

EXHIBIT M
Excerpts of Post-Trial
Hearing Transcript

1 (The proceeding began at 2:12 p.m.)

2 THE COURT: Thank you all so much and please be seated.
3 Good afternoon. Got all sorts of motions from Builders
4 FirstSource. Right?

5 MR. WOOD: That is correct, Your Honor.

6 THE COURT: And I'm listening to you, sir.

7 MR. WOOD: All right. Order of filing, we had the
8 setoff motion and motion to compel that's tied to it was the
9 first one filed. And we had JNOV new trial motions filed.
10 Subsequent to that, I'll take up the setoff and the
11 discovery motion. And right of the bat I'm going to say on
12 this one, I agree with one point that Mr. Lucey is that the
13 production hinges on whether there is some kind of entitled
14 either to all or some partial setoff in the case. You
15 obviously don't have to compel something if I have no right
16 to it. But I do disagree; I believe we have a right to a
17 setoff and I would like to address that.

18 THE COURT: Okay.

19 MR. WOOD: We kind of had memoranda that crossed in the
20 mail. They filed one opposing our motion; we filed one
21 supporting it. I didn't have a chance to do a reply or
22 anything like that. So I'm going to kind of talk through
23 both as I go along here talking about set up. And I'd like
24 to address the procedural defenses to our motion that they
25 raised first. And one of those was that it wasn't timely

1 in limine being denied. My memory is they were all either
2 conceded to by plaintiff or granted by the Court. Thank
3 you, ma'am.

4 THE COURT: Okay. Thank you. Yes. Now, moving right
5 along.

6 MR. WOOD: Okay. Your Honor, going to the JNOV and new
7 trial motion. First off. I want to move -- we moved for
8 JNOV. I want to discuss those first before I talk about the
9 new trial. JNOV on the issue of notice on the warranty
10 claims. Your Honor, I believe there is no proof -- again of
11 the trial transcript. I will address that, Your Honor.
12 There's some confusion about ordering this when we were
13 brought into the case. Had a list; I thought it had been
14 done. It hadn't been done. I addressed that with Ms. Dyer
15 the other day. We're going to order the transcript and get
16 it in. And I apologize for not having it. I never had a
17 trial transcript delivered in toto that quick. But be that
18 as it may, we're working from counsel's memory and what I've
19 read in reviewing the extensive documentation in this case.

20 But going to the issue of those, my understanding is
21 there was no proof of notice being given to our client prior
22 to suit about the defect in the windows. Notice given to
23 us, the warranty book has a contact person I understand that
24 you're supposed to contact if there's a problem with the
25 warranty. My understanding is there's no proof of notice

1 unambiguous. It has brought enough to encompass common law
2 remedies, thus a party to an article II contract must give
3 reasonable notice of breach in order to recover common law
4 remedies for breach of the article to the contract. Here,
5 buyer failed to give reasonable notice, so it cannot
6 recover. That was dealing with the common law remedies.
7 They had already rejected any statutory article to remedies
8 because of lack of notice in the prior paragraphs. So I
9 believe, Your Honor, we're entitled to JNOV.

10 THE COURT: And the notice that you argued should've
11 been given, would've been notice from the homeowner?

12 MR. WOOD: Yes, notice from the homeowner. Their the
13 ones making the claim. But they had a book that told them
14 how to do it, Your Honor. It was exhibit 188; joint exhibit
15 188 in the trial. Exceptionally detailed. They cited for
16 one of the warranties or two warranties that were within the
17 doc -- or one was the sales thing. I don't think that was
18 in there. But in joint exhibit 188, they quote from it. I
19 couldn't find it this morning when I was looking for it.
20 But in there, there's supposedly a warranty given directly
21 from us and there's a whole page, I think it's about page --
22 I forget the page number. It's up in the beginning. It
23 says contact these people if you've got a warranty claim,
24 windows. And it gives a name. My understanding, there was
25 no evidence offered of notice in this case, Your Honor,

1 even include this ground anyway.

2 So there are four procedural bars for us to even talk
3 about the merits on any of these; any of these. But on this
4 one in particular, Your Honor, we submitted a charge to the
5 Court and we submitted a legal precedent and the precedent
6 was that a downstream user, not a party to the transaction
7 such as the case just cited to us that apparently got found
8 this morning that's not in yesterday's brief, not a party to
9 the transaction. But a downstream user, there's an
10 exception to the notice requirement. And we provided the
11 Court with the law, and the Court looked at the defense
12 counsel table and says, do you have any precedent otherwise?
13 The answer was no. The Court charged the law as it had been
14 shown to the Court by the plaintiff. There was no objection
15 by the defendant. So that's a fifth procedural bar to them
16 now raising this. There was no objection to that charge;
17 there was no objection to any charges by the defendant. And
18 Your Honor, it was properly charged.

19 We shouldn't be starting over from scratch. That's not
20 what a JNOV -- the whole JNOV motion right now is untimely.
21 The motion was made at the close of the case and denied.
22 The law in this state is clear, you cannot have successive
23 JNOV motions. They cannot pull one ground out of that JNOV
24 motion that's proper for this Court to hear today because
25 JNOV was denied on September 1st. And the way, after that a

1 Form 4 order was entered, entering the jury verdict, and the
2 box checking this case is ended was checked, the appeal
3 period has already run. This case has sailed. There's
4 nothing here. But I'm happy to address each ground that
5 they want to go through of the Court would like to. But
6 two-thirds of what I just told the Court applies to every
7 ground there is. There's no exception; there's no grounds
8 in the DV motion. There was no second DV motion. The JNOV
9 motion has already been denied. This JNOV motion is
10 untimely. It doesn't exist in the eyes of a law. This
11 motion does not exist. And the jury was charged without
12 objection.

13 THE COURT: Yeah. Do you have -- let me ask you this
14 question: Have you got that part of the transcript?

15 MR. LUCEY: Yes, ma'am. It's attached to our motion.
16 I'm glad to hand up my copy.

17 THE COURT: Okay. No, no, no. Hold on.

18 MR. LUCEY: The JNOV motion at the close of evidence,
19 plaintiff's evidence, that did not have this ground is the
20 August 3st, 2016 transcript, page 39.

21 MR. WOOD: Is that one of your exhibits in your file?

22 MR. LUCEY: Yes, sir.

23 MR. WOOD: Which is it? B?

24 MS. LYNN: Yes, sir.

25 MR. WOOD: Thank you.

1 MR. LUCEY: I can walk the Court through it when the
2 Court is ready.

3 (Brief pause.)

4 THE COURT: I think what's happening on the bottom of,
5 49 the top of 50, and it really boils down to sufficient
6 evidence or should've been insufficient evidence. Clearly,
7 what I understood the argument to be at the bottom of 49,
8 because I do remember this part of Ms. Dyer's argument
9 because she asked the questions about it. And it went to
10 the issue of these windows were on the site; they could have
11 been damaged as a result of having remained on the site as
12 opposed to this being a manufacturing defect. That's what I
13 remember that argument addressing. And that went to the
14 breach of warranty. In other words -- and I think you were
15 arguing -- I do remember the twin windows and the lack of
16 certification, whatever that argument was. And I think
17 that's what Ms. Dyer was certainly talking about. At this
18 juncture, at 49/50, as it related to the warranty. You
19 know, it's a little bit difficult having -- and I guess I
20 just ask that question. Mr. Lucey, what portions of the
21 transcript did you request?

22 MR. LUCEY: We requested the openings.

23 THE COURT: Yeah.

24 MR. LUCEY: We requested both directed verdict
25 arguments.

1 THE COURT: Okay.

2 MR. LUCEY: And we requested all the post-trial
3 arguments, post-trial activity.

4 THE COURT: Okay.

5 MR. LUCEY: And the closings.

6 THE COURT: Okay.

7 MR. LUCEY: And Your Honor, if I may, at page 45 you
8 finish excusing in the jury.

9 THE COURT: Okay.

10 MR. LUCEY: And you call for motions.

11 THE COURT: Yep.

12 MR. LUCEY: And you called for motions from the
13 plaintiff's first. And the entirety, the transcript from 46
14 through 58, is an argument on plaintiff's motions for
15 directed verdict.

16 THE COURT: Now, I'm at 49. You're somewhere else for
17 45. Because when I go back -- wait a minute, now.

18 MR. ANZELMO: We go through 32 to 49, uninterrupted.

19 THE COURT: Me too. It must be something else. I go
20 through 32 to 49.

21 MR. LUCEY: You mean you skip pages?

22 THE COURT: Well, but it could be under another tab.

23 Maybe some other tab? It was all under B? I'm sorry. I
24 start with 21 and then I go to -- the I go to page 32. And
25 then I have another, it just says excerpt of the transcript.

1 And then I go to page 49. And then I go to -- from 49 I go
2 to -- I go to 51. Yeah, 51. And that I go from 60 -- just
3 page 60 is by itself. Page 68 is by itself. And then I
4 have 68 through 70.

5 MR. LUCEY: We did excerpt it. We only filed what we
6 relied on.

7 THE COURT: Sure.

8 MR. LUCEY: I have the comprehensive documents from the
9 court reporter if I can hand those up to the Court.

10 THE COURT: Okay.

11 MR. LUCEY: They're not excerpt; they should be
12 paginated properly.

13 THE COURT: Okay.

14 MR. LUCEY: And they're by date. And some of the
15 pagination changes, you see as a new date ---

16 THE COURT: You know, this is not really fair to you
17 guys because y'all have to put up with us saying we just
18 want what you're relying on. You know, here I am asking for
19 more. I feel like I owe everybody an apology. Because I
20 know we say we just want what we want.

21 MR. LUCEY: So if I could take the Court to
22 September 1st transcript.

23 THE COURT: Okay.

24 MR. LUCEY: On page 45, the Court finishes excusing the
25 jury.

1 THE COURT: Right.

2 MR. LUCEY: And call for motions from the plaintiff
3 first.

4 THE COURT: Yes.

5 MR. LUCEY: Page 46, the plaintiff's began their
6 directed verdict motions. The entirety of pages 46 through
7 58 are arguments on plaintiff's motions. And Ms. Dyer did
8 argue in opposition to several of our motions that we did
9 spend some time of those twin windows. We then -- go to
10 page 59, and you deny the plaintiff's motions. And you
11 inquire at the end of that to Mr. Dyer, "Yes, motions?"
12 Ms. Dyer, "No, Your Honor." If there's any confusion
13 whatsoever about that, if we go to page 129 on the same
14 date, September 1, at line 2, page 129.

15 THE COURT: Okay. Let me ask you this question.

16 MR. LUCEY: Yes, ma'am.

17 THE COURT: It looks funny. Because I'm looking at
18 page 55 and 55 is -- and then 55 ends -- do you see how it
19 is? There's a lot of blank page and then 56.

20 MR. LUCEY: She apparently inserted a new page every
21 time she just started a new dialogue.

22 THE COURT: Every time one of you spoke, it was like
23 she's starting a new page. Is that what ---

24 MR. LUCEY: Yes, ma'am.

25 THE COURT: Okay.

1 MR. LUCEY: And then one of the things she's pointing
2 out at 55 is she saying that Builders FirstSource relied on
3 the architect specifications. And then I counter back on
4 page 56, "No, the testimony is they never saw them; they
5 never look at them." And then she responds against me again
6 at 57; I respond again at 58. Fifty-nine, you deny
7 plaintiff's motions and you call for defense motions.

8 THE COURT: I see that.

9 MR. LUCEY: And she says, "No, Your Honor."

10 THE COURT: I see that. And then we sit down; we got
11 to go do the charge.

12 MR. LUCEY: But just as importantly, if we go to page
13 129,

14 THE COURT: Okay.

15 MR. LUCEY: Page 129, after the jury is excused,
16 Builders FirstSource moved for a JNOV. It was denied.
17 There was no request for ten days for any other motions of
18 any kind. South Carolina does not recognize successive JNOV
19 motions. You get one bite at that apple. It's been made
20 and ruled on. There are no possible grounds for a JNOV at
21 this point; it's been made and ruled on. And the ten days
22 for motion to reconsider has run, and the 30 days for an
23 appeal has run. And under Boone versus Goodwin, the rule
24 does read that the Court can allow ten days. Under Boone
25 versus Goodwin, the South Carolina courts have interpreted

1 the rule to require that you request that ten days right
2 there as the jury is being excused. You can't even wait.
3 So even if they've requested ten days to make other motions,
4 post-trial motions, anything else, even if they came back a
5 week later and said can we make these? No, time is gone.
6 You got to make that request that day. As we clearly see by
7 page 129, the JNOV has been made and denied. There was no
8 time requested for any additional motions. So even to the
9 extent that the motions for new trial are somehow new and
10 different, they're time part two. There was no request on
11 September 1st for additional time to follow up post-trial
12 motions. And it's jurisdictional; it's gone. And so in
13 addition to the substantive response, I would have to every
14 ground, which we have in fact briefed out of an abundance of
15 caution, but in addition to that response they cannot
16 proffer to this Court a single ground no matter how golden
17 it is, that qualifies under the rule -- it's gone. Case is
18 over. Thank you, ma'am.

19 THE COURT: Thank you. Yes, sir?

20 MR. WOOD: Don't have the transcript, so I haven't read
21 it. I was listening. I was a little confused about where
22 this DV was happening. It sounded like he was saying one
23 was made after a jury charge. But that didn't sound right.
24 You usually make that at the close of evidence, so that
25 would've been -- so I'm not understanding the flow of the

1 MR. WOOD: I would like to offer to get a full
2 transcript, bring it back, deal with the procedure when we
3 got the whole thing and can read it through. If I can
4 address the substance -- I mean, I cannot say. I do not
5 have the transcript. We work for memory.

6 THE COURT: I understand.

7 MR. WOOD: And so, you know, the transcript is going to
8 be what the transcript is going to be. And there's some
9 disjointedness here apparently. But I would like to address
10 the issues. I think, if I remember the rule, and I'm trying
11 to do this -- a new trial motion has to be made within ten
12 days of the verdict because it's not concerned in the same
13 way as the JNOV with the sufficiency of the evidence and
14 those kind of things. It's based on the totality. I may be
15 wrong; I'm working from memory on that. But I don't think
16 there's that saying you got to request ten days to make it
17 kind of a thing. And my JNOV arguments will be bear upon
18 the 13th juror in the new trial absolute motion.

19 THE COURT: Hold on one second. (Brief pause.) Okay.
20 I was just looking for -- I was looking at the JNOV and then
21 I was looking at the just the motion for new trial. Here's
22 what concerns me, what concerns me a little bit, and I'll
23 hear from you about this, Mr. Lucey, there is a procedural
24 issue. There just is. And the transcript is critical to
25 those issues. You want to have the full transcript.

1 Certainly, Mr. Lucey has provided certain excerpts of it.
2 And, obviously, based on the excerpts, I have some concern
3 procedurally. Because if there wasn't a motion for a
4 directed verdict raised at the conclusion of all the
5 evidence then you can't make a JNOV. And the motion for
6 directed verdict dictates what issues can be raised in the
7 JNOV. So I'm more comfortable giving what I have seen, I
8 think that -- if you wish to get the transcript, that's
9 perfectly fine. But I do think the procedural -- given what
10 I have seen, the procedural part of that ought to be settled
11 first. Now, 13th juror, we'll go now to the 13th juror.

12 MR. WOOD: The new trial motion.

13 THE COURT: And the motion for new trial. That would
14 be -- your position for motion for new trial it also has to
15 be made in timely ---

16 MR. LUCEY: Absolutely. And Your Honor, the case, I
17 got the case with me. It's right on point. It covers Rule
18 59 and Rule 50. It absolutely has to be made at the time
19 the jury is excused or you have to make a motion at that
20 moment for the additional ten days or it's time-barred.

21 THE COURT: Okay.

22 MR. LUCEY: And in this case, since there was a JNOV
23 made, the only thing they could do subsequent to that is to
24 make a Rule 59(e) to amend your order on the already made
25 JNOV. You can't just file another JNOV. They're not

1 recognized, and we briefed that case law to the State, to
2 the Court, in our brief, Your Honor. But if I may hand up
3 the case of Boone versus Goodwin, it's right on point. You
4 just can't do it.

5 THE COURT: Thanks. (Brief pause.) Okay. All right.
6 And so Boone versus -- you're welcome to see it. I have it
7 in here Boone versus Goodwin certainly says, appears to say
8 that. So hence, hence, it just seems that if you want to
9 get the transcript to satisfy yourself, I think that's
10 certainly appropriate and not a problem to do that. So 13th
11 juror, is that included -- I don't know that 13th juror is
12 included in that one. Is it?

13 MR. LUCEY: Your Honor, we would respectfully submit
14 that Rule 59 covers all motions for a new trial under any
15 name of any -- and I have Rule 59 if you like to me to hand
16 it up. Rule 50 expressly, the JNOV rule.

17 THE COURT: Yeah.

18 MR. LUCEY: Expressly refers to Rule 59 on motions for
19 new trial. They both have the exact same time limitations.
20 We do believe that these are the only two rules you can move
21 under. The next one is Rule 60 on mistake or inadvertence
22 but that's just not relevant here and it hasn't been moved
23 on. And I'm happy to hand the rules up to the Court just

24 ---

25 THE COURT: I got them.

1 MR. LUCEY: And it's the Quality Trailer Products case
2 cited in our brief at page 16 that expressly rules you may
3 not have successive JNOV motions and have that case with me
4 if the Court would like to see it.

5 MR. WOOD: Your Honor, speaking to Quality Trailer if I
6 may?

7 THE COURT: Sure.

8 MR. WOOD: You can't have a motion to reconsider. The
9 case that actually deals with quality is Elam (ph). And
10 Elam says there can be an oral JNOV and you have a right to
11 make a motion to reconsider based on what was raised in the
12 oral JNOV. So it's not this motion that we have here can be
13 -- that is not a success JNOV when you do that. The Court
14 makes it very clear; you have one written opportunity to
15 seek review of that denial of the oral JNOV in the case
16 that's Elam.

17 THE COURT: As I understand it, that's what Mr. Lucey
18 is saying that you do that under Rule 59, Elam motion to
19 alter and a motion to reconsider. I mean, I think that's
20 what he's saying.

21 MR. WOOD: And this motion was filed within ten days of
22 the oral JNOV. This is not a duplicate JNOV under Elam.

23 THE COURT: I understand.

24 MR. LUCEY: The words amend, reconsider, or anything
25 similar are nowhere to be found in that document.

1 THE COURT: Okay. Okay. (Brief pause.) Yes, sir?

2 MR. WOOD: I was trying to think and started -- I was
3 trying to think of a way to go forward on it. I would like
4 to get the transcript and you had mentioned and confirmed.

5 THE COURT: Sure..

6 MR. WOOD: Get the whole thing.

7 THE COURT: Sure. Absolutely.

8 MR. WOOD: And I don't know if Your Honor wants to hear
9 what we've got to say or wait until we see it?

10 THE COURT: You know, here's what I want to do.

11 MR. WOOD: We'll travel to St. George, wherever we need
12 to come for it.

13 THE COURT: You're so kind. I think that it's
14 appropriate to get the transcript; I really do. And to do
15 it fully because I don't want to start a study of matters if
16 I got to turnaround procedurally after I've done that amount
17 of work. I just think it make sense to go ahead and let's
18 see where we are procedurally. So I think that is where we
19 are going to be. Let's wait; let's get the transcript;
20 let's look at the transcript and see where you are in that
21 regard, okay?

22 MR. WOOD: Be glad to do so.

23 THE COURT: And then if you want to, once you have the
24 procedural -- once you have your transcript then we can
25 handle the rest of that argument.