they get and how much of the
2 consequential damages should be put in there. It's a
3 single number; you put it all under one number. And
4 frankly plaintiffs ask that you award them the full
5 amount of the damages they have put on at trial.

6 They're okay with the reduction for the stucco that
7 has to be replaced anyway. We do understand it's going
8 to be an overlap on the repair job so for that nine
9 inches around we understand that. But the full amount of
10 damages even with that portion removed is 4.7 million
11 dollars and that is what the plaintiffs are asking you to
12 award them.

13 And there was a primary issue in this case.
14 Forgetting all the legal stuff and who did what and
15 causes of action there was a primary issue. Do the
16 windows leak? When you go into your jury room consider
17 how little of Mr. Drake's testimony was about that
18 question do the windows leak. Most of his testimony was
19 there are other leaks going on in the buildings which
20 frankly was no surprise and he really didn't need to take
21 his time up on that. I told you that in our opening
22 statement and we've shown you the pictures and you've got
23 the Whitlock report. There are lots of other problems.
24 He didn't need to spend any time on that. He needed to
25 spend time on one of the dominant issues in this case; do

CLOSING ARGUMENT

BY MS. DYER:

Ladies and gentlemen as you heard the Judge is shortly going to charge you with the law in the case. I did ask you to think about three questions as you were listening to the evidence and the reason that I picked those three questions is because they directly correlate with the law that you are going to hear.

Let's talk about the first one and the first one is negligence. Negligence is basically in layman's terms a reasonable man's standard. What would a reasonable person put in this same position do? In this case let's back up and look at the evidence that you saw related to the windows that the architect, the design professional who designed the building, what did he call out. We've seen the specification that is in evidence. He asked for a vinyl Fin impact rated DP-50 window manufactured by a company called Energy Saving Products or ESP.

You've also heard that there was a purchase order executed by somebody at Builder's First Source showing evidence that Trammell Crow, a sophisticated homebuilder, came in to Builder's First Source or called Larry Bratten. Now Larry Bratten hasn't been around to testify. I'm not certain of his health condition and perhaps as Mr. Lucey suggested he is deceased. But I

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Ms. Dyer
September 1, 2016

1 don't know that but he isn't here to be able to tell us
2 whether or not he looked at the specifications or what
3 his role was. Bob Lanier said that -- Bob Lanier didn't
4 look at the specifications. He was the area vice
5 president. We really haven't heard from the sales person
6 and unfortunately we can't hear from the sales person
7 about what he did or didn't do. But we do have seen his
8 P-O. And the P-O spells out, the purchase order, that
9 Trammell Crow whether they came in, called or emailed
10 they asked for a particular order to be placed. They
11 asked for what the architect specified 324 vinyl Fin DP-
12 50 impact rated windows manufactured by Energy Saving
13 Products of Florida.

14 We know that the buildings are erect and have been
15 built. They are standing in Mount Pleasant as we speak.
16 They've been there since 2006 so we know that the Mount
17 Pleasant building officials approved the project to be
18 permitted to allow it to be built, which means that they
19 Trammell Crow the architect represented to the Mount
20 Pleasant building officials that it was going to meet the
21 equitable building code including everything that is
22 required to build a building and windows are part of
23 that. We understand that the homeowners moved into the
24 buildings and have been living there for some number of
25 years meaning that the buildings were issued certificates

1 of occupancy. Mount Pleasant didn't just hand out a
2 building code and walk away; they came back over and over
3 again throughout the course of this construction and
4 certified that the building and construction process and
5 the components that are a part of the construction all
6 were meeting the building code.

7 The certificates of occupancy were issued so that is
8 evidence the code had been met. You've seen the test
9 reports that state that the windows passed DP-50 and
10 impact rated. You've heard Doctor Whitlock, you've heard
11 Mr. VanDommelen, you've heard Mr. Drake; all three of
12 them admitted that the windows passed DP-50 and impact
13 certification.

14 Doctor Whitlock has some suspicions about the
15 certification of the windows; the documentation behind
16 that certification process. But Doctor Whitlock hasn't
17 gone to talk to talk to AAMA. He hasn't gone to
18 investigate with Keystone, the validator. He never
19 talked to the testing facility to say hey, there is a
20 problem with these documents. Let's go back and look at
21 them. For AAMA you're in charge of the industry; you're
22 the regulator can you open a file here and do an
23 investigation and see if these windows were properly
24 certified. Doctor Whitlock admitted that Cline Design,
25 the architect in this case, has been specifying these ESP

1 windows for other projects. So it's not that we're just
2 dealing with these four windows. If he is honestly
3 concerned the windows are illegal, if they don't meet the
4 code, that they are dangerous then why hasn't he done
5 more than come in here today or this week and tell us
6 that the windows aren't proper for this particular
7 application because he knows that the windows are all
8 over the place. They're installed in all kinds of
9 projects.

10 Shouldn't he have taken additional steps to see
11 whether or not his hypothesis that some of the typos on
12 the test report indicated that there was actually a
13 problem with the certification? We didn't see any
14 evidence that the certification was revoked either.
15 We've got the documents, they might have some errors but
16 that doesn't mean that the certification at the end of
17 the day wasn't approved by the validator under the AAMA
18 certification standards.

19 With regard to Builder's First Source's duty in
20 selling windows plaintiff suggested that they should have
21 done more, they should have done independent research to
22 validate this certification. Okay, let's put Builder's
23 First Source -- let's give you a different analogy
24 instead of a building supplier. This is one that I think
25 we can all relate to. You're experiencing a medical

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Ms. Dyer
September 1, 2016

1 condition so you go to your doctor. You tell your doctor
2 what the problem is, he does an examination and he
3 diagnoses you with a particular condition. His treatment
4 is going to be through medication. So he gives you a
5 prescription for a particular medication made by Pfizer
6 let's say. He says you need to take this, get it filled
7 and it should be five milligrams a day.

8 So you as the patient having trusted your doctor as
9 a medical professional, you take it to Walgreens and your
10 pharmacist. You give it to Walgreens and Walgreens says
11 well I don't carry this in stock but I can call and get
12 it from Pfizer and fill the prescription for you. You
13 agreed to that because you need that particular product,
14 you need the five milligram Pfizer product and so the
15 pharmacist goes ahead and contacts the drug manufacturer
16 and the drug manufacturer ends up giving you your
17 medication.

18 Would you expect in that situation for the
19 pharmacist, the middle man here, to go back to the doctor
20 and question whether or not the doctor, the professional,
21 has adequately diagnosed you or if he selected the right
22 medication for your condition? And at the same time
23 would you expect for the pharmacist to look to Pfizer,
24 the drug company, and say wait a minute I need copies of
25 all the FDA approvals that you got to be able to bring

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Ms. Dyer
September 1, 2016

1 that product to market before I can give it to my
2 customer. Builder's First Source is in a similar
3 position. There is a design professional in one end of
4 this who says this is the building that I designed.
5 These are the windows that this building -- that I want
6 to put in this building. I know what the code is and I
7 know what I'm going to have to do to make sure that this
8 building can be built by the contractor so here's the
9 windows that I need. And the contractor carries that
10 order to Builder's First Source and says here's what our
11 design professional wants.

12 Builder's First Source goes to the window
13 manufacturer and places the order trusting that the
14 window manufacturer who is selling a window on the open
15 market has done everything that they need to do in order
16 to sell it on the open market; that it has passed the
17 certification. Would you expect Builder's First Source
18 to do anything more than place the order trusting that
19 the professionals on both ends either from the design
20 professional who picked it to the window manufacturer who
21 is selling it that they've done everything they need to
22 do to qualify in this situation.

23 Breach of warranty is another cause of action. To
24 prove the breach of warranty the plaintiff has to prove
25 that Builder's First Source made a promise it didn't

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Ms. Dyer
September 1, 2016

1 around the region were unreasonably dangerous that he
2 wouldn't be obligated to do something more than write a
3 report and come in here and tell us about it. Shouldn't
4 he go someplace to AAMA or to the newspaper or someplace
5 and tell somebody that these windows are unreasonably
6 dangerous. We got to do something about this instead of
7 just documenting it in some binders with lots of pictures
8 and waiting for his opportunity to tell the jury. I
9 think that you've have heard enough evidence that the
10 windows at One Belle Hall arrived in a condition that
11 certainly wasn't unreasonably dangerous. They can't meet
12 their burden of proof for strict liability.

13 Now let's talk about damages because that's really
14 what we are here to talk about. At the end of the day it
15 is all about money in this lawsuit. So each cause of
16 action requires that you can make a direct connection
17 between what Builder's First Source did wrong, what was
18 unreasonable. Did they break a promise and were the
19 windows delivered in an unreasonably dangerous condition.

20 So what did Builder's First Source do on this side
21 of the column and can they directly correlate a line, can
22 they draw a line from this side to this side saying that
23 whatever Builder's First Source did or didn't do caused
24 damage. So that's the first step but you also the Judge
25 will tell you can't be allowed to guess about the damages

1 or how much the damages are. Now the law I believe she
2 will say that the plaintiffs don't have to prove it to a
3 mathematical certainty but you can't be left to guess,
4 conjecture or speculate as these damages.

5 We saw lots and lots of pictures and we heard lots
6 of testimony that there are very many comprehensive
7 problems with the buildings outside of the window units.
8 We know that the buildings have been damaged by the roof,
9 the stucco, the siding, the bricks, the waterproofing,
10 the installation of flashings or missing flashings, the
11 waterproofing on the balconies and the stairs; the list
12 goes on and on from the top to the bottom. We've told
13 you that this whole week.

14 Over 40 people as you heard were originally brought
15 in as defendants and blamed for the situation that is
16 going on here. Mr. Whitlock [sic] has produced exhibit
17 39 which is a 169 page report about all the problems he's
18 documented on these four buildings. But the windows
19 don't exist in isolation. They are part of a system. So
20 if the plaintiff is correct and you believe that he has
21 met his burden of proving that the window has caused
22 damage nobody this week has been able to tell you how
23 much. Doctor Whitlock sat there, brilliant man, and I
24 asked him what percentage of the damage to these
25 buildings how much of that water damage that is in all

1 and all three sides and put it back in and that
2 eliminates the problem; it stops leaking. Whether that
3 be natural leaking or if you fill it up with water from a
4 water bottle.

5 Another engineer Rimkus we've heard a little bit
6 about them. His name is Craig Rogers and he actually
7 prescribed that repair for these windows before Mr. Drake
8 did. So there have been two engineers who looked at this
9 issue. Mr. Rogers even duplicated the test results of
10 Doctor Whitlock and said yes, you can force this sill
11 insert to leak and the repair for that is to add more
12 silicone. Mr. Drake concurs let's add more silicone.

13 So we asked Mr. Watkins throughout this entire
14 litigation you've produced estimate after estimate after
15 estimate and what was the one consistent thing? It was
16 this repair for windows. And he told you today that it
17 is going to cost 25 bucks a window to pop that piece out
18 and put new silicone down and he guarantees that water
19 wouldn't get through that seal once he had done his work.
20 And the total cost for that was 20,461 dollars.

21 Now is it fair to ask Builder's First Source to bear
22 the cost of a multimillion dollar repair when a) the
23 windows have to come out anyway and b) we don't have
24 conclusive evidence that the windows either aren't DP-50,
25 aren't impact rated, were an actual violation of any kind

One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Remarks by Ms. Dyer
September 1, 2016

1 of building code or are defective. Is there enough proof
2 that the windows are defective using any element that has
3 been demonstrated to you? Did Builder's First Source in
4 selling the product that their sophisticated customer
5 came to them and asked for did they do anything
6 unreasonable?

7 We appreciate your time and know that the
8 circumstances are not good weather wise and we're on the
9 eve of Labor Day weekend. But I ask that you take your
10 time and consider what you've heard and then do what is
11 fair. Thank you.

12 THE COURT: Thank you. Yes, sir?

13 MR. LUCEY: Thank you, Your Honor.

14 THE COURT: Yes?

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One Belle Hall Homeowners Association, et al v Builders First Source
Closing Argument-Reply by Mr. Lucey
September 1, 2016

1 repairs somehow Moore's numbers are speculation?
2 Builder's First Source if you didn't catch it they just
3 adopted Mr. Moore's numbers. They just said if you find
4 it is four cracked windows use Moore's number 11,000 a
5 window. They apparently don't think its speculation.
6 They asked you shouldn't you have seen more damage if the
7 windows have been leaking as long as they have been.
8 Didn't y'all see enough damage on that screen? Weren't
9 you ready for the photographs to end?

10 We all know what is going on here. The manufacturer
11 was peddling cheap windows to make a buck. TCR was using
12 cheap windows to make a buck. Builder's First Source was
13 reselling cheap windows to make a buck. But One Belle
14 Hall homeowners are the victim and they don't get a get
15 out of jail free card. They are a part of that
16 transaction. They facilitated TCR using these cheap
17 windows. They supplied them, they sold them. Hold them
18 responsible.

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Exhibit "B"

9/1/16 DYER EMAIL AGREEING TO PROPOSED SECOND VERDICT FORM



Re: OBH - Plaintiffs proposed verdict form

1 message

Davi Dyer <ddyer@kemodlelaw.com>

Thu, Sep 1, 2016 at 8:17 PM

To: Justin Lucey <jlucey@lucey-law.com>

Cc: Kristina Shemoff <kshemoff@lucey-law.com>, dgoodsteinj@sccourts.org, DGOODSTEINLC@sccourts.org, Annette Mixson <amixson@lucey-law.com>

Fine with me

C. Davi Dyer
Kemodle Coleman
914 Folly Road, Suite 200
Charleston, SC 29414
ddyer@kemodlelaw.com
(843) 795-7800
(843) 795-3032 Fax

On Thu, Sep 1, 2016 at 8:13 PM, Justin Lucey <jlucey@lucey-law.com> wrote:
Judge Goodstein & Davi:

Attached is a proposed second verdict form. Please let me know of any edits. My staff will print several copies.

Justin Lucey

On Thu, Sep 1, 2016 at 2:20 PM, Kristina Shemoff <kshemoff@lucey-law.com> wrote:

Dear Judge Goodstein,

Per Mr. Lucey's instructions, please find the attached verdict form with the case caption.

Thank you,

Kristina

Kristina K. Shemoff

JUSTIN O'TOOLE LUCEY, PA

415 Mill Street

Mt. Pleasant, SC 29464

843-849-8400 (tel.)

843-849-8408 (fax)



Exhibit "C"

VERDICT FORM

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-7594

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,

vs.

Builders First Source - Southeast Group,)
LLC;)

Defendant.

VERDICT FORM

We the jury find for the Plaintiffs on the following causes of action:

NO Negligence
YES Strict Liability
YES Breach of Warranty

And we award the Plaintiffs Two Million One Hundred Sixty-Three Thous
(\$2,163,493) in actual and compensatory damages. Four Hundred Ninety-Thre

OR

_____ We the jury find for the Defendant.



Natalie D. Wilson

Presiding Juror

Date:

Sept. 01, 2016

Exhibit "D"

FORM 4 ORDER

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-07594

FILED
2016 SEP 22 PM 1:54
JULIE J. ARMSTRONG
CLERK OF COURT

One Belle Hall Property Owners Association, Inc. and

Marvin T. Meeks and Francis E. Hill, individually, and
on behalf of all others similarly situated

PLAINTIFF(S)

Builders First Source- Southeast Group-LLC

DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: "We the jury find for the Plaintiffs on the following causes of action: Strict Liability and Breach of Warranty. And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand Four Hundred Ninety-Three Dollars (\$2,163,493.00) in actual and compensatory damages." The foregoing was the verdict.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
One Belle Hall Property Owners Association, Inc. and Marvin T. Meeks and Francis E. Hill, individually, and on behalf of all others similarly situated	Builders First Source- Southeast Group-LLC	\$2,163,493.00
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SCRCP. Amounts to be computed such as interest
SCRCP Form 4C (10/2011)

EXHIBIT

D

Page 1 of 2

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Debie L. G...
Circuit Court Judge

2112
Judge Code

9-1-2016
Date
*WLC pro
tune*

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Justin Lucey
ATTORNEY(S) FOR THE PLAINTIFF(S)

Catherine Dyer
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Joyce Rueger



State of South Carolina
The Circuit Court of the First Judicial Circuit

DIANE SCHAFFER GOODSTEIN
JUDGE

POST OFFICE BOX 234
ST. GEORGE, SOUTH CAROLINA 29477
TELEPHONE: (843) 832-0332
FAX: (843) 832-0389
E-MAIL: dgoodstein@accounts.org

September 20, 2016

Charleston County Clerk of Court
ATTN: Christine Davy
100 Broad Street, Suite 106
Charleston, SC 29401

Re: One Belle Hall v. Builders First Source et al
Case No.: 2012-CP-10-07594

Dear Ms. Davy:

I have enclosed signed original Form 4 in regards to the above referenced matter. Your office will be responsible for filing the original with your office.

Thank you for your assistance in this matter. Please do not hesitate to give me a call should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kaye Parker".

Karen "Kaye" M. Parker
Administrative Assistant to the
Honorable Judge Diane S. Goodstein

Enclosure

Exhibit "E"

NOTICE OF ENTRY OF FORM 4 ORDER

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 100
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

178



JUSTIN O'TOOLE LUCEY
PO BOX 806
MT PLEASANT SC 29465-0806

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Jury Verdict for the Plaintiff

CASE NO: 2012CP1007594

One Belle Hall Property Owners Association Inc , plaintiff, et al VS Trammell Crow Residential ,

This judgment was entered on the 22nd day of September, 2016, and notice mailed first class on Tuesday, September 27, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

OCT 3 2016



APPENDIX A

Ambruoso v. Lee
(Unpublished case)

Ambruso v. Lee

Court of Appeals of South Carolina

December 9, 2009, Heard; February 23, 2010, Filed

Unpublished Opinion No. 2010-UP-158

Reporter

2010 S.C. App. Unpub. LEXIS 148; 2010 WL 10079451

Victor N. Ambruso, MD, and Rachael Ambruso, Appellants, v. Frank L. Lee, Jr., Respondent.

Notice: THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

Subsequent History: Rehearing denied by Ambruso v. Frank, 2010 S.C. App. Unpub. LEXIS 268 (S.C. Ct. App., Apr. 22, 2010)

Prior History: [*1] Appeal From Spartanburg County. Doyet A. Early, III, Circuit Court Judge.

Disposition: AFFIRMED.

Core Terms

trial court, new trial, damages, verdict form, hip, thirteenth juror, jury's, motion for a new trial, appointments, pain, inadequacy, injuries

Counsel: Donald C. Coggins, Jr., and Amanda H. Craven, of Spartanburg, for Appellants.

Michael James Sarratt, of Landrum, and T. David Rheney, of Greenville, for Respondent.

Judges: HUFF, WILLIAMS, and GEATHERS, JJ. concur.

Opinion

PER CURIAM: Dr. Victor N. Ambruso and Rachel Ambruso appeal the trial court's denial of their motions for a new trial. They argue the court should have granted new trial absolute due to the inadequacy of the jury's verdict or new trial pursuant to the thirteenth juror doctrine. They also assert they were entitled to a new trial due to an error on the verdict form. We affirm.

FACTS/PROCEDURAL HISTORY

On April 12, 2004, the Ambrusos were involved in an automobile accident with Frank L. Lee, Jr. Dr. Ambruso was driving a 1997 Chevrolet Blazer in which Mrs. Ambruso was a passenger. They were stopped to make a left turn when the truck driven by Lee collided into the rear of their vehicle. Their Blazer was totaled as a result of the accident.

Immediately after the accident, Lee left his vehicle and went to the Blazer to apologize for the accident. The Ambrusos exited their vehicle and began talking to Lee. [*2] They admittedly were upset with him. Kenneth Bishop, who had stopped to offer assistance, asked the Ambrusos to return to their vehicle, which they did. Soon thereafter, an ambulance arrived and took them to the hospital where they were treated and released. The Ambrusos were referred to Dr. Gerald Rollins with Orthopedic Associates. Dr. Ambruso was treated by Dr. Rollins and underwent physical therapy through June 16, 2004. Dr. Ambruso testified that his problems were largely resolved at that point. Mrs. Ambruso was treated by Dr. Rollins and underwent physical therapy through August 9, 2004. Although some of her pain resolved a few weeks after the accident, she continued to experience pain in her right hip, which had caused her problems prior to the accident. She eventually had hip replacement surgery at Duke University Medical Center in February of 2005. After a long recovery period, Mrs. Ambruso's hip pain largely subsided. However, due to her fear of reinjuring herself, she did not return to her previous activities of skiing and horseback riding.

The Ambrusos brought this action against Lee. During the trial, Lee admitted fault. Thus, the trial court submitted the issue [*3] of damages alone to the jury. The jury returned a verdict of \$ 6,210.00 in actual damages for Dr. Ambruso and \$ 4,472.00 in actual damages for Mrs. Ambruso. The Ambrusos requested ten days to file their post-trial motion. In their written motion, they sought a new trial nisi additur and new trial absolute based on the inadequacy of the verdict and new trial pursuant to the thirteenth juror doctrine. They also argued they were entitled to a new trial due to the inclusion of State Farm Insurance Company as a defendant in the caption of the verdict form. The trial court denied the motion. This appeal followed.

LAW/ANALYSIS**1. New trial absolute**

The Ambruosos argue the trial court erred in denying their motion for a new trial absolute due to the inadequacy of the verdict. We disagree.

"The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion." *Dillon v. Frazer*, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009). The court must look at the testimony and inferences raised in the light most favorable to the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000). [*4] In considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered. *Welch*, at 302, 536 S.E.2d at 420. A jury's determination of damages is entitled to substantial deference. *Knoke v. S.C. Dep't. of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

The Ambruosos contend the injuries for which they claimed damages were consistent with the impact of the collision. They assert no evidence was submitted that questioned the existence of these injuries or the initial treatment they received, which included the ambulance service, emergency room treatment, follow-up treatment with Dr. Rollins, and the physical therapy ordered through his office. They claim the total costs for these treatments were \$ 3,400.00 for Dr. Ambruoso and \$ 6,067.00 for Mrs. Ambruoso. The jury, [*5] however, returned a verdict of \$ 6,210.00 in actual damages for Dr. Ambruoso and \$ 4,472.00 in actual damages for Mrs. Ambruoso.

"Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide." *Ross v. Paddy*, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). "The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest in the result." *Id.*

In the present case, Lee contested Mrs. Ambruoso's claim for damages relating to her hip problems and eventual hip replacement surgery. Lee solicited testimony Mrs. Ambruoso

had complained of and sought treatment for hip pain prior to the accident. An x-ray taken on April 29, 2003 showed advanced arthritis of the right hip. She then sought treatment from Dr. Lang with Duke University Medical Center. During an examination by Dr. Lang on April 1, 2004, Mrs. Ambruoso showed a decreased range of motion. She reported to her orthopedic surgeon in December [*6] of 2004 that while she had led an active lifestyle, starting two years earlier she had become increasingly inactive and gained weight. In addition, Mrs. Ambruoso took medication for arthritis, pain relief, and depression in the months preceding the accident.

Although the Ambruosos are not disputing on appeal the jury's failure to award damages for Mrs. Ambruoso's treatment at Duke University Medical Center, they do argue they are entitled to recover damages for the treatment from Dr. Rollins, as well as an MRI taken on July 20, 2004, which cost \$ 2,195.00. Dr. Rollins testified that on June 14, 2004, he believed Mrs. Ambruoso's complaints would be resolved in around thirty days of conservative treatment. He did not plan on seeing her back after that point. However, Mrs. Ambruoso had returned to Dr. Rollins on August 9, 2004 with primary complaints of hip and back pain after having an MRI taken on July 20, 2004. The MRI of her right hip showed advanced chondromalacia, arthritis, and in Dr. Rollins' opinion, avascular necrosis, which is death of the bone. The jury may have determined not all of the treatments claimed were in fact related to injuries caused by the accident, but were in [*7] fact due to the pre-existing condition of her hip.

The Ambruosos also contend the verdict for Dr. Ambruoso was inadequate when considering his testimony concerning his loss of income due to the accident. Dr. Ambruoso claimed \$ 2,455.20 in lost income from the appointments he cancelled at his part-time medical practice to attend his own appointments, court, and a meeting with his attorney. This amount, added to the cost of his medical treatment of \$ 3,400.00, totals \$ 5,855.20, which is less than the jury's award of \$ 6,210.00. Thus, the verdict amount is not "shockingly disproportionate to the injuries suffered." In addition, Lee contested the amount Dr. Ambruoso claimed in lost income. He asserted Dr. Ambruoso could have mitigated the loss of cancelled appointments by scheduling his own appointments on the days in which his part-time medical practice was not open. Lee also contended Dr. Ambruoso overestimated the number of appointments that might have been scheduled on the days he closed the practice in advance to attend his own appointments. Accordingly, the jury may have rejected some of Dr. Ambruoso's claims for damages for lost income.

We find the jury's award of damages was within [*8] the evidence presented at trial. Accordingly, we hold the trial court did not abuse its discretion in denying the Ambruosos'

motion for a new trial absolute.

2. Thirteenth Juror Doctrine

The Ambruosos argue the trial court should have granted a new trial under the thirteenth juror doctrine. We disagree.

In South Carolina, a trial judge may grant a new trial following a jury verdict under the thirteenth juror doctrine. The doctrine "entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (quoting *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). "As the 'thirteenth juror,' the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Id.*

The appellate court will uphold the trial judge's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. Our review is limited to consideration of [*9] whether evidence exists to support the trial court's decision. *Id.* at 478-79, 567 S.E.2d at 854. "The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." *Bailey v. Peacock*, 318 S.C. 13, 15, 455 S.E.2d 690, 692 (1995).

Lee asserted the Ambruosos were not entitled to any damages as a result of the accident. He was not required to submit evidence directly contradicting their testimony in order for their claims to be considered contested. As stated above, the trial court's decision to allow the jury's verdict to stand was supported by the evidence in the record. Accordingly, we find no error in the trial court's denial of the Ambruosos' motion for a new trial pursuant to the thirteenth juror doctrine.

3. Verdict Form

The Ambruosos argue they are entitled to a new trial because the verdict form impermissibly included evidence of liability insurance. The verdict form listed State Farm Mutual Automotive Insurance as a defendant. Although this form was

provided to the attorneys prior to its submission to the jury, the Ambruosos did not object to it at that time. [*10] After the jury returned its verdict, the court noticed the inclusion of State Farm as a defendant. The Ambruosos did not complain about the inclusion of State Farm in the caption of the verdict form until their post-trial motion. The trial court held the Ambruosos had waived any objection by failing to object earlier. As the trial court noted, all of the parties had an opportunity to review and approve the verdict form before it was submitted to the jury. We find the trial court did not err in holding the Ambruosos waived their objection to the verdict form. See *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form).

In addition, we find the trial court cured any error with an instruction given the jury. During deliberations, the jury sent a note to the court asking: "Does insurance affect [*11] the settlement? If it does, what percentage of the bills will be paid by insurance[?]" The court responded: "It does not affect your verdict. It is not to be considered or discussed." Although the court was not aware of the inclusion of State Farm in the caption of the verdict form at the time, its response to the jury's question adequately addressed the issue. "Generally, a curative instruction is deemed to have cured any alleged error." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." *Id.* at 658, 623 S.E.2d at 130. Accordingly, we find the trial court did not abuse its discretion in denying the Ambruosos' motion for new trial on this issue.

CONCLUSION

For the above stated reasons, the decision of the trial court is

AFFIRMED.

HUFF, WILLIAMS, and GEATHERS, JJ. concur.

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