

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594
Appellate Case No. 2018-001230

RECEIVED
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SC Court of Appeals

One Belle Hall Property Owners Association, Inc., and
Marvin T. Meek and Francis E. Hill, individually and
on behalf of all others similarly situated,.....

Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ...

Appellant.

RECORD ON APPEAL
VOLUME II

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Individually and on behalf of all others
similarly situated

**RECORD ON APPEAL
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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

TRANSCRIPT OF RECORD

August 31, 2016
Charleston, South Carolina

VOLUME 3 (OF 4)

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Proceedings
August 31, 2016

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PROCEEDINGS

THE COURT: Good morning. Anything from the
plaintiff before we bring the jury out?

MR. LUCEY: No, Your Honor.

THE COURT: From the defense?

MS. DYER: No, Your Honor.

THE COURT: All right. Bring them in.

[Whereupon, Doctor Whitlock comes forward to the
witness stand]

[Whereupon, the jury enters at 9:58 a.m.]

THE COURT: Good morning ladies and gentlemen.
You're going to be thrilled to know that today I brought
the rain. At this time we will continue with the
plaintiff's case and the cross-examination by Ms. Dyer of
Doctor Whitlock.

1 RHETT WHITLOCK,

2 Having been previously duly sworn,

3 Was examined and testified as follows:

4 CROSS-EXAMINATION (resumes)

5 BY MS. DYER:

6 Q. Doctor Whitlock we were interrupted but we'll get
7 back to where we were. The NCTL Independent Test Lab
8 report on its face states the windows passed tests
9 proving them were an LC or light commercial DP 50 impact
10 rated. I'll hand you exhibit 12 which was also exhibit
11 82.3.

12 [Whereupon, the witness reviews document]

13 A. Is there a question?

14 Q. Yes. Would you agree that on its face the NCTL test
15 lab report states that the windows passed the test
16 proving that they were DP 50 and impact rated?

17 A. I think you said LC 50 just now but that's not what
18 it says. It says it is C-50 commercial which is
19 incorrect.

20 Q. As far as the DP 50 does it state that the windows
21 passed the DP 50?

22 A. That's what it says, yes.

23 Q. And impact rated as well, sir?

24 A. Yes.

25 Q. Okay. And if NCTL produced a report that

1 represented that the windows passed a certification test
2 that the NCTL didn't actually perform would that be a
3 direct violation of their AAMA certification or
4 accreditation; excuse me?

5 A. I would assume that it would be a violation of their
6 responsibility but I would have to read their agreement
7 with AAMA to see. I'm not sure.

8 Q. Fair enough, sir. I'm going to hand you exhibit 13,
9 which is also marked as 82.5.

10 [Whereupon, the witness is shown document]

11 Q. Sir my question is the third party validator in this
12 case, Keystone reviewed the tests from NCTL that we just
13 looked at in exhibit 12 and issued what is called
14 certification authentication reports which say that the
15 windows are DP 50 and impact rated correct?

16 A. What it says is that based on this test report the
17 product rating is LC 50 which is not what this report
18 says.

19 Somehow or another between this report and this
20 certification it got changed from C 50 to LC 50 and I
21 don't see any correspondence or anything that indicates
22 why that was changed or how it was changed. It also says
23 that licensee stipulates and affixing certification
24 labels to products ---

25 THE COURT: --- slow down a little bit when you're

1 reading.

2 A. It says licensee stipulates in affixing
3 certification labels to products that those products are
4 representative of the specimen evaluated and documented
5 for certification authorization. But that wasn't what
6 happened in this case.

7 Q. Could you answer my question, sir? Does that
8 certification -- one of those certification
9 authentication reports indicates that the window is a DP
10 50 correct?

11 A. For one particular window size, yes.

12 Q. And the other certification authentication report
13 from Keystone, part of exhibit 13, indicates that the
14 window specimen is impact rated.

15 A. Yes, it does.

16 Q. You've identified some discrepancies and you have
17 again this morning for us in the certification and
18 testing reports for these windows and have opined that
19 they might not actually be what they say they are on the
20 label. Would you agree with that?

21 A. Yes.

22 Q. Okay. Has anyone at AAMA confirmed your opinions?

23 A. I don't know. I don't know if anyone at AAMA has
24 looked into this matter.

25 Q. Have you carried your concerns to AAMA and asked for

1 anyone to look into the certification that happened for
2 these windows?

3 A. I have not.

4 Q. Okay. And have you spoken with anybody at Keystone
5 with regard to your theories?

6 A. I called Keystone a while back and they would not
7 give me any information.

8 Q. Okay. And have you contacted any other independent
9 validators to discuss your concerns about these
10 certification reports?

11 A. No.

12 Q. Have you spoken with anybody or attempted to sir at
13 NCTL laboratories about your suspicions?

14 A. I've been to their laboratory and I've spoken to
15 their personnel but not about this particular test.

16 Q. I understand. Have you spoken with any other AAMA
17 accredited test labs about your hypothesis in this case?

18 A. I have not.

19 Q. Do you recall as part of your research on the file
20 looking up the Florida building code online products
21 approval list?

22 A. I don't remember if I did that or not.

23 Q. I'm going to hand this to you for identification,
24 sir. Do you recognize that as coming from your file?

25 [Whereupon, the witness reviews document]

1 A. I don't remember if I've seen this or not.

2 Q. You don't remember undertaking to do that inquiry?

3 A. No.

4 Q. Are you familiar with the Florida building code
5 online product approval list?

6 A. Vaguely...

7 Q. Could you look at the document that I've given you
8 which I represented came from your file and tell us
9 whether or not according to that product approval list
10 the windows are DP 50 and impact rated or are you
11 uncomfortable doing that?

12 A. I'm studying it right now to see if I see that
13 indication.

14 [Whereupon, the witness reviews document]

15 A. It references the Keystone certification and
16 contains basically the same information as the Keystone
17 certification, yes.

18 Q. Would it appear then that whoever posted that
19 information to the website for Florida building -- let me
20 get the name right -- Florida Building Code online at
21 least indicated that they were relying on the Keystone
22 certification reports?

23 A. That's what it says.

24 Q. As far as you know Doctor Whitlock NCTL testing
25 laboratory wasn't part of the litigation in this instance

1 correct?

2 A. I don't think so.

3 Q. Do you whether or not Keystone was included as a
4 defendant originally?

5 A. I don't think so.

6 Q. I'm going to hand you an excerpt from exhibit 2, its
7 joint exhibit 2 previously marked as exhibit 28 and its
8 six pages.

9 [Whereupon, the witness is shown document]

10 Q. Doctor Whitlock would you agree with me that is
11 section zero 8565 the pages that I have handed you?

12 A. Yes, it is.

13 MS. DYER: At this point I would like to move that
14 exhibit into evidence.

15 MR. LUCEY: No objection, Your Honor.

16 THE COURT: Okay.

17 [Whereupon, joint exhibit number 2 is entered into
18 evidence by the court]

19 Q. [Ms. Dyer] Sir, could you turn with me to section
20 one point zero four on the second page?

21 [Whereupon, the witness complies]

22 A. Okay.

23 Q. Just generally so the jury understands what we're
24 looking at what is this section zero 8565?

25 A. It's the specification section for vinyl windows

1 from the project manual.

2 Q. For One Belle Hall correct?

3 A. Yes.

4 Q. And who was the architect do you recall?

5 A. I don't recall.

6 Q. Does Cline Design sound right ---

7 A. --- yes, Cline Design --

8 THE COURT REPORTER: I'm sorry, the name again
9 please.

10 MS. DYER: Cline, C-L-I-N-E, Design.

11 Q. [Ms. Dyer] Doctor Whitlock, do you know whether or
12 not Cline Design prepared this specification manual for
13 the job?

14 A. I believe they did, yes.

15 Q. Thank you. And going back to section one point zero
16 four you would agree that it is entitled Submittals
17 correct?

18 A. Yes.

19 Q. And if I could read one point zero four(4) into the
20 record it says furnish seven copies of shop drawings
21 showing complete details of window construction for
22 architect's approval in accordance with section zero one
23 three zero zero three of this project manual. Did I read
24 that correctly sir?

25 A. I think it said section zero one three zero zero.

1 Q. Okay. Did I misspeak there?

2 A. I think so; maybe not.

3 Q. Okay. The part that I would like to focus on sir
4 is the request for seven copies of shop drawings, fair
5 enough?

6 A. I see that it says that, yes.

7 Q. Okay. Do you know what shop drawings are
8 referenced in this spec? Would they be from the window
9 manufacturer?

10 A. They should be.

11 Q. Okay. And the drawings that we've seen
12 accompanying the NCTL reports those are dye drawings not
13 shop drawings correct?

14 A. I think they are installation instruction drawings.

15 Q. Would they qualify as shop drawings under the
16 submittal in your opinion?

17 A. That type of information is frequently submitted as
18 shop drawings.

19 Q. Okay. And the building official on the project in
20 Mount Pleasant in this case would require a set of the
21 shop drawings from the window manufacturer in order to
22 permit the project as part of the whole package for a
23 building permit correct?

24 A. Not normally the building officials usually permit a
25 project based on the architectural plans. Some things

1 are required for submittal by building officials
2 particularly wood trusses; those are usually required.
3 But I don't think the building official requires other
4 types of shop drawings for permits.

5 Q. Are you familiar enough with the Mount Pleasant
6 protocol and the building official over there to know
7 whether or not they require building shop drawings for
8 permitting?

9 A. I don't think that they do but I haven't asked them
10 if they do.

11 Q. Okay. Would you agree that the ultimate
12 interpretation of the applicable building code for any
13 project rests with the local building code official?

14 A. With respect to gaining the permit, correct I guess.

15 Q. Would you agree that the architect designed these
16 buildings at One Belle Hall to have twin windows?

17 A. Yes.

18 Q. And you opined yesterday that the twin also known as
19 mulled windows would need to be tested separately for
20 certification to maintain proof that they maintained the
21 required performance values isn't that correct?

22 A. That's correct.

23 Q. You have not seen a certification report relative to
24 the ESP twin windows correct?

25 A. I have not.

1 Q. Do you know whether or not one existed?

2 A. I do know.

3 Q. Okay. Did you contact NCTL to inquire about
4 whether they have a test report for the twin windows?

5 A. No.

6 Q. Section two point zero one sir in exhibit 2 could
7 you turn there? It should just be the next page.

8 [Whereupon, the witness complies]

9 Q. If you look at two point zero one (a) that is where
10 the architect calls out which windows in this case were
11 supposed to be used for the third floor agreed?

12 A. Yes.

13 Q. Okay. And we understand from the documentation in
14 the project Doctor Whitlock that there was a change order
15 that occurred so all three floors in fact utilized the
16 product originally specified for just the third floor?

17 A. That's correct.

18 Q. Okay. So if we're looking at the project
19 specification under section two point zero one of the
20 specification number one says what sir if you could read
21 it for the jurors?

22 A. Number one says vinyl fin frame single home window
23 from Energy Saving Products of Florida Incorporated dash
24 two zero four one series vinyl impact window.

25 Q. The architect spec calls for a fin framed window

1 correct?

2 A. Yes, fin framed series two zero four one is what it
3 says.

4 Q. Correct. Now the window that is installed at One
5 Belle Hall do you believe it to be a series 2031 window?

6 A. Yes.

7 Q. Is the window that is installed at One Belle Hall a
8 fin window?

9 A. It is.

10 Q. Do you believe that the project One Belle Hall as it
11 was designed should use a fin framed window because it is
12 a wood framed structure?

13 A. Yes, it should.

14 Q. So the window that is installed out there is a fin
15 frame correct?

16 A. Yes.

17 Q. And the architect called for a fin framed correct?

18 A. And series 2041.

19 Q. Correct. Is it possible, in the realm of
20 possibility; is it possible that there is a Scribner's
21 error between the 2031 and 2041 on the specification?

22 A. What kind of error?

23 Q. A Scribner's error out of the type of window?

24 A. It could be that. He meant to say flange and not
25 fin.

1 Q. Would a flange window be appropriate for the
2 project?

3 A. It would work but it's not common.

4 Q. So it would be unusual for the architect to spec a
5 flanged window in a wood framed building?

6 A. Yes.

7 Q. Thank you. You can set that document aside Doctor
8 Whitlock. Sir, how many windows did you spray rack test?

9 A. Fourteen separate locations. Some were twins that
10 were two windows each; twin.

11 Q. Understood. Do you know how many built -- how many
12 windows are on all four buildings?

13 A. Not exactly; several hundred.

14 Q. Did you do a window count as part of your
15 investigation?

16 A. We might have. I don't remember. It might be in
17 our file.

18 Q. You provided a scope of repair for the project that
19 required 100 percent, all of the windows regardless of
20 how many to be replaced agreed?

21 A. Yes.

22 Q. Okay. And sitting here today where you could
23 probably reference your file do you know where we might
24 look in your file to find a window count?

25 A. If we did a window count it would probably be in an

1 Excel spreadsheet and the file is very large so it would
2 take a while to find it.

3 Q. Okay. Sir, I am going to hand you joint exhibit 3
4 which was previously plaintiff's exhibit 44.

5 [Whereupon, the witness is shown exhibit]

6 Q. Do you recognize that as one of the purchase orders
7 in the file?

8 A. Yes.

9 Q. And how many -- I'm sorry strike that. My question
10 is the twin windows as they are identified on the
11 purchase order are called out as one window unit so to
12 speak would you agree?

13 A. Yes.

14 Q. So when we're ordering the twin windows we're just
15 ordering one window unit even though it is composed of
16 two individual windows does that make sense?

17 A. Yes.

18 Q. Okay. And the P-O, the purchase order that you are
19 looking at there in exhibit 3 indicates 324 windows were
20 ordered for the project would you concur?

21 A. I don't see 324 here but if you add those numbers up
22 are you saying that that equals ---

23 Q. --- yes sir.

24 A. Yes, there are four different types of windows and a
25 different number of each one and they probably add up to

1 a little over 300 I think.

2 Q. Thank you, sir. How many windows did you sill dam
3 test?

4 A. Nine.

5 Q. And would you agree that the majority of the leakage
6 that you were able to observe when performing the sill
7 dam tests came from the horizontal or vertical joint of
8 that sill insert?

9 A. The majority did, yes.

10 Q. Thank you.

11 A. Some came from cracks.

12 Q. Right. Now how many windows that you observed had a
13 crack near the miter?

14 A. I believe there were four cracks and at least one
15 was in the miter itself.

16 Q. Okay. So that would be four separate window units
17 then sir?

18 A. Yes.

19 Q. Counting a twin as one unit or no?

20 A. Yes, as one unit.

21 Q. How many -- did you make any observations with --
22 strike that -- you showed us some pictures yesterday
23 Doctor Whitlock where there was sealant above that
24 horizontal sill insert joint, which you indicated was
25 evidence that the wood stool or window trim had been

1 installed above the sill insert joint.

2 A. Yes, correct.

3 Q. Do you know how many, did you make an observation of
4 how many had been installed in that condition where that
5 horizontal joint was covered or underneath the wood trim?

6 A. I didn't count that.

7 Q. If the horizontal joint of that sill insert is above
8 the window trim would you agree with me that a window
9 exhibiting leaks at either the horizontal joint or the
10 vertical joint is at the sill insert would result in
11 water on the interior of the unit?

12 A. It would result in water draining between the trim
13 and the window underneath the trim.

14 Q. And on top of the trim is that fair?

15 A. Well not necessarily. If the level of the trim is
16 higher than the joint then the water has to go up to get
17 over. It goes down by gravity.

18 Q. And my question probably wasn't very artful but I
19 was asking you in situations where it is not covered
20 where that joint is not covered by the wood trim would
21 you see the water flowing out onto the wood trim or the
22 stool?

23 A. You would, yes.

24 Q. Okay. Now in those conditions where again the sill
25 insert horizontal joint is above the wood trim

1 understood?

2 A. Yes.

3 Q. Okay. In that condition did you see evidence that
4 the wood trim or the drywall below the trim had
5 experienced eight years of repeated leakage at the sill
6 dam?

7 A. There were stains on most of them; on most sills.

8 Q. Did you see anything beyond the stain?

9 A. Well an accumulation of material like efflorescence
10 or some kind of material coming in with the water; a
11 crusty type of material.

12 Q. How about degradation of the drywall?

13 A. There was some of that, yes.

14 Q. To indicate that this condition had been going on
15 for eight years?

16 A. It had been going on for a while. I don't know if
17 it's a full eight years but for awhile.

18 Q. And remind us please Doctor Whitlock how old were
19 the windows when you performed your testing; just round
20 about?

21 A. Six years old.

22 Q. Your testing was done in what year, sir?

23 A. 2013.

24 Q. And they were installed in what year?

25 A. '07 I believe.

1 Q. I believe sir that the C.O.'s, would you like to see
2 them, were issued at the end of 2006 and 2007?

3 A. Well, I said 2007; is that close enough?

4 Q. The windows would have been installed in 2006 before
5 the C.O. date correct?

6 A. Yes.

7 Q. Okay. So the windows should have been installed in
8 2006 roughly, I'm not talking about a month, and then
9 your testing was done in 2013 correct?

10 A. January of 2013, yes.

11 Q. Thank you. In your -- first of all Doctor Whitlock
12 is your report that you produced in this case a good
13 summary of your findings?

14 A. Yes, I think it is. There may be some additional
15 discovery since the report was written but it contains
16 most of the issues.

17 Q. Okay. And in your report when you were discussing
18 the water testing why did you cite to AAMA 502 as the
19 proper authority to designate the static pressure for
20 your water testing?

21 A. Well, I think I referenced it because it discusses
22 field testing of windows and it says if windows are field
23 tested they should be tested at pressure that is lower
24 than that for a laboratory test.

25 Q. Okay. Is AAMA 502 specifically applicable to the

1 windows at One Belle Hall at the time you were testing
2 them?

3 A. It says it is for newly installed windows, not
4 windows that have been there for awhile.

5 Q. Okay. So the guideline or standard AAMA 502 which
6 you referenced is applicable to windows that have been
7 installed six months or less would you agree?

8 A. That's what it says, yes.

9 Q. And in this case the windows had been installed for
10 roughly six years?

11 A. Roughly, yes.

12 Q. So AAMA 502 doesn't apply to the windows at One
13 Belle Hall as tested?

14 A. That's correct.

15 Q. After a window has been installed in the field
16 beyond six months Doctor under AAMA standards is it
17 required to pass a test to confirm its design pressure?

18 A. No, that's what I just said. Even windows that are
19 six months old or less per the AAMA standard for newly
20 installed windows it's not expected that the windows
21 would pass the full brunt of the test that is done in the
22 laboratory.

23 Q. Okay. I understand. When you are doing a forensic
24 test and let me give you a hypothetical if I may if you
25 are looking at -- let's take one of these ESP windows and

1 you go into a unit and discover at your visual
2 observation before any water testing that there is a
3 weather stripping missing at the meeting rail where the
4 two sashes meet. Do you understand my scenario?

5 A. Yes.

6 Q. Okay. If you are going to forensically test that
7 window for leakage and you observe that that weather
8 stripping is missing should you replace that weather
9 stripping before you perform a water test?

10 A. No.

11 Q. And why not?

12 A. Because the purpose of the test is to diagnose what
13 exists at the moment.

14 Q. But by then ---

15 A. --- because --

16 Q. I'm sorry.

17 A. At the time that we do the test.

18 Q. But by visually observing the window you notice that
19 there is a missing weather stripping that is designed to
20 be in the window. And the window is not designed to
21 perform without that weather stripping correct?

22 A. Hypothetically speaking, yes.

23 Q. So do you need to do a water test to understand that
24 if that weather stripping is not there it's going to
25 leak?

1 A. Well, it could be that it might not leak even with
2 the weather stripping missing, which you wouldn't know
3 until you test it.

4 Q. Okay. Before you complete your testing on the
5 window without a weather stripping should you replace the
6 weather stripping as it is designed to be there and then
7 test the window again?

8 A. You'd do it both ways; with and without.

9 Q. You should do it; I'm sorry?

10 A. You could.

11 Q. And that would confirm the results of your test if
12 you tested it without the weather stripping that was
13 designed to be there and it fails and then you replace it
14 and test it and it passes then you've confirmed the
15 theory and in turn fixed the window right?

16 A. Assuming all that is as you state, yes.

17 Q. Okay. Did you attempt to isolate the window units
18 themselves by masking off all of the surrounding
19 components before doing the spray rack testing?

20 A. We did not. We sprayed the units with the
21 surrounding walls unmasked.

22 Q. Okay. And could you have masked off the surround
23 and just tested the window by itself?

24 A. You could.

25 Q. Why didn't you do that?

1 A. It's very time consuming and we removed materials
2 from the inside so we could see the window itself and see
3 if water was coming in through the window and not the
4 perimeter.

5 Q. But the damaged sheathing that we saw all the
6 pictures of yesterday would you agree that could be
7 caused by broken sealants between the window and the
8 stucco?

9 A. Yes. Water could and did get to sheathing and other
10 ways through joints and cracks yes.

11 Q. How about improper waterproofing? Is that another
12 source you identified as a cause for the water damage to
13 the sheathing?

14 A. Improper water proofing would allow the water that
15 gets to the water proofing to come through and into the
16 sheathing, yes.

17 Q. And that in turn caused damage to this building in
18 this case right?

19 A. Yes.

20 Q. What about improper or missing flashing around rough
21 openings? And rough openings are where the window goes
22 in first of all right?

23 A. Rough opening is a hole that the window is placed
24 into, yes.

25 Q. Okay. And there should be some component of

1 flashing at the rough opening correct?

2 A. There should be, yes.

3 Q. Tell the jury sir if you would what does flashing
4 mean? What does it do?

5 A. It's usually a rubber membrane that goes in a sill
6 below the window and up the sides and over the surface of
7 the sheathing to help prevent water from getting to the
8 wood.

9 Q. And at One Belle Hall during your investigation did
10 you observe that there was flashing that was installed
11 improperly?

12 A. Yes, I did.

13 Q. Did you also observe that there was flashing that
14 was missing?

15 A. Yes.

16 Q. Either by the architect not calling it out or it not
17 being installed.

18 A. One or the other but more likely not installed.

19 Q. Okay. You performed some air infiltration testing
20 correct?

21 A. Yes.

22 Q. And why did you do that?

23 A. Complaints from homeowners about drafts through the
24 windows and their perception of hearing drafts and
25 feeling drafts which you get in the winter time.

1 Q. Okay. And you cite in your report related to that
2 section of your infiltration testing to the AAMA standard
3 five zero three, which is entitled the voluntary
4 specification for field testing of newly installed store
5 fronts, curtain walls, and sloped glazing systems. Do
6 you recall citing to that standard?

7 A. I think so, yes.

8 Q. And sir is that an appropriate standard for the
9 windows at One Belle Hall?

10 A. Yes.

11 Q. Do we have a store front condition?

12 A. No.

13 Q. Is there a curtain wall at One Belle Hall?

14 A. No.

15 Q. And what about a sloped glazing system are we
16 dealing with that at One Belle Hall?

17 A. No.

18 Q. So how does AAMA 503 apply to the buildings at One
19 Belle Hall?

20 A. I'd need to review it but I believe it's one of
21 several documents that speaks to installed windows and
22 air infiltration and that they need not pass the
23 requirements for a lab test. They are permitted to have
24 air infiltration that exceeds the lab requirement by 50
25 percent.

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- 1 Q. Now we looked at AAMA 502 earlier or discussed it
2 and similar to the title of AAMA 502 AAMA 503 indicates
3 that the testing is for newly installed whatever. Is
4 AAMA 503 also limited to windows that have been installed
5 for six months or less?
- 6 A. I'd have to read it to see. I don't remember.
- 7 Q. Doctor Whitlock your investigation concluded that
8 One Belle Hall suffers from numerous construction
9 defects, fair?
- 10 A. Yes.
- 11 Q. Okay. And you have recommended the replacement of
12 the following elements. I'm just going to list them and
13 then if you could confirm or deny. The first one would
14 be the shingled roof. It needs to be replaced?
- 15 A. I think we said it could be repaired or replaced.
- 16 Q. How about the stucco on the building?
- 17 A. It needs to come off completely.
- 18 Q. A hundred percent?
- 19 A. Yes.
- 20 Q. What about the brick veneer on some of the
21 elevations?
- 22 A. It needs to be repaired or replaced.
- 23 Q. And the cement board siding; some of us refer to
24 that as hearty plank.
- 25 A. It needs to be replaced.

- 1 Q. What about the doors?
- 2 A. I believe we said that the doors could be remedied
3 by additional weather stripping. I'd have to read the
4 report to see but I think that's what we concluded.
- 5 Q. And what about the window installation method. Did
6 you find an issue with the window installation methods?
- 7 A. In some places, yes.
- 8 Q. But you have recommended replacement of 100 percent
9 of the windows --
- 10 A. Yes.
- 11 Q. What about the concrete and waterproofing on the
12 balconies. Have you recommended replacement?
- 13 A. We did, yes.
- 14 Q. And how about the same concrete and waterproofing on
15 the stairways?
- 16 A. I don't remember. That might have been recommended
17 that be replaced as well.
- 18 Q. Okay, thank you. You did some water testing on the
19 roof correct?
- 20 A. We did, yes, on the flashing above the roof.
- 21 Q. And did you find failure through your water testing
22 on the roof?
- 23 A. Yes.
- 24 Q. And you also tested some fields of the stucco walls
25 using a similar square back test correct?

1 A. Yes.

2 Q. And when you performed that test, Doctor there
3 weren't any windows in that particular section of the
4 wall you choose.

5 A. We did a spray rack test on a stucco wall that did
6 not have windows close-by.

7 Q. Okay. And did you find a failure of the stucco as
8 a result of that water testing?

9 A. We found that water went through the control joints
10 and wet the waterproofing and sheathing behind it.

11 Q. Okay. I understand completely Doctor Whitlock that
12 it is your opinion that the windows are contributing to
13 the damage of the building.

14 Are you able to give us a percentage of how much of
15 the water damage you observed in these buildings as being
16 contributed by the window product itself?

17 A. I think the windows are contributing to all the
18 damage below the windows. There is damage away from
19 windows on the ledge windows that the windows aren't
20 causing.

21 Q. Have you done an exercise to try to identify for us
22 of the total square footage around the buildings what
23 percentage of the damage is related to the window
24 product?

25 A. I have not computed that, no.

1 Q. Would you be able to compute that?

2 A. I can try.

3 Q. But sitting here today you haven't undertaken that?

4 A. I have not.

5 Q. Let's look at some of the photos from your
6 appendices, which is the exhibit 42 or 301.

7 [Whereupon, the witness reviews photographs]

8 Q. This is image 52 Doctor Whitlock. Do you recognize
9 that from your file?

10 A. It appears to be a photograph at Belle Hall.

11 Q. And I'll represent to you sir that this came out of
12 one; and I can put the binder here if you'd like to
13 compare. Doctor Whitlock can you tell the jury why you
14 took or someone in your firm took the picture in 52?

15 A. To illustrate the window and the perimeter sealants
16 and the stucco.

17 Q. And let's look at photo 96.

18 [Whereupon, the witness views photograph]

19 Q. Why did you take this picture?

20 A. For the same reason.

21 Q. Okay. In your opinion does this window depict a
22 failure of that sealant joint between the stucco and the
23 window?

24 A. Yes. The sealant was applied over the finished coat
25 of the stucco and -- at that joint.

1 THE COURT REPORTER: I'm sorry; what was the last
2 part of your answer?

3 A. De-bonded at the joint between the stucco and the
4 sealant.

5 Q. [Ms. Dyer] Is that a condition that you opined
6 contributes to water intrusion at the wall?

7 A. It contributes to water that gets behind the sealant
8 joint, yes.

9 Q. Okay. Let's look at photo 115.

10 [Whereupon, the witness views photograph]

11 Q. Sir, why was this picture taken?

12 A. For the same reason. It illustrates a failure of
13 the sealant at the sill of the window.

14 Q. And in fact in this picture can you see any sealant
15 between the stucco and the window?

16 A. This appears to be sealant here [indicates] that was
17 bonded there [indicates] but no longer is.

18 Q. So that bond has failed?

19 A. Yes.

20 Q. And again we're looking at a condition that could
21 allow water to get behind the stucco?

22 A. Yes.

23 Q. Okay. Let's look at photo 118.

24 [Whereupon, the witness views photograph]

25 Q. And what's this photo of?

1 A. That's a roof counter slashing.

2 Q. And the black material is that what you're calling
3 flashing material just for the jury's understanding?

4 A. Yes.

5 Q. Thank you, sir. And is the flashing in this case
6 lapped properly?

7 A. No.

8 Q. Is that a condition that could allow water to get
9 into the wall behind the stucco?

10 A. It would allow water to get between the flashing and
11 the stucco and then probably leak into the roof below it.

12 Q. Okay. How about photo 206?

13 [Whereupon, the witness is shown photograph]

14 Q. What is the significance of this photograph?

15 A. It shows a lot of damage at a balcony.

16 Q. Between the two balconies there?

17 A. Well, at two balconies. Not necessarily between
18 them but at the balcony and below the balconies, yes.

19 Q. Okay. So we're looking at the arch that we can see
20 in the bottom of the picture is a balcony below is that
21 fair?

22 A. This [indicates] is a concrete balcony here
23 [indicates] and over here [indicates]. Below is probably
24 a patio.

25 Q. Okay. An open living space underneath the balcony

1 that we see the bottom of?

2 A. Yes.

3 Q. Okay. And you're showing us in the picture
4 extensive water damage at that intersection correct?

5 A. Yes, at the balcony where it meets this column
6 [indicates].

7 Q. Photo 24.

8 [Whereupon, the witness is shown photograph]

9 Q. Why did you take this picture?

10 A. That was behind brick veneer and it illustrates poor
11 installation of the flashing above the window.

12 Q. And we can look at I think it looks like the next
13 one nine is a close up of that would you agree it's a
14 closer picture?

15 A. It's a closer picture. I don't know if it's the
16 same flashing but its similar condition.

17 Q. And the gentleman shouldn't be able to stick his
18 finger inbetween that weather barrier correct?

19 A. No, it should be sealed.

20 Q. And the black material there is that also flashing?

21 A. Below my fingers is the flashing, yes.

22 Q. And has it been peeled back to take the picture do
23 you recall?

24 A. It unpeeled itself. It just came loose.

25 Q. So the adhesive then had failed before you opened up

1 that area?

2 A. Yes.

3 Q. Photo 188.

4 [Whereupon, the witness is shown photograph]

5 Q. Sir, you mentioned controlled joints yesterday and

6 then again this morning. Could you explain for the jury

7 do we see controlled joints in photo 188?

8 A. Yes, there is a control joint there, yes.

9 Q. Can you show it to them would you mind?

10 A. Right here [indicates].

11 Q. Okay. And it runs from the corner of the top

12 window down to the corner of the bottom window?

13 A. Yes.

14 Q. Does that control joint run behind the darker color

15 trim that we see in the middle?

16 A. Yes, it's behind that band yes.

17 Q. And that's a bad thing right?

18 A. It will likely cause cracking of the band. It did

19 in some places and not others.

20 Q. And photo 68 I believe we have another example of

21 how the control joints run from window to window correct

22 in the stucco?

23 [Whereupon, the witness is shown photograph]

24 A. Yes. It shows a horizontal one as well here

25 [indicates].

1 Q. And the next page.
2 [Whereupon, the witness is shown photograph]
3 Q. This is a photograph, two composite photographs from
4 your report, page 42 of your report. What are you
5 showing us by choosing these pictures in the video?
6 A. I took the pictures and they show damage below that
7 window corner in the sheathing and the stud framing.
8 Q. Okay. And you opened up -- that test cut that we
9 see opens up right along where a controlled joint was
10 correct?
11 A. Yes.
12 Q. And we can look at the next pictures, the next page.
13 [Whereupon, the witness is shown photograph]
14 Q. So in this instance a test cut was taken to take out
15 the trim that runs over the top of the control joint
16 correct?
17 A. Yes.
18 Q. And it shows that that crack, that intentional crack
19 goes all the way down; the control joint goes all the way
20 down behind the trim correct?
21 A. Yes, it does.
22 Q. Okay. And what's bad about that condition?
23 A. It causes the trim to crack like that [indicates].
24 Q. And does that allow water to get behind the stucco?
25 A. It could.

1 Q. The next picture?

2 A. Well, I misspoke. It could allow water to get
3 behind the trim; not necessarily behind the stucco.

4 Q. Okay.

5 [Whereupon, the witness is shown photographs]

6 Q. This is a page from your report and it has
7 photographs 25 and 26 correct?

8 A. Yes.

9 Q. And then the next page should -- I think they are in
10 the wrong order but go ahead. In your report you used
11 photographs 25 through 30; that's 25 and 26 and then here
12 we see 27 and 28 correct?

13 A. Yes.

14 Q. And then 29 and 30?

15 A. That's what it says yes.

16 Q. They're all there but in the wrong order agree?
17 Would you agree?

18 A. I agree they are in the wrong order.

19 Q. And it's photographs 25 through 30 that we can see.
20 There is 29 and 30 [indicates], there is 27 and 28
21 [indicates] and there is 25 and 26 [indicates] correct?

22 A. Yes. But in my report they were in the correct
23 order. You produced them in the wrong order.

24 Q. I agree completely. And in your report you use
25 these photos to show what is wrong with the control

1 joints and the type of damage that it is causing correct?

2 A. I would have to read the paragraph that references
3 these photographs but it shows damage, yes. It shows
4 control joints, yes and other things.

5 Q. I'm going to hand you a copy of your report. It's
6 been marked as joint exhibit 39 and it was previously
7 exhibit 300.5. And I've turned to page 38 for you.

8 [Whereupon, the witness is shown exhibit]

9 Q. Do you recognize that first of all as a copy of your
10 report from June 27, 2014?

11 A. Yes.

12 Q. And the pages that I directed you to sir has a
13 description on it identifying a particular set of
14 conditions that you take issue with correct?

15 A. Yes.

16 Q. And in reference or as support of that paragraph it
17 references photographs what?

18 A. Are you asking me to look at these photographs?

19 Q. The paragraph there.

20 A. The paragraph, okay.

21 Q. You call that a defect in your report just generally
22 speaking sir. Your report works this way. You provide
23 us with a narrative of what the problem is that you
24 discovered and then you provide photographs as examples
25 of that defect correct?

1 A. Yes.

2 Q. Okay. And so I've turned your attention to a
3 particular paragraph and what is that paragraph generally
4 dealing with?

5 A. That's dealing with the issue we just discussed
6 about the trim.

7 Q. And the control joints correct?

8 A. Yes.

9 Q. That intersection? And as referenced to show the
10 damage that that control joint trim condition is causing
11 you referenced which photographs?

12 A. Twenty-three through 30.

13 Q. And we've seen a number of those here on the screen
14 25 through 30 correct?

15 A. Yes, you've shown some of those photographs yes.

16 MS. DYER: At this time I'd like to move exhibit
17 39, joint exhibit 39 into evidence.

18 THE COURT: Any objection?

19 MR. LUCEY: No objection if it includes all
20 appendices, Your Honor.

21 MS. DYER: Three hundred and five.

22 [Whereupon, Ms. Dyer and Mr. Lucey confer]

23 THE COURT: Okay. In evidence.

24 [Whereupon, joint exhibit number 39 is entered into
25 evidence by the court]

1 Q. [Ms. Dyer] Doctor Whitlock as part of your opinions
2 did you opine that the mortar joints and the brick could
3 be contributing to water intrusion behind the brick?

4 A. Yes. Brick walls will allow water penetration
5 behind the brick typically through the mortar joints.

6 Q. Now as far as the windows go sir isn't it true that
7 Trammell Crow, the developer builder in this case, could
8 have performed water testing of the windows immediately
9 after installation during the original construction?

10 A. They could have, yes.

11 Q. And in this case they did not?

12 A. I don't know.

13 Q. If they had performed that water testing during the
14 construction phase of the project would it have
15 identified problems with the design of the building?

16 A. It would have identified problems with the windows;
17 the windows would have leaked.

18 Q. And what about the installation of the windows if
19 there was a problem there that was causing leaks that
20 could have come out as well with the water testing at
21 construction?

22 A. That could have been determined, yes.

23 Q. And what about the design condition of a recessed
24 window? If the water testing would have been done at
25 construction would the potential for water intrusion

1 resulting from that window design come out?

2 A. That could have been discovered, yes.

3 Q. Explain to the jury, sir I didn't take the liberty
4 to pick any photographs because I'm not certain they
5 would do a very good job of illustrating it.

6 But if you could explain to the jury what condition
7 you have taken issue with as a defect related to the
8 recess of windows and that's a design component?

9 A. Well the walls are made out of two by sixes about
10 this wide [indicates]. But at the windows they changed
11 it to two by four so that the windows are then set back
12 into the wall and have a return that's deeper.

13 It makes for a condition I wouldn't say you can't do
14 it but it makes sort of a difficult condition at the
15 bottom where the flashing is installed. It creates a
16 horizontal ledge in the wall and the horizontal ledge of
17 course water is going to get into it and if there are any
18 pin holes in it or open seams water will then get through
19 it.

20 Q. And in fact you identified that as a concern in your
21 report correct?

22 A. Yes.

23 Q. And have you provided a repair for that condition?

24 A. We recommended that that recessed condition be
25 eliminated.

1 Q. How would that be done?

2 A. Remove the two by four framing and put in a two by
3 six before the window goes back in.

4 Q. So you make the wall essentially push it out an
5 additional two inches to make a flat plane?

6 A. Yes.

7 Q. And then you would reinstall windows into that plat
8 plane?

9 A. Yes.

10 Q. Okay. Doctor Whitlock based on your investigation
11 at One Belle Hall is there any question whether Energy
12 Saving Products manufactured the product we're dealing
13 with?

14 A. I'm sorry I didn't understand your question.

15 Q. Certainly; I'm happy to repeat it. Based on your
16 investigation is there any question in your mind that
17 Energy Saving Products manufactured the window product?

18 A. All the documentation appears to be that they did
19 make the windows.

20 Q. Have you dealt with Energy Saving Products on other
21 investigations?

22 A. Yes. Those windows have been used on other
23 buildings that I have been involved with.

24 Q. Have you seen any other projects where Cline Design,
25 the architect at One Belle Hall, specified the use of

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1 Energy Saving Products windows?

2 A. Yes.

3 Q. Do you know how the windows were transported to the
4 job site, sir?

5 A. They were shipped direct to the job site from the
6 manufacturing facility.

7 Q. And would they presumably have come in a truck?

8 A. Yes; they didn't come by train, they came by truck.

9 Q. Fair enough. And could they, the windows have
10 sustained damage in transit?

11 A. It's possible. Anything can be damaged in transit,
12 yes.

13 Q. Do you know how they were unloaded from the truck,
14 forklift or dolly or by hand?

15 A. I don't know.

16 Q. And could they have sustained damage during
17 unloading and handling?

18 A. They could have but I didn't see any indications of
19 windows being damaged by impact.

20 Q. I understand. Do you know how the windows were
21 stored on the job site before installation?

22 A. I do not.

23 Q. Typically when you receive a window order and aren't
24 ready to put the windows in how should the windows be
25 stored?

1 A. Usually distributed around the site to the locations
2 where they will be used and placed and leaned up against
3 a wall inside the unit.

4 Q. Should they be protected in any way?

5 A. They should be and usually they are shipped with
6 protection. They are usually shipped with a cardboard
7 surround and a plastic sheathing material surrounding
8 that.

9 Q. And do we know how many times they were moved around
10 the job site before ultimately be installed at One Belle
11 Hall?

12 A. I don't know that they were.

13 Q. Okay. Who installed them? Do you remember?

14 A. I don't remember the name of the trade.

15 Q. Does Coastal Lumber and Framing sound familiar?

16 A. Yes.

17 Q. Okay. Do you know what skill level or experience
18 the installers had?

19 A. I don't know anything about the installers.

20 Q. And do you recall having a letter in your file from
21 the stucco installer, First Exteriors, complaining about
22 the windows not being installed correctly?

23 A. I recall a letter from First Exteriors complaining
24 about I think the rough opening being maybe too big and
25 requiring more sealant than normal. I'd have to read it

1 again to be sure what it said.

2 Q. Windows can be damaged during installation can't
3 they?

4 A. It's possible.

5 Q. And if the rough opening is too small and the window
6 is forced into it can that cause cracks in the frame?

7 A. If it's too small the window won't go in. I've
8 never seen anybody force a window into a rough opening.
9 Usually they take a saw and make the rough opening larger
10 to make the window fit.

11 Q. Okay. Can installation cause cracks in the frame?

12 A. It's possible.

13 Q. You haven't seen any evidence that Builders First
14 Source had anything to do with manufacturing of the
15 windows correct?

16 A. I know they manufacture windows but I don't think
17 they manufactured these.

18 Q. Okay. And I believe you just said earlier that the
19 evidence indicates that the windows were shipped directly
20 from the manufacturer to the job site correct?

21 A. Yes.

22 Q. So there is no indication that Builders First Source
23 was involved in the shipment or delivery right?

24 A. Only that they facilitated it and were responsible
25 for it.

1 Q. And we just discussed it a second ago but we
2 understand from the documentation that the windows were
3 installed by a subcontractor Coastal Lumber and Framing
4 and not by Builders First Source correct?

5 A. I believe that's correct, yes.

6 Q. Thank you for your time, sir.

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1 THE COURT: All right, we're going to take our
2 morning break. Please leave your notebooks in your seats
3 and step to your jury room. Do not discuss this matter
4 or allow anyone to discuss it with you. We'll take
5 fifteen. Thank you now.

6 [Whereupon, the jury exits at 10:55 a.m.]

7 THE COURT: You all please be at ease and we'll
8 take our break.

9 MR. LUCEY: Did you say ten, Your Honor.

10 THE COURT: Fifteen. And as you know do not
11 discuss your testimony with anyone. Enjoy your break.

12 [Whereupon, court is in recess from 10:56 a.m. until
13 11:19 a.m.]

14 THE COURT: Thank you. Are we ready for the jury?

15 MR. LUCEY: Yes, ma'am.

16 THE COURT: Okay, jury.

17 [Whereupon, the jury enters at 11:22 a.m.]

18 THE COURT: All right. At this time we will
19 continue with the plaintiff's case and the redirect
20 examination of Doctor Whitlock.

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REDIRECT EXAMINATION

BY MR. LUCEY:

Q. Doctor Whitlock you were just handed a copy and I'm going to hand you an excerpt of plaintiff's exhibit 39, actually joint 39 which is your report dated 2014?

A. Yes.

Q. June 27 I believe?

A. Yes.

Q. And at the top left read to the jury what the title is.

A. Preliminary report One Belle Hall Mount Pleasant, South Carolina.

Q. Thank you. And then you continued doing your investigation in this matter after you issued your preliminary report?

A. Yes.

Q. There was approximately eight months between your preliminary report and when you sat for five days of deposition in February and March of 2015 correct?

A. Yes.

Q. And did you continue investigating the structure during that time period?

A. Yes.

Q. And sir appended to that report that just went into evidence is your firm's work product in this matter?

- 1 A. Yes.
- 2 Q. Your photographs and the charts and what have you?
- 3 A. Yes.
- 4 Q. Some of the photographs we saw yesterday?
- 5 A. We did.
- 6 Q. And speaking of the photographs yesterday you were
- 7 just examined about missing rough opening flashing in the
- 8 window openings?
- 9 A. Yes.
- 10 Q. What was that black stuff you pointed out to the
- 11 jury yesterday on the photos?
- 12 A. Flashing.
- 13 Q. Rough opening flashing?
- 14 A. Yes.
- 15 Q. And in that photograph that you were shown just a
- 16 second ago, image 52 the first one, do you recall that?
- 17 A. Yes.
- 18 Q. The sealant joint between the stucco and the window?
- 19 A. I recall that, yes.
- 20 Q. You were asked whether water would get through that
- 21 joint to the sheathing and you clarified that it would
- 22 get through the joint behind the stucco. Why did you
- 23 make that clarification?
- 24 A. Because water will go through a crack but when it
- 25 gets through that crack it should drain vertically down

1 between the waterproofing membrane and the back surface
2 of the sealant or stucco.

3 Q. And that particular sealant joint you were shown in
4 image 52 is that sealant joint above or below the
5 interior window sill?

6 A. The horizontal joint below the window is below the
7 interior sill.

8 Q. The exterior horizontal joint was below the interior
9 sill is that what you said?

10 A. Yes, that's correct.

11 Q. And speaking of that interior sill we'll focus on
12 the stool for a second you were asked about the condition
13 when the stool is installed in such a manner where its
14 top level is below the horizontal joint between the sill
15 insert and the window frame. Do you recall that?

16 A. Yes.

17 Q. Now will a homeowner see water on the stool if there
18 is a broken joint or a gap between the window and the
19 stool?

20 A. If there is a space between the stool and the window
21 frame water can drain between the two and not necessarily
22 accumulate on the stool.

23 Q. And did you see that condition at One Belle Hall?

24 A. Yes.

25 Q. Was it common?

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1 A. It was common.
2 Q. What was creating that condition?
3 A. Water getting into the wood framing causing it to
4 swell and push the sill apart.
5 Q. I'm going to show you what has been marked for
6 identification purposes only as plaintiff's exhibit,
7 joint exhibit number 167. But first let me ask you have
8 you reviewed a set of photos in this matter called the
9 Drake photos?
10 A. I believe I have, yes.
11 Q. Let me show you exhibit 167.
12 [Whereupon, the witness is shown photographs]
13 Q. Do you recognize this as part of those photos that
14 you reviewed, the Drake photos?
15 A. Yes.
16 Q. And did you see conditions such as that at One Belle
17 Hall?
18 A. I don't remember seeing anything like this.
19 Q. Okay. What is down in the lower, this left corner
20 of that window right there [indicates]?
21 A. It looks like termite frass or dirt dauber nests.
22 I'm not sure what it is. It could be from termites or
23 from other insects; I'm not sure.
24 Q. It's your testimony you did not see that condition
25 at One Belle Hall?

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- 1 A. No.
- 2 Q. And you went into what 40 odd units?
- 3 A. At least.
- 4 Q. Forty or 59? You were asked about the fact that
- 5 these windows were shipped directly from the manufacturer
- 6 to the job site. It didn't go through Builders First
- 7 Source warehouse. Is that common in this industry?
- 8 A. Yes, it is.
- 9 Q. Did you see any evidence in the 40 odd units you
- 10 were in and all the windows you tested of damage that had
- 11 been caused to these windows by shipping, handling,
- 12 storage, or installation?
- 13 A. I didn't see any damage that I could identify as
- 14 being impact damage where something was crushed.
- 15 Q. Now you told Ms. Dyer that you did not require
- 16 replacement of the roof or the doors correct?
- 17 A. That's correct.
- 18 Q. Did you require replacement of the brick?
- 19 A. No.
- 20 Q. So that's three instances in this repair scope where
- 21 you sanctioned a repair rather than a replacement. Am I
- 22 correct on that?
- 23 A. Yes.
- 24 Q. Why didn't you do that for the windows?
- 25 A. Because the windows aren't suitable for repair.

1 They don't meet -- they can't be reused. If you take the
2 windows out to repair them what you put back in has to
3 meet the current building code and they don't.

4 Q. Was your window sampling sufficient to be a
5 representative sample for your opinions in this matter,
6 sir?

7 A. Yes.

8 Q. You were shown a picture on the screen of balcony
9 damage. Do you recall that?

10 A. Yes.

11 Q. Have you ever indicated or opined or hinted that any
12 of the balcony damage is related to window leakage?

13 A. No.

14 Q. Have any of the photographs that you were shown or
15 any of the questions and answers in any way affected your
16 opinion that the windows at One Belle Hall are leaking
17 and causing damage to the structure?

18 A. That's my opinion. Nothing has changed it.

19 Q. Thank you, sir.

20 THE COURT: Recross?

21 MS. DYER: No, Your Honor.

22 THE COURT: Very well. Yes sir, you may come down.

23 [Whereupon, the witness is excused and exits the
24 witness stand]

25 THE COURT: Call your next witness please.

1 MS. LYNN: Plaintiffs call Gary Moore.

2 [Whereupon, Mr. Moore comes forward]

3 [Whereupon, the witness is duly sworn by the Clerk
4 of Court]

5 CLERK OF COURT: Sir, for the record if you will
6 please state your name spelling your last name.

7 THE WITNESS: My name is Gary Moore, M-O-O-R-E.

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9 GARY MOORE,

10 Having been first duly sworn,
11 Was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MS. LYNN:

14 Q. Gary, good afternoon. Let's begin by discussing
15 your construction experience. If you could, please
16 provide the jury a general overview of your experience in
17 construction and repair construction.

18 A. In general I've been banging nails since I was about
19 15 years old. After I got out of college in '71 I went
20 into the glass and glazing industry for 19 years
21 basically installing store front curtain wall windows in
22 various applications.

23 The next 25 years or so I've spent in the building
24 envelope industry just working on the skins of buildings
25 as a general contractor and restoration contractor. We

1 don't build new buildings; what we do is we restore the
2 skin.

3 Q. Let's now turn to the contracting company you're
4 involved with. What's the name of that company?

5 A. Exterior Building Services.

6 Q. And what licenses does that company hold?

7 A. It has an unlimited license.

8 Q. Can you explain to the jury what an unlimited
9 license entails?

10 A. In our part of the industry basically unlimited
11 means you can build anything. You can build from a
12 garage to a ten story building.

13 We're required to meet all of those audits legal to
14 be able in the building restoration to have a general
15 contractor they require to be there.

16 Q. In what states are you licensed in?

17 A. Currently North and South Carolina. I have other
18 licenses that are pending right now in Virginia,
19 Tennessee, Florida but I'm not using those right now.

20 Q. How long have you been licensed in North and South
21 Carolina?

22 A. I believe that goes back to '90, '91; somewhere in
23 there.

24 Q. What other window related licenses do you hold?

25 A. Well there is a specialty license in the state of

1 South Carolina that you have to hold to be able to put in
2 windows, well curtain wall windows, skylights and that
3 sort of thing. So I've had that for as long as they've
4 had that statute out.

5 Q. Can you explain the importance of that glazing
6 license?

7 A. Well a lot of the issues that have been around
8 windows and curtain walls and glazing and such they
9 wanted that to be a specialty much like you have you HVAC
10 and electrical.

11 They want to make sure that you understand the
12 safety issues, the building codes. And I think it
13 represents that you understand that part of the industry
14 and it's very important to the building envelope or the
15 skin of the building.

16 Q. And have you ever been qualified as an expert
17 witness in construction and repair construction in South
18 Carolina?

19 A. Yes, ma'am.

20 Q. And what particular area of work does your company
21 now focus on?

22 A. Well primarily building exterior, the building
23 envelope. We also do repairs on garages. We do a lot of
24 historic work here in town; here again that's related to
25 the building envelope. We're one of the largest masonry

1 contractors as well here in town.

2 Q. Can you please elaborate on some of these buildings
3 that you have worked on in this area with your company?

4 A. Let's see, well we can start across the street, ex-
5 Mayor Riley's building. I did all the masonry on that.
6 Missroon which is down the street at the battery we tuck
7 pointed and redid that, the People's building down at the
8 end of the block, we did windows, actually did the roof,
9 the waterproofing across the roof, redid the brick; tuck
10 pointing.

11 We just finished at 32 Battery a home down there
12 with brownstone brick, etcetera. Finished up Concord and
13 Cumberland where we took the entire skin off the condos
14 windows, stucco, brick, through all flashing,
15 waterproofing. Let's see Dock Street Theatre we did all
16 the masonry in that.

17 Going up the street Saint Phillips that had historic
18 damage both from the earthquake and piles were driven
19 later on and we went up and -- I'm probably getting too
20 technical here -- but we went up and fixed the tower that
21 was structurally damaged.

22 Grace Episcopal Church, here again from structural
23 damage through the years and through the earthquake.
24 Craig Bennett [phonetic] found that the roof was pulling
25 away from the wall and we had to go in and stabilize

1 that. And if you look at that tower we did various
2 repairs in that from taking down the spires, we took the
3 brick down six feet, ran rods down and put it all back
4 together and set those back up there.

5 I'm getting too far off on that. Tennis and Rose
6 [phonetic] Condo, Island Park we just finished so I'll
7 stop there; I'm sorry.

8 Q. How often do the restored projects like the ones you
9 just mentioned involve window replacement?

10 A. I would say probably 50 percent of them like doing
11 Randolph Hall; we did all the exterior of Randolph Hall.
12 On that one we did all the brick but we did not do the
13 windows because it was an historic window. So it's about
14 50 percent.

15 Q. And what role has the material supplier played in
16 these restorative projects you have worked on which
17 involved window replacement?

18 A. Well, the folks that I work with I bring them as
19 close in as I can. We're doing this job hand in hand.
20 We go through the shop drawings. They need to make sure
21 they are approved.

22 They need to know where this project is going, how
23 far it is from the coast. We talk about that for the
24 zone loads, the building codes, what type of product they
25 are going to supply. They have to know where that is

1 going to be and approve that. So we work very close
2 hand in hand with them to make sure they know exactly
3 what the glass is, what the conditions are, what the
4 drawings are, what the engineers are asking for and do we
5 need to go back and make any recommendations based on
6 what they may have asked for because the most important
7 thing is just providing the right window, the right code,
8 the right product. So we work very closely with them.

9 Q. And let's discuss One Belle Hall. What did you do
10 in connection with One Belle Hall?

11 A. Well, I provided the estimate for that project.

12 Q. And what did you do to provide that estimate?

13 A. Well, to start with Doctor Whitlock's report I
14 started with that in reading that. From there which I
15 always do I go to the site and try to get a feel for what
16 the project is like and start reviewing.

17 I usually take my own photographs. I usually take
18 my own photographs to -- here again that's my best
19 memory. As old as I am I've got to take pictures to
20 remember what I'm doing. That way I can go back and
21 review it.

22 And what I will do from time to time when I'm trying
23 to put this together I'll go back and forth a couple of
24 times and I call him Rhett, but he was out there doing
25 some things that I could look at with the doors and

1 windows and brick and so forth so get an idea when they
2 are doing the destructive testing. What I do at that
3 point in conjunction with his report is I have to think
4 through and understand if this goes into another engineer
5 or architect's hands how are they going to handle it. In
6 other words what type of spec they may write, how they
7 may detail it because I work with the Stantec, REI's --

8 THE COURT REPORTER: --- I'm sorry; slow down just
9 a little and repeat those groups again.

10 A. In preparing that I work with all of the engineers
11 in the area; that would be Sutton Kennerly, REI, ABS,
12 Stantec. So through the 20 some years I've been working
13 I've watched them evolve in how they develop the new
14 products.

15 So what I have to do is anticipate that. And even
16 if it was Doctor Whitlock I would have to make sure that
17 I would understand how he would write up the plans and
18 specs. So I try to incorporate all that in the estimate.

19 Q. And you referenced site visits. How much time did
20 you spend on site at One Belle Hall?

21 A. I think it was at least three times that Doctor
22 Whitlock was actually doing something I needed to see. I
23 probably went out there about another three or four times
24 on my own just to look at certain things. One in
25 particular was the curves and some HVAC units and then

1 just go to again get an overall look at the project.

2 Q. And how many windows are on site at One Belle Hall?

3 A. I believe it's about 315.

4 Q. And how did you arrive at that number?

5 A. A physical count plus we were provided some type of
6 drawing I believe that was again through Doctor
7 Whitlock's firm that we compared it to.

8 Q. And how did you put together the pricing of your
9 final estimate?

10 A. All of our since we are an active contractor we do
11 historic data. We actually have a person that tracks all
12 the stuff that we do into man hours.

13 So what I do is I take that historic information and
14 then I provide that with what we're actually performing.
15 And I can those unit prices and add it to them and simply
16 multiply it out.

17 Q. Did you personally do that here for One Belle Hall?

18 A. I did. I do all those estimates, yes.

19 MS. LYNN: Your Honor, the plaintiffs tender Mr.
20 Moore as an expert in construction and repair
21 construction including means and methods used and the
22 cost of repair.

23 THE COURT: Voir Dire?

24 MS. DYER: No voir dire and no objection.

25 THE COURT: Very well. So qualified.

1 Q. [Ms. Lynn] All right Mr. Moore, I'm going to hand
2 you formerly plaintiff's exhibit 304.3 and now joint
3 exhibit 48 and I'm going to ask that you please confirm
4 that this is your repair estimate for One Belle Hall.

5 [Whereupon, the witness is shown document]

6 A. Yes ma'am that appears to be.

7 Q. And let's talk about why you're here today and what
8 you have been asked to provide in connection with that
9 estimate.

10 A. Well, I was asked to compare with just respect to
11 the windows and the basic surround how much that would
12 cost to provide that function and that estimate for that.

13 Q. And what have you determined that cost to be?

14 A. Basically if you are talking just the window and the
15 surround about 3.5 million dollars.

16 Q. And what does that figure exclude?

17 A. Well, let me go through that a little bit. It
18 excludes any structural damage directly behind that area.
19 In other words if you're thinking that windows and how
20 they are stacked what you would have to do is take that
21 perimeter off, pull that off down to the studs.

22 So I'm just pulling that out that's the 3.5 price.
23 If we had to fix all the way through that back to the
24 studs and do that structural repair because there is some
25 rot back there, then that would be the 5 million dollar

1 figure, 5 to 5.2 somewhere in there.

2 Q. So the 5 to 5.2 million dollar figure includes the
3 removal and replacement of the windows and repair
4 associated damage?

5 A. Yes, ma'am. That would be going all the way back
6 into the structure, rebuilding that structure, meeting
7 the studs, jacks, and head around that so you would be
8 rebuilding that.

9 Q. And how much would it cost to remove and replace the
10 windows and associated damage but subtracting the
11 surrounding platting right around those windows?

12 A. That's about 4.7.

13 Q. Million?

14 A. Yes ma'am, million.

15 Q. Would you please describe to the jury how you
16 reached the 3.5, 4.7 and 5 million dollar numbers using
17 that final estimate.

18 A. Well, all of the components were in the estimate so
19 they can just be pulled out. In other words I have a
20 line item for each thing so the window can come out, the
21 amount of hearty can come out, the sheathing; that's all
22 there as a line item.

23 The other items the general conditions and
24 scaffolding and all that are below and that's a function
25 of time; how long the scaffold will be there, how long

1 the staff will be there so that's just a monthly thing.

2 So you can just multiply that out and you can come real
3 close.

4 Q. How long will the work take at One Belle Hall for
5 the window fix?

6 A. Between 12 and 14 months.

7 Q. What, if any, determination have you made as to
8 whether the One Belle Hall homeowners will be able to
9 occupy their units during that 12 to 14 month period?

10 A. They would have to vacate.

11 Q. And how ready are you to perform this work?

12 A. I would love to work with the HOA and provide them a
13 good product, yes.

14 Q. And how capable are you to perform this work?

15 A. Well, I think we have a pretty good reputation. I
16 think you could ask the engineers in town and folks that
17 we work for and we do a good job and try to do a quality
18 job.

19 Q. What, if any, considerations have you made to lower
20 the price of this work?

21 A. I think that because we are competitive in the
22 industry that the prices that we compete everyday on the
23 street with I think are valued correctly. We have looked
24 at what Doctor Whitlock has set out to be proper. We're
25 using the current means and methods and up to date

1 products. We've tried to pull all that together and give
2 what I think would be a good price in the market so I
3 think that's a good value in the industry.

4 Q. And what is the cheapest amount you could do this
5 window replacement for?

6 A. Well I'll phrase it this way. The most valued
7 product that they would get for that, I don't like the
8 word cheap, is three and half million dollars and 4.7 and
9 the 5. I think those are good solid numbers and
10 competitive.

11 Q. And to clarify the 12 to 14 month time period is
12 just the amount of time it would take to do the window
13 repair, not the entire project?

14 A. Yes, ma'am. We're just focused on the window itself
15 and the immediate surround to tie that back in.

16 Q. And what, if any, warranty will you issue in
17 relation to your work?

18 A. We always make sure that the products that we bring
19 on board that they the people know about -- the
20 manufacturers know about the product, they know where
21 it's being used, and make sure the warranties are in good
22 standing at the end of the job.

23 That is all handed to the HOA. So where that
24 variety may change from a five to a ten year they get
25 that and they get it in a binder. And then we give them

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1 a two year labor warranty.

2 Q. Thank you Mr. Moore. No further questions.

3 THE COURT: All right. Cross-examination?

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1 CROSS-EXAMINATION

2 BY MS. DYER:

3 Q. Mr. Moore, Davi Dyer. You were provided with a
4 specific scope of repair to provide a price by Doctor
5 Rhett Whitlock correct?

6 A. Yes, ma'am.

7 Q. Okay. And you didn't develop any independent Gary
8 Moore opinions about what the cause of the damage to the
9 buildings has been correct?

10 A. No ma'am, mine was just the estimate.

11 Q. Just the price; that's what you're here to tell us
12 today right?

13 A. Yes, ma'am.

14 Q. Okay. And you didn't make any attempt to determine
15 if the window product itself as installed at One Belle
16 Hall the stuff that is out there the windows are bad did
17 you?

18 A. No, ma'am.

19 Q. And again you would defer to Doctor Whitlock I
20 presume?

21 A. Yes, ma'am.

22 Q. Okay. Your estimate that we are looking at in
23 exhibit 48, you have a copy up there, correct?

24 A. Yes, ma'am.

25 Q. And that is your final estimate for the job right?

1 A. Yes ma'am, that's correct.

2 Q. Exhibit 48 contemplates the repair of everything
3 Doctor Whitlock has opined is wrong with the four
4 buildings correct?

5 A. To the best of my knowledge yes, ma'am.

6 Q. Anything that you have been asked to price is
7 included in exhibit 48 is that fair?

8 A. Yes, ma'am.

9 Q. Okay. Did you do any work to revise or determine a
10 portion of the general conditions in your report that
11 would be attributable to the window product or just 100
12 percent of the line items going toward the window repair?

13 A. I think if I'm answering your question properly
14 everything comes -- the information that I gave them
15 comes right out of the estimate yes, ma'am.

16 Q. Okay. Let's do this. It might be the easiest way
17 for me to understand and maybe the jury. On exhibit 48
18 you were talking about the line items right, sir?

19 A. Yes, ma'am.

20 Q. And there is an individual line item for every
21 repair undertaking broken out?

22 A. Yes, ma'am.

23 Q. Okay. Can you go through and identify for us which
24 line items you included to come to your window
25 replacement numbers. And I understand sir that you have

1 provided a couple of different numbers; 3.5 and 5.2
2 million. Could you tell us what line items that is
3 associated with?

4 A. Yes, ma'am. Number one would be power washing.
5 Number two is sealants. Number three would be on staff.
6 Number four -- excuse me, let me make sure I'm going to
7 read out the right numbers here.

8 [Whereupon, the witness reviews document]

9 A. Excuse me, number seven which is termite water
10 damage. Number eight is hearty plank, number 11, which
11 is stucco. And then from there down you have to go 13
12 through 18, which is windows.

13 Q. And what else? Anything else?

14 A. When you get down to the bottom and I'm going to
15 read these numbers and I'm going to back up a little bit.
16 In other words basically 45 through 64 part of when you
17 have to go down to where it says subs that window price
18 is part of that price. You have to go down and pick up
19 part of the bond, you have to go down and pick up part of
20 the engineering fees.

21 Recapping going back from 45 through 64 some of
22 those line items where they are like HVAC have nothing to
23 do with this. Part of the general conditions,
24 mobilization, scaffolding demo; all of those would be
25 proportioned out to that price.

1 Q. So is it fair to say that if you're only going to
2 fix the window problem at One Belle Hall a percentage of
3 the applicable 45 through 64 line items should be
4 attributed to the window repair?

5 A. Well yes ma'am but some of those, not to drag this
6 on but some of them would actually come out like the HVAC
7 it would come out completely. It wouldn't be a
8 percentage so it's just directly associated with the
9 windows.

10 Q. Okay. So to be fair lines 45 through -- I just
11 want to make sure I'm on the same page -- lines 45
12 through 64 those line items that are applicable to the
13 window repair job you would reduce the applicable line
14 items to a certain percentage and attribute it to the
15 window repair job because as we see it here on exhibit 48
16 that contemplated repair of all of the problems with the
17 building?

18 A. Well and that percentage as you're saying has to do
19 with in other words the length of time and number of
20 months that you're on the job which is directly related,
21 yes ma'am.

22 Q. Okay. So what was the discount for 45 through 64
23 for the window repair?

24 A. I did it on that monthly -- that proportion, that
25 month I did it in that manner.

1 Q. Okay. So how many -- so if we're looking at 45
2 through 64 on exhibit 48 how much time was contemplated
3 for the entire repair?

4 A. Twelve to 14 months.

5 Q. So it's the same?

6 A. Yes, ma'am.

7 MS. LYNN: Objection. She is misstating the
8 witness.

9 THE COURT: Say again?

10 MS. LYNN: She's misstated the witness.

11 THE COURT: Overruled.

12 Q. [Ms. Dyer] The repair that you have contemplated for
13 just fixing the windows you said was between 12 and 14
14 months or no?

15 A. That's correct.

16 Q. And then just a second ago you said that the repair
17 for all the problems that Doctor Whitlock found on the
18 buildings was also expected to take 12 to how many
19 months?

20 A. I'd have to go back and look at that. I don't know.
21 Well actually it might be --

22 [Whereupon, the witness reviews document]

23 A. I missed what you were saying. I thought you were
24 just talking about the windows; I'm sorry. Thirty
25 months.

1 Q. Okay. So if the whole job if we're looking at
2 exhibit 48 as it is right now -- you have a copy and I
3 have a copy right?

4 A. Yes, ma'am.

5 Q. The numbers 45 through 64 contemplate a 30 month
6 job?

7 A. That's correct.

8 Q. And if we are pairing down exhibit 48 to only
9 include the window repairs then we would take roughly
10 half or less of 45 through 64 which would indicate a 12
11 to 14 month job?

12 A. Well it's not directly proportional in that manner
13 because like I said there are items in that that would
14 come out completely. So it's not a direct correlation to
15 the percentages.

16 Q. Okay. Do you know how much the window repair, how
17 much items 45 thorough 64, just the applicable ones sir,
18 how much is that amount?

19 A. I would have to go back and recalculate. I didn't
20 write that down. I'd just have to go back and re-do it.

21 Q. Okay. So we're just looking at exhibit 48 as we
22 sit in the courtroom today Mr. Moore can we really use
23 this and try to figure out how much the window repairs is
24 going to cost line by line?

25 A. You could, yes.

1 Q. And can we undertake that activity now or we would
2 need to look at your calculations for 45 through 64?
3 A. Well, we might be here for a while and I need a
4 calculator.
5 Q. All right. So as a result of your work doing that
6 reducing exhibit 48 down to just the window repair you
7 came up with the two numbers that you talked about; 3.5
8 million and 5.2 million right?
9 A. Yes, ma'am.
10 Q. Line item seven is entitled carpentry, termite,
11 water damage, framing is that right?
12 A. Yes, ma'am.
13 Q. And it's 437,628 -- I'm sorry, 437,628 dollars and
14 42 cents correct?
15 A. Yes, ma'am.
16 Q. Okay. Tell us what that is for, that line item.
17 A. That is water damage that would be associated with
18 the entire project that would have to be replaced with
19 new heads, jacks, studs, etcetera.
20 Q. Okay. Is it all attributable to a window or is it
21 like you said for the whole project?
22 A. That would be for the whole project.
23 Q. Okay. So would 100 percent of line item number 7
24 then go towards this window repair or just a portion of
25 it?

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1 A. I believe there's a portion of it that would go to
2 it.

3 Q. Can you tell the jury what percentage that is or how
4 much it was towards your numbers?

5 A. Not off the top of my head, no ma'am.

6 Q. Okay. Does anybody -- just sitting here today part
7 of this that we just looked at was for termite damage
8 repair correct, line item number seven?

9 A. That could have been yes.

10 Q. And does anybody know how much termite damage these
11 buildings have suffered until the outside skin comes off?

12 A. To the exact amount I'm not sure that anybody would.

13 Q. Could you turn to the page of your report sir that
14 talks about line item number seven?

15 [Whereupon, the witness complies]

16 Q. Just so the jury understands Mr. Moore the front is
17 kind of a cover summary where we say each line item and
18 how much it is and then we can find an associated detail
19 page behind that correct?

20 A. Yes, ma'am.

21 Q. That breaks it out in even more specifics. Are you
22 there, sir?

23 A. Yes.

24 Q. Okay. Now it appears that one line item says talks
25 about remove existing framing and then another one says

1 installed framing and then the quantity is 272. Do you
2 see where I'm getting that?

3 A. Yes.

4 Q. What are we talking about there, 272 what, sir?

5 A. That would most likely be 272 types of locations
6 that I would have identified to be removed and then to be
7 reframed.

8 Q. Okay. So those locations could be like around the
9 window for example?

10 A. They could be, yes.

11 Q. Could they be also just in a field of a wall or are
12 all these ---

13 A. --- they could be, yes.

14 Q. So it's not 272 window openings that you need to
15 repair according to line item seven?

16 A. I think this refers to direct areas that could be
17 below the windows, they could be above the windows, they
18 could be to the side; yes ma'am.

19 Q. So if the above, below or to the side of a window.
20 Would this 272 figure contemplate anything that is not
21 actually around the window?

22 A. I think it could, yes.

23 Q. Okay. Where did you get the number 272?

24 A. To the best of my knowledge I believe there was a
25 color coded drawing to lay out some of the areas where

1 this damage was if it was thought to be at a window or
2 balcony ledge, etcetera.
3 Q. Okay. So that 272 count might have been from a
4 document you were produced?
5 A. Correct.
6 Q. Okay. Not from Doctor Whitlock?
7 A. No, I believe that document was color coded from his
8 office that laid out some of those locations.
9 Q. Okay. Would you agree that if we look at the front
10 here you said line items 13 through 18 are related to the
11 window removal and replacement correct?
12 A. Correct.
13 Q. And does that also include repair of damage around
14 the windows?
15 A. It does some of the damage around the windows.
16 Q. Okay. And I referenced the line items 14, 16, and
17 18, sir. Those are related to interior repairs including
18 drywall, painting, and trim that will be necessary as a
19 result of removing and replacing windows correct?
20 A. That's correct.
21 Q. Okay. And that same interior work was contemplated
22 for repair of damage around those 272 areas that we
23 looked out in exhibit 7 correct?
24 A. Yes. We adjusted that.
25 Q. So there is no duplication in exhibit 48?

1 A. I believe we had adjusted that sometime back, yes.

2 Q. Okay. So the line items are exclusive of one
3 other?

4 A. To the best of my knowledge that's correct.

5 Q. Okay. You have identified that there are 30
6 windows set in brick which need to be reframed so the
7 wall and the windows can sit in plane with the wall is
8 that right?

9 A. That sounds correct, yes.

10 Q. Okay. So there are framing costs associated with
11 the windows set in brick that are unrelated to any damage
12 repair; it's just changing the design condition right?

13 A. Yes ma'am, that's correct.

14 Q. And are those set forth separated someplace here on
15 exhibit 48?

16 [Whereupon, the witness reviews document]

17 A. Looking quick I don't see where the brick is
18 distinguished a standalone price.

19 Q. Do you know if the cost to reframe the windows and
20 the brick to get rid of this recessed condition and make
21 the windows in plane with the wall is that part of the
22 figures you added up to get to the 3.5 or 5.2 million?

23 A. It would not be included in that 3.2 price, yes.

24 Q. So you did not include it?

25 A. I did not include it.

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1 Q. You're confident of that?
2 A. Yes.
3 Q. But we can't find it itemized on your exhibit 48 is
4 that right?
5 A. With a quick look I didn't specifically see it.
6 Q. Okay. The type A window is the most common window
7 in the project correct?
8 A. I would have to look that up but that...
9 Q. Well, I was wrong so you don't have to look it up.
10 How about type B window is the most common window in the
11 project? I'm looking at the front of your repair
12 estimate those line items 13 through 18 have a quantity
13 next to them correct?
14 A. They do. 207 seems to be the most -- type B.
15 Q. Type which? I just didn't hear you sir.
16 A. Type B.
17 Q. Okay. And are type B the twin windows or not?
18 A. I'd have to go back and check the size real quick.
19 Let's see.
20 [Whereupon, the witness reviews document]
21 A. Yes, that's correct.
22 Q. Okay. Your estimate, exhibit 48, I believe we've
23 done the math in the past as part of this litigation
24 process. Would you agree that your estimate indicates
25 that it is going to take two men, two laborers, 13 hours

1 to set one type A window?

2 A. If that's what the -- because I have calculated for
3 that and that's what that says yes ma'am.

4 Q. Does that ring a bell to you?

5 A. I'd have to divide it out. The total man hours just
6 for setting the windows is on this calculation, yes.

7 Q. And type A window we just talked about is not a twin
8 window. Type A window by default would be smaller than a
9 twin window correct?

10 A. It would be a single window.

11 Q. So would setting of a twin window, the type B take
12 longer than the type A to set; longer than 13 hours?

13 A. It would, yes.

14 Q. And so it's going to take 13 hours to set one window
15 and we've got 315 of them correct?

16 A. That's correct.

17 Q. It could take more than 13 hours per window
18 depending on the size of the window and how many guys it
19 takes?

20 A. You're talking about the total application is 13
21 hours. That would be the total; not just setting the
22 window.

23 Q. What does that include, 13 hours?

24 A. In taking it with totality of the estimate it's
25 unloading the truck, removing the old windows,

1 distributing the old windows -- distributing the new
2 windows, setting the perimeter, plumbing and anchoring
3 it, blocking is necessary to waterproofing, setting the
4 window is involved in that.

5 Q. So for the jury sir that doesn't do this every day
6 can you tell us kind of in lay person's terms what are
7 you doing with the window?

8 A. Well, it takes it from the truck backing up to the
9 site to actually putting it in and all the components
10 that are involved in that.

11 The going back the brick that you were talking about
12 is actually located on the 30 windows that are involved
13 there so the framing is figured in here; so I do have it
14 in here.

15 Q. So just to back up as you kind of pointed out there
16 your new window repair numbers 3.5 or 5.2 include the
17 redesign if you will of the windows and the brick.

18 A. I adjusted for that. We took those 30 out.

19 Q. Okay. So is it your testimony today that to
20 replace the windows, to take the windows out and put them
21 back in, not repair damage around the window if necessary
22 was 3.5 million is that right?

23 A. The 3.5 includes the surround, the immediate
24 surround. In other words you have to take out so much of
25 the perimeter and the expandable area that is between the

1 windows and integrate that waterproofing system to make
2 sure the plane is going to drain that water out correctly
3 and that the -- is still flashing and all that. So it's
4 just that is what we priced.

5 Q. Okay. And that would be 3.5 million covers 315
6 windows correct?

7 A. That's correct.

8 Q. So if we break that down and just do the math and
9 divide it out do you have an apparatus to do that with
10 you up there?

11 A. I do not. I shut my phone off so I need a
12 calculator.

13 Q. Sir, it's not fancy but I think it will do some
14 simple arithmetic.

15 A. Okay.

16 [Whereupon, the witness is supplied a calculator]

17 Q. Could you divide your estimate to just remove and
18 replace the windows the 3.5 million by 315 windows?

19 A. If I did that right that's 11,111 dollars.

20 Q. Eleven thousand 111 dollars per window and that
21 includes the cost of the new window correct?

22 A. That's correct.

23 Q. Okay. Let's look at the cost of the new windows
24 sir and if you could keep that calculator handy. The
25 cost can be found in your exhibit 48 under subcontractor

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1 summary is that right, sir?
2 A. That's correct.
3 Q. Could you turn to that page?
4 [Whereupon, the witness complies]
5 Q. Sir, does your copy have bates labels on the bottom?
6 A. They do.
7 Q. I'm looking at page 360 if that's helpful at all.
8 A. 360?
9 Q. Yes, sir.
10 A. Okay. This should have been right behind the
11 summary.
12 Q. You found it right?
13 A. Yes, I have.
14 Q. Sir, can you tell the jury how much the new windows,
15 315 new windows are on this page right?
16 A. That's correct.
17 Q. Just the product only. What's the material cost on
18 all the new windows?
19 A. 349,960.41.
20 Q. Okay. And that includes a couple of different
21 types or sizes of windows correct?
22 A. It does.
23 Q. So I guess the different sizes or types have
24 different prices. But would you perform an average for
25 us and tell us on average how much each window would be

1 just by dividing the total amount by 315?

2 A. It would be 1,100 -- well actually if you round it
3 off it would be 1,111 dollars.

4 Q. Okay. And just a moment ago you performed a
5 calculation for us but to get the window out of the truck
6 and get it in the hole essentially, set it properly that
7 whole operation including the cost of the window is
8 11,111 dollars, right?

9 A. 11,111 dollars.

10 Q. Okay. And of that 11,111 dollars a tenth or 1,111
11 is the price of the window itself right?

12 A. That's correct.

13 Q. So it cost 10,000 per window on average to get it
14 out of the truck and put it in the hole at One Belle Hall
15 correct?

16 A. Yes, simply said, yes.

17 Q. I understand there are lots of variables ---

18 A. --- yes ---

19 Q. --- but just so we're all on a level playing field
20 and can understand what is going to happen with the
21 repairs

22 And sir, the 5.2 million dollar figure that you
23 provided for us today that is putting a new window in and
24 doing what we just talked about as far as needing to
25 incorporate the window into the rest of the wall correct,

1 as part of the 5.2 million is that right?

2 A. That's part of it along with the structural framing
3 behind it.

4 Q. Okay. So the additional amount on top of the 3.5
5 please tell the jury what that was for to get us to 5.2?

6 A. Well that's the structural damage that I was talking
7 about to the rot or water damage that has to come out in
8 order to put that back safely.

9 Q. And are we certain that extra work needs to happen
10 at all 315 windows?

11 A. I think that would be determined as you are doing
12 the project, yes.

13 Q. So as you sit here today before we start taking the
14 building apart any more so than was done at destructive
15 testing we can't tell how much of that structural repair
16 needs to happen correct?

17 A. I think precisely, no.

18 Q. Okay. Now could you do one more calculation for us
19 please? Would you mind telling us per window how much it
20 is going to cost to make those structural repairs if it
21 needs to happen in fact? So that would be dividing the
22 5.2 million by 315 windows correct?

23 A. That would be 16,508 dollars.

24 Q. Okay. And of that again we still have to account
25 for 1,111 dollars as the cost of the material, the window

1 itself correct?

2 A. Well, that's included in this.

3 Q. Right. That's what I am saying.

4 A. Yes, it is included.

5 Q. So if we have to make these structural repairs
6 around all the windows it's going to cost 5.2 million
7 dollars right?

8 A. Correct.

9 Q. And we don't necessarily know that that has to
10 happen around all of the windows correct; sitting here
11 today?

12 A. I don't know that each one of them have the total
13 damage.

14 Q. Right. Do we know how many do have the total damage
15 that would require that kind of work?

16 A. Ask that again; I'm sorry.

17 Q. Sure. As we sit in the courtroom today sir do we
18 know -- we don't know if every window needs, all 315,
19 need the structural repairs that would cost 5.2 million
20 dollars right?

21 A. In other words to come up with that number I have to
22 go by what is recommended in the scope of work. And the
23 scope of work is to replace all of that and that's what
24 the number is priced on, yes.

25 Q. But we're not certain if the actual building

1 requires that work until we take the surfaces off right?

2 A. That would be determined by the amount of damage
3 that has been seen to project that thought through to say
4 yes it would be all of the windows. That's the method
5 I've used.

6 Q. Okay. So if all that work is necessary in fact
7 then per window out there we're talking about 16,500
8 dollars and some change to make repairs around the window
9 and put a new window in the hole, correct?

10 A. That's correct.

11 Q. And only 1,000 roughly of that is the price of the
12 window right?

13 A. That's correct, on average.

14 Q. I don't have any other questions. Thank you.

15 THE COURT: All right. Redirect?
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REDIRECT EXAMINATION

BY MS. LYNN:

Q. Very briefly, I want to talk about all that it takes to move a window from a truck and actually install it into a building. Are there lifts involved?

A. Yes, typically you're going to have a forklift or a lull or some type that you have to distribute all the material around.

Q. Is there scaffolding involved?

A. There is scaffolding in front of each one of the windows.

Q. Is there safety measures that you have to take?

A. Absolutely. That scaffolding has to be tied off and leveled and inspected, yes.

Q. Are there interior rooms that you have to protect?

A. The floor is protected with plywood, a fan board that has to be put down and then you're putting plastic around that. A zip wall has to be put in either from wall to wall or right in front of that window so you are protecting as much of that.

At times depending on how we are working we may even roll back the carpet so we're now just down on your subflooring so we don't damage anything and we have to roll that back. Well, the next step of that would be what we have to do is we come in and repair that drywall

1 and then we have to paint that wall, which is in all that
2 price you're going to paint it from corner to corner
3 doing the window in that area. So you're taking off all
4 the trim which you lose, you lose the stool; you've got
5 to replace all that.

6 Once you build all that framing back then you have
7 to integrate because you're coming out about nine to
8 fourteen inches basically around that. You've got to
9 integrate that and hopefully that waterproofing system is
10 there into the liquid membrane that we're putting around
11 it and the flashings, integrate the stainless steel
12 flashing into it, set that window and put all that trim
13 back, the hearty, the stucco; all of the finishes that
14 have to be integrated.

15 And you have to think about what you're looking at
16 particularly if you're in a stucco home you can't
17 integrate that stucco back into the existing. There is a
18 technique where you feather that back but there is always
19 a mismatch there you might say. So it has to be coated
20 or painted or a band has to be put around it in order to
21 stop that image of where your work is.

22 So you are adding all of that product that has to be
23 calked along with that obviously. And then all of that
24 you're putting a liquid membrane around the opening, you
25 set your window in, you have to put another liquid

1 membrane around that and then you integrate your
2 flashing. At that point you've got to take down all of
3 your zip walls, clean up the unit and make sure
4 everything is perfect for the tenant to come back, remove
5 all your scaffolding.

6 You've got landscaping that you just tore up and
7 you're going to have to replace. You've got curbs that
8 you're going to have to replace. Typically you just
9 can't get around that.

10 You're going to bring a lull on top of something and
11 you're going to crush a curb. You're going to buy some
12 bushes and trees but that's kind of part of it.

13 Q. And your experience based on 20 odd years in
14 experience in restorative work how much is all that work
15 going to cost in connection with repairing and replacing
16 One Belle Hall windows?

17 A. Well if you do the total package that's going to be
18 5.2 million dollars. And believe me I've replaced plenty
19 of landscaping and paint, so yes.

20 Q. And have all of your original worksheets from the
21 original preparation of that final estimate approximately
22 two years ago been previously provided in the production
23 to all parties including BFS?

24 A. Yes ma'am, I think so.

25 Q. Thank you, Gary.

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1 A. Yes, ma'am.
2 THE COURT: Recross?
3 MS. DYER: No, Your Honor.
4 THE COURT: Very well. You may come down.
5 [Whereupon, the witness is excused and exits the
6 witness stand]
7 THE COURT: Call your next witness please.
8 [Whereupon, the witness comes forward]
9 [Whereupon, the witness is duly sworn by the Clerk
10 of Court]
11 MS. DYER: Excuse me, Your Honor. We have a matter
12 we would like to discuss.
13 THE COURT: Sure. Come on up.
14 [Whereupon, an off the record bench conference is
15 held]
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1 THE COURT: I've got a settlement that I need to
2 approve real quick.

3 [Whereupon, court is in recess from 1:57 p.m. until
4 2:16 p.m.]

5 THE COURT: Okay. So you researched?

6 MS. DYER: Yes, Your Honor.

7 THE COURT: Tell me.

8 MS. DYER: We would just like to put on the record
9 that we would object to plaintiff's using Mr. VanDommelen
10 who was previously named as an expert by my client
11 Builders First Source as a witness in the case.

12 THE COURT: Got it. Very well. It's on the
13 record. You will be able to proceed.

14 MR. LUCEY: Thank you, Your Honor.

15 THE COURT: Very well. Let's have the jury.

16 [Whereupon, Mr. VanDommelen takes the witness stand]

17 [Whereupon, the jury enters at 2:18 p.m.]
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1 THE COURT: Very well. If you will please stand
2 and we can swear you in as our next witness please sir.

3 [Whereupon, the witness is duly sworn by the Clerk
4 of Court]

5 CLERK OF COURT: For the record if you could state
6 your first and last name and spell out your last name
7 please.

8 THE WITNESS: David VanDommelen, V-A-N-D-O-M-M-E-L-
9 E-N.

10 THE COURT: Your witness.

11 MR. LUCEY: Thank you, ma'am.

12 - - - - -

13 DAVID VANDOMMELEN,

14 Having been first duly sworn,

15 Was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LUCEY:

18 Q. Good afternoon, sir. You are a licensed architect
19 in the state of South Carolina correct?

20 A. That's correct.

21 Q. And tell us where you got your degree?

22 A. I received my Masters Degree of Architecture with a
23 focus on structural engineering at the University of
24 Illinois in Urbana Champaign.

25 Q. What year would that have been?

- 1 A. I graduated with my Masters in 2009.
- 2 Q. And tell us where and when you got your Bachelors
3 and what it was?
- 4 A. My bachelor's degree was a Bachelor of Science in
5 Architectural Studies in 2007 at the University of
6 Illinois at Urbana Champaign.
- 7 Q. And you are licensed in the state of South Carolina
8 correct?
- 9 A. Correct.
- 10 Q. A licensed architect?
- 11 A. Yes, sir.
- 12 Q. And your employer or your firm is Fuller
13 Engineering?
- 14 A. Its Fuller Group Incorporated, formerly known as
15 Fuller Consulting Engineers.
- 16 Q. Name change because they've got an architect now
17 right?
- 18 A. Changes due to some of the services and changes in
19 additional staff that we have, yes.
- 20 Q. And Builders First Source hired your firm Fuller
21 Group to perform an investigation in this matter correct?
- 22 A. Yes, we were hired on their behalf.
- 23 Q. And you were hired to present expert testimony on
24 their behalf if so asked correct?
- 25 A. That's correct.

- 1 Q. And your firm did perform an investigation in this
2 matter correct?
- 3 A. Yes, sir.
- 4 Q. That would have been I'm thinking back in the 2014
5 timeframe?
- 6 A. I believe we began in May 2014 around that time,
7 yes.
- 8 Q. And you would have finished sometime in 2015?
- 9 A. Around that time, yes.
- 10 Q. And your firm actually issued a written report
11 documenting what you all had done and what your findings
12 were right?
- 13 A. That's correct, yes.
- 14 Q. So that anybody else could see what you had done and
15 what your findings were correct?
- 16 A. Correct.
- 17 Q. Because that's how it's done in this type of
18 business with architecture and engineering you do it that
19 way right?
- 20 A. That's typical to provide a report of what your
21 findings are.
- 22 Q. So that others can replicate your work and determine
23 for themselves whether it's correct?
- 24 A. That's correct.
- 25 Q. And your firm did that in this case?

- 1 A. Yes, sir.
- 2 Q. And first Lucas Young was involved in the case and
3 then you were correct?
- 4 A. Yes, sir.
- 5 Q. And eventually it was you that was presented for
6 deposition in this case?
- 7 A. That's correct.
- 8 Q. To testify on behalf of Fuller Engineering, right
- 9 A. That's correct.
- 10 Q. I'm sorry; Fuller Group?
- 11 A. Fuller Group, yes.
- 12 Q. Fuller Group on behalf of Builders First Source
13 correct?
- 14 A. Yes, sir.
- 15 Q. And in so doing not only did you do your own work
16 but you reviewed the plaintiff's work correct?
- 17 A. That's correct. I reviewed portions of his work,
18 yes.
- 19 Q. And specifically because you were only interested in
20 the windows right?
- 21 A. That's correct.
- 22 Q. And specifically you reviewed water test reports
23 correct?
- 24 A. Yes, we did review that.
- 25 Q. And you're familiar with ASTM E-2128?

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- 1 A. Yes.
- 2 Q. E-1105?
- 3 A. Correct.
- 4 Q. AAMA 511?
- 5 A. 511 is our forensic standard, yes.
- 6 Q. And as a result of your review of the technical
- 7 information that is available relating to these windows
- 8 and the tests they performed you don't dispute that the
- 9 windows leak do you?
- 10 A. I wasn't present for the water testing so I can only
- 11 reference what Doctor Whitlock reported in the report and
- 12 he did report that during the water testing the windows
- 13 did leak. And I have no reason to believe that he would
- 14 falsely report that or lie about that information.
- 15 Q. And you don't dispute the windows leak do you?
- 16 A. Based on the information that I had in his report
- 17 the windows did leak during his water testing.
- 18 Q. And in fact you believe that given the age of the
- 19 windows at the time of testing approximately five years
- 20 old they should not have failed at zero pressure in the
- 21 E-1105 test correct?
- 22 A. I believe I testified that it is abnormal for that
- 23 to occur. I have seen it happen due to failed gaskets or
- 24 installation instructions but typically a well installed
- 25 performing window at five years old shouldn't leak at

1 zero pressure.

2 Q. Using your words it was abnormal for those windows
3 to fail at zero pressure at that age correct?

4 A. That's correct.

5 Q. And you further believe that the leaks at the vinyl
6 to vinyl joints in the window frame where the sill insert
7 fits it you believe that the leaks related to sealant or
8 whatever at that location is a joiner issue, a
9 manufacturing issue not a homeowner issue correct?

10 A. That's correct.

11 Q. And you further believe you further reached the
12 conclusion that the windows that were supplied to One
13 Belle Hall were not the windows specified by the
14 architect for the project correct?

15 A. The windows specified by the architect and the
16 project manual in the specifications was a 2041 integral
17 fin window; that's what was specified. And the document
18 I reviewed was a Trammell Crow Residential invoice or
19 order for a 2031 window.

20 Q. So the short answer is I'm correct that the windows
21 supplied are not the ones specced, correct?

22 A. 2041 was specified and 2031 was what was ultimately
23 supplied.

24 Q. And just so we're clear while you were doing this
25 work you were being paid on behalf of Builders First

1 Source to investigate these issues, correct?

2 A. That's correct.

3 Q. And you were applying your architectural background
4 and your experience and your Masters and your Bachelors
5 and everything else you could correct?

6 A. Yes, sir.

7 Q. And you on behalf of Builders First Source didn't do
8 any water testing correct?

9 A. No, we did not.

10 Q. And that's because you all were not interested in
11 seeing if the windows leaked correct?

12 A. We were not asked to perform any water testing.

13 Q. Sir, you gave a deposition in this matter correct?

14 A. Yes, sir.

15 Q. Do you deny telling me under oath that you and
16 Builders First Source were not interested in seeing if
17 the windows leaked?

18 A. If that's what my testimony is then I would agree
19 with that, yes.

20 Q. You do not deny that?

21 A. I do not deny that, no.

22 Q. And you're further of the opinion as I understand it
23 that a construction product reseller should review the
24 product information before reselling product correct?

25 A. In construction there is certain ways that things

1 are done specifically with suppliers. Sometimes an
2 architect will come to someone and say I'm looking for
3 the performance of a product. Do you have one that does
4 that? Other times this is a product that I would like to
5 use. Do you have that product? Can I have that
6 information? Do you have information on that?

7 Other times they may say I have this building at a
8 certain location do you have a product that would meet
9 the requirements for that?

10 Q. Sir, do you deny telling me under oath previously
11 that a construction product reseller such as your client,
12 Builders First Source, should review the product
13 information before selling products?

14 A. I would agree with that. Yes, I did say that.

15 Q. And you further agreed with me that you had not been
16 provided with any evidence whatsoever that that occurred
17 in this case correct?

18 A. I'm not aware of what Builders First Source did or
19 did not review with regards to the windows for this case.

20 Q. And as part of our -- your investigation and our
21 discussion during your deposition we reviewed the test
22 report on this project correct?

23 A. That's correct. I believe we reviewed two different
24 test reports; one by NCTL and one by CTL.

25 Q. One of those is referenced by the label and the

1 color on the label that relate to these specific windows
2 correct?

3 A. That's correct; the NCTL test report is referenced
4 by the certification label.

5 Q. And we're going to put on the screen for you what is
6 in evidence as joint 12. And that is the copy of the
7 report behind you correct?

8 [Whereupon, the witness is shown exhibit]

9 A. Yes, sir.

10 Q. And you'd agreed with me and you do agree with me
11 that that report applies to a window where both sashes
12 are interior glazed correct?

13 A. In the test report the description I believe says --

14 Q. In the paragraph called glazing?

15 A. Under glazing it describes all sashes were interior
16 glazed.

17 Q. And you agree that if in fact the bottom sash in the
18 windows, all the windows at One Belle Hall in fact is
19 exterior glazed that test report applies to a different
20 product correct?

21 A. I can't confirm if it was applied to a different
22 product but it does describe the test specimen as being
23 interior glazed.

24 Q. And so if the One Belle Hall products are exterior
25 glazed they're not covered by that test report, correct?

1 A. It would not match the description of the test
2 report as being interior glazed ---

3 Q. --- certainly a national construction product
4 reseller such as Builders First Source who actually
5 manufactures some of the windows they sell would know the
6 difference between an exterior glazed sash and an
7 interior glazed sash, correct?

8 A. I'm not sure of their level of expertise. Some
9 suppliers that I have worked with may not have that level
10 of expertise to understand the difference between
11 interior glaze and exterior glaze. And it may depend if
12 they have seen the window products themselves.

13 Q. Sir, you and I further previously discussed the
14 different sealants that were used in the different
15 specimens in those tests correct?

16 A. That's correct.

17 Q. And you agree that the Sika sealant was used on the
18 impact product and the GE 2800 was used on the structural
19 test; the air and water structural test?

20 A. That's correct.

21 Q. And those two sealants have different properties
22 correct?

23 A. Yes, they have different properties.

24 Q. They are often specified for different purposes for
25 different reasons because of those different properties

1 correct?

2 A. Yes, that's common for sealants to be specified
3 depending upon their performance.

4 Q. The Sika sealant has a tensile strength of almost
5 double of the GE 2800 correct?

6 A. That's correct. I believe the Sika had over a
7 potential strength of over 400 while the 2800 was in the
8 200 to 230 range.

9 Q. And that's why the Sika was used in the impact test
10 because it's stronger, it doesn't move; it's solid,
11 correct?

12 A. Tensile strength means it has a higher hold or bond
13 capacity.

14 Q. As opposed to the 2800 which has what is called
15 greater elongation, correct?

16 A. That's correct which means more flexibility not as
17 stiff or rigid.

18 Q. And the structural test in the AAMA 101 air water
19 structural bends the window if there is enough force
20 during the structural test correct?

21 A. The structural test does, yes sir.

22 Q. That's a slower sort of bending where elongation
23 might come into play correct?

24 A. Yes, that's a possibility.

25 Q. As opposed to the impact which is an instantaneous

1 boom and it's over correct?

2 A. Yes, the impact test of an object such as a two by
3 four is shot at the window so it is an actual impact, not
4 a slow elongation or a movement of the frame.

5 Q. And sir you further agreed with me that at the One
6 Belle Hall windows that the horizontal joint below the
7 sill insert between the sill insert and the frame, that
8 horizontal joint that is often covered up by the stool or
9 by interior sealant trying to join the stool to the
10 window frame correct?

11 A. Yes. It's common that that horizontal joint the way
12 that it sits in the window frame or the profile the stool
13 of the window or the wood stool can cover that up.

14 Q. And in such a case the homeowner may not see the
15 water intrusion that is actually occurring into and under
16 the stool until the water does enough damage in the wall
17 to manifest itself through the drywall or result for
18 instance in a termite infestation which comes in,
19 correct?

20 A. Yes, depending on the location of the stool and the
21 horizontal joint I've seen it before a leakage at the
22 horizontal joint has caused the stool to swell at other
23 times. But yes, the actual joint would be concealed by
24 the joint itself.

25 Q. Okay. And just so we're clear you've never been

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1 discharged by Builders First Source in this matter have
2 you?

3 A. No, sir.

4 Q. And when was the first time you learned they were
5 going to call a gentleman named Mr. Drake instead of you?

6 A. Approximately one month ago.

7 Q. One month ago ---

8 A. --- or a few weeks ago.

9 Q. But they did have you be available in case they
10 needed you?

11 A. Yes, sir.

12 Q. But you're here today because I subpoenaed you
13 correct?

14 A. That's correct.

15 Q. Thank you, sir.

16 THE COURT: Cross-examination.

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CROSS-EXAMINATION

BY MS. DYER:

Q. Mr. VanDommelen you were retained by my firm on behalf of Builders First Source to analyze the data and the report by Doctor Whitlock and his firm as it relates to the window testing and his opinions right?

A. That's correct.

Q. Okay. You never witnessed the testing?

A. No, ma'am.

Q. You didn't perform your own testing?

A. No, ma'am.

Q. You didn't get a chance to go inside any of the units?

A. No, ma'am.

Q. Did you have an opportunity to actually observe the wood trim and the drywall damage with your own eyes?

A. No. The only observations I performed was through the photographs and Doctor Whitlock's report. I was never on site.

Q. So you had to rely solely on documentation of what was done by Doctor Whitlock and his firm correct?

A. That's correct.

Q. Okay. And you have no reason as we sit here today to think that Doctor Whitlock would falsify or misrepresent his findings correct?

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1 A. No, ma'am.

2 Q. Okay. So when he reports that when he tested
3 windows at One Belle Hall that he was able to produce a
4 leak you've taken him at his word, fair?

5 A. Yes.

6 Q. What type of windows did the architect specify for
7 the project?

8 A. It was 2041 series integral fin windows vinyl single
9 hung windows.

10 Q. I'm sorry I'm having a little trouble hearing you.

11 A. Oh, I'm sorry.

12 Q. And I can show you the specification if you'd like
13 to look at it.

14 A. What I believe is a 2041 integral fin vinyl single
15 hung window.

16 Q. A vinyl single -- I'm sorry.

17 A. Vinyl single hung window.

18 Q. And you said integral fin?

19 A. Yes, ma'am.

20 Q. Okay. What does the window series number indicate,
21 the 2031 versus the 2041?

22 A. I'm not entirely sure what the difference is between
23 the two. Looking at one of the test reports by CTL lab
24 they clarified or defined the specimen as the 2031 as a
25 fin window and the 2041 as a flange window.

1 Q. And in this case the specification from the
2 architect although it calls out a number but it did also
3 specify a fin window product right?

4 A. That's correct.

5 Q. Is it your understanding that the window product
6 installed from One Belle Hall according to your review of
7 documents is a fin window product?

8 A. Yes, it is. The certification label on there said
9 it was a 2031 slash 2041 window. And reviewing the
10 photographs it was in fact a fin window.

11 Q. Is a fin window the most appropriate window when
12 we're talking about a wood frame construction project?

13 A. I wouldn't clarify it as the most appropriate but it
14 is an appropriate window to be used in wood frame
15 construction.

16 Q. Okay. And have you reviewed any evidence to
17 suggest that Builders First Source was involved in the
18 selection of this window product?

19 A. I have not reviewed or have any evidence of that.

20 Q. Do you know or do you understand that Doctor
21 Whitlock has opined that the windows were not certified
22 properly?

23 A. I agree, yes.

24 Q. The certification tests, and I'm happy to hand them
25 to you if you'd like to look at them, but we've marked

1 the NCTL laboratory test as exhibit 12 and the CAR or
2 Certification Authorization Reports from Keystone as
3 exhibit 13. Looking at those two documents they indicate
4 that the ESP 2031 slash 2041 window was in fact DP 50
5 certified, correct?

6 A. That's correct. The certificates from Keystone
7 provided that.

8 Q. And is there also a certificate that indicates from
9 Keystone confirming the NCTL test report that these
10 windows were tested and certified as impact treated
11 windows?

12 A. That's correct. And the impact certification sheet
13 referenced the other certification sheet for the
14 structural qualifications.

15 Q. So the window model numbers set aside 2031 and 2041
16 are both on the test report, correct?

17 A. That's correct.

18 Q. And the 2031 and 2041 are both on the Keystone
19 Certification Authentication reports or authorization
20 reports?

21 A. That's correct.

22 Q. Okay. And the architect called out a 2041 right?

23 A. Yes.

24 Q. And the window that was ordered and installed I
25 understand to be a 2031 right?

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- 1 A. That's correct.
- 2 Q. But the architect also asked for a fin window?
- 3 A. Yes, that's in the specifications.
- 4 Q. And a fin window is installed?
- 5 A. Yes.
- 6 Q. And the architect asked for a DP-50 window?
- 7 A. That's correct.
- 8 Q. Do you agree that a DP-50 window as represented by
- 9 certification documents was provided?
- 10 A. Yes, it says a DP-50 window was certified.
- 11 Q. And what about impact rated? Are the windows at One
- 12 Belle Hall according to the certification process impact
- 13 rated windows?
- 14 A. Yes, it says it's an impact rated window.
- 15 Q. Let's talk about the sealant beads. The test
- 16 reports indicate that there is a different sealant used
- 17 as a glazing bead in the two different tests that were
- 18 performed on these windows. Can you tell the jury what a
- 19 glazing bead is?
- 20 A. A glazing bead is an actual sealant bead that the
- 21 glass is used that is put around the perimeter of glass
- 22 and that is affixed to the frame so that's what holds the
- 23 glass to the window frame itself.
- 24 Q. And you just testified for Mr. Lucey that the GE
- 25 2800 was a less strong; there is probably a better way to

1 put that, sealant than the Sika 552 which was used in the
2 impact test correct?

3 A. That's correct. The 2800 has a less tensile
4 strength, almost 50 percent less.

5 Q. Have you done any research to inform you whether or
6 not it is acceptable in the industry to use two different
7 sealants on the two different tests?

8 A. I did some research and my experience with AAMA who
9 is also a window certifier and got some information on
10 that that is commonly substituted.

11 The sealants are substituted between the impact and
12 structural so that the impact sealant can be different
13 than the structural as long as the structural sealant is
14 weaker than the impact sealant.

15 Q. So if it had been reversed, if the stronger Sika 552
16 sealant had been used in the structural test window
17 specimen and the weaker GE 2800 had been used in the
18 impact test specimen that would not be okay correct?

19 A. That's correct.

20 Q. But the way that it was reported on the
21 certification documents is it your understanding that
22 that is acceptable in the window industry?

23 A. Yes, ma'am.

24 Q. Have you seen any documentation Mr. VanDommelen to
25 suggest that anyone other than Doctor Whitlock has

1 challenged certification of these ESP windows?
2 A. No, I have not.
3 Q. Have you seen any evidence that the certification of
4 the windows was retracted or revoked by Keystone?
5 A. No, I haven't seen any evidence of that.
6 Q. And how about AAMA? Is there any evidence that the
7 windows were decertified so to speak by AAMA?
8 A. No, ma'am.
9 Q. Based on everything that you have reviewed in this
10 matter would you agree that the windows ordered for One
11 Belle Hall were DP-50 and impact rated?
12 A. Yes, that's what is provided on the certification
13 label on the actual windows at the site.
14 Q. And is that to a reasonable degree of certainty in
15 architecture?
16 A. Yes, ma'am.
17 Q. Does your firm Fuller Group engage in water testing
18 of windows?
19 A. Yes, we do.
20 Q. Have you been involved in water testing of windows?
21 A. Yes, I have.
22 Q. How about the ASTM E-1105 test that Doctor Whitlock
23 performed have you performed those tests?
24 A. Yes, that is a very common test for windows for both
25 quality control for new construction as well as forensic

1 diagnostics for existing construction.

2 Q. And the intent of doing a water test on a window
3 that has been in the field longer than six months is
4 what?

5 A. The intent for the diagnostic water testing is to
6 recreate leaks that are known to occur, to recreate the
7 environment during which the leaks were reported.

8 Q. And in order to determine with a degree of certainty
9 whether or not a window product is leaking as opposed to
10 the entire wall assembly, the window and everything
11 around it, what would you do in an E-1105 test?

12 A. For an E-1105 test I like to isolate first the
13 window unit itself by terms of masking which is a plastic
14 sheet that is applied around the window frame to isolate
15 it from the surrounding construction such that only the
16 window unit itself is being tested.

17 That can be performed and that is commonly done to
18 determine what leaks are happening from the window unit
19 itself. Following that test the masking is pulled off
20 and the window unit and the surrounding construction is
21 tested.

22 On the AAMA 511 forensic protocol provides
23 commentary on that that this is one method of isolating
24 the window unit to determine what leaks are occurring
25 just from the window unit itself. It does provide up to

1 the discretion of the observer whether or not he can
2 determine if he feels like masking is required to discern
3 between the surrounding construction of the window unit.

4 But when I performed the testing we preferred to put
5 the masking up just so that it certain in our minds that
6 it is specifically from one element versus another.

7 Q. And if you don't mask the window before you do the
8 spray rack testing and you cut out the drywall underneath
9 the window on the interior of the unit and then perform
10 your spray rack testing without masking the window can
11 you be reasonably certain that the leaks that you're
12 seeing are only from the window?

13 A. It really depends on the condition of the
14 surrounding construction and existing construction.
15 Sometimes that can be performed if the window is lifted
16 on the shims that provide a good view of the underside of
17 the window versus the rough framing under the window.

18 Other times if the window is tight to the frame it
19 can be difficult to discern. It really depends on a case
20 by case basis.

21 Q. So from a forensic analysis perspective the best way
22 to be certain about whether or not water is coming
23 through the window itself as opposed to the surrounding
24 construction components would be to mask everything but
25 the window before you water test it?

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1 A. Yes. We prefer to mask the window unit itself.

2 Q. Doctor Whitlock performed some air infiltration
3 testing. Did you review his test methodology?

4 A. Yes, I did review that.

5 Q. Did you review his results?

6 A. I did, yes.

7 Q. Would you agree with me that the windows at One
8 Belle Hall are not required to meet any standard with
9 regard to air infiltration?

10 A. The standards I am aware of are AAMA 502 and AAMA
11 503 testing protocols for infiltration and that's for
12 newly installed which they define within six months of
13 installation or occupancy of the building. After that
14 I'm not aware of any forensic air infiltration testing
15 standards.

16 Q. And setting that aside, do you recall if Doctor
17 Whitlock was able to find windows that both passed and
18 failed this air infiltration test?

19 A. That's correct. When I reviewed his information
20 there was three windows that he tested at a confluent 25
21 miles per hour load on the windows.

22 And there was two windows that passed below the
23 threshold requirement of point four five and there was
24 one window that was deemed a fail at point four seven; so
25 point zero two over the allotment.

1 Q. But even still the windows aren't obligated due to
2 age to have any air infiltration standard?

3 A. Correct. I'm not aware of any air infiltration
4 standard at that age.

5 Q. You testified a few moments ago about whether or not
6 a building materials supplier should do any investigation
7 into the product that they are selling to a homebuilder
8 correct?

9 A. Yes.

10 Q. And do you know whether or not Trammell Crow
11 Residential requested any kind of assistance with the
12 selection of the product?

13 A. I'm not aware of what they did.

14 Q. And you've seen that well in advance of the purchase
15 order between Builders First Source and Trammell Crow for
16 these windows the architect Cline Design in fact selected
17 the window correct?

18 A. Yes, within the project manual specifications.

19 Q. Thank you Mr. VanDommelen.

20 THE COURT: Redirect?

21 MR. LUCEY: Yes, ma'am.

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REDIRECT EXAMINATION

BY MR. LUCEY:

Q. Sir AAMA 511, I'm using the 2008 version specifically provides, expressly provides and I'm happy to show it to you an exception for masking windows if the investigator can see the leak path from the window from the inside correct?

A. That's correct. That's why I described AAMA leaves it up to the discretion of the test observer whether he feels he can discern between the two.

Q. And you're aware that Doctor Whitlock cut the dry wall out inside and took the stool out so he could look right there at that joint himself to see whether the water was coming out of the joint correct?

A. Yes. His photographs show that he removed the interior benches around the windows.

Q. And you do believe that's a very reliable engineering and architectural observation when an engineer and architect sits right there and watches the water come out of the crack correct?

A. Yes. Typically when we are doing that with the interior finishes removed as you're describing you can see underside sill of the windows. Sometimes there is a larger gap than not but you can -- if there is a large gap or a gap provided you can see if a water droplet

1 comes from the underside of the window or a different
2 location.

3 Q. And if the jury themselves in their own eyes saw on
4 the screen yesterday a video of the water coming out of
5 the joint they can rely that they actually saw what they
6 saw; that it was water coming out of a joint because the
7 stool had been removed and they could see the joint
8 correct?

9 A. Yes, if the water droplet was coming from the window
10 frame yes, sir.

11 Q. And you said that you hadn't been on site but you
12 actually performed a joint investigation with your
13 partner Lucas Young correct?

14 A. I was not on site but Lucas was on site.

15 Q. You all both signed and sealed your report correct?

16 A. That's correct.

17 Q. And it has site photographs in it doesn't it?

18 A. Yes sir, it does.

19 Q. Your partner went on site and made observations of
20 the windows correct?

21 A. I wouldn't say he made observations of the windows.
22 I believe he went on site to become generally familiar
23 with the windows and I think he did a window count as
24 well.

25 Q. And then you all issued a joint report correct?

1 A. That's correct.
2 Q. And you talked to him before you gave your
3 deposition correct?
4 A. That's correct.
5 Q. So you had enough of a basis to provide your window
6 opinions correct?
7 A. Yes, sir.
8 Q. Do you recall previously telling me under oath that
9 you no longer believed that you could just substitute
10 sealants in a certification test?
11 A. To just substitute sealants?
12 Q. Yes, sir.
13 A. I don't specifically remember that.
14 Q. Would it refresh your memory to look at your
15 deposition?
16 A. Sure.
17 MR. LUCEY: May I, Your Honor?
18 THE COURT: Yes. We'll mark it for I.D. purposes.
19 [Whereupon, joint exhibit number 168 is marked by
20 the court reporter]
21 [Whereupon, the witness is shown exhibit]
22 Q. [Mr. Lucey] Would you go to page 103 please?
23 [Whereupon, the witness complies]
24 Q. And you and I were discussing the AAMA approved
25 product guide, correct?

- 1 A. The verified components list?
- 2 Q. Yes, sir.
- 3 A. Yes, sir.
- 4 Q. And you have previously testified in this deposition
5 that if a sealant is in that guide you can substitute it
6 correct?
- 7 A. That's correct.
- 8 Q. And you relied on this guide AAMA exhibit 544 the
9 AAMA component guide?
- 10 A. Yes, sir.
- 11 Q. And we reviewed it together correct?
- 12 A. Yes, sir.
- 13 Q. And you agreed with me at page 103 that AAMA does
14 not certify components correct?
- 15 A. I agree with that yes.
- 16 Q. It only certifies that the manufacturer stated it
17 has been represented regarding that component is reliable
18 correct?
- 19 A. Right. The list produced by AAMA is more of a --
20 not a certification but a list saying that this
21 information provided by the manufacturer has been tested
22 by a third party lab and it states that this information
23 is accurate as provided or stated by the manufacturer.
- 24 Q. And at page 103 line 16 I asked you nowhere in here
25 does it say and you may freely substitute these products

1 without retesting your product does it?

2 A. It does not.

3 Q. And you responded it does not say that on this
4 product, no. And I further asked you, you have been
5 unable to identify for us the written document where you
6 have allegedly read that before and you answered that's
7 correct.

8 A. That's correct.

9 Q. And sir, are you aware that Charleston and Mount
10 Pleasant included is expecting a hurricane on Friday?

11 A. I'm not aware of that. I've been following the
12 weather and know that a tropical storm is forming. I did
13 not know it was expected to turn into a hurricane.

14 Q. And based upon what we have seen in this case if we
15 do get that hurricane on Friday we know what's going to
16 happen at One Belle Hall don't we?

17 A. We don't know specifically but it may get hit with
18 some heavy weather yes sir.

19 Q. And it will probably leak correct?

20 A. There is a potential for that. There is a heavy
21 storm with heavy winds ---

22 THE COURT: --- we have an objection? Hold on.

23 MR. LUCEY: That's all I have, Your Honor. Thank
24 you.

25 THE COURT: Recross?

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1 MS. DYER: No, Your Honor.

2 THE COURT: All right. You may come down.

3 [Whereupon, the witness is excused and exits the
4 witness stand]

5 THE COURT: Is this witness free to leave, counsel?

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

7 THE COURT: Any objection? You are free to go sir.
8 Call your next witness please.

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1 [Whereupon, the deposition of Richard Woodward is
2 read into the record] [Not taken down]

3 MS. LYNN: Your Honor?

4 THE COURT: Yes?

5 MS. LYNN: Plaintiffs would like to move BFS web
6 pages which are trial exhibits 65 and 66 which were just
7 authenticated by Mr. Woodward into evidence.

8 THE COURT: Any objection?

9 MS. DYER: No objection, Your Honor.

10 THE COURT: Very well. So entered.

11 [Whereupon, joint exhibit numbers 65 and 66 are
12 entered into evidence by the court]

13 THE COURT: Let's take a break. We're going to
14 take our afternoon break. We'll take 15 minutes. Please
15 do not discuss this matter or allow anyone to discuss it
16 with you. Leave your notepads in your seat.

17 [Whereupon, the jury exits at 3:33 p.m.]

18 THE COURT: Y'all be at ease. We'll take our break
19 as well. Thank you so much.

20 [Whereupon, court is in recess from 3:33 p.m. until
21 3:54 p.m.]

22 THE COURT: Thank you so much. Please be seated.

23 All right. Anything before I bring the jury out?

24 MR. LUCEY: No, Your Honor.

25 THE COURT: No? No? Let's have the jury.

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1 [Whereupon, the jury enters at 3:55 p.m.]
2 THE COURT: Yes?
3 MR. LUCEY: The plaintiff calls Robert Lanier.
4 THE COURT: Very well.
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1 [Whereupon, Mr. Lanier comes forward]

2 [Whereupon, the witness is duly sworn by the Clerk
3 of Court]

4 CLERK OF COURT: For the record if you could state
5 your first and last name and spell out your last name
6 please?

7 THE WITNESS: Robert Lanier, L-A-N-I-E-R.

8 - - - - -

9 ROBERT LANIER,

10 Having been first duly sworn,

11 Was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. LUCEY:

14 Q. Good afternoon, Mr. Lanier. We've not previously
15 met have we? My name is Justin Lucey.

16 A. No, sir.

17 Q. Okay. You worked for Builders First Source and
18 it's predecessors for several decades or more correct?

19 A. Yes.

20 Q. You were with Sun Belt originally which was acquired
21 by Pelican [phonetic] in about 1995.

22 A. Yes, sir.

23 Q. And you went into Pelican and it was acquired by
24 Builders First Source in 1998 or so correct?

25 A. Yes, sir.

1 Q. And you continued working for them? You eventually
2 became essentially what was an area vice president for
3 Builders First Source with 20 some locations answering to
4 you?

5 A. Yes, sir.

6 Q. And along the way you came into contact with an
7 outside sales person named Larry Bratton?

8 A. Yes, sir.

9 Q. Am I pronouncing his name right?

10 A. Bratton.

11 Q. And if I understand it correctly you essentially
12 inherited Larry Bratton as part of your team in
13 approximately 1992?

14 A. Yes, sir.

15 Q. And the two of you worked directly together for the
16 ensuing eight years correct?

17 A. Correct.

18 Q. And you worked together for the following eight
19 years too but not as closely correct?

20 A. Correct.

21 Q. So your relationship with the sales person Larry
22 Bratton was approximately 16 years.

23 A. Yes, sir.

24 Q. And he was not only an outside sales for Builders
25 First Source but Builders First Source also performed a

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August 31, 2016

- 1 lot of subcontracting at job sites utilizing Mr. Bratton
2 correct?
3 A. Yes, sir.
4 Q. And they utilized Mr. Bratton and Mr. Bratton traded
5 in his name Total Opening Sales correct?
6 A. Yes, sir.
7 Q. And you move to Charleston yourself in 2004 correct?
8 A. Yes, sir.
9 Q. And one of your outside sales people's jobs was to
10 call on builders and sell product, correct?
11 A. Yes, sir.
12 Q. TCR was Larry Bratton's customer, correct?
13 A. Yes, sir.
14 Q. His job was to call on TCR, correct?
15 A. Yes, sir.
16 Q. His job was to sell to TCR, correct?
17 A. Yes, sir.
18 Q. And typically TCR refers to specs, correct?
19 A. Yes, sir.
20 Q. But you did not review the TCR specs for the One
21 Belle Hall transaction did you?
22 A. No, sir.
23 Q. And essentially Larry Bratton handled the One Belle
24 Hall transaction for Builders First Source, correct?
25 A. Yes, sir.

1 Q. And typically Mr. Bratton, Larry Bratton would be
2 the one who would issue the P-O, correct?

3 A. The BFS people, yes.

4 Q. And when we refer to Mr. Bratton issuing the P-O
5 that's short for purchase order, correct?

6 A. Yes, sir.

7 Q. And you recall signing the One Belle Hall purchase
8 order, correct?

9 A. Yes, sir.

10 MR. LUCEY: And that would be for our court
11 reporter's record joint 3.

12 [Whereupon, joint exhibit number 3 is shown]

13 Q. And that's your signature on the bottom right of
14 joint 3 on the board, correct?

15 A. Yes, sir.

16 Q. And joint 3 that purchase order had three pages,
17 correct?

18 A. I don't recollect.

19 Q. The second page was the terms and conditions?

20 [Whereupon, the witness reviews document]

21 A. That's correct.

22 Q. And the third page was the addendum?

23 A. Yes, sir. But Builders First Source's addendum is
24 three pages, yes sir.

25 Q. And the addendum in 44 is signed by you and dated

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1 April 4th correct?
2 A. Yes, sir.
3 Q. And then you signed a second P-O on behalf of
4 Builders First Source which the addendum was changed and
5 that would be joint 4 please.
6 [Whereupon, the witness is shown documents]
7 Q. And on this addendum the date is May 2, correct?
8 A. That's not an addendum. I'm looking at the P-O.
9 Q. Let me just hand you this paper copy while the
10 technician catches up with you. 44-A the addendum date
11 is May, correct?
12 A. Yes, sir. And the original addendum you said April
13 the 4th but it was April the 14th.
14 Q. 14th? Thank you for correcting that sir. And the
15 difference between the April addendum and the May
16 addendum was that the paragraph 3 from the April addendum
17 was removed from the document correct?
18 A. Can you expand paragraph 3?
19 [Whereupon, Mr. Lucey complies]
20 A. Yes, that's correct.
21 Q. And by removing paragraph 3 from this document the
22 one year limitation on installation warranty was removed
23 from the agreement correct?
24 A. I haven't read the addendum in years, sir. I'm not
25 sure.

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1 Q. Okay. Well 3 previously had one year limitation in
2 front of you, correct?

3 A. Correct.

4 Q. And that got eliminated in May correct?

5 A. Yes, sir.

6 Q. The bottom half of 3 also previously had an
7 exclusion or limitation on implied warranties, correct?

8 Do you see it on the screen?

9 A. Yes, sir.

10 Q. And that got removed in the May addendum, correct?

11 A. Yes, sir.

12 Q. So there was no more exclusion, correct? And then
13 we're still left with the terms in exhibit 44-A joint 4
14 the term sheet page 2 -- if you would put it on the
15 screen please -- and sir, you have a paper copy in front
16 of you. Do you see that?

17 [Whereupon, the witness reviews document]

18 A. Which paragraph are you referring to?

19 Q. I'm referring to just the document first, the
20 general conditions, correct?

21 A. I have the document, yes sir.

22 Q. And the terms included paragraph 4, correct which
23 reads articles furnished hereunder shall be of new
24 material of the most suitable grade of their respective
25 kind for the purposes intended and vendor warrants all to

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1 be free from defect in materials, design, and workmanship
2 correct?

3 A. Yes, sir.

4 Q. And further paragraph 4 (c) provided that vendor
5 shall verify and be responsible for all measurements,
6 dimensions, layouts, colors, qualities, quantities,
7 etcetera in so far as same are pertinent to the articles
8 for services furnished hereunder correct?

9 A. Yes, sir.

10 Q. And you aren't aware of anybody doing that, correct;
11 making sure the quality of the product that was shipped
12 to One Belle Hall was of suitable quality, correct?

13 A. Only the manufacturer.

14 Q. You yourself did not check the product, correct?

15 A. No, sir.

16 Q. And you're unaware if Larry Bratton checked the
17 product, correct?

18 A. Correct.

19 Q. And you agree that this addendum and this purchase
20 order once it was signed by both parties in fact became a
21 contract, correct?

22 A. Yes, sir.

23 Q. And Builders First Source was obligated to adhere to
24 the contract, correct?

25 A. Yes, sir.

1 Q. And part of that further down on paragraph 4 on that
2 general provisions reads, actually down to paragraph 9,
3 vendor shall comply with all applicable federal, state,
4 and local laws and regulations, correct?

5 A. Yes, sir.

6 Q. And you understand that the building code has the
7 force of law, correct?

8 A. Yes, sir.

9 Q. And you're unaware of anything that Builders First
10 Source or Larry Bratton did to ensure that the windows
11 would comply with the building code, correct?

12 A. Only that we ordered the product specified on the
13 P-O from the manufacturer.

14 Q. And you're aware that the building code provides for
15 a higher design pressure to be utilized in coastal areas,
16 correct?

17 A. Yes, sir.

18 Q. In fact you agree that the likely design pressure
19 required in the Charleston area is a D-50, correct?

20 A. Yes, sir.

21 Q. And you further agree that Builders First Source
22 would not supply a non-code compliant window even if the
23 customer wanted it, correct?

24 A. Not knowingly, yes sir.

25 Q. And you agree that a leaky window is not a quality

One Belle Hall POA v Builders First Source Southeast Group, LLC
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- 1 product correct?
- 2 A. Yes sir, according to the conditions.
- 3 Q. And you did not review the ESP testing information
- 4 or technical literature at the time of this sale,
- 5 correct?
- 6 A. No, sir.
- 7 Q. And you're unaware of Larry Bratton doing it either,
- 8 correct?
- 9 A. No, sir.
- 10 Q. You're unaware if Builders First Source even
- 11 possessing the ESP test report at the time they sold
- 12 these windows to One Belle Hall, correct?
- 13 A. Correct.
- 14 Q. And these windows were direct shipped to the job
- 15 site correct?
- 16 A. Correct.
- 17 Q. That is very common in the construction industry;
- 18 you ship bulky products directly to the job site correct?
- 19 A. Yes, sir.
- 20 Q. That doesn't change your relationship with the
- 21 customer in any way does it?
- 22 A. No, sir.
- 23 Q. Now Builders First Source -- do you still serve as a
- 24 consultant for Builders First Source from time to time?
- 25 A. Occasionally, yes sir.

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- 1 Q. But you retired from full time in 2008?
- 2 A. Correct.
- 3 Q. And you understand that the primary business is the
- 4 sale of building products, correct?
- 5 A. Yes, sir.
- 6 Q. And that Builders First Source makes some of its own
- 7 windows down in Texas?
- 8 A. Yes, sir.
- 9 Q. And it holds itself out as an industry leader in
- 10 product supply?
- 11 A. Yes, sir.
- 12 Q. And by the way sir do you know the difference
- 13 between an interior glazed window and an exterior glazed
- 14 window?
- 15 A. No, sir.
- 16 Q. There is no doubt in your mind that this transaction
- 17 occurred, this sale of the windows by Builders First
- 18 Source to One Belle Hall, correct?
- 19 A. Correct.
- 20 Q. You participated in it, correct?
- 21 A. Correct.
- 22 Q. And you paid Larry Bratton a commission for bringing
- 23 that sale in and doing his job, correct?
- 24 A. Yes, sir.
- 25 Q. And Builders First Source's goal in being an

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1 industry leader is to make a profit and develop and
2 deliver a return for its investors, correct?

3 A. Yes, sir.

4 Q. Thank you, sir. That's all I have.

5 THE COURT: Cross-examination?
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1 CROSS-EXAMINATION

2 BY MS. DYER:

3 Q. Good afternoon Mr. Lanier. So Builders First Source

4 does manufacture some windows is that right?

5 A. Restate that.

6 Q. Does Builders First Source manufacture some windows?

7 A. Yes.

8 Q. At any time did Builders First Source manufacture

9 Energy Saving Products windows?

10 A. No.

11 Q. Okay. And during your tenure with Builders First

12 Source from 1995 to 2008 did Builders First Source stock

13 ESP windows in South Carolina stores?

14 A. Not that I'm aware of.

15 Q. Would it be fair to characterize this One Belle Hall

16 order as a special order that Larry placed for Trammell

17 Crow?

18 A. Yes.

19 Q. And in your experience do large homebuilders such as

20 Trammell Crow Residential typically place orders using an

21 architect's specification?

22 A. Yes.

23 Q. So they come in the door Mr. Lanier and say I need X

24 number of windows manufactured by this company in this

25 model and these sizes?

1 A. Correct.

2 Q. Okay. And do they typically ask from any input
3 from Builders First Source as to whether or not that
4 product is appropriate for the project they are planning
5 and building?

6 A. No.

7 Q. If they were to ask for it would you be able to
8 provide it?

9 A. We could only provide the manufacturers
10 specifications and testing information.

11 Q. Okay. But Builders First Source would be willing to
12 do that if a customer required or needed it?

13 A. Yes.

14 Q. And when materials are directly shipped from the
15 manufacturer to the job site who typically checks to make
16 sure that order is accurate?

17 A. The customer.

18 Q. Okay. And in this case the customer is Trammell
19 Crow, correct?

20 A. Correct.

21 Q. Now the P-O do you still have one in front of you,
22 sir?

23 A. Yes.

24 Q. Toward the bottom of the purchase order under where
25 it says total there is a paragraph of text do you see

1 that?

2 A. Yes.

3 Q. Could you read it for the jury and a little slowly
4 Mr. Lanier so the court reporter can get all the words?

5 A. So the windows to be delivered in truckload
6 quantities ordered by the project superintendent.
7 Windows will be counted and inspected after and while
8 unloading. Supplier shall replace any damaged windows
9 from shipment.

10 Q. Based on that language that you read for us the
11 windows were supposed to be inspected and counted upon
12 delivery by Trammell Crow or somebody on their behalf,
13 correct?

14 A. Correct.

15 Q. And do you know whether or not anyone at Builders
16 First Source ever heard anything back from Trammell Crow
17 after delivery?

18 A. Not to my knowledge.

19 Q. If 324 windows arrived on site would you expect that
20 as the area vice president you would hear if they were
21 the wrong windows?

22 A. Certainly.

23 Q. And you didn't hear that in this case?

24 A. No.

25 Q. I'm sorry?

One Belle Hall POA v Builders First Source Southeast Group, LLC
Robert Lanier-Cross-Examination by Ms. Dyer
August 31, 2016

1 A. No.

2 Q. Who is the person, who is the company in the best
3 position to determine the most appropriate product for
4 the intended purpose? In this scenario would it be the
5 general contractor Trammell Crow or Builders First Source
6 the supplier?

7 A. Trammell Crow.

8 Q. When a company like Trammell Crow comes in or calls
9 and says I need X number of this product by this
10 manufacturer shipped to an address does Builders First
11 Source necessarily know what the building code is that is
12 applicable to the project?

13 A. No.

14 Q. Does Trammell Crow or a national builder like that
15 anticipate Builders First Source is going to ask about
16 the building code applicable?

17 A. No.

18 Q. They just expect you to place the order they want,
19 right?

20 A. Correct.

21 Q. So in summary Builders First Source in this job had
22 Larry Bratton as the sales agent, right?

23 A. Correct.

24 Q. And his customer is Trammell Crow, correct?

25 A. Correct.

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Robert Lanier-Cross-Examination by Ms. Dyer
August 31, 2016

- 1 Q. And Trammell Crow in some way shape or form by phone
2 or email or in person comes to Larry and says I need
3 these windows, right?
- 4 A. Yes.
- 5 Q. And Larry places an order with the manufacturer ESP?
- 6 A. Yes.
- 7 Q. And says ESP, Mr. Manufacturer, we need the windows
8 delivered to this address?
- 9 A. Yes.
- 10 Q. And so is that all Builders First Source did?
- 11 A. Yes.
- 12 Q. Just the middle man?
- 13 A. Yes.
- 14 Q. That's the end of the story?
- 15 A. Well, yes and no. That's the end of the story in
16 ordering. Of course once the material is received and we
17 receive proof that Trammell Crow received it we being
18 Builders First Source would then in turn invoice them for
19 it and expect payment.
- 20 Q. But as far as the order goes, you place the order,
21 the manufacturer ships it to the job site and if you
22 don't hear back from the general contractor that portion
23 of it is over?
- 24 A. Yes.
- 25 Q. Thank you, sir.

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Robert Lanier-Redirect Examination by Mr. Lucey
August 31, 2016

1 THE COURT: Redirect?

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

3 REDIRECT EXAMINATION

4 BY MR. LUCEY:

5 Q. Sir, are you telling the jury -- you were here in
6 Charleston when this order was placed right?

7 A. Yes.

8 Q. This was a South Carolina order, correct?

9 A. Yes.

10 Q. Y'all were selling to a project here in Mount
11 Pleasant, correct?

12 A. Yes.

13 Q. Are you telling the jury that Builders First Source
14 didn't know what building code was in effect in
15 Charleston County, South Carolina at the time it sold the
16 product for use at One Belle Hall?

17 A. Well, yes. Typically a salesman would not be an
18 expert on the building code.

19 Q. Would he know what building code was in effect?

20 A. I don't know what year or what -- I don't know.

21 Q. Does this regional or national supplier known as
22 Builders First Source expect their outside salesman at a
23 minimum to know what building code is in effect where
24 they are selling products?

25 A. No.

1 Q. And you have absolutely no evidence that any of the
2 One Belle Hall product was damaged during shipment do
3 you?

4 A. No.

5 Q. And you have no evidence and no information one way
6 or the other that Builders First Source ever saw or
7 relied upon the architect's specification correct?

8 A. No.

9 Q. And is it also your testimony that a national --
10 developer, a builder like Trammell Crow has more
11 knowledge about construction products than a national
12 construction product reseller such as Builders First
13 Source?

14 A. My answer to that is we rely on Trammell Crow's
15 architect who Trammell Crow and/or their architect to
16 specify the product for their jobs. Builders First
17 Source job is not to specify products for a customer's
18 job?

19 Q. Got you. I want to ask my question one more time
20 and if you could answer it for the jury that would be
21 great if you can't no worries.

22 Are you telling the jury that a builder like
23 Trammell Crow, a regional builder who actually just
24 builds structures, buys products from others and builds
25 structures, are you telling the jury that Trammell Crow

One Belle Hall POA v Builders First Source Southeast Group, LLC
Robert Lanier-Redirect Examination by Mr. Lucey
August 31, 2016

1 would have more building product knowledge than a
2 national building product reseller such as Builders First
3 Source that advertises itself as a leader in the
4 industry?

5 A. No.

6 Q. Thank you.

7 THE COURT: Recross?

8 MS. DYER: No, Your Honor.

9 THE COURT: Is this witness free to leave?

10 MR. LUCEY: Yes, ma'am.

11 THE COURT: All right. Any objection?

12 MS. DYER: No, Your Honor.

13 THE COURT: All right. You are free to go sir.

14 [Whereupon, the witness is excused and exits the
15 witness stand]

16 THE COURT: Call your next witness.

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Proceedings
August 31, 2016

1 MR. LUCEY: Plaintiffs will publish a short
2 excerpt from the deposition of Galvin.

3 THE COURT: All right.

4 MR. LUCEY: Homeowner Galvin.

5 THE COURT: I gather that is Mr.?

6 MS. LYNN: Mr. Mark Galvin.

7 THE COURT: Perfect. Thank you. As I understand
8 it this is the deposition of Mark Galvin, correct?

9 UNIDENTIFIED SPEAKER: Yes, ma'am.

10 THE COURT: Very well. You may proceed.

11 [Whereupon, an excerpt of the deposition of Mr. Mark
12 Galvin is read into the record] [Not taken down]

13 THE COURT: Thank you. Call your next witness
14 please.

15 MR. LUCEY: Plaintiff rests.

16 THE COURT: All right, very well. Ladies and
17 gentlemen you have now heard the witnesses and received
18 the evidence which you will from the plaintiffs in the
19 plaintiff's case in chief. That signifies to me that
20 there are matters that I must take up outside your
21 presence. I'm going to ask you to step to your jury
22 room. Remember do not discuss this matter or allow
23 anyone to discuss it with you. I don't think we will be
24 long.

25 [Whereupon, the jury exits at 4:32 p.m.]

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1 THE COURT: All right, thank you. Motions?

2 MR. LUCEY: One administrative matter, Your Honor.

3 THE COURT: Sure.

4 MR. LUCEY: We placed on the record or we thought
5 we placed on the record at the very beginning of the case
6 we asked that the exhibit list that was stipulated as to
7 the bold and I think the court reporter wasn't sure that
8 it was in the record and I just wanted to reiterate that
9 the exhibit list submitted the bold was stipulated into
10 evidence by both parties which is why we've been
11 referring to these as joint exhibits, plus there has
12 probably been three exhibits moved in before. Thank you.

13 THE COURT: Very well. I think that is correct.
14 So bold is in plus 3. All right. Motions?

15 MS. DYER: Yes, Your Honor.

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict
August 31, 2016

1 MOTION FOR DIRECTED VERDICT

2 BY MS. DYER:

3 We'd like to move for a directed verdict. The first
4 directed verdict would be in regards to the cause of
5 action for negligence. We feel there has been a failure
6 by the plaintiff to meet its burden of proof that
7 Builder's First Source had a duty with regard to selling
8 the windows that was in fact breached and caused damage.
9 The second directed verdict ---

10 THE COURT: --- let me go ahead and handle it now.
11 I am going to respectfully deny your motion. Taking the
12 evidence in the light most favorable to the non-moving
13 party I do believe there is evidence of negligence. Yes,
14 next?

15 MS. DYER: Yes, Your Honor. The next would be
16 directed verdict on the cause of action of strict
17 liability. Under the statute code section 15-73-10 it's
18 our position that there has been a failure of proof by
19 the evidence or testimony that the windows were in fact
20 unreasonably dangerous. The windows have been in
21 operation for ten years. If they have contributed at all
22 to damage it is only one small component of the damage
23 and the buildings are certainly habitable. There has
24 been no injury to life or limb. Those are the grounds of
25 our motion, Your Honor.

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict
August 31, 2016

1 THE COURT: Very well. Likewise I would
2 respectfully deny your motion. Taking the evidence in
3 the light most favorable to the non-moving party I do
4 believe that there is evidence in which a jury can make
5 that determination that these windows pose an
6 unreasonable danger. Next?

7 MS. DYER: Yes, Your Honor ---

8 THE COURT: --- especially based on what we just saw
9 and heard.

10 MS. DYER: Yes, Your Honor. The breach of warranty
11 cause of action we would move for a directed verdict on
12 that cause of action in that there has been insufficient
13 evidence and proof to establish that the windows are in
14 fact in a defective condition which would constitute
15 breach of warranty.

16 THE COURT: Respectfully denied.

17 MS. DYER: Yes, Your Honor.

18 THE COURT: Very well. All right.

19 MS. DYER: No further motions from the defendant.

20 THE COURT: Very well. Are you ready?

21 MS. DYER: Yes.

22 THE COURT: Excellent. Let's have the jury please.

23 [Whereupon, the jury enters at 4:37 p.m.]

24 THE COURT: Thank you so much. Ladies and
25 gentlemen as I mentioned to you we heard from the

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motion for Directed Verdict
August 31, 2016

1 plaintiff's in their case in chief and we will now hear
2 from the defense. Ms. Dyer, call your first witness
3 please.

4 MS. DYER: Yes, Your Honor.

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Phillip Drake-Direct Examination by Ms. Dyer
August 31, 2016

1 MS. DYER: The defense calls Phillip Drake.
2 [Whereupon, Mr. Drake comes forward]
3 [Whereupon, the witness is duly sworn by the Clerk
4 of Court]
5 CLERK OF COURT: For the record if you could state
6 your first and last name and spell out your last name
7 please?
8 THE WITNESS: Phillip Drake, D-R-A-K-E.
9 THE COURT: Your witness.
10 - - - - -
11 PHILLIP DRAKE,
12 Having been first duly sworn,
13 Was examined and testified as follows:
14 DIRECT EXAMINATION
15 BY MS. DYER:
16 Q. Mr. Drake, good afternoon. Tell us where you live?
17 A. I live in Medford, Wisconsin.
18 Q. What is your educational background, sir?
19 A. I have a Bachelor of Science degree from Iowa State
20 University in Agricultural Engineering and power
21 machinery option.
22 Q. And do you -- what line of work are you in sir?
23 A. I'm a professional engineer. Mostly I am a
24 consultant.
25 Q. Where are you licensed as a professional engineer?

One Belle Hall POA v Builders First Source Southeast Group, LLC
Phillip Drake-Direct Examination by Ms. Dyer
August 31, 2016

1 A. In Iowa.

2 Q. Work experience if you would share with us please
3 your experience began where and with who.

4 A. My work experience really began as a child. I grew
5 up on a small farm. My father built one house a year to
6 make ends meet and ---

7 THE COURT: --- I need you to speak up just a
8 little bit for us please sir.

9 A. I said my father built one house a year along with
10 his farming and I worked beside him. We would close the
11 house in in the fall, work inside and build the cabinets
12 and all that kind of stuff in the winter time and then by
13 planting time the house was done and we would do the
14 farming.

15 Q. [Ms. Dyer] And did you work when you were in school?

16 A. All through high school.

17 Q. Doing what kind of jobs?

18 A. Doing farm work and helping my father build the
19 houses. I graduated from high school in 1965 and that's
20 when I went to Iowa State University and graduated there
21 in 1969. I went to work for a company called Acco --

22 THE COURT REPORTER: What is the name of it again
23 please?

24 A. Acco Babcock, A-C-C-O, as a design engineer. For
25 seven years I was a mechanical engineer there. In that

One Belle Hall POA v Builders First Source Southeast Group, LLC
Phillip Drake-Direct Examination by Ms. Dyer
August 31, 2016

1 time I became licensed as a mechanical engineer. The
2 last seven years I was chief engineer. And what we
3 produced is computer controlled machinery.

4 And a company such as the auto companies, the
5 aircraft companies, Boeing, McDonald Douglas and those
6 kind of people probably still have some machinery we sold
7 them back then --

8 Q. And you left Acco in 1983, correct?

9 A. That would be correct.

10 Q. And you went to work for Plexco and what generally
11 did Plexco do as a company?

12 A. They extruded polyethylene pipe for gas lines.

13 Q. And what was your job with them?

14 A. I was plant engineer.

15 Q. How long were you at Plexco?

16 A. I was only there a year and I was recruited by
17 Pella, Pella Windows and Doors.

18 Q. I'm sorry?

19 A. I was recruited by Pella Windows and Doors after one
20 year.

21 Q. And so what year would that have been that you went
22 to work for Pella?

23 A. I think late in '84.

24 Q. Okay. And how long did you stay with Pella?

25 A. Almost nine years.

1 Q. Pella is a window designer is that right?

2 A. Pella is a large window company. They recruited me
3 to be a manager in their research and development
4 department.

5 They gave me four areas to manage, drafting, model
6 building shop, test lab and -- service. And they also
7 asked me that I have designed or design and build a more
8 modern test lab for them.

9 Q. Okay. Did you work on design of any actual window
10 product for Pella?

11 A. Not that first two years. I spent the first two
12 years designing the machinery and the computer controls
13 for that machinery for their laboratory. It's one of my
14 accomplishments that I am very proud of because at the
15 time it was pretty much undisputed that that was the
16 world's finest test lab for administration.

17 Q. The test lab that you put together for Pella?

18 A. Yes. I think it's true today actually.

19 Q. Beyond the first two years when you were putting
20 together the test laboratory for Pella Windows what did
21 you do then? What was your next project there?

22 A. The next two years -- I got a promotion about every
23 two years ---

24 THE COURT: --- I need you to speak up. Our jurors
25 are having difficulty hearing you if you would be so kind

1 as to -- there you go; wonderful. Thank you.

2 A. I had a job change there about every two years; they
3 would give me a promotion. They were happy with the test
4 lab. They promoted me. I directed a design engineering
5 department, product design engineering department and did
6 that for two years where we designed Pella products.

7 The next two years they wanted to start a new
8 division to build custom products and they wanted me to
9 head up the engineering for that. I headed up both
10 design engineering and the manufacturing engineering for
11 that next two years. During that time we built at least
12 50 window products that Pella had never built before at
13 that time.

14 Q. And this is from the design, from the inception from
15 designing the window to manufacturing you took those
16 products from start to finish so to speak?

17 A. Yes. Now these are custom items. If somebody is
18 building a church or something and they want gothic
19 windows; they want stained glass in them. Sometimes
20 large office buildings in fact FBI buildings, consulates
21 for different countries, and some of those have bullet
22 proof glass.

23 And one unique project I had was one year as a
24 promotion I had for the national builders show they had
25 me build two round windows like ten foot cross round

1 windows with the likeness of Marilyn Monroe on it. And
2 that was an interesting project. First of all they had
3 to pay her foundation for the rights to do that. They
4 had an artist draw her face, with just a black pen on a
5 napkin, it was actually a napkins with her mole and
6 everything.

7 No one could look at it and not recognize it as
8 Marilyn Monroe. But we reproduced what he did with a
9 salt tip and wooden mutton bars to form her face and
10 around --

11 Q. How did you advance in Pella beyond that project?

12 A. The last years I was with them I was corporate
13 quality assurance manager.

14 Q. What does that mean?

15 A. Each plant has a quality assurance organization
16 within the plant. Those organizations would report to me
17 or I would direct them and give them direction an
18 obviously on quality assurance programs.

19 Q. And how many plants were you overseeing?

20 A. That would have been four.

21 Q. Four plants?

22 A. Actually more than that because within the town of
23 Pella there were probably six plants there.

24 Q. And so what were the people who you were overseeing
25 what was they job as far as quality assurance?

1 A. They conducted the quality programs and every
2 process in a factory it doesn't matter whether you're
3 painting or whatever it is you have quality tests that
4 you have to periodic tests to make sure things are going
5 correctly.

6 We also check the products. The lab that I had
7 earlier built I had the capability of doing air water
8 structural tests on five windows per day. It was quite
9 an automated machine.

10 And so we would constantly pull windows from the
11 line, doing tests. The marketing people would buy
12 competitive windows and we would run them to that lab to
13 see how the competitors were and if we liked what we saw
14 we would reverse engineered them.

15 It was also for special projects. If an architect
16 wanted a section of wall with windows mounted in it and
17 wanted to see it tested our test facility would check
18 fairly large chunks of wall with several windows in them
19 and we would do that for them.

20 Q. The test lab that you designed for Pella, Mr. Drake,
21 it wasn't accredited to perform actual certification
22 testing on the windows was it?

23 A. That is not possible to have. They don't accredit
24 manufacturers with that ability. What we did have every
25 machine we had was a certified machine. And occasionally

1 in fact it happened pretty regular test labs would jump
2 at the chance to use our equipment. And they would come
3 in and we would supply the windows they wanted tested.

4 They would run their own calibration on our
5 equipment to make sure that it was doing what it was
6 supposed to do and they would test the product using our
7 equipment. And then they would write a test report.

8 Q. Then in 1994 you moved to Phillips Products in Elk
9 Ridge [phonetic] Indiana. Could you tell the jury what
10 you did for them?

11 A. I was director of engineering and quality assurance.

12 Q. And what does Phillips Products -- did they do?

13 A. They are out of business now. They supplied windows
14 and doors to the manufactured housing industry.

15 Q. And as the director of engineering what kinds of
16 things fell underneath your purview?

17 A. I had all the product design. For a while I had the
18 manufacturing engineered and I manned the quality
19 assurance office also.

20 Q. And in 1997 sir you took employment with SNE
21 Enterprises, Inc. is that right?

22 A. That's correct.

23 Q. And what kind of business is SNE Enterprises?

24 A. They are a window and door manufacturer.

25 Q. And what was your job with SNE?

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Phillip Drake-Direct Examination by Ms. Dyer
August 31, 2016

1 A. I was director of engineering.

2 Q. Was it the same type of job responsibilities you had
3 previously at Phillips?

4 A. It was very much the same but the product was very
5 much different.

6 Q. What kind of product -- how was the product
7 different if you could explain?

8 A. Those products were residential windows and doors.

9 Q. And previously it was for what?

10 A. Manufactured housing. There is a different set of
11 standards. Manufactured housing is controlled by HUD.

12 Q. After your 1997, sir where did you take employment?

13 A. I went to a company called Vinyl Source.

14 Q. And what did you do for them?

15 A. I headed up engineering for them. We designed vinyl
16 window products. Many of those are still sold today. We
17 extruded the parts because we weren't an extruder and we
18 sold the parts to window companies and they assembled
19 them into windows. We didn't make windows ourselves. We
20 designed them, made the parts, and window companies built
21 the windows.

22 Q. I understand. And so you said that Vinyl Source was
23 -- all of your work at Vinyl Source related to vinyl
24 window products?

25 A. It was.

1 Q. Leaving there you went to work for Hurd Millwork,
2 H-U-R-D Millwork Company in Medford Wisconsin from 2000
3 to 2001. Can you tell us about your work there?

4 A. I was director of engineering.

5 Q. What were the products that were involved?

6 A. Those were residential products.

7 Q. And after Hurd Millwork where did you go to work?

8 A. Weather Shield.

9 Q. And where is Weather Shield?

10 A. It's in the same town; it's in Medford Wisconsin.

11 Q. And what did they manufacture?

12 A. A full line of residential windows and doors.

13 Q. Does that include vinyl windows?

14 A. Yes.

15 Q. What were your responsibilities at Weather Shield,
16 sir?

17 A. I was field operations director, or director of
18 field operations.

19 Q. Did that include quality control assurance?

20 A. That did not.

21 Q. Did it include supervising performance excuse me;
22 performance concerns and troubleshooting?

23 A. Yes. I always told everybody I directed field
24 operations from the field. I travelled almost constantly
25 from jobsite to jobsite helping out contractors,

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1 architects with any questions when it came to
2 installation or anything like that with products, use of
3 the products. If there was ever a problem of any kind I
4 would go to help solve it.

5 And of course that led to water testing buildings,
6 and water testing windows and doors; which was the thing
7 I was very accustomed to doing from my Pella days of
8 testing windows.

9 Q. So how many years have you worked in the window
10 product field, sir?

11 A. Well clear up until -- well from '84 -- for a window
12 company or just designing?

13 Q. Window companies, sir?

14 A. For me '04 until 2012.

15 Q. Okay. And what is it that you do presently today,
16 you have your own company?

17 A. Yes, I do.

18 Q. What is it called?

19 A. Phillip Drake Consulting, LLC.

20 Q. And what does Phillip Drake Consulting, LLC do
21 primarily?

22 A. Well there are two categories; one primary category
23 is people hire me to go to jobsites and figure out what
24 is wrong and tell them how to fix it. Occasionally they
25 hire me to direct a crew to actually do that fixing. And

1 also window companies will hire me to go where they have
2 a large claim and they just want to know what the facts
3 are with the situation.

4 Q. So you do an investigative forensic analysis?

5 A. Yes. The other part of my business is litigation.

6 Q. What percentage of your business relates to
7 litigation?

8 A. When it comes to the number of projects that I work
9 on it's less than half because there are a large number
10 of projects that are not litigation involved.

11 Q. Since 1984 have you been working with AAMA standards
12 on a regular basis?

13 A. Yes, I have. I had to learn them very, very well
14 before I could design that laboratory I was explaining to
15 you to test products to those standards.

16 Q. Would you agree that you keep up with the AAMA
17 standards if there are any changes over the years?

18 A. I have. I've been a voting member of AAMA in the
19 past as I have worked for window companies. I haven't
20 been involved with AAMA itself since 2000. But I work
21 with window companies all the time when they come up
22 against obstacles.

23 I've helped them design test plants because
24 especially with impact windows the testing is extremely
25 expensive. And you don't want to test any, you don't

1 want to pay for any test you don't have to have. So if
2 you're going to qualify a product line and the last one I
3 worked on was a door line you want to design your
4 sequence of tests so that you're not spending more money
5 than you need to spend getting the product qualified.

6 Q. Have you worked with -- how many products have you
7 supplied to an accredited test lab to have certification
8 testing done?

9 A. Me personally where I designed the product, supplied
10 it to the lab, witnessed the test, went through all the
11 steps and kind of certified. I'm estimating ten. The
12 people working for me have done many more than that.

13 Q. Okay. And have you had experiences when you're
14 ready to tender a window product or window line for
15 certification testing that you work with a validator on
16 the front end of the testing to make sure the validator
17 knows what tests are going to be done and that they are
18 going to be done properly?

19 A. I do. In fact the last time I assisted with a test
20 plan for doors I had quite a long meeting with the
21 validator. I found out a lot of things have changed.

22 The last time they did that was like 2011 and I was
23 still working for Weather Shield but it was very close to
24 the time that I was leaving. A lot of things have
25 changed. What happens in the industry is there is a

1 small group of validators ---

2 MR. LUCEY: --- objection, Your Honor. The witness
3 appears to be beginning to testify from this meeting that
4 he went to with these validators. And he's testified
5 things have changed and now is starting to testify about
6 what was changed and we believe this is hearsay
7 testimony.

8 THE COURT: Very well. Be mindful of the hearsay
9 all right?

10 MS. DYER: Yes, ma'am.

11 Q. [Ms. Dyer] Mr. Drake, tells the jury what
12 fenestration means.

13 A. It's a German word for windows and doors.

14 MS. DYER: At this time we would like to offer Mr.
15 Drake as an expert in the field of fenestration
16 engineering.

17 THE COURT: All right. Is there any voir dire?

18 MR. LUCEY: Yes, Your Honor.

19 THE COURT: All right, very well.

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1 VOIR DIRE

2 BY MR. LUCEY:

3 Q. Mr. Drake, you told the jury about your sense of
4 experience with Pella from I believe 1985 to 1993?

5 A. Maybe the end of '84 to '93, yes.

6 Q. Then you of course you would be aware that during
7 that time period Pella designed and brought to market
8 three series of casement windows one known as the
9 Proline, one known as the Architect and one known as the
10 Designer series windows, correct?

11 A. They did.

12 Q. They designed and tested these windows with all this
13 fancy test apparatus you were talking about, correct?

14 A. That's correct.

15 Q. And you would have had direct or indirectly some
16 involvement in that design, correct?

17 A. Those three products I didn't have direct
18 involvement with.

19 Q. You didn't?

20 A. No.

21 Q. Did you have any involvement quality control or
22 otherwise?

23 A. I would have had quality control the last two years
24 I was there. Of course those products would have been
25 tested in a laboratory.

1 Q. And in some of the test equipment you've told the
2 jury about correct?

3 A. Yes.

4 Q. And you are, of course, aware that the design work
5 in those products came to fruition in the early 90's with
6 the Proline coming into the market in '91 and the
7 Architect and Designer coming to market in '92, correct?

8 A. Well, actually the Architect series wasn't new.
9 That was the old Pella window just -- marketing wise.

10 Q. It was redesigned correct?

11 A. Very little.

12 Q. And the Designer was modified too correct, the
13 Designer series, the fancy casement?

14 A. Yes. That was all new actually.

15 Q. And you're no doubt aware that the Proline series of
16 casements is subject to national litigation for defective
17 design in Chicago right now, correct?

18 A. I'm not aware of that.

19 Q. Well, you're no doubt aware that both the Architect
20 and the Designer series are subject to national
21 litigation right here in Charleston, South Carolina for
22 defective design?

23 A. I'm not aware of that. I don't have any contact
24 with Pella anymore.

25 Q. And you've had five excluding the extruder you've

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- 1 had five window company employments correct?
- 2 A. I'll take your word for it. I've never tried to
- 3 count them up.
- 4 Q. We've got Pella, Phillips, SNE, Hurd, and Weather
- 5 Shield correct?
- 6 A. That would be correct.
- 7 Q. Out of the five window manufacturer employments
- 8 you've been involuntarily terminated from three of the
- 9 five, correct?
- 10 A. That's not correct.
- 11 Q. You got fired from SNE.
- 12 A. Yes.
- 13 Q. You got fired from Hurd?
- 14 A. Yes.
- 15 Q. And you got laid off by Weather Shield?
- 16 A. Yes, well I'm an old guy.
- 17 Q. So I'm correct. You've been laid off or
- 18 involuntarily terminated from three of the five window
- 19 manufacturers you've worked for, correct?
- 20 A. That is correct.
- 21 Q. You don't have a South Carolina engineering license?
- 22 A. No.
- 23 Q. You don't have any kind of South Carolina license?
- 24 A. Not for South Carolina I don't.
- 25 Q. You've testified in this state over 20 times and

1 never procured a license here or filed an income tax
2 return here, correct?

3 A. I don't do engineering here.

4 Q. You don't do engineering?

5 A. I simply work as an expert witness.

6 Q. So you're not going to present the jury with any
7 engineering opinions is that correct, sir?

8 A. Well, I'll give them opinions. I'm not selling
9 engineering here.

10 Q. I want to stick with your words sir. You said a
11 moment ago you're not doing engineering here. And you
12 and I were talking about those two dozen odd other South
13 Carolina cases that you testified about windows on behalf
14 of window manufacturers.

15 You just told the jury you're not doing engineering.
16 And I just want to confirm that when you give testimony
17 today you will not be giving engineering testimony
18 because you're not licensed to testify as an engineer in
19 this state.

20 A. I won't be doing engineering work that requires an
21 engineer's license.

22 Q. So you won't be giving engineering testimony?

23 A. I'll just be giving opinions.

24 Q. And they will not be engineering based because you
25 don't do that here ---

1 A. --- I will not be designing anything that would
2 require a license.
3 Q. And you won't be giving any engineering opinions?
4 A. I'll give my opinions.
5 Q. Based upon your engineering background?
6 A. Based upon my total background.
7 Q. But it won't be engineering?
8 A. I won't be designing anything.
9 Q. In fact you consider the testing of windows to be
10 engineering correct?
11 A. No.
12 Q. You don't?
13 A. No.
14 Q. That's not why you've only tested windows in
15 approximately three of your nearly 50 engagements for
16 expert testimony in the last 15 years?
17 A. Testing windows is not engineering.
18 Q. So that's not the reason you don't test windows in
19 your investigation?
20 A. I test windows when I need to test windows to find
21 out something.
22 Q. And you've only done that once as a consultant in a
23 litigation, correct in a multifamily complex? The other
24 two times were in single family homes, correct?
25 A. Which case are you talking about?

1 Q. The one here in Charleston. You didn't actually do
2 it; you had ATI do it, correct?

3 A. Oh, if I need a performance test one I hire the
4 people that have the credentials to do a performance
5 test. That's an accredited lab. I don't attempt to do
6 that myself.

7 Q. You've only performed or had somebody perform in
8 your behalf water testing on one of your multifamily in
9 litigation projects in the last 25 years correct?

10 A. I only had the one project where I needed to have a
11 performance test done.

12 Q. One project -- one of your litigation projects?
13 Different for those two ---

14 A. --- there is a difference between performance
15 testing and forensic testing.

16 Q. Forensic testing too. You only performed or have
17 performed in your behalf forensic testing on a
18 multifamily complex for litigation engagement once since
19 1993, correct?

20 A. In litigation. I do it more often not for
21 litigation.

22 Q. And you investigated dozens and dozens of
23 multifamily complexes in litigation, correct?

24 A. Yes.

25 Q. And only one got tested by you or on your behalf

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1 water testing, correct?

2 A. That's true.

3 MR. LUCEY: That's all I have, Your Honor.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL POA, et al

Plaintiffs

vs.

BUILDERS FIRST SOURCE

SOUTHEAST GROUP, LLC

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-10-7594

TRANSCRIPT OF RECORD

September 1, 2016

Charleston, South Carolina

VOLUME 4 (OF 4)

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

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

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Circuit Court Reporter

ROA_00517

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Proceedings
September 1, 2016

1 PROCEEDINGS

2 THE COURT: Thank you so much. Let me just begin
3 by telling you that I had a note from a juror when I came
4 in and I'll bring it out. Apparently she was the
5 representative to say we were asked on Monday whether we
6 could go into the second week. We were told this was a
7 one-week trial. We are all getting concerned with the
8 weather. We're very concerned, etcetera, etcetera.

9 And so I have assured them that we will move along
10 and get things done. I've tried to do a not to worry for
11 them. And so we got to get her done, which means I may
12 be violating my rule. I have a rule. I don't make court
13 people -- I love you guys -- but I don't make court
14 people stay late. So we've got to pick up the pace and
15 we're going to keep the jury here during lunch so we're
16 going to keep trucking as we can, okay. Yes? Yes?

17 [Whereupon, court's exhibit number 2 is marked by
18 the court reporter]

19 MS. DYER: Your Honor, I have jury charges to hand
20 up if that's okay.

21 THE COURT: That's fabulous. It's not okay, it's
22 terrific. Thank you so much.

23 [Whereupon, Ms. Dyer provides documents to the
24 court]

25 MR. LUCEY: Your Honor, as the court is aware I

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1 PHILLIP DRAKE,

2 Having been previously duly sworn,

3 Was examined and testified as follows:

4 DIRECT EXAMINATION (resumes)

5 BY MS. DYER:

6 Q. Mr. Drake, what day did you perform your site
7 inspection at One Belle Hall?

8 A. It was on July 31st of 2014.

9 Q. How many condo units were you allowed to inspect?

10 A. Ten.

11 Q. Were you allowed access to the interiors of those
12 units I presume?

13 A. Yes.

14 Q. And did you also inspect the outside of the
15 buildings?

16 A. Yes, I did.

17 Q. And did you select the condominiums units that you
18 visited?

19 A. No, I was led to them along with all the other
20 experts that were present that day.

21 Q. Do you anticipate that the party with the complaints
22 will show you the areas exhibiting the worse damage when
23 you conduct a field investigation?

24 A. That is normal, yes. That's what I find.

25 Q. How did you document your findings at One Belle

1 Hall?

2 A. I take photographs.

3 Q. Let's go ahead and bring up some photographs from
4 your file. Your file has already been stipulated into
5 evidence as exhibit 693, which is joint exhibit 115 and
6 I'd like to mark the excerpt from that file as a new
7 joint exhibit; just the photographs we're going to see
8 today.

9 [Whereupon, joint exhibit number 169 is marked by
10 the court reporter]

11 Q. [Ms. Dyer] Mr. Drake, your photographs are going to
12 be up on the screen as well. Here's a hard copy of them
13 that we've marked as joint exhibit 169.

14 [Whereupon, the witness is given photographs and the
15 photographs are shown]

16 Q. Building 1900 unit 103. These are your pictures
17 again, correct?

18 A. Yes, they are.

19 Q. Okay. Why did you take this picture?

20 A. I really didn't take it, well originally I took it
21 to get the number, the 103 because that's the apartment
22 number but I included it today because of the cracked
23 column. There are a lot of things wrong with this
24 building so a few of my photographs show some of that.

25 Q. And this is cracks -- what are we seeing; the cracks

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September 1, 2016

1 in what?

2 A. That's a column under balconies.

3 Q. What is the exterior made of?

4 A. Stucco.

5 Q. And your next photograph?

6 A. This is within that unit. I've taken my hand and
7 pulled back the blind so I could take a picture up at the
8 head of the window. What I am looking at is mainly this
9 crack right here [indicates].

10 Q. What's the significance of that crack, sir?

11 A. This [indicates] is the window and this [indicates]
12 is the wall. And there has been water running from
13 between the window of the wall at the head of these
14 windows. And it has left a brown what we call tea stains
15 in the industry.

16 And later you will see pictures where the tea stains
17 have even stained the shades and other things that it has
18 fallen on. But there has been a considerable amount of
19 water running out of the wall above this window.

20 Q. Okay. Sir, why did you take this picture?

21 A. This is showing the condition of the sill. If you
22 look closely, you may not be able to see it in the
23 photographs, you can tell there has been a little tea
24 stain on the sill but the homeowners have probably
25 cleaned that off so it's not really distinct on the sill

1 but it's been there. The next building, the 1900
2 building unit 104 within this unit internally I didn't
3 find any damage so I won't spend a lot of time there but
4 this is a photo of a typical window sill in that unit.

5 Q. And your next photo, why did you take this photo?

6 A. This is outside the unit. It's just some of the
7 investigating and if I had seen the presentations
8 yesterday I might not even have put this one in here but
9 there is a lot of things going on in this building.

10 And there a lot of experts that have been
11 investigating the problems with the buildings. I'm not
12 up here to say there is nothing wrong with this building;
13 there is a lot wrong with this building so.

14 Q. Next picture. You changed to a different unit;
15 building 1900, 201 is that right?

16 A. Yes.

17 Q. Okay. And then the next picture?

18 A. This is a typical sill in this unit. Next picture?
19 This is an atypical sill in the unit. Here again we've
20 got brown tea staining water that has been in this area
21 [indicates] and we've got some cracking here [indicates]
22 and there is some distress shown up the jamb which could
23 be drywall in these buildings I believe.

24 And to me that's a sign of water running down the
25 sides of the window because if you remember the

1 photograph of the big crack at the top of the window that
2 window takes a shower every once in a while when it
3 rains. That's water coming off the top of the window.
4 It comes down in the wall, hits the top of the window, it
5 runs off the top of the window down the front area to the
6 inside of the window.

7 Well, some of that water doesn't run off the top; it
8 runs around the sides and it gets between the window and
9 the jambs. And it tends to settle at the bottom and it
10 tends to damage this jamb area right in here [indicates].
11 Next picture?

12 That's the same jamb area and someone has done some
13 repair there. You can still see the tea stain puddle
14 that has been there. Vinyl windows don't turn water
15 brown.

16 That tea stain is from deteriorating wood and most
17 often the darkest tea stain and the quickest tea staining
18 show up comes from decaying OSB because it decays quicker
19 and faster than regular dimension lumber does.

20 Q. So would that damage that we see here would that
21 damage on the jamb there [indicates] where someone has
22 made a repair have come from the window product, the
23 window unit?

24 A. No. That would be some of the water that is running
25 around that is getting a little farther into the wall

1 that has done damage from the backside of that return.

2 Q. Okay. Next picture? Why did you take this
3 picture, sir?

4 A. That's the same window. You can see the repair; you
5 can see the tea stain puddle. There is a lot of dirt in
6 the sill of this window. Later we'll go through a
7 picture where I dug out some of that dirt..

8 Q. Your next picture sir, why did you take this
9 picture?

10 A. Okay. This photograph is very significant. It's
11 common throughout the project. You saw photos yesterday
12 of cracked sealant between the window and the stucco.
13 You'll probably see more today later but this was one I
14 took in that unit. And we've got cracking here
15 [indicates], here [indicates] and even the EFIS trim
16 material is cracked.

17 And one of the things that Doctor Whitlock points
18 out in his reports is that the windows are set back from
19 the outside facing the wall. And that forms a shelf
20 there and water is going to run in these cracks, all of
21 these when it rains really hard water is going to go in
22 there and it's going to get behind the stucco.

23 Also in Doctor Whitlock's reports he talks about the
24 flashing around the windows as not being proper. When
25 windows are set back like this that flashing is more of a

1 challenge to get it proper. And when it's not proper it
2 doesn't do its job. Any incidental water that might come
3 in from wall maintaining sealant lines there would still
4 be some incidental water getting in. That flashing is
5 supposed to carry that water out and back down the
6 backside of the stucco so that it doesn't get into the
7 OSB; it's supposed to be on the outside of the paper.

8 Well, when that flashing isn't correct it lets the
9 water through the paper. The water gets to the OSB and
10 the window below takes a shower. That's why none of the
11 windows on the third floor takes showers. It's because
12 the water comes in at the base of the installation around
13 the window and falls on the -- travels through the wall
14 under the top of the windows below.

15 The water that comes in here is highly unlikely to
16 show up inside this apartment because about in this area
17 [indicates] is where the OSB is. So that water is coming
18 down getting into the area of the OSB which is clear out
19 here [indicates] and travels on down the wall.

20 It would have to be an extremely hard wind-driven
21 rain, a hurricane maybe, to create enough pressure to
22 make that water show up at this particular window. If
23 there is going to be any kind of rain and if it rains for
24 any period of time water is going to show up below.

25 Q. The next picture, sir. Why did you take this photo?

1 A. This is just things I saw; its other investigative
2 openings that have been made in the building. There are
3 a lot of them and I won't spend time on those.

4 Q. That particular one would you agree that's not
5 related to a window?

6 A. Well, a lot of that opening is over between the
7 windows. I didn't do that; other experts did that
8 though.

9 Q. Your next photograph. Why did you take this
10 picture?

11 A. That's my steel rule stuck beside the window, not at
12 the bottom but up quite a ways and its simply showing
13 that the sealant is totally separated from the stucco.
14 Every time it rains water is going to run right in that
15 crack.

16 Q. Your next photo, sir this is building 2000, unit
17 206. Why did you take this photograph, sir?

18 A. That's a -- there again that's a typical sill in
19 that apartment that I saw.

20 Q. And the next photograph what are we looking at here?

21 A. This is a window that has taken showers
22 occasionally. The tea staining, the same material as
23 that first photograph showed above the windows has that
24 brown water has come down not only over the window but
25 it's gotten on the shade and left these brown stains.

1 Q. The next photograph?

2 A. That's the head of a window. In this apartment here
3 again I pulled the blind back and took a picture and up
4 here [indicates] to a lesser degree than the other
5 photograph but we still have the brown tea stains where
6 water has been running from above this window.

7 It's not possible for that water to come from this
8 window. It has to come from above this window for it to
9 run off the head of the window. Windows don't leak at
10 the head. If they're going to leak it is going to be at
11 the sill.

12 Q. Would that be a function of gravity?

13 A. Yes. There are two principles about water. It
14 always runs downhill and if there is a hole it will go in
15 there so.

16 Q. Your next photograph, sir. Where is this condition?

17 A. This is the same apartment. This is a window, it is
18 mounted in brick. And I simply took that to show that
19 there was absolutely no sealant between the window and
20 the brick.

21 The brick is supposed to have a water management
22 system behind it that will handle any incidental water
23 that gets behind it. And water always gets behind brick
24 because it soaks right through the mortar and it leaves
25 down the backside of the brick. Well, the system is

1 supposed to handle that and in Doctor Whitlock's reports
2 he reports that there are deficiencies in that water
3 management system behind the brick.

4 So a lot of water is going to go I mean it is going
5 to slide right across that almost horizontal brick sill
6 right under that window and it is right behind the brick.

7 Q. What's the little rectangular hole that we see there
8 [indicates]?

9 A. Okay. That's a window weep. And the way these
10 windows are designed the water that gets between the
11 front of the window and the sash falls down into the
12 sill. And the sill is like a pan, it's like a window
13 pan.

14 It's not a pan under the window, it's a part of the
15 window that catches the water and that water runs out
16 that weep. It's part of the window's water managing
17 system. And of course that weep has to not be clogged or
18 the water can't get out and the water builds up and the
19 window runs over.

20 Q. Your next photograph was in a different unit,
21 building 2000, unit 103. Tell us what we're looking at
22 here.

23 A. This is another unit inside there is no signs of
24 damage. This is a typical window sill.

25 Q. Your next photograph what is this?

1 A. This is outside that unit. It is pointing out the
2 crack in the sealant, which is common throughout these
3 buildings.

4 Q. Your next photograph sir, why did you take this
5 photo?

6 A. I look at windows almost every day and when I see
7 something like this I know it's wrong. That gap right
8 here [indicates] is excessive. It's so great that the
9 weather strip material isn't even touching the jamb of
10 the window. And what causes that condition is the window
11 is not mounted squarely.

12 One thing I learned yesterday in looking at some of
13 Doctor Whitlock's photographs and maybe even the movies
14 of his water test is he showed pictures I believe he said
15 there were a total of four windows that had cracks from
16 the miter joints down to the bottom of the sill.

17 If a vinyl window is too tightly installed in an
18 opening, a standard size window opening is one inch
19 bigger than the window so you've a half inch each side to
20 square the window up and shim it up so that it is right.

21 It's very, very difficult to get a rough opening
22 perfectly square because you're working with dimension
23 lumber and it's just very difficult. So you leave that
24 gap around there so you've got room to square the window.
25 But the gap serves another purpose and that is that the

1 window is made of vinyl and when vinyl gets warm, when
2 the sun shines on it or whatever, it expands and if that
3 window is fit into an opening that is very, very tight
4 and doesn't have room to expand sometimes the window will
5 crack. And windows don't often crack if they're put in
6 openings where they can expand but quite often they will
7 crack if they are in tight places.

8 Another thing I have seen, not very often
9 fortunately, is I have seen people install windows where
10 they had to lay a two by four across the window and bang
11 on it to get it to go in the opening it was so tight.

12 Q. Would this photograph represent the rough opening is
13 too tight?

14 A. Well from this I know the window is out of square.

15 Q. Okay.

16 A. One of the reasons that happens though is the
17 opening is so tight that there is not room to shim the
18 window to where it isn't tight.

19 Q. Okay. Your next photo, sir what is the condition
20 we are looking at?

21 A. There we're looking at dirt in the sill of that
22 window.

23 Q. And the next set of photos is building 2-1-0-0,
24 2100, unit 202. The first photograph what is the
25 significance?

1 A. Okay. That's a typical sill in this unit. This
2 unit has no visible inside damage. You see some marks
3 here [indicates]. Those are from the plantation shutters
4 when they close across the sill and drag a little bit.

5 Q. Your next photo why did you take this photograph?

6 A. Here I'm leaning out the window. I just took a
7 photograph of some of the other investigated areas that
8 had been done previously.

9 Q. And building 2100, unit 104 your first photograph
10 why did you take this picture?

11 A. That's a typical sill. Here again in this unit I
12 didn't find any internal damage.

13 Q. Building 2100, unit 304 your first photograph in
14 that unit what is the significance here?

15 A. Here again this unit doesn't have internal damage.
16 That's a typical sill.

17 Q. And your next photograph, why did you take this one?

18 A. This one there may be a line in the paint here very,
19 very faint and it goes all the way across and it's kind
20 of even. That's not from repeated water; the paint would
21 be damaged more. That's not fresh paint either.

22 I don't know how that got there. It could have
23 fallen from above but it also looks like the kind of
24 staining that if somebody accidentally left a window open
25 during a rain and it might have gotten rained on once or

1 something like that that might have left a line like
2 that. It could be from above but it could be from an
3 open window.

4 Q. Okay. Building 2200, unit 303 why did you take
5 this photograph?

6 A. Inside this unit again there is really no physical
7 damage. Outside the unit this is another example of
8 cracks in the sealant. The EFIS has even started to
9 deteriorate and fungus has started growing out of the
10 EFIS.

11 Q. Your next photo sir, why did you take this picture?

12 A. That's a typical sill in that unit.

13 Q. Did you see damage there?

14 A. No.

15 Q. Your next photograph what are we looking at here?

16 A. This is broken sealant again like we've seen before.

17 Q. And that's the way you described for us the way
18 water can get into the wall?

19 A. Absolutely. That is a water entry point that occurs
20 -- this window is covered or these buildings are covered
21 with windows, lots of windows. And this is happening
22 virtually at every window water is entering.

23 The water entering here and the fact that the
24 flashing system, the water draining system isn't properly
25 installed in my opinion is probably the biggest problem

1 with these buildings.

2 Q. Does the flashing or the exterior sealant have any
3 correlation to a problem with the window?

4 A. No. In the window industry people look at things
5 only two ways; it's either the fault of the window, it
6 came through the window or they refer to it as
7 installation, which is the rest of the building because
8 that's what the window is installed at. It's not
9 necessarily the window installation itself but in this
10 case it is.

11 Q. The next building is 2200, unit 301 and your first
12 picture represents what?

13 A. That is -- this is another unit that doesn't really
14 have any damage inside and that's a typical sill on this
15 window.

16 Q. While we are looking at this picture Mr. Drake we've
17 heard a lot of testimony about the sill insert. Would
18 you show the jury the horizontal joint between the sill
19 insert and the frame that we've heard Doctor Whitlock
20 observe leakage?

21 A. This is the sill insert [indicates]. It goes from
22 one side of the sill to the other side of the sill. You
23 see a line at the bottom of it and below that is the
24 plastic mainframe of the window. And the sill insert
25 snaps into the window. The original purpose of the sill

1 insert was to restrain the bottom of the sash, to hold it
2 back when this window was originally designed. As DP
3 pressures come up in requirement window manufacturers had
4 to start sealing in front of the sill insert right down
5 through here [indicates] to keep water from running
6 around it.

7 And they had to start sealing this line right here
8 [indicates] to keep water from running out of the sill
9 because at the higher test levels the water gets higher
10 in that sill and that is protection from having it flow
11 over.

12 Q. Where is the sealant located for that sill insert?

13 A. Well, it's not going to be -- it's not visible.
14 Some of the windows where I felt the seal might have been
15 disturbed, not that there was leakage there, but I went
16 ahead and I pried that vertical leg forward because it's
17 vinyl, you can move it, so I could see some sealant in
18 there.

19 But it's placed on the main frame just inside this
20 crack [indicates] which is a space that's maybe a little
21 more than a half inch wide and it's just a little bead of
22 sealant and then they snap the -- because these are
23 plastic parts and they're snapped together, the sill
24 insert in. And then they seal after that is all snapped
25 in and sealed then they'll go up here and seal the front

1 side between the frame, the window frame and this is the
2 sill insert and you will see from the front down to where
3 that sealant meets up with the sealant line they lay it
4 underneath it.

5 Q. The front side is not the side that we see in this
6 picture is that right?

7 A. Excuse me, which side?

8 Q. You said the front side is where the sealant is?

9 A. Yes.

10 Q. Are we looking at the front side?

11 A. No, we're looking at the backside. You usually put
12 that bead down the front side.

13 Q. So is the sill insert, sir an L shaped piece?

14 A. It's an L. This [indicates] is the vertical leg of
15 the L. There is a horizontal leg that covers the trough
16 in the sill. The way these windows are designed that
17 trough -- well, the mainframe is the same all the way
18 around all four sides. And that trough is necessary for
19 the sash to slide in when it's on the jamb.

20 When it's on the sill the sill cover covers that
21 trough up except for the very ends of the sill cover
22 where it is left open you know an inch or so and that's
23 so any water that hits that can run off the end, fall
24 down into the trough, and go through the internal weep
25 and then on out the weep that lets the water run out of

1 the front of the sill.

2 Q. Your next photograph, sir, why did you take this
3 picture?

4 A. This was a very dirty window. This window has so
5 much dirt in it there is no doubt in my mind whatsoever
6 that the weeps can't operate.

7 Q. What's the dirt from?

8 A. It's construction dirt. Next photo and I can...

9 Q. Sure.

10 A. That's just the other end of the sill. Next photo.
11 I dug some of the dirt out. That's not house dirt;
12 that's construction dirt. That's sand, its pebbles of
13 mortar and its drywall material. Homeowners didn't put
14 that in there.

15 During the construction of this project they didn't
16 protect these windows. Its common on projects to do what
17 they call bag the windows; they put clear plastic on them
18 to protect them from the mortar of any sprayed material
19 during the construction process.

20 And that obviously wasn't done and these windows
21 filled up with dirt and it's normal that before a
22 property is turned over to an owner that the windows will
23 be clean. And to clean this you basically stick a vacuum
24 cleaner at the end of that sill adapter and suck the dirt
25 out. And you do it to the other side and usually that's

1 adequate. But it's been left in there, it's settled on
2 down in to where it is going to clog the weeps.

3 Q. Do we see the area in this photograph; this is your
4 next one, where you stick the vacuum cleaner to try to
5 suck the construction debris?

6 A. Yes. You put the nozzle right up in there
7 [indicates] and you might even close off the part of the
8 trough so you get a little more suction out of the
9 vacuum. But if that material is dry and not settled in
10 there for a few years it would suck out.

11 Q. Can we see in this picture the horizontal leg of the
12 sill insert?

13 A. Yes. It's down here [indicates]. This is the end
14 of the horizontal leg right here [indicates] and this is
15 the horizontal leg here [indicates].

16 Q. And can we see the vertical leg in this picture?

17 A. The top of the vertical leg is right here
18 [indicates], that's the top of the vertical leg and that
19 sealant line goes right down in front of that; not on the
20 slope like that [indicates] but straight down to seal
21 that leg to the jamb.

22 Q. So if I just fold my piece of paper like this
23 [indicates] is this kind of what a sill insert is shaped
24 like?

25 A. It is. It has a couple of little snaps on the

1 bottom of it that holds to hold it that trough. When you
2 push it down in there they spring in and then back out
3 again and they have barbs on them and they hold it in
4 place.

5 Q. Would the sealant for the sill insert be applied
6 underneath that horizontal leg?

7 A. No, it's under the vertical leg.

8 Q. Okay.

9 A. It might be towards -- it might be under the
10 horizontal leg by a quarter inch but no more than that.

11 Q. Next photograph? What's the significance of this?

12 A. There again I'm digging -- I think this is even
13 another window. I'm digging some of the material out to
14 see what it is. And again, it's sand, its mortar, and
15 its drywall material.

16 Q. The next photograph, what is this a picture of?

17 A. Just another dirty sill.

18 Q. And this photograph, sir what are we looking at?

19 A. I took that -- it doesn't have anything to do with
20 the windows; that's a door. I just walking by I could
21 notice by looking at it I could tell it wasn't sealed
22 down. I stuck my ruler in there and took a picture. The
23 sill of that door is not properly sealed off.

24 Q. Yesterday sir, Doctor Whitlock used one of your
25 photos or it was introduced to him, it was joint exhibit

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1 167. Do you recognize that photo?

2 [Whereupon, the witness is shown photograph]

3 A. Yes, it's one of the dirty sills.

4 Q. So you took this photo?

5 A. Yes.

6 Q. I'm sorry?

7 A. Yes.

8 MS. DYER: Publish to the jury, Your Honor?

9 THE COURT: Any objection? No?

10 MR. LUCEY: No.

11 [Whereupon, joint exhibit number 167 is entered into
12 evidence by the court].

13 THE COURT: Very well. Ladies and gentlemen you
14 will be shown a photograph. Please do not allow the
15 photograph to keep you from being able to listen to the
16 witness and observe the witness. You will have that with
17 you in your jury room during your deliberations. You may
18 proceed.

19 Q. [Ms. Dyer] Did you hear Doctor Whitlock testify
20 about your photograph?

21 MR. LUCEY: Objection, Your Honor, pitting
22 witnesses.

23 THE COURT: Yes, sustained.

24 Q. [Ms. Dyer] What is the material that you see in that
25 photograph 167?

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1 A. What I'm looking at is the sand, the mortar, clogs
2 of mortar and chunks of mortar, and the drywall material.

3 Q. Did you see evidence of termite debris in that
4 photograph?

5 A. I didn't notice any.

6 Q. And more so than in the photograph when you were
7 taking a picture in the field did you see termite debris
8 in the sill of that window?

9 A. As we were going through them I saw one winged
10 critter or two laying on sills. When I took the
11 photographs I had no idea that they were termites. I'm
12 not a termite expert. You'll find some winged critters
13 in some of these photos.

14 Q. Mr. Drake, have you see the architect's
15 specification for this project?

16 A. I have.

17 Q. Did the architect specify a fin window?

18 A. Yes, he did.

19 Q. Is a fin window installed at One Belle Hall?

20 A. Yes, it is.

21 Q. Did the architect specify a DP-50 window?

22 A. He did.

23 Q. Is a DP-50 window installed at One Belle Hall?

24 A. It is.

25 Q. Is it your opinion to a reasonable degree of

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1 certainty in your field that the 2030 window at One Belle
2 Hall is a DP-50 window?

3 A. Yes, I believe it is a DP-50 window.

4 Q. And is it your opinion to a reasonable degree of
5 certainty in your field that a 2031 window is impact
6 rated?

7 A. Yes, these are impact rated windows.

8 Q. Is there a problem with the structural test and the
9 impact tests using two different glazing sealants for the
10 certification process?

11 A. No, there isn't.

12 Q. What do you base your opinion on?

13 A. Well, the rule in the industry that you can always
14 test something that is weaker ---

15 MR. LUCEY: --- objection, Your Honor, foundational
16 hearsay.

17 Q. [Ms. Dyer] Where does your information come from?

18 A. That's the way it's always been. Every time I have
19 asked a test lab or asked a validator what I have to do
20 when I prepare a set of windows for testing you can
21 always test something weaker ---

22 MR. LUCEY: --- objection, hearsay. He's relating
23 what the validators told him and he's just set his
24 foundation to what when he asked the validator what he
25 has to do to test them.

1 THE COURT: Sustained on the lack of foundation.
2 You may continue to lay a foundation.
3 Q. [Ms. Dyer] How many windows have you personally
4 submitted to an accredited testing lab for certification?
5 A. Personally I think about ten.
6 Q. And did you work with the validator and the
7 association with each of those ten windows to lay out a
8 test plan?
9 A. I think I did in the majority. Those that I didn't
10 I worked with a test lab.
11 Q. As opposed to the validator?
12 A. Yes.
13 Q. And did you ever submit windows with different
14 glazings when you were submitting the ones that you had
15 something to do with, those ten, to a certification lab?
16 A. Sure. And for the same reasons that this was done
17 the way it was done it's spelled out. It's not a secret,
18 it's written right there. You glaze with one material
19 because you want that water test and that structural test
20 and that air test to apply to a non-impact window. You
21 want to be able to make this window product non impact.
22 And when you do that you want to use this weaker
23 sealant. It's in this case it's a GE-2800 and it's a
24 weaker sealant than the SIKA that is used in the impact
25 specimens, which is why they allow it. And then you make

1 your impact specimens with the stronger sealant where you
2 might need it. I've actually submitted impact specimens
3 that were glazed with 2800 but a lot of window companies
4 won't use it for impact because they know the SIKa is
5 much stronger and they don't want to risk failing an
6 impact test. Those impact tests are expensive so there
7 is good reason to not want to fail them.

8 Q. Do you have an opinion about whether or not the twin
9 or mulled windows would need to be tested as a twin
10 window to certify that they maintain the required
11 performance values?

12 A. AAMA would require that, yes.

13 Q. Have you seen a test report for the twin windows in
14 this matter?

15 A. I have not.

16 Q. Is that an indication to you that the twin window
17 wasn't certified?

18 A. I don't know whether it wasn't certified or not. I
19 just haven't been shown a test report.

20 Q. In your experience does the local building official
21 have the ultimate authority to interpret the adopted
22 building code for a project?

23 A. Yes.

24 Q. There has been concern expressed by Doctor Whitlock
25 in his reports about the reliability of the certification

1 because of the reported window dimensions in the test
2 report. Do you agree with that opinion?

3 MR. LUCEY: Objection, pitting witnesses, Your
4 Honor.

5 MS. DYER: Doctor Whitlock has opinions and I'm
6 just presenting the opinions and asking if he agrees or
7 doesn't agree and the foundation for that ---

8 THE COURT: --- sustained; pitting witnesses.

9 Q. [Ms. Dyer] Do you have an opinion about the
10 reliability of the certification with regard to the
11 reporting of dimensions on the test report?

12 A. I have no reason to believe that the window didn't
13 deserve the certification. Yes, there is a mistake in
14 the way the report was written up but I have no reason to
15 not believe the certification that Keystone gave them.

16 Q. Is there any evidence that the windows were not
17 tested by the AHMA accredited lab, in this case NCTL?

18 A. No.

19 Q. Is the window design that we see here, a 2031 unique
20 to Energy Saving Products?

21 A. Absolutely not.

22 Q. Do other window manufacturers in fact sell the same
23 design under different names?

24 A. Yes, there would be many.

25 Q. How many years has this window design been common or

1 typical in the industry?

2 A. Well, Fiberlux is the company that sells these
3 window components to Energy Saving Products of Florida to
4 make windows. I've seen this design many times. Even
5 when I was an extruder I extruded a window that was very,
6 very similar. The mainframe design dates back to the
7 early '80 when all vinyl windows in this country were
8 replacement windows.

9 People didn't use them for new construction. And
10 back then they didn't have fins on them; that's the
11 nailing fin that goes all the way around the window that
12 they nail the window to the wall when they're installing
13 it because that's characteristic of new construction
14 windows.

15 But when you're replacing windows you don't want
16 that fin in your way. If they didn't have the fin you
17 pushed them into the opening. But in the late '80's it
18 became popular that builders wanted vinyl windows. They
19 were inexpensive, they didn't have to paint them and they
20 were relatively unaffected by water or anything like
21 that.

22 So they wanted vinyl windows but they wanted fins on
23 them so extruders started adding fins to the designs they
24 already had. It was just something they made windows out
25 of. The replacement window became the construction

1 window. And it's been very popular since the late '80.

2 Q. The test reports from NCTL and the CAR,
3 certification authentication reports from Keystone that
4 are part of the evidence here I think include the words a
5 2031 slash a 2041. What's the significance, if any, of
6 both of those model numbers being on the report?

7 A. Okay. I think I have that figured out. When you
8 look at the certification package of the test report
9 followed by the ---

10 MR. LUCEY: --- objection, Your Honor. The witness
11 has just testified implicitly that he has not reached his
12 opinion through a reasonable degree of certainty in his
13 field of expertise.

14 THE COURT: So you are objecting on the form of the
15 question?

16 MR. LUCEY: Yes, ma'am.

17 THE COURT: Sustained. If you will re-ask the
18 question?

19 MS. DYER: Sure.

20 Q. [Ms. Dyer] What is the difference between the 2031
21 and the 2041 window based on your research?

22 A. Okay. There is a part included in that package of
23 drawings. It is a J ---

24 THE COURT REPORTER: --- it's a what?

25 A. A J channel, which is a U shape with one of the legs

1 of the U extended beyond the bottom of the U. And that U
2 channel, the long leg, slides into a groove that is to
3 the side of the front of the window, it slips in, and
4 makes a J channel on the outside of the window up at the
5 front of the window.

6 And that could be used to slide siding into when you
7 are constructing. And you wouldn't have to put the --
8 say you were using vinyl siding and you didn't want to
9 have to put the channel around the window for the siding
10 to slide into you can buy windows with this J channel
11 already on them and slide your siding into the channel
12 that is on the window.

13 Q. [Ms. Dyer] Have you seen any evidence that the
14 certification ---

15 A. --- excuse me, I think it's a 2041 that they put
16 that channel on.

17 Q. Okay. Have you see any evidence that the
18 certification status of these windows was retracted at
19 any time?

20 A. No.

21 Q. Do the windows supplied match the architect's
22 critical product specifications for the project?

23 A. Yes.

24 Q. And is that in your opinion to a reasonable degree
25 of certainty in your field?

1 A. Yes.

2 Q. What standards are these windows required to meet as
3 installed at One Belle Hall?

4 A. Today there is no standard. No one expects a window
5 to leak during real rains and if it does you need to take
6 care of whatever is causing it whether it is clogged
7 weeps, whether it's taking a shower from above.

8 I mean you might not have to do anything to the
9 window but you've got to take care of whatever is giving
10 the window a bath. You don't expect water in but there
11 is no specific performance test they are obligated to
12 pass because of aged windows; they fall into the class of
13 aged windows.

14 Q. Is the AAMA 502 standard or appropriate to apply to
15 the windows at One Belle Hall?

16 A. No. AAMA 502 was created as a test method and
17 standard that can be used for the acceptance of a
18 building if you want to test the confines of the building
19 to make sure it's good before you pay for it basically.

20 And that test is required to be done within six
21 months of the window installation and it is required to
22 be done by an accredited laboratory.

23 And that is the last opportunity in the life of a
24 window where it is required to pass performance testing.
25 Anything after that is strictly diagnostic to try to find

1 the problem to fix it.

2 Q. Did you formulate any hypotheses with regard to why
3 the windows tests failed at zero percent?

4 A. Oh, at the zero percent test? There is like 14 or
5 16 windows that were tested and they all failed at zero.
6 What that tells me is especially when I know that it is a
7 certified window it has been to a lab and it has been
8 tested there is something else in play here because you
9 wouldn't expect even a ten or 15 year old window to fail
10 at zero. There is something else at play here.

11 And one thing -- the first two things that popped in
12 my mind is number one there is either too much water
13 being applied or the weep system is somehow impaired so
14 that it can't handle the water anymore and it's causing
15 the window to run over.

16 And of course dirt being in there is an impairment
17 of the weep system. And when it comes to field testing
18 there is a quirk in the industry. When you calibrate
19 your testing rack you're allowed to deliver ten gallons
20 of water per hour per square foot on this window.

21 That is the equivalent of 16 inches of horizontal
22 rain in one hour. Not a day or not two days; in one
23 hour. It doesn't rain that hard. But when they are
24 certified in the test lab the standard says they have to
25 handle five gallons of water per hour per square foot.

1 That's what the window has to be able to handle. Well,
2 the test labs calibrate their spray racks quite
3 accurately and they are going to deliver five gallons,
4 5.1 gallons, 5.2, maybe 5.3; not ten.

5 So when the window is developed they are using a
6 spray of just over five gallons. And that's how they
7 determine the size of the weeps. They keep increasing
8 the size of the weeps until the weeps can keep up with
9 that water delivery.

10 So five gallons is what the window is going to be
11 able to handle. If you throw ten at it you're going to
12 overload the system.

13 Q. How many forensic water tests have you been involved
14 with in your career both in and out of litigation
15 settings?

16 A. Hundreds.

17 Q. In your experience with water testing what is the
18 best methodology to identify only leaks with the window
19 product?

20 A. You have to mask the building away from the window.
21 You can't allow water to run around the window or under
22 the window and show up coming in under the sill of the
23 window or any other place or dripping out or running down
24 the inside of the OSB or dripping out of the bottom of
25 the rough opening, which is where the water that comes in

1 around the opening during the tests where you've got a
2 lot of water and you think is where it would show up.

3 So you use plastic and tape and you tape that
4 plastic around the perimeter of the window, extend it on
5 to the surface of the wall so that when you spray water
6 with the spray rack the water only hits the window. It's
7 not hitting the wall or more importantly it's not hitting
8 the crack between the window and the wall.

9 Q. In the condominiums units that you inspected, the
10 ten that you were provided access to did you observe any
11 windows where the window sill trim, I think we've had it
12 called the stool this week, was installed in such a way
13 that it covered up the horizontal sill joint that we saw
14 in the pictures?

15 A. I didn't see anything like that.

16 Q. You understand that that condition could exist at
17 One Belle Hall?

18 A. Oh, I can see where it could exist, sure.

19 Q. That would make it difficult for a homeowner to see
20 water that would be coming from a broken sill joint there
21 correct?

22 A. Yes. If that sill joint was broken and there was
23 water coming out and the stool was above it with a seal
24 -- most assuredly the water would go under the sill and
25 you wouldn't be able to see it.

1 Q. Did you see any manifestation on the drywall
2 underneath the wood trim?

3 A. Depends on the path the water takes. Water runs
4 downhill; that's one of the cardinal rules. And
5 depending on the slope of things it could run towards the
6 drywall. It could run to the front of the window.

7 Q. What are some of the ways that the seals of that
8 sill insert could become compromised?

9 A. Well, in handling. During the construction process
10 people use windows as doors when -- they don't like to
11 climb scaffolding and I don't like to climb scaffolding
12 but I have to do it once in a while.

13 But if they can go upstairs and step out of a window
14 onto a scaffolding it's less work than climbing the
15 scaffolding. And so they are used that way during
16 construction. Hoses, electrical cords things like that
17 get run through windows.

18 Sometimes the windows get closed and that can spring
19 the sill insert, break a leg out or break the seal at the
20 end. Things can happen. I've even seen many times where
21 people actually stand on sills of windows, step on them.
22 I know that because you see the mud from their boots.

23 Q. Can you always tell by looking at the sill insert
24 whether or not the seal has been compromised?

25 A. No, it's pretty much hidden. There were some that I

1 inspected where I went to the edge and I pried back just
2 a little bit to see if the sealant was broken. If it
3 wasn't broken I didn't go any further because I didn't
4 want to break any seals.

5 If it was broken I pried it on back a little farther
6 to look at how it was broken and all. If a person wants
7 to break a seal on that it's very easy. You put your
8 thumb over it and you pry it back and you'll break it.

9 Q. And you're not talking about breaking the sill
10 insert are you?

11 A. No, it's plastic; it would spring right back. You'd
12 have to be pretty strong to break it.

13 Q. Okay. Just the sealant ---

14 A. --- the sealant that ties it to the jamb.

15 Q. Okay. Is the existence of these broken sealants
16 that we've seen documented indications of a manufacturing
17 defect in your opinion?

18 A. Well, there is no way you could conclude that.

19 Q. And if the sill insert joints the seals are broken
20 as we've been talking about can that be repaired?

21 A. Oh yes, very easily.

22 Q. How would you make that repair?

23 A. What you would do is you would snap the sill insert
24 out and scrape off old sealant. Just use a putty knife
25 or a kitchen knife even and apply new sealant to the full

1 length, full width of the sill, snap the insert back in
2 and then seal the vertical leg of the sill to the jamb.

3 Q. Okay. Is it your opinion that that repair should
4 be undertaken where ever the sill insert seals have been
5 broken at One Belle Hall?

6 A. Especially any place that they have really
7 experienced leakage from the water coming from the sill
8 insert. It's a test producing water in a sill insert and
9 a real rain producing water at the sill insert are two
10 totally different things. If there has been leakage from
11 real rains then by all means they need to be snapped out
12 and resealed.

13 Q. Okay. And based on your evaluation of the windows
14 at One Belle Hall and all the documentation that you have
15 reviewed is it your opinion that the windows need to be
16 replaced?

17 A. No. If they are four broken ones those need to be
18 replaced. In the process of doing this if they are too
19 tightly installed there may be more broken getting them
20 out. And anything that gets broken is going to have to
21 be replaced?

22 Q. Is that your opinion to a reasonable degree of
23 certainty in your field?

24 A. Yes.

25 Q. Have you seen anything in the evidence or through

1 your research that indicates the windows at One Belle
2 Hall exhibit a manufacturing defect?

3 A. No.

4 Q. Is that your opinion to a reasonable degree of
5 certainty in your field?

6 A. Yes, I inspected the windows there.

7 Q. Thank you, sir. Please answer any questions Mr.
8 Lucey has.

9 THE COURT: All right. Ladies and gentlemen
10 anybody need a break let me know otherwise we'll
11 continue. Cross-examination Mr. Lucey.

12 MR. LUCEY: Thank you, Your Honor.
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1 CROSS-EXAMINATION

2 BY MR. LUCEY:

3 Q. Sir, you just testified you didn't observe the
4 condition at One Belle Hall where the stool was above the
5 gap?

6 A. I don't recall seeing that, no.

7 [Whereupon, the photograph is shown]

8 Q. This is your photograph taken at 12:10 a.m. on July
9 31st, 2014 and we've already established that was the
10 date you were there correct?

11 A. Yes.

12 Q. You can't even see the back dam on this photograph
13 can you?

14 A. I was in error. This one is higher.

15 Q. And just so we're clear your consulting business you
16 make a living out of testifying on behalf of window
17 manufacturers, correct?

18 A. That's a part of my consulting business.

19 Q. And in fact you've never testified against a window
20 manufacturer in your life. You've conceded once or twice
21 that maybe a window needed to be fixed but you have never
22 in your life testified against a window manufacturer,
23 correct?

24 A. I did not. I've never taken on that job, no.

25 Q. People don't hire you for that reason do they?

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- 1 A. No.
- 2 Q. In fact you represented one homeowner in your life
3 correct?
- 4 A. That's correct.
- 5 Q. And that was not against a window manufacturer was
6 it?
- 7 A. There were windows involved but they were not the
8 problems with the building.
- 9 Q. I'm going to make this easy. That homeowner
10 representation was not against a window manufacturer was
11 it?
- 12 A. No.
- 13 Q. Thank you. Tell the jury how many E-1105 spray
14 rack tests you performed at One Belle Hall?
- 15 A. I didn't perform any tests. I didn't make any cuts.
- 16 Q. That's a zero on the 1105?
- 17 A. Yes, that's a zero.
- 18 Q. Okay. Now tell the jury how many sill dam tests
19 you performed at One Belle Hall?
- 20 A. I performed no tests.
- 21 Q. Okay. Now tell the jury how many water tests of
22 any kind you performed at One Belle Hall?
- 23 A. I performed no tests at One Belle Hall.
- 24 Q. You've only performed water testing at one of your
25 multifamily complexes correct?

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1 A. In a lawsuit. I do it quite often when it's not a
2 lawsuit, which is the biggest part of my business.

3 Q. Now when you saw that clogged weep, you found a
4 single weep that you described as completely clogged,
5 correct?

6 A. No, I saw at least two windows that the sill was
7 full of dirt; it had to be clogged.

8 Q. Okay. So you saw two instances of it, correct?

9 A. Yes.

10 Q. And we know one of them was at 8:12 a.m. on that
11 day, correct?

12 A. Yes, that would be Central Standard Time.

13 Q. And you were in that first unit for a good while;
14 about 45 minutes, correct?

15 A. I don't remember.

16 Q. And so if the jury finds the second dirty or clogged
17 weep in that 8 a.m. to 8:45 a.m. timeframe they could
18 reasonably conclude it was in that same single unit where
19 you found the fully clogged unit, correct?

20 A. Yes, the photos that I chose to use today were from
21 the same unit.

22 Q. And when you saw that clogged weep sir you were
23 actually -- I'm saying weep I'm going to call it clogged
24 reservoir, you could actually only see each end of the
25 reservoir, correct?

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- 1 A. What do you mean?
- 2 Q. Well, there is a fake bottom to the sill that blocks
3 your view of most of the reservoir, correct?
- 4 A. Yes.
- 5 Q. So you could only see maybe a half inch on one end
6 and a half inch on the other end, correct?
- 7 A. But that's the entrance to the reservoir.
- 8 Q. At that point you formed a hypothesis, correct?
- 9 A. Yes.
- 10 Q. You formed a theory, correct?
- 11 A. I know what is going to happen when you get dirt in
12 there.
- 13 Q. You formed a belief that that dirt you are looking
14 at might be clogging the entire reservoir, even the part
15 you couldn't see, correct?
- 16 A. It's not clogging the entire reservoir. The
17 material gets washed down to the weeps, which are
18 actually four distinctive holes.
- 19 There are two internal ones that you can't see and
20 there are two external ones that you can see from the
21 outside. And those are like three sixteenths by an inch
22 holes and those get clogged with material like I dug out
23 of that window.
- 24 Q. And you couldn't see any of those weeps from where
25 you were taking that dirty reservoir photograph could

1 you?

2 A. I couldn't see the weeps but I know what happens
3 when you have silt ---

4 Q. --- so you had to infer. You had to use
5 circumstantial evidence that the dirt you were seeing was
6 probably clogging the weeps you couldn't see, correct?

7 A. This is not the first time in my career I've seen
8 this ---

9 Q. --- sure. But after you formed that theory you
10 could have tested your hypothesis, correct?

11 A. I feel that would have been rather stupid.

12 Q. You could have gone to the kitchen sink in that unit
13 and filled your water bottle, taken your dansi bottle,
14 filled your water bottle, poured it in the sill and see
15 whether it would drain correct?

16 A. I would expect some to drain. It just wouldn't
17 drain at the rate it is designed to drain at.

18 Q. And you didn't go to the sink and fill your water
19 bottle and pour it into that sill to see if it drained
20 did you?

21 A. I don't even know that I would have been allowed to.

22 Q. Tell the jury how many test cuts you performed at
23 One Belle Hall?

24 A. I think I've already told you I haven't made any
25 test cuts or tests?

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- 1 Q. So that number is zero too?
- 2 A. That's correct.
- 3 Q. Do you understand the difference between patent and
- 4 latent damage?
- 5 A. I know what damage is in a building, yes.
- 6 Q. Do you know the difference between patent damage and
- 7 latent damage?
- 8 A. Well, what's your definition of patent damage?
- 9 Q. Obvious damage?
- 10 A. Yes.
- 11 Q. And latent is hidden damage correct?
- 12 A. There is both.
- 13 Q. And the nature of latent damage or hidden damage is
- 14 you can't see it unless you cut open the wall to see it
- 15 correct?
- 16 A. That's correct.
- 17 Q. And you didn't cut open any walls?
- 18 A. In this case I looked at the photographs and read
- 19 the reports of Mr. Whitlock.
- 20 Q. But you didn't cut open any walls correct?
- 21 A. No.
- 22 Q. So when you tell the jury that you walked into a
- 23 condominium and you saw no damage or very little damage
- 24 all you're saying is that you saw no patent damage.
- 25 You're not telling them that there is not latent damage

1 in those condominiums correct?

2 A. That's correct. That's one reason I showed those
3 photos of the investigations that had been taken on the
4 exterior of those units.

5 I've never said there is no damage to the building.
6 I just said that there is no visible damage in those
7 seven out of ten units that I went to.

8 Q. And sir, you took some time to show the jury some
9 balcony damage again, correct?

10 A. Yes.

11 Q. You've never heard any One Belle Hall homeowner
12 relate their window damage to the balconies have you?

13 A. No, but its damage to the building.

14 Q. Nobody disputes that there are other issues with the
15 building, correct?

16 A. There are a lot of other issues with the building.

17 Q. The issue here at this trial is whether or not the
18 window products themselves leak, correct?

19 A. Yes, it is. But I think it's important when you're
20 trying to determine what caused the problems with the
21 building it's important to talk about everything that
22 caused the problems and not just one thing.

23 Q. There could be multiple causes of problems correct?

24 A. Oh, there are definitely multiple causes.

25 Q. In fact there can be two causes of the problems on

1 the windows correct?

2 A. Sure.

3 Q. Water from different sources can combine to cause
4 damage correct?

5 A. Sure.

6 Q. So the fact that a sealant joint might be leaking
7 doesn't mean that the window is not leaking correct?

8 A. One has to distinguish between leaks during a test
9 and leak during real rain. But if you have water leaking
10 through a sill and real rain and that stool is high
11 enough that it covers that leak point up yes that water
12 can go under the window and combine with everything else.

13 Q. Are you disputing that ASTM E-1105 a national, if
14 not international recognized standard is designed by
15 professionals to simulate wind driven rain?

16 A. That's what people say. That was the purpose of it.

17 Q. You take issue with that?

18 A. It's not the same as wind driven rain. It's a
19 constant suction with a constant flow of water and real
20 rains don't happen that way; you have fluxuations.

21 And for any residential window that is made with a
22 water separation system, those have to be one of them,
23 they are designed as water enters the system it falls out
24 and drains away. In a real rain you have fluxuations of
25 wind and you can take a window that you are going to

1 certify in a laboratory and you can equate the pressure
2 you're using to a certain mile per hour wind, but in a
3 real rain with that same mile per hour wind the window
4 will perform better than it will in a laboratory where
5 using constant suction or in a field test where you're
6 using a constant suction.

7 Q. And you keep saying suction but these windows failed
8 at zero pressure. There was no suction, correct?

9 A. At zero pressure the way to make them fail is to
10 have the weep system clogs that can't work or to apply
11 more than five gallons per minute or per hour of water
12 testing. If you put enough water in it you can make
13 anything fail.

14 Q. And the same with the sill dam test too right?

15 A. If you pour the water deep enough you can make it
16 fail.

17 Q. And you of course are aware that Doctor Whitlock's
18 firm is not the only firm that performed sill dam
19 testing?

20 A. I'm aware of that.

21 Q. A firm named Rimkus Engineering hired by the general
22 contractor performed sill dam testing there too, correct?

23 A. That's correct.

24 Q. And they tested even more locations than Doctor
25 Whitlock didn't they?

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- 1 A. I don't remember how many they did.
- 2 Q. And every one of their sill dam tests failed,
3 correct?
- 4 A. Here again I don't know how they did the sill dam
5 tests.
- 6 Q. I understand that you say you don't know how they
7 did it but sill dam tests by professionals, licensed
8 engineers, are typically performed in accordance with the
9 optional sill dam test protocol that is found in the back
10 of AAMA 511, correct?
- 11 A. Being a licensed professional engineer doesn't make
12 you an expert in testing windows.
- 13 Q. Well, people generally perform sill dam tests if
14 they're doing them right in accordance with AAMA 511 the
15 optional testing fact, correct?
- 16 A. People who know what they're doing do that. I mean
17 I do it myself.
- 18 Q. And so you don't know the details of what they did
19 beyond AAMA 511 but back to my question every sill dam
20 test they performed failed, correct?
- 21 A. That's what they said; yes it's in the report.
- 22 Q. And sir, you've not reviewed the building
23 inspector's file in this matter have you?
- 24 A. Not that I recall, no.
- 25 Q. You don't have any idea what was submitted to the

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1 building inspector do you?

2 A. I don't even know that it exists but.

3 Q. Your client didn't inform you that building
4 inspector's file had been produced in the litigation?

5 A. I don't believe so.

6 Q. You testify in construction litigation for a living
7 and you're not aware that the building inspector's file
8 is always produced in litigation?

9 A. When I did my inspection at One Belle Hall I was
10 actually working for a different client and I did ask
11 that client to obtain that material from the building
12 department but I never saw it.

13 Q. You were working for a different client. You were
14 working for the window manufacturer back then weren't
15 you?

16 A. Yes.

17 Q. And in fact that's a good point because you asked
18 the window manufacturer, your then client, for all the
19 information they had regarding these windows, correct?

20 A. I believe they gave me the information on the
21 windows?

22 Q. Let's stick with my question first, sir, it's real
23 simple. You asked your then client, the window
24 manufacturer, to give you all the evidence, all the
25 technical literature, all the data on these windows,

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1 correct?

2 A. Everything they could give, yes.

3 Q. And they did not give you any test report on the 200
4 twin windows installed at One Belle Hall much less a
5 certification of the 200 twin windows installed at One
6 Belle Hall, correct?

7 A. I have not seen that.

8 Q. And from that from the fact that your client, the
9 window manufacturer, couldn't give you the test report
10 for a twin window or the certification would lead
11 reasonable people such as you and me to conclude it
12 didn't exist, correct?

13 A. Well, when you say the window manufacturer I think
14 you're talking about the company at one time owned the
15 window manufacturer.

16 Q. Yes, sir.

17 A. They don't own that window manufacturer anymore.

18 Q. Well, that's not correct. They just don't make the
19 windows anymore, correct?

20 A. Well, that window manufacturer is not in operation
21 anymore.

22 Q. ESP is defunct, correct?

23 A. As far as I know.

24 Q. But for a period of time it was a division of your
25 client, Raymond Building Supply. That's why they hired

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1 you right?

2 A. Yes.

3 Q. And these are the people you asked for all the
4 information, correct.

5 A. I think they gave me everything they had.

6 Q. And the fact that they gave you everything they had
7 and it didn't include a test report or a certification
8 for the 200 twin windows at One Belle Hall would allow
9 reasonable people such as you and me to conclude it does
10 not exist, correct?

11 A. No, I wouldn't conclude that. It's just probably
12 lost.

13 Q. Probably lost; is that what you just said?

14 A. They closed the company down. It probably went to
15 the wayside.

16 Q. The company lost it, the test reporting company lost
17 it, the certification company lost it; everybody lost it,
18 is that correct?

19 A. I wouldn't know what certification company did it
20 even and certification companies and test labs because
21 when they complete a test they have to cut the corners of
22 the windows and they compare the design of the window to
23 the actual construction of the window.

24 And after four years they destroy that and it's been
25 a long enough time that I don't think you're going to be

1 able to -- you might call everybody, you might find
2 somebody that had something but most people are going to
3 destroy it in four years after it expires.

4 Q. So they found a 2003 erroneous certification on the
5 single window but they couldn't find the certification on
6 the twin window is that your testimony to the jury?

7 A. I think that's what's happened.

8 Q. And this theory about the component inside the
9 parts, what you called a J channel being utilized to
10 create a 2041 model out of a 2031 you reached that theory
11 after you got on a plane in Wisconsin and arrived in
12 Charleston Sunday afternoon correct?

13 A. Yes.

14 Q. You've been in and out of this case for three and a
15 half years and you get a new theory the night before
16 trial starts is that correct?

17 A. Well, to be perfectly honest I never worried about
18 the number because it was all the same window according
19 to the test report.

20 Q. Now if, in fact, that new theory that you developed
21 the night before the trial about J channels being the
22 2041 if, in fact, that was correct would that change the
23 mounting location of the window product?

24 A. No.

25 Q. You would still mount the product through the fin?

1 A. It still has the fin on it, yes.
2 Q. Let me have joint exhibit 9, plaintiff's exhibit 82
3 on the screen please on the second page.
4 [Whereupon, the exhibit is shown]
5 Q. Would you build up the top left box? Sir, do you
6 see the top left box, page 2 of joint exhibit 9 on the
7 screen?
8 A. Yes.
9 Q. And do you see where the fastener is?
10 A. Yes.
11 Q. That fastener is through the jamb correct?
12 A. Yes, it is.
13 Q. It's not through the nailing pen is it?
14 A. There is no nailing pen on that window.
15 Q. Thank you. So they didn't just attach a J channel
16 did they?
17 A. What makes you think that's a 2041?
18 Q. What makes you think it's a 2041?
19 A. I'm thinking it's a 2031 with a fin removed, which
20 happens.
21 Q. So your theory now is not only did they insert a J
22 channel to make a 2041 but they cut the fin off too is
23 that correct?
24 A. I don't think the fin has anything to do with it
25 being a 2041.

- 1 Q. You don't think it ever had a fin to begin with?
- 2 A. No, the window was made with a fin but people cut
3 them off.
- 4 Q. Okay.
- 5 A. It's commonly done.
- 6 Q. So you think to make a 2041 you take the 2031 you
7 add the J channel from the parts and you cut off the fins
8 correct?
- 9 A. No, you don't -- you don't cut the fin off.
- 10 Q. Where is the fin in that photograph sir?
- 11 A. Well, it's cut off in this photograph because the
12 installation is not a fin installation. You can cut the
13 fin off of any new construction window.
- 14 Q. Now you mentioned that the test report has an error
15 in it, correct?
- 16 A. Yes, there is more than one; typo or error whatever
17 you want to call them.
- 18 Q. Did you say the test reports have more than one
19 error in them?
- 20 A. Yes.
- 21 Q. What are the errors?
- 22 A. What's that?
- 23 Q. What's the first error?
- 24 A. One error was they referred to the sash as being
25 internal glazed and reality is the sash is external

1 glazed. The top light is internal glazed so I think
2 somebody said it wrong.

3 Q. So you believe the test report that describes -- can
4 we have 82.3, which is joint 12 on the screen.

5 [Whereupon, the exhibit is shown]

6 Q. You believe this test report which allegedly
7 certifies these windows or produces their results is
8 erroneous in their description of the lower sash is that
9 correct?

10 A. I believe so.

11 Q. It does say that the lower sash is interior glazed,
12 correct?

13 A. This is just a statement. Accompanying this are the
14 drawings.

15 Q. This is the sealed report, correct?

16 A. This is the report but accompanying this for a
17 window to be certified has to be drawings, accurate
18 drawings with this when they did the test and that's why
19 when they completed the test they cut the window apart
20 and made sure that the tested window was the one in the
21 drawings. That's part of the process.

22 Q. Back to my question. This report is sealed correct?
23 It's sealed by a licensed engineer.

24 A. They don't have to be. I don't that this one is or
25 not. It looks like it has some kind of seal; yes, it

1 does have a seal. I see it there.

2 Q. So your testimony to the jury is that the report,
3 the sealed report does not match the product drawings
4 that are attached to it, correct?

5 A. There is an error in the description, the written
6 description.

7 Q. There is an error. It's your opinion it's in the
8 report and not the drawing, but there is an error,
9 correct?

10 A. The drawings are used to make the windows. It would
11 be kind of hard for the...

12 Q. That's the theory the windows are supposed to be
13 made like the drawings that are certified, correct?

14 A. And at the end of the test they cut the windows
15 apart and make sure that they are like the drawings.

16 Q. That's what they are supposed to do, correct?

17 A. Yes.

18 Q. And this particular test report we're looking at its
19 signed and dated in the lower right hand corner of each
20 page, it's on your screen as March 25, 2004 and the test
21 report is -- the date of the test was September 9th --
22 excuse me September 25, 2003?

23 A. I believe that's what's on it.

24 Q. Okay. And you believe on September 25, 2003 they
25 tested this product, they cut it apart, they checked it

1 against the drawings, made sure everything matched and
2 they did that at the NCTL lab?

3 A. Yes.

4 Q. On September 25, 2003. May I have 712 on the
5 screen, page one?

6 [Whereupon, the exhibit is shown]

7 Q. These are the drawings you're referring to, correct?

8 A. That's one of them.

9 Q. Okay. And we can shrink back out on that please.
10 And this is called a cross-sectional view?

11 A. This would be the cross section [indicates]. This
12 [indicates] is what the corner section would look like
13 when they sawed them out of the wood.

14 Q. Okay.

15 THE COURT: This is actually a marvelous place.
16 We'll back up one question; our jurors need a break.

17 MR. LUCEY: Yes, ma'am.

18 THE COURT: Do not discuss this matter or allow
19 anyone to discuss it with you. Leave your notepads in
20 your seats. Let's take about 15. Thank you.

21 [Whereupon, the jury exits at 11:23]

22 THE COURT: All right. We'll take 15. And Mr.
23 Drake you feel free to take a break. Just remember not
24 to talk about your testimony with anyone. Thank you.

25 [Whereupon, court is in recess from 11:24 a.m. until

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1 12:02 p.m.]

2 THE COURT: Thank you so much. Are you ready?

3 MR. LUCEY: Yes.

4 MS. DYER: Yes.

5 THE COURT: Okay. Ready.

6 [Whereupon, the jury enters at 12:04 p.m.]

7 THE COURT: Thank you so much. All right ladies
8 and gentlemen at this time we will continue with the
9 cross-examination. We're in the defendant's case. Mr.
10 Lucey, you may continue with your cross-examination.

11 MR. LUCEY: Thank you, Your Honor.

12 CROSS-EXAMINATION (resumes)

13 BY MR. LUCEY:

14 Q. Sir, we still have plaintiffs exhibit 712, joint
15 exhibit 128 on the screen, page one. And when we were
16 taking a break you were testifying that the testing
17 laboratory would have checked the test specimen against
18 these drawings on September 25, 2003 as it is written up
19 there to verify that the specimen was what it was being
20 reported as, correct?

21 A. That's correct. This in combination with all the
22 other drawings because this one doesn't have any
23 dimensions on it.

24 Q. And they would have checked it at the time of
25 testing, correct?

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- 1 A. After testing.
- 2 Q. The next day or?
- 3 A. When they can get to it, yes.
- 4 Q. Is that typically very soon or is it ---
- 5 A. --- yes ---
- 6 Q. --- typically very soon? Look at the date up on the
- 7 bottom of that drawing please. This drawing was not
- 8 created until February 15, 2004 was it, sir?
- 9 A. It looks like revision number one.
- 10 Q. They did not compare this drawing to the test
- 11 specimen on September 25, 2003 did they?
- 12 A. It doesn't look like it.
- 13 Q. Thank you, sir.
- 14 A. There was a revision made there of some kind.
- 15 Q. And that revision date is 2004 correct?
- 16 A. That's the date that I see there.
- 17 Q. Let's go back briefly to the construction impact
- 18 report, plaintiff's exhibit 82.3. You had described one
- 19 of the errors to the jury which is that the drawings
- 20 don't match the report, the sealed report.
- 21 The second error sir is that the sash is described
- 22 in this report the dimensions are clearly, clearly
- 23 erroneous, correct?
- 24 A. Yes, they're wrong.
- 25 Q. You couldn't make a window with those size sashes

1 with that size frame, correct?

2 A. That's correct.

3 Q. And the third error you're aware of on this report
4 sir is that it says up top in the reference it's for an H
5 dash C-50, correct?

6 A. This particular one does.

7 Q. And the specimen in this report is an inaccurately
8 sized specimen for gateway testing for an H dash C-50
9 rating correct?

10 A. At the time this was made that was an error but we
11 have a corrected copy.

12 Q. This is an error, correct?

13 A. I believe so.

14 Q. And you're aware this is what was submitted on this
15 job at One Belle Hall, correct?

16 A. I'm not aware of that.

17 Q. You don't know one way or the other?

18 A. Don't know one way or the other.

19 Q. And sir let me hand you what has been marked for
20 purposes of identification only as joint 139 which is
21 ASTM E-1105.

22 Tell the jury, please what the standard provides for
23 the amount of water that is to be sprayed per square foot
24 per hour in an E-1105 testing?

25 A. Well, it refers to this five gallons per square foot

1 per hour but when you calibrate the test rack it would
2 actually be 10.

3 Q. The standard provides for a delivery of five,
4 correct?

5 A. The standard provides it is to be a delivery of five
6 but the standard also says how you have to how -- what
7 calibrated your rack has to be and it can go clear up to
8 10 with that rack.

9 Q. So you believe that even so the standard says five
10 that it is actually 10?

11 A. It can be.

12 Q. Thank you, sir. And sir, you gave some testimony
13 about construction conditions. You actually didn't see
14 any of the photographs from the period of construction
15 did you?

16 A. No.

17 Q. They exist but you don't have them, correct?

18 A. That would be correct.

19 Q. So you don't know whether the windows were covered
20 do you?

21 A. Judging from the amount of dirt in them I'm going to
22 say that a lot of them weren't covered.

23 Q. You haven't seen any photographs to see whether they
24 were covered in construction, correct?

25 A. I have not.

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- 1 Q. And you didn't see anybody using two by fours to
2 bang the windows into the opening, correct?
- 3 A. No.
- 4 Q. And you said that you questioned the gap in the
5 openings. You've never personally seen an exposed
6 opening at One Belle Hall, correct?
- 7 A. I've seen Doctor Whitlock's photographs of them.
- 8 Q. Right, but you've never seen it in person?
- 9 A. No.
- 10 Q. You've never measured the gap in any of these
11 openings?
- 12 A. I saw photos yesterday of windows with cracked
13 corners and there is no gap.
- 14 Q. This is an easy question. You have never measured a
15 single gap in a single rough opening at One Belle Hall
16 have you?
- 17 A. No.
- 18 Q. And you said to the jury that these windows had been
19 to the lab and they had been certified. These windows
20 haven't; a specimen that was supposed to match the
21 windows is what's been to the lab, correct?
- 22 A. Yes, the lab certifies on a particular window
23 physically it's the design of the window.
- 24 Q. And this is actually your fifth engagement to
25 testify on behalf of Builders First Source in litigation,

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1 correct?

2 A. I'll take your word for it.

3 Q. You testified at East Bridge [phonetic] right?

4 A. I gave that position.

5 Q. And even though you already have a preexisting
6 relationship with Builders First Source when you
7 contacted them in early 2014 and offered your services to
8 Builders First Source in this case they declined your
9 services didn't they?

10 A. Yes.

11 Q. Thank you.

12 MR. LUCEY: Nothing further, Your Honor.

13 THE COURT: All right, redirect?
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Phillip Drake-Redirect Examination by Ms. Dyer
September 1, 2016

1 REDIRECT EXAMINATION

2 BY MS. DYER:

3 Q. Mr. Drake, has anything that has been brought up
4 before you by Mr. Lucey this afternoon changed your
5 opinions that you gave earlier today?

6 A. No.

7 Q. Thank you.

8 MR. LUCEY: Nothing further, Your Honor.

9 THE COURT: Very well. You may come down sir.

10 [Whereupon, the witness is excused and exits the
11 witness stand]

12 THE COURT: Call your next witness please?

13 MS. DYER: Yes, ma'am.

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Steve Watkins-Direct Examination by Ms. Dyer
September 1, 2016

1 MS. DYER: The defense calls Steve Watkins.
2 [Whereupon, Mr. Watkins comes forward]
3 [Whereupon, the witness is duly sworn by the Clerk
4 of Court]
5 CLERK OF COURT: For the record if you could state
6 your first and last name and spell out your last name
7 please?
8 THE WITNESS: Steve Wayne Watkins, II, W-A-T-K-I-N-S.
9 - - - - -
10 STEVE WATKINS,
11 Having been first duly sworn,
12 Was examined and testified as follows:
13 DIRECT EXAMINATION
14 BY MS. DYER:
15 Q. Mr. Watkins, where do you live?
16 A. Myrtle Beach, South Carolina.
17 Q. And what is your educational background?
18 A. I graduated from Myrtle Beach High School in 1988.
19 I attended Coastal Carolina University and Horry
20 Georgetown Technical College but did not graduate.
21 Q. Okay. And what is your profession?
22 A. I am a general contractor.
23 Q. Are you licensed in South Carolina?
24 A. Yes, ma'am.
25 Q. What licenses do you hold sir?

1 A. Unlimited level 5 general contracting license.

2 Q. And do you have licenses in any other states?

3 A. It has reciprocity in North Carolina. We normally
4 don't work outside of South or North Carolina.

5 Q. Tell us about your work history in building and
6 construction.

7 A. I began as a teenager. My dad, I'm third
8 generation, my dad he helped his dad build houses when
9 they were young, all kinds of residential roofing, they
10 moved into commercial roofing. They continued to build
11 houses through the 60's and the 70's.

12 They started getting into some more into commercial
13 roofing and high rise water proofing through the 80's.
14 He still built a little bit, that was my dad's passion,
15 but the water proofing and repair part of our business
16 seemed to be paying better so we pursued that more.

17 I started in the early 80's as a teenager. I had to
18 go to the job sites and learn the business, work. I've
19 done all kinds of framing with my own two hands, roofing,
20 commercial roofing, residential roofing, shingles, TPO --

21 THE COURT REPORTER: --- I'm sorry, what? Give me
22 those initials again?

23 A. When I'm nervous I talk fast; I apologize.

24 Commercial roofing, TPO, DPDM; just all types of
25 different roofing, high rise waterproofing where we drop

1 swing stages. I started moving into more and more repair
2 work in the 90's. We kept finding while we were doing
3 water proofing work there was a lot of rot we were
4 finding and termite damage.

5 We started making those repairs, continuing to make
6 those repairs and more into -- our former business was
7 Watkins Commercial Roofing and Waterproofing and then we
8 moved it to Watkins Services I think in '99 to
9 incorporate the other parts of our business.

10 Q. And you are currently employed by Watkins Services
11 is that right?

12 A. Yes, ma'am.

13 Q. Are you a shareholder, sir?

14 A. Yes.

15 Q. And what if you could just summarize for the jury
16 what Watkins Services what kind of projects they work on
17 today.

18 A. We work on primarily we do commercial properties,
19 multifamily, townhomes, condos. We basically take those
20 apart and put them back together. We can do the roofing;
21 replace windows, any type of platting, stucco. We try to
22 stay away from eaves but just things like that. We
23 basically take those apart and put them back together.

24 Q. What are some values of the jobs -- how high value
25 jobs have you done at Watkins Services?

1 A. It varies. We've been lucky here lately. I'm
2 currently working on an 11 million dollar job on James
3 Island and a five -- with both phases it will be an eight
4 million dollar job in Seneca, South Carolina. We
5 finished last year a five million dollar job at True
6 Blue.

7 But we've only grossed -- here in the last few years
8 we've been grossing around five million. But as a
9 contractor your work is up and down so we're in a good
10 run right now but preparing for the bad run if it
11 happens; hopefully not.

12 Q. Yes, sir. And as part of your job at Watkins
13 Services do you prepare estimates?

14 A. Yes, ma'am.

15 Q. And how do you do that?

16 A. Well, my dad passed away three years ago. And he
17 was our testifying expert in the company. I ran all the
18 field projects and he did the testifying.

19 We have an estimator, Robert Ayers, he prepares the
20 estimates or he prepared them with my dad's help and then
21 Robert Ayers would prepare my dad to testify in these
22 cases. My dad passed in January of 2013 so I had to
23 start doing that work. And I hate talking about it; I'm
24 sorry.

25 Q. I'm sorry.

1 A. I need to get myself together?

2 Q. Do you need some water?

3 A. No ma'am, I'm fine.

4 MS. DYER: At this time the defense would ask that
5 Mr. Watkins be qualified by the court as an expert in the
6 field of construction cost estimation.

7 MR. LUCEY: No objection, Your Honor.

8 THE COURT: Very well, so qualified.

9 Q. [Ms. Dyer] Mr. Watkins, what was your job related to
10 One Belle Hall?

11 A. I work on a lot of these cases and sometimes I'm
12 called by the Design Professional and sometimes I'm
13 called by the attorneys. I can't remember who contacted
14 me first in this. Justin may have it in my deposition
15 but I think I started working for Cords Ford and Harrison
16 Trammell and then the other defendants started.

17 If y'all will remember this was, I think I put
18 together like seven or eight estimates for this case.
19 But that's how it began. I can't remember if we were
20 asked to do the -- help with the destructive testing
21 before or after I was hired as a pricing expert. I think
22 maybe I was asked to help with destructive testing first
23 and then asked to be a pricing expert after that.

24 Q. What did you do as far as the destructive testing?

25 A. We do a lot of that type work. We provide crewman

1 to help design professionals take buildings apart, to cut
2 holes in them, investigate and see what's wrong with them
3 and we repair those areas back. I think we performed two
4 tests out there. I was seeing pictures of July 2014 and
5 I think that was our first destructive test.

6 There were a lot of different experts there. Some
7 were just doing interior observations, some were doing
8 exterior cuts. And then several months after that I
9 can't recall -- at some point after that we were asked to
10 come back out and do additional test cuts.

11 Q. And when you're talking about test cuts please tell
12 the jury what that means?

13 A. It's whatever surface it could be a cladding it
14 could be some flat work, it could be concrete topping or
15 whatever that is or whatever they would like to look at.
16 They ask us to make a cut in the material so they can see
17 how the material, hopefully they can see how the system
18 was installed and what type of components are in there
19 and how it was waterproofed and things like that.

20 Q. And so Watkins Services provided people, including
21 yourself to make test cuts at One Belle Hall is that
22 right?

23 A. Yes. I try not to do that work anymore -- hands.
24 Sometimes I have to unfortunately but I didn't physically
25 make any cuts. Our crewmen assisted in making cuts on

1 those two tests.

2 Q. Did you formulate any independent opinions about
3 what the problems are at One Belle Hall?

4 A. No.

5 Q. Has your work, Mr. Watkins, been solely to provide
6 estimates for various defendants?

7 A. Yes, ma'am.

8 Q. Are you aware, I think you just said a few minutes
9 ago a different number. Would you be surprised to learn
10 that you produced 11 different estimates in this case?

11 A. No. I told myself I'd never do that again.

12 Q. And I'm going to introduce to you what has
13 previously been marked as exhibit 50, 51, 55, 56 and 56
14 actually has subparts A through G, various different
15 estimates.

16 [Whereupon, the witness is shown documents]

17 Q. Mr. Watkins, would you confirm that those are
18 estimates you provided for One Belle Hall that contain
19 different scopes of repair?

20 A. Yes ma'am, they appear to be. There were some
21 crossover in all the estimates but they appear to be, yes
22 ma'am.

23 Q. Could you read for the jury what the values of those
24 estimates are in total; if you could give each one, the
25 total of each one?

1 A. Just call it by exhibit?

2 Q. That would be great.

3 A. Okay. Plaintiff's exhibit 311 was 991,930 dollars
4 and one penny. Plaintiff's exhibit 324 was one million,
5 587,965 dollars and 69 cents. Plaintiff's exhibit 325-A
6 was 948,636 dollars and 71 cents.

7 Plaintiff's exhibit 325-B one million, 338,634
8 dollars and three cents; plaintiff's exhibit 325, I think
9 that's C, 313,589 dollars and 57 cents --

10 THE COURT REPORTER: I'm sorry; repeat that number
11 again, please?

12 A. 313,589 and 57 cents. Plaintiff's exhibit 325-D one
13 million 587,965 dollars and 69 cents; plaintiff's exhibit
14 325 two million 163,493 dollars and 55 cents; exhibit
15 325-E one million 914,161 dollars and 88 cents; exhibit
16 325-F two million 163,493 dollars and 55 cents; exhibit
17 325-G, one million 246,802 dollars and 30 cents; exhibit
18 312 991,930 dollars and one cent; and exhibit 314 is
19 636,430 dollars and 33 cents.

20 Q. Thank you. Mr. Watkins, I'm going to hand you what
21 has been marked as joint exhibit 57 previously
22 plaintiff's exhibit 325-H.

23 [Whereupon, the witness is shown document]

24 Q. Do you recognize this estimate, sir?

25 A. Yes, ma'am.

- 1 Q. Did Watkins Services prepare it?
- 2 A. Yes, ma'am.
- 3 Q. If we look back to all of the 11 estimates that you
4 provided where did the scope of the repair for those
5 different estimates come from?
- 6 A. We were given, it sort of grew as the case went on,
7 but we were given estimates -- I'm sorry, we were given
8 scopes of work by different experts in the case. And
9 some of that work was put together and combined on
10 certain estimates, some were separated. That's why we
11 have so many different estimates.
- 12 Q. If you look at those would you agree that you have,
13 Watkins Services, has itemized the work by categories so
14 to speak, windows is one category; roofing is another
15 category?
- 16 A. We try to stay very close to the format that we're
17 given in the scope of work.
- 18 Q. Okay. And item number 4 is what across those
19 estimates?
- 20 A. Windows.
- 21 Q. And did your inclusion, the figures that you
22 produced in those estimates for window repair stay
23 consistent across those various estimates you produced?
- 24 A. I would think they did, yes ma'am.
- 25 Q. Can you tell the jury what the window section of

1 your repair contemplates?

2 A. I know y'all have seen all the pictures. There is
3 an L piece that snaps into the rear of the window that
4 receives the sash. It's to remove that piece, clean the
5 existent sealant underneath it, reseal it, and then
6 reseed that piece.

7 Q. And you talked to Mr. -- who originally gave you
8 that scope of work?

9 A. The first person I talked to about it was Craig
10 Rogers at Rimkus. I think he prescribed that to me.

11 Q. Have you since had a conversation with Mr. Drake
12 about the repair?

13 A. Yes, ma'am.

14 Q. Does the repair sound like it is the same as you
15 discussed with Mr. Rogers?

16 A. It does. In fact he was able to explain it to me a
17 little better.

18 Q. Okay. Mr. Drake was?

19 A. Yes, ma'am.

20 Q. And tell me what line item four point zero point one
21 reads?

22 A. In?

23 Q. In any of those estimates.

24 A. Remove slash reinstall rear seal inserts and caulk.

25 Q. And how many are you going to do that to?

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- 1 A. 384 windows.
- 2 Q. And why is the window count 384? I thought there
3 were about 315 windows.
- 4 A. If a window is gained together, if it is a twin we
5 consider that two windows for this repair because it will
6 be two individual pieces that have to come out and go
7 back.
- 8 Q. Okay. And how much is it going to cost to do each
9 window on four point zero one?
- 10 A. Before markup 25 dollars.
- 11 Q. And that includes your material costs?
- 12 A. Yes, ma'am.
- 13 Q. What material are you using?
- 14 A. Silicone.
- 15 Q. So you're able to reuse the sill insert itself?
- 16 A. I assume so, yes ma'am.
- 17 Q. Is that what you have been instructed to do?
- 18 A. It is.
- 19 Q. And line item four point zero point two how does
20 that read?
- 21 A. Inspect window trim, nails, counter seam, fill, and
22 paint.
- 23 Q. And what does that mean in layperson's terms?
- 24 A. If there is -- I think originally this line item was
25 meant for the exterior of certain windows because some

1 windows are in stucco, some are in hearty siding, or
2 hardboard siding. And there was I guess something
3 prescribed I'm trying to remember in one of my scopes of
4 repair to if we see any nails that maybe are under
5 driven, overdriven, make sure they are counter sunk, make
6 sure they are puttied and paint especially for esthetics.
7 Q. Okay. And how much per window would that cost?
8 A. Twenty-five dollars per window.
9 Q. Okay. And since the only defendant left in this
10 litigation is Builders First Source which is really the
11 window supplier were you asked to revise an estimate to
12 just target that repair we just talked about?
13 A. Yes, ma'am. Basically, I pulled that pricing out of
14 our other estimates and applied our general requirements
15 and our markups to it so it can stand alone.
16 Q. So the scope of the work that you are contemplating
17 doing at One Belle Hall stayed the same as it has in all
18 the other estimates correct; for the windows?
19 A. For this task, yes ma'am.
20 Q. Okay. And the price to do the window work has
21 stayed the same across the estimates correct?
22 A. The line items have yes, ma'am.
23 Q. And so for exhibit 57 you just added in general
24 conditions and overhead and profit?
25 A. Yes, ma'am.

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1 Q. And what is your total?

2 A. 20,461 dollars.

3 Q. So 20,461 dollars as we see on exhibit 7 is how much

4 Watkins Services would charge to reseal the sill dam

5 insert if hired to do the job?

6 A. Yes ma'am, as prescribed, yes ma'am.

7 Q. Would you sign a contract to do the job for that

8 price?

9 A. Yes, as prescribed in the original scope of repair.

10 Q. Correct. Thank you, sir. Please answer any

11 questions Mr. Lucey has.

12 THE COURT: Cross-examination?

13 MR. LUCEY: Thank you, ma'am.

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1 CROSS-EXAMINATION

2 BY MR. LUCEY:

3 Q. Good afternoon, Mr. Watkins. Good to see you again.

4 A. You too, Justin. Here we go again.

5 Q. It's not so bad is it?

6 A. It's not so bad, not yet anyway.

7 Q. You actually don't typically do 12,000 dollar jobs
8 do you?

9 A. Typically we don't. Sometimes we do. We have a
10 waterproofing division that if we have -- a property
11 manager might say hey, I really need you to come out and
12 take care of this because we know you can do it right we
13 will but I don't seek that type of work.

14 Q. You might be willing to do it in this case in an
15 effort to get the rest of the work at One Belle Hall but
16 otherwise a 12,000 dollar job really isn't what an
17 unlimited general contractor does correct?

18 A. That's correct. And what you just said sometimes
19 it's possible if owners have heard you have a good
20 reputation they'll ask you to come out and do a few
21 things to just see if you know what you're doing if you
22 can stop some issues that other contractors haven't been
23 able to do and that could lead to additional work. So
24 that's usually if I do smaller work on a job like this
25 that's usually the intent.

1 Q. Let me first hand you what has been marked for
2 purposes of identification only as plaintiff's exhibit
3 636-A, joint exhibit 87 and you'll find attached to it a
4 collection of photographs that happen to have your name
5 on the bottom you see that?

6 A. Yes, sir.

7 Q. And these are photographs that you and your team
8 took from time to time while you were assisting with the
9 destructive testing by the defendant's engineers, the
10 developer's engineers correct? Y'all did those
11 destructive tests?

12 A. Yes, sir. It was a group of engineers. I don't
13 recall who all the defendants were but it was a group,
14 yes sir.

15 Q. And do you recall the primary engineers in the case
16 for a while when it had a developer in the case was a
17 firm by the name of Rimkus Engineering?

18 A. Yes, sir.

19 Q. And by the way you were looking for the name of the
20 attorney that hired you that would have been J.D. Smith
21 correct?

22 A. J.D., yes sir. J.D. did call to me first, yes sir.

23 Q. So you all assisted Rimkus Engineering in their
24 testing at the site and you took a few photographs as you
25 went along, correct?

1 A. Yes, sir. I remember CSC was there.

2 Q. A lot of people were there?

3 A. Yes, sir. You know how it is. We do a lot of
4 destructive testing, yes sir.

5 Q. And if we look at these photographs these are your
6 firm's photographs correct?

7 [Whereupon, the witness views photographs]

8 A. They appear to be yes, sir. It has our name on it.
9 I haven't reviewed them so.

10 Q. And you and I talked about these photographs before
11 correct?

12 A. That's correct.

13 Q. We've done depositions.

14 A. I think we've done two so far in this case, yes sir.

15 Q. So if we look at photograph 176, Watkins 176.

16 A. Yes, sir.

17 Q. This is a picture that somebody has taken after this
18 window has been water tested correct?

19 A. I don't know that. It's very possible. I don't
20 know that for sure.

21 Q. You know water testing took place in the presence of
22 your firm?

23 A. There was a group that went to the interior. I know
24 they were filling the tracks; they were doing some
25 testing like that. I didn't spend a lot of time inside

1 but I remember that.

2 Q. Filling the tracks you ever heard anyone call that a
3 sill dam test?

4 A. Yes. There are several different types of dam
5 testing that engineers will perform on windows yes, sir.

6 Q. Anyway in photo 176 you've documented water on the
7 inside of the structure that either occurred during
8 testing or as a result of rain, correct? Water doesn't
9 get there in any other reason.

10 A. I would assume, yes sir.

11 Q. Okay. And you were asked about one of the
12 estimates that you did for these other parties. Let me
13 follow up on that just a little bit and make sure the
14 jury is with us 100 percent.

15 When you were talking to the jury about doing
16 different scopes that's because there used to be a lot of
17 different defendants in the case, correct?

18 A. That's correct.

19 Q. One defendant might have done the HVAC work which
20 would result in a different scope of repair, correct?

21 A. That's correct.

22 Q. Another defendant might be the roofer and he would
23 have a different scope of repair, correct?

24 A. Correct.

25 Q. And it goes on from there windows, etcetera,

1 etcetera right?

2 A. Yes, sir.

3 Q. So you had different trades who were defendants
4 asking you to estimate what their piece of the pie might
5 be, correct?

6 A. I would assume. Sometimes a design professional
7 will represent more than one client. They don't always
8 but you know how it is; there is a little bit of cross-
9 ever. But we take the scopes of repair that we are given
10 by the different design professionals and we price them.

11 Q. Yes, sir. And you've actually done estimating on
12 both sides of the aisle so to speak. You've done some
13 plaintiffs, more defendants but you've done some
14 plaintiffs, correct?

15 A. Yes, sir.

16 Q. So you're familiar with the different focus that
17 occurs when you are assisting the plaintiff's engineers
18 as opposed to when you are assisting the defendant's
19 engineers, correct?

20 A. Yes. They -- we're directed by the design
21 professional and I don't want to speak about a trade that
22 I'm not in but I'm assuming that the design professional
23 when they go to a site they are looking for specific
24 things.

25 Q. Right. And you've previously described the

1 defendants approach as more of a rifle approach, correct,
2 a target; rifle.

3 A. Yes, sir. Usually it's -- yes, sir. Yes, sir.

4 Q. Almost like a horse with blinders on. Everything
5 else doesn't matter. It's just this one issue that we
6 want to look at, correct?

7 A. Sometimes and sometimes not.

8 Q. I suppose the plaintiff's engineer once they are on
9 site they are going to document anything wrong with the
10 building, correct?

11 A. Yes. Usually if an HOA hires an attorney and a
12 design professional they are going out to inspect the
13 entire building using their experience to try to find any
14 defects that may be there. Let's say that somebody like
15 Phil asked me to come out and help them I wouldn't expect
16 him to cut holes in the fill so.

17 Q. And you never were asked to do a comprehensive
18 estimate on all the repairs at One Belle Hall were you?

19 A. I don't think I was, no sir. You mean a price, the
20 plaintiff's quote?

21 Q. No, to price a comprehensive repair scope be it
22 plaintiff or defendant?

23 A. Define comprehensive for me.

24 Q. Fix the buildings completely. Not one of those
25 estimates that y'all just talked about are you able to

1 say I wrote that estimate and it will fix the buildings
2 completely, correct?

3 A. To be fair I didn't do an independent investigation
4 on my own to find out all the problems with the
5 buildings. I just priced what I was given to fix.

6 Q. Well, let me have joint 88, plaintiff's 637 on the
7 screen please? Let me hand you this exhibit sir that is
8 in evidence.

9 [Whereupon, the witness is shown document]

10 Q. And do you recall that you and I previously went
11 through an exercise where we took your biggest estimate
12 and we went through it and we made a list of everything
13 that was missing in it?

14 A. [No response]

15 Q. Let me make it easier than that for you. Let me
16 make it easier. Do you recognize your handwriting on
17 plaintiff's exhibit 637?

18 A. Yes sir, I do.

19 Q. Okay. And this is a list that you and I made about
20 everything that is missing from your largest estimate
21 correct?

22 A. What I remember is I remember you telling me to
23 write stuff down and I wrote it down.

24 Q. And then you corrected it, correct? That's your
25 handwriting?

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- 1 A. Yes, sir.
- 2 Q. You clarified item 1-B, four and five correct? And
3 the jury can only see one page at a time but this is a
4 two page list correct?
- 5 A. Correct. Oh, I see yes sir, the notes. The number
6 correction is I guess on the second page at the bottom on
7 the MBP, the wiring.
- 8 Q. Yes, sir. And in fact we got you to put your
9 initials next to every correction you made didn't we?
- 10 A. Yes, sir.
- 11 Q. So you do recognize this document?
- 12 A. Yes, sir. Yes, sir.
- 13 Q. Quite a long list of things that are missing from
14 the largest repair estimate you ever did in this matter
15 correct?
- 16 A. Correct.
- 17 Q. And some of those repair estimates that were put in
18 were just for a specific trade for instance the
19 balconies, correct?
- 20 A. Correct. Yes, sir.
- 21 Q. And the general contractor Rimkus excluded the
22 balconies from their repair scope because they were
23 counting on KMAC, the balcony subcontractor, handling
24 that repair scope, correct?
- 25 A. Justin, I can't -- there were so many...

1 Q. It was a lot.

2 A. There were so many defendants and experts I can't
3 remember all OF them. I didn't prepare for that part of
4 the...

5 Q. Let's do this. Let's move on to exhibit 638 and
6 I'll hand you a paper copy but it's also on your screen.
7 This is a separate little list you and I made during your
8 deposition, correct?

9 A. Yes, sir.

10 Q. And once again we see your handwriting on this,
11 correct?

12 A. That's correct.

13 Q. We listed out all the different estimates that you
14 just talked fifteen minutes ago, correct?

15 A. Yes. I think that's all of them. I think there may
16 be more than that based on this list but ---

17 Q. --- and then we listed who the estimates were for,
18 correct?

19 A. Yes, sir.

20 Q. And you can't just add all these up to get a number
21 in part because we had that two page list of missing
22 items, correct?

23 A. That's correct.

24 Q. At any rate this is a huge project, correct? I mean
25 the repair project to repair One Belle Hall.

- 1 A. To do the plaintiff's scope it is, yes sir.
- 2 Q. And you are doing a similar scope at Mira Vista
- 3 right now over on James Island, correct?
- 4 A. Yes, sir. To be ---
- 5 Q. --- we're going to get to the differences.
- 6 A. I didn't read the plaintiff's scope of repair in
- 7 this case or I don't recall doing that but at Mira Vista
- 8 we are -- it's basically a full, declad, reclad window
- 9 replacement.
- 10 Q. The difference between the Mira Vista scope and any
- 11 scope that y'all have talked about here or listed on that
- 12 screen is that the Mira Vista scope includes the removal
- 13 and the replacement of the windows, correct?
- 14 A. That's correct.
- 15 Q. Tell the jury why the Mira Vista windows are being
- 16 removed and replaced instead of getting a little bead of
- 17 sealant down the middle.
- 18 A. My dad was involved in the Mira Vista case. He
- 19 passed away in the middle of it and I took it over at the
- 20 end. I don't specifically recall, I think it may have
- 21 had something to do with design pressure. I don't recall
- 22 -- or impact rating. Honestly, I cannot remember.
- 23 Q. Let's go here. Do you recall fixing degraded
- 24 sheathing below the windows at Mira Vista?
- 25 A. We're doing that right now, yes sir.

1 Q. Thank you, sir. And you don't deny that the windows
2 at Mira Vista leak do you?
3 A. No, we've seen the evidence.
4 Q. You've seen the evidence that the windows leak at
5 Mira Vista?
6 A. Yes, sir.
7 Q. And the Mira Vista job there is a few more units
8 over there but the Mira Vista job started as a 14.5
9 million dollar job didn't it?
10 A. Are you referring to our last cost estimate in the
11 case?
12 Q. I don't know if I have the last one.
13 A. Because I know there were bigger numbers than that
14 on the other side, yes sir.
15 Q. It always grows doesn't it?
16 A. Yes sir, it does.
17 Q. You've described it before as repairing these
18 buildings as going on an Easter egg hunt for the damage,
19 huh?
20 A. Did I say that?
21 Q. You don't recall that?
22 A. I do commonly refer to it as like a search and
23 repair like if you know there are systemic problems it's
24 almost a search and repair type situation.
25 Q. These repair scopes and the required repair once you

1 get into the building almost always expands correct, once
2 you uncover the rock?

3 A. Sometimes it does and sometimes it doesn't. I'll
4 give you an example. We're doing a project up in Seneca
5 that has two phases that is called Stone Ledge. And
6 there are parts of its hearty plank -- we're replacing
7 cedar siding with hearty plank siding and there is stone
8 veneer.

9 There are sections of stone veneer that we've
10 discovered that we don't have to do but then we
11 discovered there is other sections that we do based on
12 once you get to the job and you start digging into the
13 buildings and you see where they -- once you expose them
14 you see where the problems are.

15 There is also some windows that we were asked to
16 pull, flash and reset that we've discovered that we don't
17 have to do that in certain sections because of the type
18 of if they are in the foundation and walls and things
19 like that. So the scope will some of it does grow and
20 some of it contracts.

21 Q. Well, let's look at an example closer to home. East
22 Bridge condos, apartments right by the Ravenel Bridge you
23 were in that case, correct?

24 A. Yes, sir. I came in second in the bidding too, yes
25 sir.

1 Q. And your initial repair scope of 6.5 million dollars
2 grew to eight million dollars by trial, correct?

3 A. Justin, I don't remember it being as high as eight.
4 I know it was seven and change but it could have been
5 closer to eight.

6 Q. And you and I had the same conversation sitting and
7 standing exactly where we were back then, correct?

8 A. I was thinking this was the same courtroom; I can't
9 remember.

10 Q. And when we added a few more things to your repair
11 scope at trial on East Bridge it became 10 million
12 dollars correct?

13 A. I do not recall that.

14 Q. And the jury came back with 22 million dollars in
15 actual damages at East Bridge correct?

16 A. I don't know. The last I heard was I think you had
17 16 to 18. What I was told before I testified is that
18 you had 16 to 18 secured already and I didn't know what
19 happened after that.

20 Q. You're not aware that the East Bridge verdict was
21 three and half times your estimate?

22 A. No, I knew it was big but I don't remember the exact
23 figure.

24 Q. Well, the same thing happened at Tennyson Row
25 correct? And that was your firm's estimate but it was

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1 your daddy testifying, correct?

2 A. That's correct. Yes, sir.

3 MS. DYER: Your Honor, object to the relevance of
4 various verdicts.

5 THE COURT: Yes. What's the relevance?

6 MR. LUCEY: The relevance is ---

7 THE COURT: --- no, come forward.

8 [Whereupon, an off the record bench conference is
9 held]

10 Q. [Mr. Lucey] Sir, with regards to the repair of this
11 window you told us a moment ago that you've since spoken
12 with Mr. Drake about how to repair the windows?

13 A. Correct.

14 Q. And when did that occur?

15 A. It was at I think maybe the middle of last week I
16 was driving back from Clemson mid Tuesday, Wednesday, or
17 Thursday; somewhere in there and Davi had asked me if I
18 could call in and do a conference call with her and Phil
19 and I did going down the road. My part took ten minutes
20 maybe.

21 Q. Okay. Well, prior to that call you were operating
22 completely on what Rimkus Engineering had instructed you
23 to do for the repair, correct?

24 A. Correct.

25 Q. And did Mr. Drake change your protocol?

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1 A. I don't think so. He clarified a couple of things
2 but he didn't change it.
3 Q. And so prior to that phone call you were aware that
4 there is a very small bite in the vertical joint between
5 the back dam, the back dam on the sill -- and the window
6 frame, correct?
7 A. What do you mean by small bite?
8 Q. A very small area placed sealant.
9 A. Do you mean once the L bracket is off the amount of
10 frame that you have?
11 Q. Right.
12 A. I'm guessing that's maybe a half inch, maybe five
13 eighths.
14 Q. It's actually about a 64th of an inch wide from ---
15 A. --- oh we're not talking about the same thing. I'm
16 sorry.
17 Q. How thick is the vinyl at the end of the sill riser?
18 A. I understand what you're talking about now. The end
19 dams of the L piece?
20 Q. Yes, sir.
21 A. I don't know how thick it is. I don't have a gauge.
22 Q. It's very thin correct?
23 A. Right; three sixteenth's max.
24 Q. Okay. Sealant has a hard time acting as an
25 adhesion agent on a piece of flexible vinyl with a small

1 bite or surface area such as that to hold on to, correct?

2 A. I'm not a window expert but I've used sealants my
3 whole life and they are used to adhere things from time
4 to time but I'm not -- I don't have the expertise to
5 testify whether it is proper in this case or not. I just
6 priced what I was given, yes sir.

7 Q. In fact when you and I talked about it at first you
8 smiled when I asked you, you won't warrant that repair
9 will you?

10 A. I've got to be very careful with that because with
11 what I do for a living and my experience I will guarantee
12 that the sealant that I apply to that L bracket water
13 won't pass between the vinyl and that sealant.

14 But I can't guarantee that I'm fixing every problem
15 on that window. I have no idea what the problems are and
16 I've got to be very careful on how I'll word a warranty
17 or a guarantee that I'm not responsible for the other
18 components on the window.

19 Q. The word you previously used was hesitant. You
20 would be hesitant to ---

21 A. --- I would yes, sir ---

22 Q. --- to warrant that repair, correct?

23 A. I would be, yes sir.

24 Q. And you spoke of other problems with the window. I
25 didn't see any costs in your repair estimate for the

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1 cracked windows. Did I miss it?
2 A. It's not there.
3 Q. There is no estimate for cracked window replacement?
4 A. Do you mean the actual window itself being cracked?
5 Q. Yes, sir.
6 A. It's not there.
7 Q. I didn't see any line item in that estimate for the
8 repair of any water damage below the window.
9 A. That's correct. I do have a contingency that
10 potentially could absorb those issues. If it is systemic,
11 if most of the windows are damaged it won't cover it.
12 Q. Tell us what that contingency is please.
13 A. 2,192 dollars and 25 cents.
14 Q. Tell the jury how far that contingency would have
15 gone at Mira Vista.
16 A. To do what repair?
17 Q. The water damage under the windows.
18 A. It depends on where it is. I'm assuming that any
19 water that would get in that would bypass that L bracket
20 would damage the stool on the interior. That would
21 replace a lot of stools but it won't repair a lot of
22 framing or exterior sheathing.
23 Q. And sir, just to digress for a second you estimated
24 384 windows, correct?
25 A. Yes, sir.

1 Q. And you were asked why you estimated 384 when there
2 is only 324 there, 315 there and you said it's because of
3 twins?

4 A. Yes. Anything that is ganged we consider each of
5 those windows individual because of this type of repair.

6 Q. And that means you think that there is 60 ganged
7 windows there, correct?

8 A. I'm not sure. I didn't look at that.

9 Q. Well, 384 less 324 is 60 correct? If you add 60
10 windows you must be you think there are 60 twins.

11 A. I'll say this. I think there is 384 individual
12 single hung windows there but I don't know how many of
13 them are ganged together.

14 Q. So you're not aware there are over 200 twins at One
15 Belle Hall correct?

16 A. I'm not aware of that.

17 Q. So just to be clear as I understand it you're
18 pricing this sealant repair that you've told the jury
19 about because that's what you have been told to do; not
20 because you've adopted any independent belief that that
21 is an appropriate repair for those window products.

22 A. That's correct.

23 Q. And sir, tell the jury if you would please how your
24 bead of sealant is going to differ at all from the bead
25 of sealant that the manufacturer placed in there when

1 they manufactured the windows.

2 A. Based on the pictures and seeing one popped out at
3 the destructive test it appeared, and I'm not a window
4 expert; but just based on my experience in sealants and
5 making repairs, that a sealant bead was run horizontal up
6 underneath a vertical leg of the L bracket but it didn't
7 go all the way to the corners and it didn't turn up to
8 form an indent.

9 Our bead of sealant will go from corner to corner
10 and turn up to form a vertical seal on the L bracket.
11 That's what has been prescribed.

12 Q. You personally witnessed gaps in the sealant bead
13 under the sill insert at the corners is that correct sir?

14 A. I saw a picture of that yes, sir.

15 Q. That is how the windows arrived on site and were
16 installed correct? They were defective from day one
17 weren't they? They are missing sealant at the corners.

18 A. Because I didn't see them I don't know for sure but
19 I'm assuming based on what I saw in that picture that I
20 don't know how much -- here's why I'm hesitating.

21 I'm assuming that the silicone that was placed when
22 the L bracket was removed all of the sealant stayed at
23 the frame and didn't go with the L bracket. I didn't
24 look at the L bracket individually. I couldn't find a
25 picture to see if part of the sealant at that corner went

1 with the L bracket; that's why I am hesitating. But if
2 it didn't then I would assume that that's how it did come
3 from the factory.

4 Q. We can't have it both ways. You can't tell the jury
5 how your sealant is going to do what the manufacturer
6 didn't do if you don't know whether there were gaps there
7 to begin with.

8 A. What I'm trying to say is I'm making an assumption
9 when I look at those pictures as a contractor for my
10 pricing but I'm not qualified to testify as an expert on
11 that window build or manufacture.

12 Q. That's not the issue. The issue is how your sealant
13 bead is going to be any different, any better than the
14 manufacturer's sealant bead.

15 And if the manufacturer's sealant bead was full to
16 begin with then you're won't be any different. And if it
17 was not full to begin with the windows were defective on
18 day one.

19 A. All I can say is our bead will be an uninterrupted
20 bead horizontally and vertically with that L bracket.

21 Q. So I'm gathering at this point in the conversation
22 you can't actually tell the jury how your sealant bead
23 will be different from the manufacturer's bead?

24 A. To do that I would have to assume things that I
25 don't know for sure.

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1 Q. And we all know the manufacturer's bead has leaked,
2 correct?

3 A. I saw it leak in a test.

4 Q. And there is nothing in the repair scope to fix the
5 leaking meeting rails either is there?

6 A. No, sir.

7 Q. And there is nothing in the repair scope to bring
8 the illegal twin windows into building code compliance,
9 correct?

10 MS. DYER: Objection.

11 THE COURT: Say again.

12 MS. DYER: Objection.

13 [Whereupon, an off the record bench conference is
14 held]

15 Q. [Mr. Lucey] There is nothing in your estimate to
16 bring the illegal twin windows in One Belle Hall into
17 compliance with the building code is there?

18 A. There is not but I don't know if they are illegal or
19 not. There is just nothing in my estimate to address
20 that.

21 Q. Thank you, sir.

22 A. You're welcome.

23 MR. LUCEY: Nothing further, Your Honor.

24 THE COURT: All right. Yes, ma'am?

25

REDIRECT EXAMINATION

BY MS. DYER:

Q. Mr. Watkins, did you testify a few minutes ago that you would guarantee that when the repair is made that water won't pass through those joints between the sill insert and the window mainframe?

A. Yes, ma'am.

Q. Okay. And were you ever asked to produce an estimate for the complete repair of the One Belle Hall project?

A. No, I was not. Define complete.

Q. Sure. Plaintiff's expert has provided a price, an estimate, to fix everything that their expert found wrong with the buildings, correct?

A. I assume. I haven't looked at it but I assume, yes ma'am; typically yes ma'am.

Q. Fair enough. But you weren't asked to price the same scope that plaintiff's expert has priced to your knowledge?

A. I was not asked to do that.

Q. So anything that you estimate doesn't include is something that you weren't asked to include in an estimate?

A. That's correct.

Q. Thank you.

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1 MR. LUCEY: Nothing further, Your Honor.

2 THE COURT: Very well. Is this witness free to
3 leave?

4 MS. DYER: He is.

5 THE COURT: Any objection? Very well, you are
6 free to go.

7 [Whereupon, the witness is excused and exits the
8 witness stand]

9 THE COURT: Call your next witness please.

10 MS. DYER: The defense rests.

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1 THE COURT: Will there be any reply or rebuttal?

2 MR. LUCEY: No, Your Honor.

3 THE COURT: All right. Ladies and gentlemen you
4 have now heard the witnesses and received the evidence
5 which you will in this case. What remains for us are the
6 arguments of counsel and then my charge or instruction on
7 the law. That also signifies to me that there are
8 matters which we must take up outside your presence.
9 It's also lunch time and you've got lunch. So ladies and
10 gentlemen I do need you to be mindful that you are not
11 prepared to deliberate. You must not discuss this matter
12 or allow anyone to discuss it with you so please be
13 mindful of that. If you -- it's up to you whether or not
14 you wish to stay in here or remain in here throughout
15 lunch or if you wish to leave. But we have to get lunch
16 and there are matters that I must attend to outside your
17 presence. We will reconvene this matter at 2:30, at
18 2:30. At that time I anticipate that we will have
19 closing arguments and then my charge or instruction on
20 the law and then you will receive this matter for your
21 deliberations. So please be mindful that during the
22 lunch break not to discuss this matter or allow anyone to
23 discuss it with you. Please leave your notebooks in your
24 seat and we will secure them over lunch. Thank you.
25 [Whereupon, the jury exits at 1:00 p.m.]

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Motion for Directed Verdict-Remarks by Mr. Lucey
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1 MOTION FOR DIRECTED VERDICT

2 THE COURT: All right, motions. Any from the
3 plaintiff first?

4 MR. LUCEY: Yes, Your Honor. Plaintiff moves for
5 a directed verdict on all three causes of action so we
6 can argue them at the same time. The core issues in all
7 three are the same. Among other things but certainly the
8 absolute most obvious, Your Honor, the only testimony in
9 this case, the unrefuted testimony in this case is that
10 the twin windows were illegal for use in this
11 jurisdiction.

12 Now we've established Builder's First Source's
13 duties from a number of sources including the ones they
14 voluntarily undertook in the purchase order. And just
15 referring to that for a moment one of the duties they
16 undertook in the purchase order was to comply with all
17 state and federal laws. They clearly did not do that by
18 distributing a window in this jurisdiction that can't be
19 used in this jurisdiction. Because it can't be used in
20 this jurisdiction it is on its face unsuitable and will
21 not pass without objection in the trade.

22 And Your Honor we have both the expressed warranty
23 and the implied warranty and I think the record will
24 reflect that the defendants never actually said the
25 windows don't leak or the windows don't cause damage.

1 They were very careful about that. They tried to provide
2 alternative explanations as to why things were occurring
3 in the building and why some of the tests might have
4 failed regardless of the windows performance. But they
5 never actually said these windows don't leak. These
6 windows haven't failed and these windows have not caused
7 damage. In fact they were very careful in that and
8 instead they more couched their testimony in terms of you
9 know these are five, six, eight year old windows. These
10 things may have to be done.

11 And that's another thing I want to point out when
12 the court is considering the testimony on these motions.
13 Ninety percent of Mr. Drake's testimony was this may
14 happen or this could happen. Very little did he actually
15 give an opinion to a reasonable degree of certainty in
16 his field of expertise.

17 In fact I'll give the court an example. When
18 Builder's First Source asked Mr. Drake about why windows
19 can fail testing he didn't say he had an opinion to a
20 reasonable degree of certainty or anything like that as
21 to why the windows failed the testing. He said well
22 sometimes you can leak if you apply too much pressure or
23 if the weeps are clogged. He didn't say that's what
24 occurred here. He said it can happen. They really have
25 not contested plaintiff's evidence that the windows leak

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1 and are causing damage. They're illegal. The undisputed
2 evidence is that Builder's First Source employees did not
3 perform any of the undertakings that they agreed to do in
4 the terms and conditions including ensuring the quality
5 of the windows and making sure not just that they were
6 suitable; the terms actually provide that they will be
7 the most suitable for this type of material and goods.
8 And clearly that has not occurred. The evidence is
9 overwhelming and the contradictory evidence is very
10 little, Your Honor.

11 The plaintiffs believe that they are entitled to a
12 directed verdict both on negligence, warranty implied
13 warranty and on strict liability. I'll note to the court
14 too we put in the unreasonable dangerous aspect of this
15 through Builder's First Source's own witnesses in our
16 case. So there can be little dispute on that issue and
17 we believe satisfy the elements of each of those causes
18 of action.

19 THE COURT: Thank you so much. Yes, ma'am?
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1 MS. DYER: Our position is that we have provided
2 evidence that not only are the windows -- plaintiffs have
3 put up evidence that the windows, the DP windows the
4 certification test reports to prove that they are DP-50
5 haven't been found. We have -- the fact that the
6 evidence doesn't exist doesn't mean that the windows were
7 illegal. We haven't heard from a Mount Pleasant building
8 official; we haven't heard from an architect.

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

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

19 As far as the negligence cause of action there is a
20 failure to prove what duty Builder's First Source had
21 with regard to the inspection of the certifications
22 supporting the windows. And the breach of warranty we
23 would argue that there has been sufficient evidence that
24 the windows are defective by manufacturing purposes as
25 opposed to having some kind of damage that's occurred

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1 from the time that the windows arrived on site until the
2 time that they currently exist. We feel that there has
3 been a sufficient showing of evidence on all three causes
4 of action to allow the jury to make the final
5 determination.

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

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

25 THE COURT: You haven't mentioned although it was

1 in your pleadings about intervening negligence and
2 reliability with regards to third parties. You did not
3 mention that in your argument now.

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

16 THE COURT: Okay. Yes sir, anything further?
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1 MR. LUCEY: Yes, Your Honor. There doesn't seem
2 to be that there can't be any intervening negligence as
3 to the windows, only the twin windows because they were
4 the intervening party, they were the -- party, they were
5 the middle party that actually bought the windows and
6 then resold them to this project. That aspect is just is
7 just what it is.

8 As to the damages that are arguing there we didn't
9 move for a directed verdict as to the amount of damages;
10 only as to the issue of liability. To the extent that
11 there is some sort of argument that we had a lack of
12 proof on damages because we can give a percentage ---

13 THE COURT: --- I'm not concerned about that.
14 Don't worry about that. Go back to liability; go back
15 to liability on the twin windows. Talk to me about that.

16 MR. LUCEY: Well, Your Honor, this middle man
17 bought the windows and resold them.

18 THE COURT: I'm not concerned about that. Clearly
19 our law says that the seller of the windows implied and
20 express warranty and it certainly has been your position
21 that they had an affirmative duty to do certain things
22 that they did not do like make sure that they were
23 appropriate windows, make sure that they had -- that the
24 testing had been complied with, etcetera. You've got
25 that. Talk to me specifically your position with regards

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1 to the twin windows.

2 MR. LUCEY: The twin windows were illegal for use
3 from the get go.

4 THE COURT: Okay.

5 MR. LUCEY: They can't say somebody else handled
6 that issue. There are no test reports on the twin
7 windows, there are no certifications. They can claim
8 confusion as to the certification or the test reports on
9 the single windows but there never was, there is no
10 evidence of a test report or a certification on the twin
11 windows.

12 There is no way they can blame somebody else for
13 that; they just never even checked. They never checked
14 anything but had they checked they would have found there
15 is none. There is just no mistake to be made. There is
16 no certification; you can't use it, they can't be sold
17 here. And there is no just way for them to blame anybody
18 else for that.

19 THE COURT: Okay. On that one issue let me hear
20 from you about that.

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1 MS. DYER: Yes, Your Honor. The plaintiff has the
2 burden to prove that the windows were illegal. And here
3 we just have an absence of that proof. We have Doctor
4 Whitlock, the finding that the windows didn't meet
5 building code. Doctor Whitlock is not a building code
6 official. We haven't heard from a building code official
7 to indicate that the windows do violate the code.

8 We also haven't seen again a test report and the
9 plaintiff has the burden of proof that there isn't a test
10 report; not just that there is an absence of one overall.

11 THE COURT: I'm trying to remember the testimony
12 that was elicited by Builder's Source that in fact
13 Builder's Source had made a determination that in fact
14 that the twin windows had -- that they had done a review
15 to be sure that they had been tested because as I
16 remember they were drop shipped to the site.

17 And I don't remember any testimony -- I do remember
18 the testimony about the single windows and I remember
19 there were some questions about a number of issues but
20 you walked the witnesses for the plaintiff through that
21 on the single windows. What about the double windows?

22 MS. DYER: The specification from the architect,
23 the design professional in this case, wasn't exclusive to
24 a single window or a twin window. It was more all of the
25 windows. The window component itself before it is joined

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1 together is the same window.

2 THE COURT: I remember that.

3 MS. DYER: And so the architect design professional
4 is who Builder's First Source relied on as far as calling
5 out the appropriate window for this particular project,
6 calling out that that window met the specifications,
7 which in turn met the building code as it was a permitted
8 project and eventually was C-O'ed [phonetic].

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1 MR. LUCEY: There is actually no evidence of
2 reliance in the record. No evidence that Builder's First
3 Source relied on the architect. The evidence is that the
4 Builder's First Source sales person prepared the purchase
5 order and the model number on the purchase order is not
6 found in these facts. You can believe whatever
7 explanation you want but the two model numbers do not
8 match. And the sales person is deceased and we don't
9 have his testimony.

10 But not only is there no evidence of reliance there
11 was testimony from Builder's First Source current
12 consultant and former area V.P. that neither he nor
13 Bratten looked at the specs or looked at the test
14 reports. They didn't look at anything; that was the
15 their testimony. There can't be reliance if they didn't
16 even look at it.

17 THE COURT: Yes?
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1 MS. DYER: I believe that Bob Lanier did testify
2 that Builder's First Source relies on the specifications
3 from the design professionals.
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One Belle Hall POA v Builders First Source Southeast Group, LLC
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1 MR. LUCEY: But that general practice can't
2 contradict the specific testimony as to this transaction
3 where he said they didn't look at it. He didn't look at
4 it. Bratten didn't look at it. They didn't look at the
5 specs, they didn't look at the tests; they didn't look at
6 anything.
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1 THE COURT: Okay. Taking the evidence in the
2 light most favorable to the non-moving party, which of
3 course would be the defendant I believe that what has
4 been laid out are issues for the jury and I am
5 respectfully going to deny the motion for -- see I think
6 it is an involuntary non-suit with prejudice but a
7 directed verdict is what it is commonly called at this
8 juncture so I would respectfully deny your motion noting
9 your exception thereto. Yes, motions?

10 MS. DYER: No, Your Honor.
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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.

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1 MS. DYER: Your Honor, I have a housekeeping
2 matter.

3 THE COURT: Sure.

4 MS. DYER: We marked the photos that we used in Mr.
5 Drake's presentation today as Joint exhibit 169. I
6 failed to move it into evidence.

7 [Whereupon, joint exhibit number 169 is entered into
8 evidence by the court]

9 THE COURT: Are y'all ready?

10 MS. DYER: Yes, Your Honor.

11 THE COURT: We're ready. Let's have the jury.

12 [Whereupon, the jury enters at 3:11 p.m.]

13 THE COURT: Ladies and gentlemen we have now
14 reached the point in the trial where we are going to have
15 the closing arguments and this is how we're going to be
16 proceedings. You're first going to hear from the
17 plaintiff in the plaintiff's closing argument, and then
18 you're going to hear from the defendant in the
19 defendant's closing argument, and then a reply rebuttal
20 argument from the plaintiff.

21 So there will be three closing arguments. Then
22 there is going to be a short break that is going to
23 really make sense to you -- I'll tell you what it is now.
24 I'm going to find out if anybody needs to take a comfort
25 break quite frankly because I want you to be able to pay

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1 attention to me while I deliver the charge on the law to
2 you. I'm then going to do that; I'm going to deliver the
3 charge and the instruction on the law to you. Then there
4 will be another short break and I'll explain to you that
5 when we reach that point and then you're going to receive
6 this case for your deliberations.

7 At this time though I ask that you please draw close
8 and give you undivided attention please to these matters
9 as we listen to the closing arguments of our attorneys.

10 MR. LUCEY: May it please the court?

11 THE COURT: Yes, sir.

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CLOSING ARGUMENT

BY MR. LUCEY:

That's where we started three days ago that photograph that is on the screen. That is the entrance to One Belle Hall. These [indicates] are the four buildings we looked at right at the beginning of trial. The four One Belle Hall buildings that surround that parking area and miniature park building 2200 on the right, 2100 in the center, 2000 on the left, and 1900.

Plaintiffs have shown to the jury leaks and damage in every one of those buildings and in the vast majority of the condominiums units. The evidence you've seen this week a recap of the witnesses is on your screen. It started with Len Terradista, the current president and a homeowner, telling you about his issues with the windows and what the association had generally experienced..

Gary Moore and Doctor Rhett Whitlock; two of the plaintiff's experts. Doctor Whitlock told you about his extensive investigation and how he not only formed a hypothesis about the windows leaking and causing damage but that he was the one expert that tested the hypothesis before he came before you today. You heard from David VanDommelen; Builder's First Source's expert, their expert not plaintiff's, their architect not the plaintiffs. You heard from him that he conceded the

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1 leaking. He conceded the violations. He respected the
2 testing done by WDP but most of all for me when I heard
3 it most of all he told you why they didn't test. He told
4 you why Builder's First Source did not test the windows
5 of this property. In his words that he conceded on the
6 witness stand he said we, being him and his client, four
7 engineering and four groups, and his client, Builder's
8 First Source we were not interested in seeing if the
9 windows leaked. Those are his words and I hope you
10 remember them because when you saw them present Mr. Drake
11 later you could see that Mr. VanDommelen was
12 substantiated.

13 Mr. Drake, the late hire just before trial expert
14 performed his new opinions about how these windows worked
15 Sunday night after he landed at Charleston International
16 Airport. That late expert he wasn't interested in seeing
17 if the windows leaked either. He didn't pour a single
18 drop of water in any one of the 324 windows at One Belle
19 Hall to see if they leaked.

20 You heard from Bob Lanier, the area vice president
21 from Builder's First Source; the man who signed the
22 P-O, the purchase order, the purchase order with the
23 terms that set forth additional duties that Builder's
24 First Source assumed in this transaction by virtue of
25 signing that contract. You heard him testify it was his

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1 signature on the contract, that he understood they were
2 obligated under that contract, that there were duties in
3 paragraph 3 and 4 and 9 on the back of that contract and
4 that he didn't do any of those duties and he wasn't aware
5 of anybody doing those duties and that his sales person,
6 the man who was operating total opening, Larry Bratten,
7 didn't do it either.

8 He didn't look at the specs, he couldn't have relied
9 on the specs because they didn't look at the specs,
10 didn't look at the test reports, didn't look at the
11 certification, didn't ask for any information about the
12 windows; not one action whatsoever by either of those two
13 gentlemen to comply with paragraphs 3, 5, and 9 or 3, 4,
14 and 9 on the back of that, not one action at all.

15 No, what you heard from the Builder's First Source
16 witnesses, and by the way the plaintiffs called all the
17 Builder's First Source witnesses. Builder's First Source
18 didn't send anybody here to trial to talk to you. The
19 plaintiffs brought them. We published Mr. Woodward to
20 you, the 30(b)(6) person. You saw the two people reading
21 the deposition during the trial that was the person they
22 presented for deposition as their most knowledgeable
23 person about this transaction, about these windows, and
24 about how they vet their windows. That was their
25 30(b)(6) witness and you recall the Judge gave you an

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1 informational instruction on what a 30(b)(6) deposition
2 is and how it works and what the significance is. It was
3 as if the corporation, that big entity, that national
4 entity with the 55 or the 5500 distribution centers or
5 whatever it is they have it's as if that company was
6 sitting right here and testifying when we published Mr.
7 Woodward's deposition. And we'll get back to that in
8 more detail.

9 But getting back to Mr. Lanier, the other Builder's
10 First Source employee that we called, plaintiffs called,
11 what did you hear from him about this transaction? What
12 did he actually have knowledge about? He had knowledge
13 about three things maybe four. Larry Bratten was his
14 outside sales person. TCR was his client. It was Larry
15 Bratten's job to go bird dog that client and make that
16 sale.

17 And as the typical practice between him and Larry
18 Bratten on behalf of Builder's First Source Larry Bratten
19 would write up the P-O, plaintiff's exhibit 44 and 44-A,
20 the April one and then the modified one on May 7th.
21 Larry Bratten would do that and we all know Larry Bratten
22 did it and we're going to look at it in a second and I'm
23 getting ahead of myself but we know he did it. Why?
24 Because on that P-O you'll see it is a form. It's
25 nobody's custom document, it's not like letterhead.

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1 You'll see everybody's name is filled in on that form and
2 the very first name that is filled in is Builder's First
3 Source dash Total Opening Sales; Larry's little trade
4 name. And you'll look under it you'll see the address.
5 You won't recognize that address; it's Catawba Lane.
6 Look at all the Builder's First Source invoices in
7 evidence and you will never see that address. Why? It's
8 Larry Bratten's address.

9 So we know Larry Bratten is the one who put in the
10 purchase order but why do we care? Well they keep
11 wanting to say hey, we're just the middle guy. All he
12 did was supply what the architect specified. Well, one
13 they testified they never saw the specifications, never
14 looked at them. Two, the number on the P-O 2031 doesn't
15 match the number on the submittal -- excuse me, on the
16 specifications exhibit 2. It doesn't match.

17 Now you've heard three or four explanations about
18 why it doesn't match and we heard a brand new one that
19 Mr. Drake concocted Sunday night after he flew into town
20 about how you take apart the window and put it back
21 together again and somehow you have a new window. And
22 although it's a new window and make it so the numbers
23 match they still don't match. So you heard all those
24 explanations and the only evidence before the jury now as
25 to how a different number got on the P-O is that Larry

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1 Bratten prepared the P-O 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

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

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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

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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.

22 They now have to do what they say they're going to
23 do. And it's overwhelming that that did not occur. So
24 once you got into the evidence you've got this big
25 national company who is a self described product industry

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

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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

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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

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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

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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

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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

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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

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.

11 We have a second sill dam chart I want to show you
12 in a second. And actually when I'm say 16 it's really a
13 bit of an understatement because about half of the
14 windows were twins so if you test 16 openings you're
15 actually testing 24 or 26 windows okay. Additionally
16 while he tested all 16 openings at zero pressure
17 originally -- I may be misspeaking; I think maybe it's 14
18 -- at zero pressure originally he went on and retested
19 three or four of them at one third pressure and he
20 retested two or three of them at two thirds pressure.

21 So he actually performed closer to 30 window spray
22 back tests if you count all windows and all level of
23 pressure. As you've heard so many times this week all
24 windows failed at zero pressure. They could not
25 withstand regular rain without even considering the issue

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

8 And when you put a mullion down the middle it
9 changes the size of the opening as explained by Doctor
10 Whitlock. It changes the test parameters and the window
11 has to be retested. And that didn't happen and you see
12 a lot of your leaks occurring at the corners immediately
13 adjacent to that mullion. And the windows are also
14 leaking at areas four and five which is the meeting rail.

15 While four and five are put in the middle of those
16 photographs you might recall during trial that the
17 meeting rail splatter that you would see on the back of
18 the screen during testing actually more often occurred at
19 each end of the meeting rail and it would just splatter
20 onto the protective, the pressure chamber behind the
21 test.

22 There is an example right there the left corner of
23 the meeting rail splattering onto the pressure chamber
24 behind the test. Here's another one of his test
25 photographs with water dripping out of the window. Here

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

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

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

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

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

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

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

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

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

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1 federal government at the Capital, UVA; impressive,
2 impressive list of projects where he has spearheaded the
3 forensic leakage investigation or a structural
4 investigation; an impressive list. And he applied that
5 experience to his investigation here and performed it in
6 the same way that he'd perform any other investigation
7 using his ASTM standards.

8 And he testified for you to a reasonable degree of
9 certainty in his field of expertise that the windows are
10 defective, they are not DP-50. They leak at multiple
11 locations. They leak at zero pressure. They're causing
12 damage to all the buildings. They're illegal for use
13 over at One Belle Hall and that they must be removed and
14 replaced.

15 This is the on the screen now is the test report
16 that the defendant wanted to reply upon to prove that
17 these windows were fine, they're good, they're DP-50,
18 they are impact resistant and everything else. You don't
19 even need to get to the issue of the different sealants
20 being used in testing.

21 And those are technical issues and y'all probably
22 got that that they were tested with different sealants;
23 that the structural specimen never passed testing with
24 the proper sealant. But you don't even need to get there
25 because you just look at the face of the report and it's

1 talking about interior glazed windows. Nobody denied
2 this week that the sashes on these windows are exterior
3 glaze and nobody denied it. And regardless of that you
4 heard Mr. Drake concede that the drawings attached to his
5 report don't match the signed and sealed engineer
6 drawings. Something is wrong; they are both wrong. And
7 we know they are wrong because we have exterior glazed
8 windows.

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

17 Actually before you press the glass against the sash
18 frame you'd put a bed of sealant around the sash frame
19 that you are going to press the glass to. So now that
20 sealant is going to be on the inside of the glass;
21 between the glass and the sash frame.

22 And then you're going to lock that IGU, that glass
23 into place with the glazing beads again from the exterior
24 of the structure. You just put these pieces of vinyl in.
25 What that means is that you are exterior glazed. You've

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1 moved the glaze in the back bedding, the sealant, to the
2 inside of the structure. The exterior of the sash no
3 longer has any water resistant capability. There is no
4 sealant between the bottom glazing bead and the glass. A
5 vinyl to glass joint cannot resist water intrusion. By
6 them switching the sash from an interior glaze to an
7 exterior glaze doubled the amount of water that was
8 getting dumped into the sill that couldn't handle the
9 water anyway. And as testified by Doctor Whitlock it
10 contributed to the damage that was being done here.

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

19 And for somebody to suggest that it is a third party
20 validation is just frankly ridiculous when it doesn't
21 even match the specimens. Even Mr. Drake eventually
22 conceded that there were multiple errors in the report.
23 Here's another example of a typical condition at One
24 Belle Hall you can see with your own eyes you can see the
25 vertical joint at the end of the sill dam and you can see

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1 it is discolored. And you can see a discoloration down
2 below it and the discoloration in the corner. And Mr.
3 Drake wants to tell you that even though you can see the
4 water line at the joint in the vertical joint that the
5 water came from somewhere else and besides this is pretty
6 much just dirty anyway in his opinion.

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

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

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

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1 the Judge is going to instruct you on the law at the
2 close of the case; we talked about that and in the
3 opening we discussed briefly the three causes of action
4 that the plaintiff has brought and what the plaintiff
5 thinks they need to prove to satisfy the law that the
6 Judge will charge you. We think we've done that as to
7 strict liability.

8 Obviously if Builder's First Source claims it's an
9 industry leader that it is in the business of reselling
10 these goods so this is their business, which is a
11 criterion. They sold these windows and there can be no
12 dispute about that. They themselves concede that these
13 windows are unreasonably dangerous and the windows have
14 caused damage.

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

23 And that duty in the simplest terms is to sell a
24 product that is suitable, a usable product, a product
25 that is useful for its ordinary purpose and for its

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1 intended purpose. Its plaintiff's position that as to
2 windows the ordinary purpose keeping the weather out
3 merges with its particular purpose which is having light
4 in and keeping the weather out and therefore we have
5 satisfied the elements required for both of those causes
6 of action.

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

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

22 He said it's not a maintenance issue. He said it's
23 a manufacturing issue; their architect. Builder's First
24 Source may also argue what is called a mitigation defense
25 that somehow the homeowners once they realized they had a

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1 problem should have done a better job of keeping it from
2 getting worse. You heard from Doctor Whitlock there was
3 nothing they could do short of a complete reclad of the
4 building. Slapping more caulk on this is not going to
5 change it.

6 They need to fix their stucco which is not at issue
7 here today but they also need to fix these windows which
8 is at issue today and you can't just slap some more
9 sealant on these windows. It won't do any good. And you
10 can't even find the cracks in these windows unless you do
11 what Doctor Whitlock did which is to go cut open the
12 interiors.

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

22 The multiple party defense. What we've heard about
23 that is somehow this is caused by the architect, caused
24 by somebody else; not us. What we've already seen they
25 never looked at the specs. They can't show it's caused

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1 by the architect and they didn't comply with the specs.
2 The model numbers don't match. The law does not insulate
3 the middle man. They are responsible we'll believe
4 you'll see under the law as the Judge gives it to you.
5 They are responsible for products they sell. It doesn't
6 matter if they manufacture them or not. They sold them.
7 You put into commerce the defective product you can be
8 held accountable for it.

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

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

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1 proximate cause. So in summation on this issue on the
2 issue of the defect we believe we've answered the
3 questions posed by Builder's First Source during its
4 opening. Did they make a promise they did not keep?
5 Yes. Did it supply a dangerous product? Yes. Do the
6 windows leak? Yes. Do those leaky windows result in
7 damage? Yes. And what is that damage?

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

20 Well if his original testimony was correct that
21 means he was testifying that these windows were
22 inherently defective. They had gaps in the corners of
23 the sealant at the time they were manufactured and then
24 sold and delivered at One Belle Hall. And that would be
25 the only way that his sealant would be any different and

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1 better because he would have no gaps. But when
2 questioned on that he said oh well you know maybe the
3 sealant got stuck up above and I just didn't see it. So
4 maybe it was there and maybe I shouldn't testify that
5 they were defective originally. And I asked him I said
6 Mr. Watkins you can't have it both ways. Either there is
7 a defect in that sealant job that you're going to do a
8 better job of or you're going to do the same thing the
9 manufacturer did and it's going to fail the same way
10 because the windows are just bad windows and you just
11 can't fix it. Which is it? And we really didn't get an
12 answer out of him.

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

21 He did not include any cracking. He did not include
22 any rot repair. This is in contrast to Gary Moore,
23 plaintiff's damage estimator, damage expert and
24 contractor and you heard and saw Gary Moore and frankly
25 he pretty much did seem like a contractor. He spoke of

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1 hammering nails all his life. And he got up there and he
2 told you his experience and he showed you his detailed
3 estimate. Now at the time he prepared that estimate the
4 entire buildings were an issue, the entire buildings and
5 so it contains lots of things that don't apply to a case
6 just about windows.

7 So what he did was he backed out the components that
8 related to windows into a smaller number. He testified
9 that repairing the windows by themselves would be 3.5 --
10 to replace them would be 3.5 million dollars. Repairing
11 the damage associated with the windows it would be 5 to
12 5.2 million dollars. And if you took off the cladding
13 work that needs to be done to repair a window because
14 you've got to replace your stucco anyway then it would be
15 reduced down to 4.7 million dollars.

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

23 You'll see more detail in fact if you get a second
24 compare it to the Watkins depositions. What he's got at
25 60 pages Watkins can get done in a page and I'm not

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1 criticizing that but it's a compliment to Mr. Moore the
2 extent of the detail to which you can find in his
3 estimate as to what is included and what is not included
4 in his estimate. And you'll see the sections, the top
5 sections on his repair estimate that were removed because
6 they did not relate to water damage or added in because
7 it did relate to the window damage. And he allocated the
8 general conditions at the bottom. He reduced the amount
9 of time the job would take and he detailed it in the
10 attached.

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

19 Well plaintiffs concede Gary Moore is a top quality
20 window mechanic. He told you about the churches he has
21 restored; he's told you about all the Charleston historic
22 buildings he has restored. He's the top quality; he's a
23 Cadillac, we get that. But he knows what he is doing and
24 he told you about his experience. And he does this for a
25 living; he estimates jobs and does jobs for a living and

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1 guess what? Defendants if they thought his estimate was
2 too high they had the opportunity to come in here and
3 show you what it would really cost to replace the
4 windows. If they thought they could get it done for
5 5,000 a window or 500 a window they had that opportunity.
6 They had the contractor there that doesn't do 12,000
7 dollar jobs. They could have given you an estimate of
8 what it would really costs in their mind instead of
9 making fun of Mr. Moore who is a top flight glazing
10 mechanic.

11 At the conclusion of this matter the Judge is going
12 to give you something called a verdict form. On the
13 verdict form will be several questions. It's about a
14 page; it's very simple. And the first question is do you
15 find for the plaintiff. And then it lists out the
16 plaintiff's three causes of action; strict liability, I
17 believe warranty is first and then strict liability and
18 then negligence.

19 And the plaintiffs would ask that you find in their
20 favor on all three, that you check all three because the
21 plaintiffs believe they have proved all three. It won't
22 change what they recover but it's important to them that
23 they prove all three causes of action. Underneath those
24 locations you will find an amount where you will put
25 damages. That's where you would write in what you think,

1 how much you think the plaintiffs have been damaged if
2 you should decide in their favor. And it's just a single
3 number so it's up to you to decide how much replacement
4 costs they get and how much of the consequential damages
5 should be put in there. It's a single number; you put it
6 all under one number. And frankly plaintiffs ask that
7 you award them the full amount of the damages they have
8 put on at trial.

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

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

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1 the Whitlock report. There are lots of other problems.
2 He didn't need to spend any time on that. He needed to
3 spend time on one of the dominant issues in this case; do
4 the windows leak. You didn't hear much from him about
5 that. His words were when talking about the testing his
6 words were well if you apply too much water you might get
7 a leak. I don't know that happened but it happened it
8 happened.

9 He showed you one picture of one window that he
10 thinks has too much debris in it the one where he leaned
11 over the kitchen sink to get that water bottle and poured
12 it down there to see if there was a problem. He showed
13 you that one picture.

14 He said if you have some debris yes okay maybe it
15 can back up and leak. So he gave you some possible
16 alternative causes but he never sat in front of you and
17 said these windows don't leak and I know this because of
18 this. He never did that and it's because he couldn't.
19 He did no testing of anything. He barely did any
20 examination. And if you look at his photos in the jury
21 room you'll find one perhaps two but one for sure window
22 that has some debris in the reservoir.

23 And that worse picture was shown to Doctor Whitlock
24 yesterday and he who had inspected far more of these
25 units that Mr. Drake testified under oath that he had

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1 never seen a condition like that in the entire complex.
2 So Mr. Drake who could have gotten up here and given you
3 some powerful evidence about how and why the windows
4 don't leak and how and why they're not causing the damage
5 below he didn't give you that and we'd ask you to
6 consider that.

7 And of course in considering that we'd ask you to
8 consider that Builder's First Source did no testing. And
9 you got told why they did no testing from Mr.
10 VanDommelen, their architect. In his words they just
11 weren't interested in knowing whether or not the windows
12 leaked. They didn't care.

13 This has been a long segue for the homeowners as we
14 discussed in opening, this window component part is the
15 last part and we'd ask you to render a verdict for the
16 plaintiffs for the full amount of their damages. Thank
17 you.

18 THE COURT: Thank you, Mr. Lucey. Ms. Dyer?
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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

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.

8 But we do have seen his P-O. And the P-O spells
9 out, the purchase order, that Trammell Crow whether they
10 came in, called or emailed they asked for a particular
11 order to be placed. They asked for what the architect
12 specified 324 vinyl Fin DP-50 impact rated windows
13 manufactured by Energy Saving 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

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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.

21 Let's go back and look at them. For AAMA you're in
22 charge of the industry; you're the regulator can you open
23 a file here and do an investigation and see if these
24 windows were properly certified. Doctor Whitlock
25 admitted that Cline Design, the architect in this case,

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

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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

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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.

7 I know what the code is and I know what I'm going to
8 have to do to make sure that this building can be built
9 by the contractor so here's the windows that I need. And
10 the contractor carries that order to Builder's First
11 Source and says here's what our design professional
12 wants.

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

24 Breach of warranty is another cause of action. To
25 prove the breach of warranty the plaintiff has to prove

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1 that Builder's First Source made a promise it didn't
2 keep. We've heard a lot about that. In this case
3 Builder's First Source's warranty says that the windows
4 will be free from defects due to defective materials or
5 workmanship. Well what evidence have we seen that the
6 windows were actually defective?

7 Doctor Whitlock tested 14 windows. Of those 14 he
8 performed a second test, a sill dam test, on nine of
9 those windows. We're talking about between 315 according
10 to Mr. Moore or 324 windows on the P-O so there is
11 already a discrepancy about how many windows are out on
12 the project but fourteen out of 315 or 324 total windows
13 is about four percent. Is the examination of four
14 percent of the windows sufficient evidence that there is
15 a systemic defect with the windows?

16 Doctor Whitlock also admitted that the standards
17 that he called out in his report for the testing of these
18 windows, the AAMA standards were inapplicable. All of
19 these windows don't apply to the AAMA standards 502 and
20 503 because the windows have been installed for longer
21 than six months. You heard Mr. Drake say that in fact
22 there actually is no standard that the windows have to
23 meet because they've been in the field for so long.

24 There is evidence that the drainage or the weep
25 systems in these windows may have been compromised. You

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1 saw the photographs. Mr. Drake found that there was
2 debris down in some of the tracks or the hollows
3 underneath the sill inserts. Now you don't necessarily
4 see the debris because you've got the sill insert that
5 creates a false bottom. You could look at this window
6 and it could look completely clean and fine. But
7 underneath the important part where when water gets into
8 the window because the windows aren't designed to be
9 water tight it's supposed to be able to flow out through
10 those weeps on the outside those little tiny rectangles
11 that we saw in some of the pictures.

12 And it's common sense that if there is construction
13 debris, not something the homeowners did but we're
14 talking about sand and drywall and mortar if that has
15 gotten into the windows before installation while they
16 are sitting around the job site then they're not going to
17 be able to effectively operate as designed. Water will
18 be able to back up. That's not a manufacturing defect;
19 that's a problem with the installation and failure to
20 clean the windows properly before the general contractor
21 turned over this whole project to the homeowners.

22 You also heard that Doctor Whitlock didn't isolate
23 the windows. Now Mr. Drake and Mr. VanDommelen both
24 testified that when they do water testing if they are
25 trying to determine that there is a problem with the

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1 window product itself, the window is installed in a wall
2 and the wall has all kinds of construction components;
3 it's a system. If you want to come in and say with 100
4 percent certainty that the window product has failed and
5 is causing leaks then you just mask off the window.. You
6 can take tape and you take plastic or vinyl sheeting and
7 you eliminate all those variables.

8 So we aren't going to be talking about a leak that
9 could have come from missing flashing or bad flashing.
10 We're not going to be talking about a leak that could be
11 produced by bad stucco or things that have been damaged
12 by termites. We're just going to talk about what is
13 going on with the vinyl window because we've isolated the
14 window before we did the water testing. And
15 unfortunately Doctor Whitlock didn't do that in this
16 case.

17 Doctor Whitlock I believe testified that there were
18 four, four windows that exhibited cracks near the miter
19 joint near the corner. Now the windows are made of four
20 pieces of vinyl; the top the bottom and the sides. And
21 the manufacturer uses heat to weld those corners
22 together. If you'll remember the pictures there is a
23 little hairline crack near those corners. Doctor
24 Whitlock wasn't able to specify what his hypothesis is
25 about where that crack comes from. And again we've only

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1 seen four out of 315 or 324 windows. Is that enough to
2 require that all of them be removed, replaced with new
3 ones? Mr. Drake admitted today that if there is a broken
4 window out there this isn't a manufacturing defect. This
5 one is broken and something has happened to it. And he
6 gave you a bunch of options. It could have been damaged
7 in handling. It could have been damaged in installation.

8 And there are lots of options for how that window
9 was damaged and nobody here can tell us. Doctor Whitlock
10 can't tell us; nobody can tell us how those cracks
11 occurred but the window needs to be replaced. But is the
12 occurrence of four is that enough, a big enough sample to
13 say that all of them has to come out and be replaced?

14 The leakage at the sill dam we've seen pictures of
15 that. You pour water into the track of the window and
16 there is this joint there is a horizontal joint that goes
17 across the bottom and then the two vertical legs. And
18 that's what Mr. Watkins believes he can seal up and
19 prevent and guarantee in fact that no water is going to
20 get through in that location again.

21 Is the leakage of that sill dam a consequence of a
22 manufacturing defect? Did you hear anybody say that? Or
23 is it a consequence of being a ten year old window of
24 people bumping into it, wear and tear, things that
25 happened during construction. Somebody might run a hose

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1 out the window just down -- use the window as a door that
2 you heard testimony about that can cause that vinyl to
3 flex and those sealants to fail or to break. Is that a
4 manufacturing defect? Did you hear anybody tell you
5 that? Wouldn't you expect to see more damage inside
6 these units if they had been leaking for ten years?

7 2016 is the ten year anniversary of these buildings.
8 We saw lots of pictures of damage. We didn't see very
9 many pictures of damage on the interior units. And if
10 the majority as Doctor Whitlock reported of the windows
11 leaking that he was able to create for his testing is
12 happening at that sill insert most of that damage is
13 going to come in. It's going to come into the unit
14 either on the wood trim or on the dry wall underneath.
15 And after ten years I would expect to see a lot more
16 damage that what we saw out there broken or pucker or
17 bubbling paint, soft wood trim, saturated drywall,
18 excessive staining of those conditions. I just didn't
19 see the pictures.

20 So as far as the plaintiff with a breach of warranty
21 did Builder's First Source provide a defective window?
22 Have you seen enough evidence to get as the Judge said
23 past the 50 yard line in this case? Have they met their
24 burden of proof that the window product a) leaks
25 naturally due to rain storms, that the window products,

1 the leaks that were produced during the testing by Doctor
2 Whitlock were traced back directly to the window, the
3 unit itself and not perhaps the surrounding construction
4 -- did they meet their burden of proof that the leaks at
5 the sill dam were a manufacturing defect? I don't think
6 they did? But you've got all the evidence to consider.

7 As far as strict liability now this one the words
8 are unreasonably dangerous. That's a pretty extreme
9 classification for a window especially. But strict
10 liability so that's where the product is found to reach
11 the consumer in a condition that was unreasonably
12 dangerous and caused harm. So there has to be damage as
13 well.

14 Now Mr. Woodward in his deposition Mr. Lucey pointed
15 that out to you, he actually said windows that leak can
16 be unreasonably dangerous. But the question here is are
17 the windows at One Belle Hall unreasonably dangerous.
18 Doctor Whitlock is an engineer. He has a very impressive
19 resume. I don't think anybody in the courtroom would
20 question that.

21 In fact he has worked on some of the buildings in
22 this country that we consider to be national treasures
23 from the White House and the Capital to the University of
24 South Carolina and Clemson. He has run the gamut. Do
25 you think that if Doctor Whitlock felt like windows that

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1 he knows Cline Design, the architect, has provided in not
2 only these four buildings but buildings around the region
3 were unreasonably dangerous that he wouldn't be obligated
4 to do something more than write a report and come in here
5 and tell us about it. Shouldn't he go someplace to AAMA
6 or to the newspaper or someplace and tell somebody that
7 these windows are unreasonably dangerous.

8 We got to do something about this instead of just
9 documenting it in some binders with lots of pictures and
10 waiting for his opportunity to tell the jury. I think
11 that you've have heard enough evidence that the windows
12 at One Belle Hall arrived in a condition that certainly
13 wasn't unreasonably dangerous. They can't meet their
14 burden of proof for strict liability.

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

22 So what did Builder's First Source do on this side
23 of the column and can they directly correlate a line, can
24 they draw a line from this side to this side saying that
25 whatever Builder's First Source did or didn't do caused

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1 damage. So that's the first step but you also the Judge
2 will tell you can't be allowed to guess about the damages
3 or how much the damages are. Now the law I believe she
4 will say that the plaintiffs don't have to prove it to a
5 mathematical certainty but you can't be left to guess,
6 conjecture or speculate as these damages.

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

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

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1 asked him what percentage of the damage to these
2 buildings how much of that water damage that is in all
3 these pictures was caused by the window product and he
4 said he didn't know. He offered that he might be able to
5 do the calculation but he hadn't done it. And this is
6 the opportunity, this is the time to tell you guys how
7 much of that damage came from the windows and he can't do
8 it.

9 And then Mr. Moore he's got lots of numbers for you
10 to consider. All of that is in evidence. Plaintiffs
11 have asked you for 4.7 million dollars; 4.7 million
12 dollars. But Mr. Moore has to defer to Doctor Whitlock
13 because Doctor Whitlock is the expert as far as causation
14 of the damages. So Mr. Moore can't tell you how much of
15 these buildings and repair of the buildings how much of
16 that comes from the window product itself.

17 In fact Mr. Moore couldn't really tell you how many
18 of those windows he was going to have to do structural
19 repairs around. Remember we were talking about the
20 number 272 and it was in his estimate. And I asked him
21 what that was and he thought that Doctor Whitlock had
22 told him that there were 272 areas that need to be
23 repaired.

24 He didn't really know where those were, said they
25 weren't exclusive to where the windows were. So Doctor

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1 Whitlock can't tell us how much. He can't quantify it
2 with a percentage; not just a number not just a dollar
3 amount, but he can't tell us and Mr. Moore can't tell us.
4 That's a problem. It's a problem because you can't guess
5 as the jury in your award to the plaintiff.

6 You also didn't hear anybody tell you how much their
7 loss of use is valued. You heard a couple of people
8 testify that the homeowners are going to have to move out
9 and that's likely true considering the buildings have to
10 be repaired from the roof down. I would anticipate that
11 they'd have to move out. But nobody gave you any figures
12 about how much that is going to cost to move their things
13 to get temporary rentals. We don't have any of that in
14 evidence.

15 And on top of all this Doctor Whitlock has given you
16 the opinion that because of all the problems with the
17 buildings, windows set aside that the windows -- we're
18 not talking about if the windows are defective or not at
19 this point, Doctor Whitlock's opinion is that the windows
20 have to come out. Even if they were perfect they have to
21 come out to fix everything else wrong with these
22 buildings.

23 So it doesn't really matter if there is something
24 wrong with the windows at that point because they have to
25 come out. They have to be removed in order to fix

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1 everything else. He said they can't be reinstalled. It
2 would ultimately be up to the Mount Pleasant building
3 official if he would let even perfect windows be
4 reinstalled. We didn't hear whether or not the building
5 official in this case has been able to consult on that
6 and give an opinion about whether or not -- if there is
7 nothing wrong with the windows and they have to be pulled
8 out anyway can we reuse them.

9 You heard Mr. Drake testify that the windows with
10 broken frames should be replaced. We understand that
11 there is four of them. I'll agree that those four
12 windows replacing those four windows aren't in Mr.
13 Watkins's estimate because we know there are four. We
14 can look at Mr. Moore's estimate. He said the window is
15 1,111 dollars on average. If you would like to award the
16 plaintiff for the four windows that are broken then you
17 can do the math. But the reason that it is not in the
18 estimate from Mr. Watkins is because we didn't ask him to
19 price out the replacement of four windows.

20 You heard Mr. Drake tell you that the way to fix the
21 problems that Doctor Whitlock was able to demonstrate in
22 this water test most of the problems Doctor Whitlock
23 showed us were from this sill insert. That the sealant
24 bead for whatever reason over the last ten years that
25 some of the units the sealant beads failed and Mr. Drake

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1 said no problem. You just pop that piece of vinyl out,
2 you add a new strip of silicone from one end to the other
3 and all three sides and put it back in and that
4 eliminates the problem; it stops leaking. Whether that
5 be natural leaking or if you fill it up with water from a
6 water bottle.

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

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

23 Now is it fair to ask Builder's First Source to bear
24 the cost of a multimillion dollar repair when a) the
25 windows have to come out anyway and b) we don't have

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1 conclusive evidence that the windows either aren't DP-50,
2 aren't impact rated, were an actual violation of any kind
3 of building code or are defective. Is there enough proof
4 that the windows are defective using any element that has
5 been demonstrated to you? Did Builder's First Source in
6 selling the product that their sophisticated customer
7 came to them and asked for did they do anything
8 unreasonable?

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

14 THE COURT: Thank you. Yes, sir?

15 MR. LUCEY: Thank you, Your Honor.

16 THE COURT: Yes.

17

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CLOSING ARGUMENT REPLY

BY MR. LUCEY:

You just heard Builder's First Source continue to argue that they relied upon the specifications that they testified they never saw and never looked out. You can't have it both ways in this world. Either you saw it or you didn't and they say they didn't.

Let's assume for the sake of argument they saw it. Let's just assume that they relied upon it. Let's assume facts that aren't in evidence. The law as the Judge will charge you on strict liability won't take that into account. Strict liability is simple; you're in the business you sell a defective product and it causes damage you're liable. There is not a get out of jail free card because an architect was involved.

Let's look at warranty. It's simple. You made a representation, exhibit 44-A page two, you breached it, it caused damage, and you're liable. Your representation didn't say I warrant this unless an architect specified it in which case get lost. It didn't say that. It says I warrant this. There is no architect deception in that cause of action. And those facts don't affect the negligence cause of action anyway because they don't exist. They said they didn't see it. They say they didn't review so how can they claim that they relied upon

1 it. They have a funny use of numbers too, Builder's
2 First Source it's a national company and it should know
3 numbers better than all of us. They've got a funny use
4 of numbers.

5 They want to say Doctor Whitlock can't extrapolate
6 14 or 16 test failures to the population of windows but
7 they can extrapolate two dirty reservoirs to the entire
8 population of windows. What? They get to have lower
9 statistics than everybody else? And they belittle the
10 statistics on the cracks? Four cracks out of 16 windows
11 and where I come from that's 25 percent; that's a huge
12 percentage.

13 And they continue to criticize the national
14 standards that every witness even theirs say apply ASTM
15 2128, 1105, 509. Do they think, does Builder's First
16 Source think that they don't have to comply with the
17 national standards that somehow engineering works
18 differently for them?

19 And they want to complain about masking of the
20 window when VanDommelen admitted if you cut that
21 standards provide, if you cut a new port inside where you
22 can watch the water yourself and you can see it that you
23 don't need a mask outside. If you personally, and we did
24 this yesterday or the day before, if you can see water
25 coming right out the window joint you don't need a mask

1 on the outside. Can you play 703-B please in evidence?

2 I think E shows the faster drip.

3 [Whereupon, the video is shown]

4 MR. LUCEY: Look at that drip. You see that drip
5 coming right off the bottom of the window and you can see
6 the water coming out of the joint flowing down and then
7 dropping off the bottom. Builder's First Source wants
8 you to believe that you're not seeing what you're seeing;
9 that that's not reliable. I submit that defies common
10 sense.

11 They are complaining about Doctor Whitlock not doing
12 more about these bad windows that Builder's First Source
13 is putting into the market that he should be filing
14 public complaints or something to stop their use. Well
15 the evidence is they are stopped. They are not being
16 manufactured. What can we do about it? They are
17 defunct. They're gone.

18 And the evidence is also that Doctor Whitlock is
19 investigating these windows on two other projects. He is
20 doing more about these windows; two more of those 225,000
21 TCR projects that Builder's First Source is so proud of
22 and supplied at least some to.

23 Damages. They keep wanting to say it's confusing as
24 to whether there are damages in the building. Doctor
25 Whitlock sat right here and said no, I'm not attributing

1 any property damage to the windows. No. I'm only
2 attributing the degradation and the water damage below
3 the windows to the windows. That doesn't take rocket
4 science. That's what he said. And they want you to
5 think because he doesn't take that sheathing and divide
6 the damage up between any potential water source that you
7 can't rely on them.

8 Well, that's why we discussed proximate causation 20
9 minutes ago. The requirement for proximate causation is
10 that it is a proximate cause of the damage. There can be
11 two proximate causes. The damage under the windows can
12 be getting caused both by the windows and by leakage from
13 other sources. But the windows are still damaging the
14 walls below them and that makes them a proximate cause.

15 Loss of use, yes there is evidence of loss of use.
16 The evidence is they will lose use and you have Len's
17 purchase contract in evidence that shows you what he paid
18 for his residence and from that you can compute if you
19 think that they are entitled to loss of use during move
20 out for all these repairs.

21 From the value of his condominium you can compute
22 what he should reasonably be rewarded or compensated for
23 if he is forced to give up that condominium where he
24 lives full time; if he is forced to give up that for a
25 year and move out you can simply look to the purchase

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

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

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1 THE COURT: All right. Ladies and gentlemen you
2 have now heard the arguments of counsel. Who needs to
3 take a short comfort break from my jurors? I figured
4 that; that is typical. Ladies and gentlemen let me tell
5 you you have not heard the arguments of counsel -- you've
6 not heard my charge on the law and you are not prepared
7 to deliberate so please be mindful do not discuss this
8 matter or allow anyone to discuss it with you.

9 Here's what we are going to do. I want you all to
10 take your comfort break that you need to take and when
11 you have finished taking your comfort break knock on the
12 door so you can come on back in. When you return I will
13 deliver the charge and the instruction on the law to you.
14 Have a good break.

15 [Whereupon, the jury exits at 4:47 p.m.]

16 THE COURT: Y'all please be at ease. I do need
17 y'all to look at the -- I've got the verdict form if
18 y'all will look at that for me and then everybody just be
19 at ease.

20 [Whereupon, counsel reviews the verdict form]

21 [Whereupon, court is in recess from 4:48 p.m. until
22 4:58 p.m.]

23 THE COURT: Thank you.

24 [Whereupon, the jury enters at 4:58 p.m.]
25

JURY CHARGE

1
2 THE COURT: Ladies and gentlemen you have now heard
3 the witnesses, you have received the evidence, you've
4 heard the arguments of counsel in this case. It is now
5 my duty to instruct you regarding the law applicable to
6 this case. And I remind you that during this trial you
7 and I have had and have certain duties to perform. As
8 the trial judge it is my responsibility and it has been
9 my responsibility to preside over the trial of this case.
10 And I have also had the duty to rule on the admissibility
11 of the evidence offered during this trial.

12 Ladies and gentlemen you will of course consider the
13 evidence before you and you are to consider only the
14 testimony which has been presented from this witness
15 stand and any exhibits which have been made part of the
16 record in this case. I have the additional duty to
17 charge you regarding the law applicable to this case.

18 It is your duty as jurors to accept and apply the
19 law as I now state it to you. If you think you have any
20 idea as to what the law is or what it ought to be and it
21 does not agree with what I now tell you the law is you
22 must forget your preconceived idea because you are sworn
23 to accept and apply the law exactly as I state it to you.
24 Ladies and gentlemen in every case tried in this court
25 before a jury the jury, you, become the sole, the only,

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1 the exclusive judge of the facts. A trial judge cannot
2 comment on or make any statement about the facts in a
3 case. Since you are the sole judges of the facts do not
4 think by anything that I have said during this trial that
5 I have any opinion about the facts of this case. The law
6 doesn't allow me to have an opinion about the facts. I
7 have no opinion regarding these facts. Ladies and
8 gentlemen that is a matter solely for you to determine.

9 Now ladies and gentlemen the burden of proof
10 applicable to this case is what we call the greater
11 weight or the preponderance of the evidence. Ladies and
12 gentlemen the plaintiffs in this case must meet their
13 claims by what we call the greater weight or the
14 preponderance of the evidence. The defendant has alleged
15 what are called affirmative defenses and for those
16 affirmative defenses the defendant must sustain those
17 defenses by the greater weight or the preponderance of
18 the evidence. I will point those out to you as we go
19 through this charge.

20 In determining or explaining what we mean by the
21 preponderance of the evidence I do want to review with
22 you that I reviewed with you earlier. Perhaps now it
23 will make more sense to you. It will certainly probably
24 be more apropos now than earlier because shortly you will
25 be utilizing this burden of proof and the analysis

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1 therewith. Ladies and gentlemen if you articulate with
2 words what we mean by greater weight or the preponderance
3 of the evidence it would be this. As you consider a fact
4 if it is more likely true than not true, if it is more
5 likely true than not true the preponderance has been met.

6 With regards to each of the plaintiff's claims each
7 element of the claim must be proven by the greater weight
8 or the preponderance of the evidence. The plaintiff has
9 alleged three claims, three causes of action and they are
10 independent causes of action; they rise and fall on their
11 own. And we will go over the elements of each of those
12 three in just a little bit.

13 The defendant as I say has pled affirmative defenses
14 which are applicable to one or perhaps more of the causes
15 of action but those likewise must be proven by the
16 greater weight or the preponderance of the evidence. And
17 I'm going to explain to you which affirmative defenses
18 apply to which of the claims.

19 Now ladies and gentlemen you can imagine a set of
20 scales. When the case began the scales were even and
21 after you have considered the plaintiff's claims and the
22 defendant's defenses if the scale should remain evenly
23 balanced or tip in favor of the defendant then the
24 plaintiffs will have failed to meet their burden of proof
25 and your verdict will be for the defendant. If, on the

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1 other hand, when you have considered the defendant's
2 defenses and the plaintiff's claims if those scales
3 should tip ever so slightly in favor of the plaintiff
4 then the preponderance has been met. It is necessary, of
5 course, that you do the analysis for each of the causes
6 of action and the analysis for the affirmative defenses
7 for the applicable claim as well. Now my football field
8 anything beyond the 50 yard line is the preponderance or
9 the greater weight of the evidence.

10 Now, there are two types of evidence which are
11 generally presented during a trial. One type of evidence
12 is called direct evidence, the other circumstantial
13 evidence. Direct evidence is the testimony of a person
14 who claims to have actual knowledge of a fact such as an
15 eyewitness. It is evidence which immediately establishes
16 the main fact to be proved.

17 Circumstantial evidence is proof of a chain of facts
18 and circumstances indicating the existence of a fact. It
19 is evidence which immediately establishes collateral
20 facts from which the main fact may be inferred.
21 Circumstantial evidence is based on inference and not on
22 personal knowledge or observation. It is proof that does
23 not actually establish the fact in question but that
24 asserts or describes something else from which the main
25 fact can be inferred or at least increases the

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1 probability that the fact is true. For circumstantial
2 evidence to be sufficient to warrant the finding of a
3 fact the circumstances must lead to that fact with
4 reasonable certainty. The facts and circumstances should
5 be considered in light of ordinary experience and common
6 sense. You did not check it at the courthouse door. You
7 brought your common sense right here with you.

8 However, ladies and gentlemen the existence of a
9 fact never can be based solely and only on speculation
10 surmise, or conjecture. Let me give you some examples.
11 It's February. It's cold outside. Snow is forecast.
12 You walk outside, you look up and white frozen snow hits
13 you in the eye. You are an eyewitness when you walk back
14 in and go hey, it's snowing. It got me in the eye. You
15 are an eyewitness to the fact it is snowing. So when you
16 say it is snowing if you were under oath and testifying
17 that would be direct evidence. It is snowing.

18 Now circumstantial evidence, its February, cold
19 outside, snow is forecast. You're excited. You keep
20 going outside. You want to turn on the T.V. Is it a
21 snow day tomorrow? Before you go to bed you go outside
22 and you look one more time and all you see is your poor
23 little brown crunchy grass. But alas, in the morning
24 when you wake you go outside snow covers everything and
25 Josh Marthers is on the television telling us it's a snow

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1 day. Well, here's what you know. February, snow is
2 forecast, brown crunchy grass before I went to bed at say
3 11 o'clock. I woke up, snow covers everything. By
4 inference if you are under oath and you would then
5 testify it snowed last night. You didn't see it snow
6 last night but you know it showed last night because of
7 the facts that you do know. And through inference you
8 can infer that it snowed overnight. That is
9 circumstantial evidence.

10 Our law makes absolutely no distinction between the
11 weight or value to be given to either direct or
12 circumstantial evidence. Nor is a greater degree of
13 certainty required of circumstantial evidence than of
14 direct evidence. Ladies and gentlemen you should weigh
15 all the evidence in this case and the evidence that you
16 should give the most weight to is that which convinces
17 you of its truth regardless from whom or what source it
18 comes.

19 Now as you make the findings of fact in this case
20 necessarily you must determine the creditability of the
21 witnesses who have testified in this case. Creditability
22 simply means believability. It becomes your duty as
23 jurors to evaluate the evidence and determine which
24 evidence convinces you that it is true. Ladies and
25 gentlemen I would tell you that evidence obviously is by

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1 live witnesses under oath. But testimony can also be
2 delivered through sworn testimony in a deposition. We
3 talked about what a deposition was and that is also sworn
4 testimony.

5 Now in determining the believability of witnesses
6 who have testified in this case you may believe one
7 witness as opposed to several witnesses or several
8 witnesses as opposed to one witness or over one witness.
9 You may believe a part of the testimony of a witness and
10 reject the remaining part of the testimony of the same
11 witness. You may believe the testimony of a witness in
12 its entirety or you may reject the testimony of a witness
13 in its entirety. You may consider whether the witness
14 has any interest in the result of the trial, whether the
15 witness is biased or prejudiced for or against either of
16 these sides.

17 Ladies and gentlemen you may consider the
18 opportunity for the witness to have seen the matters and
19 things about which the witness may testify and you
20 certainly may consider the way the witness acts on the
21 witness stand.

22 Ladies and gentlemen in this trial you have heard
23 testimony of those individuals who were deemed to be
24 expert witnesses. Our rules of evidence ordinarily do
25 not permit witnesses to testify regarding their opinions

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1 or their conclusions however an exception does exist for
2 this rule and that is for witnesses who have been deemed
3 to be expert witnesses. A witness who by virtue of their
4 education and experience have become an expert in some
5 art or science or profession and those witnesses may give
6 opinions as to the subject that the witness claims to be
7 an expert. And they may also give their reasons for the
8 opinion.

9 You should consider any expert opinion given by a
10 witness and like any other evidence give it the weight
11 that you think it deserves. If you decide that an
12 expert witness's opinion is not based on sufficient
13 education and experience or if you decide that the
14 reasons given in support of the opinion are not sound or
15 that the opinion is outweighed by other evidence you may
16 disregard the opinion entirely. And expert's opinion, an
17 expert witness's testimony is to be given no greater
18 weight than that of other witnesses simply because the
19 witness is an expert. And you do not have to accept an
20 expert's opinion even though it is uncontradicted.

21 Now ladies and gentlemen in our courts no
22 distinction is made between corporations and natural
23 individuals. A corporation is a person in the eyes of
24 the law. A corporation is entitled to the same fair and
25 impartial consideration and to justice by the same legal

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1 standards as a natural individual. A corporation
2 obviously can only act through its agents or employees
3 therefore a corporation is responsible for the act and
4 omissions of its agents and employees and we could say
5 officers and directors but by those acting on its behalf
6 and acting within the scope of their employment or
7 agency.

8 And ladies and gentlemen a corporation is
9 responsible for the acts or omissions of its agents or
10 employees who are acting within the scope of their
11 employment or agency which proximately, that's a new
12 word, proximately and we're going to talk about that a
13 fair amount in this charge. I will tell you that another
14 word for proximate is direct, which proximately or
15 directly caused damage to another person.

16 I further charge you that a corporation may also act
17 through another corporation where the second corporation
18 is its agent and that a limited liability corporation or
19 LLC is the equivalent of a corporation and also can act
20 only through its employee's agents.

21 Now ladies and gentlemen I am going to begin to talk
22 to you about the causes of action and the defenses and
23 then I am going to talk to you about -- I'm going to
24 instruct you regarding the issue of damages. I want to
25 give you an overview and then I'm going to go back and be

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1 much more specific. I'm first going to talk to you about
2 the cause of action which is alleged by the plaintiff and
3 that is negligence, negligence. And then I'm going to
4 talk to you about the defenses that have been pled to
5 this particular cause of action by the defendant. And
6 I'm going to save the issue for damages because I'm going
7 to talk about damages at one time.

8 Once I have talked about negligence and the defenses
9 as to that cause of action then I'm going to charge you
10 on the other causes of action that have been brought by
11 the plaintiffs and those are strict liability, express
12 warranty, and implied warranty. I'm going to talk to you
13 about those three causes of action and the elements of
14 those causes of action and then I'm going to talk to you
15 about the defenses that the defendant has pled to those
16 causes of action because those defenses apply to those
17 causes of action, those three, and also negligence. It
18 is my hope that breaking it up that way will allow you
19 perhaps and hopefully more clarity.

20 Once I have finished that group I am then going to
21 talk to you about damages, actual damages, and then we'll
22 go over the verdict form. So that gives you an overview
23 of what we are going to be doing and now we're into it.
24 Negligence means that a person has done something that a
25 reasonable person would not have done or has failed to do

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1 something that a reasonable person would have done in the
2 same situation. That would be the introduction. The
3 plaintiff claims or the plaintiffs claim that the
4 defendant was negligent and should compensate the
5 plaintiffs for their damages which they allege they have
6 suffered as a result of the defendant's negligence.

7 Now in order to prove that the defendant was
8 negligent the plaintiff must prove by the greater weight
9 or the preponderance of the evidence four things. First,
10 plaintiffs must prove by the greater weight or the
11 preponderance of the evidence that the defendant owed the
12 plaintiffs a duty of care, a duty of care.

13 Next, or second, the plaintiffs must prove by the
14 greater weight or the preponderance of the evidence that
15 the defendant breached, violated that duty of care by a
16 negligent act or omission. Ladies and gentlemen I just
17 defined for you negligence but I'm going to tell you that
18 another definition of what we mean by negligence is
19 carelessness, carelessness.

20 Ladies and gentlemen the plaintiffs must also prove
21 by the greater weight or the preponderance of the
22 evidence that they suffered damage as a direct or
23 proximate result of the defendant's breach of duty or
24 negligence or carelessness. And of course the plaintiff
25 must prove by the greater weight or the preponderance of

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1 the evidence their damages. So ladies and gentlemen
2 duty, breach of that duty, proximate cause, damages.
3 Now, what is proximate cause? This is one of those
4 theories in law school that I thought I would never
5 figure out. So I'm always excited to tell jurors what
6 that is. I'm going to read this to you and then I'm
7 going to go to the old test that finally clicked for me
8 in law school so here we go.

9 Proximate cause is something that produces a natural
10 chain of events which in the end brings about the injury,
11 the damage. It is a direct cause of the damage. To
12 prove that the defendant's negligence or carelessness
13 proximately caused the plaintiffs damage the plaintiffs
14 must first prove causation in fact. This is proven by
15 showing that the damage would not have occurred but for
16 the defendant's negligence. Plaintiffs must also prove
17 legal cause. Legal cause is proven by showing that the
18 damage was foreseeable. This means the damage occurred
19 as a natural or probable consequence of the defendant's
20 negligence.

21 The plaintiffs must prove that some damage from the
22 defendant's negligence was foreseeable but does not have
23 to prove that the particular injury that occurred was
24 foreseeable. However, the defendant cannot be held
25 responsible for things which could not be expected to

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1 happen. Proximate cause does not mean the only cause.
2 The defendant's act can be a proximate cause of the
3 plaintiff's damage if it was at least one of the direct
4 concurring causes of the injury.

5 Now I'm going to give you the rule that finally the
6 light bulb went on, the fireworks went off, and I was
7 grateful. It's called the but for test and here it is.
8 But for the negligence, but for the carelessness of the
9 defendant the plaintiffs would not have suffered the
10 damage here to the property buildings; the but for test.

11 Now I want to talk about the defenses. Ladies and
12 gentlemen the defendant has raised defenses to the
13 plaintiff's claim of negligence. The first is called a
14 general denial. What is that? Well, in a general denial
15 the defendant will go through each allegation and they
16 may agree that okay, your building is in Mount Pleasant
17 and so and so may have built the building. In other
18 words some of those allegations they admit to the truth
19 of those allegations but they denied the allegations
20 which would if admitted they would be liable and they
21 would deny those allegations.

22 Ladies and gentlemen that places the burden of proof
23 on the plaintiffs to prove their claims by the greater
24 weight or the preponderance of the evidence. Ladies and
25 gentlemen defendant has pled as their first defense the

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1 general denial. The defendant has also pled a defense
2 which is called sole negligence of third party or
3 parties. And in that the defendant claims that the
4 plaintiff's damage was not proximately or directly caused
5 by the defendant's negligence but was solely caused by
6 the negligence of another person or others.

7 Now the defendant does not have the burden of proof
8 that the negligence of the other person or persons caused
9 the plaintiffs damage, instead the burden remains on the
10 plaintiff to prove that the defendant's negligence was a
11 proximate cause of the plaintiff's damage. Now the
12 defendant has also raised the defense of what is called
13 intervening cause, intervening cause which is as follows:

14 And by that the defendant is saying this; if you
15 find that the defendant was negligent however, the
16 defendant denies that negligence but should you so find
17 that the defendant was negligent the defendant alleges
18 that they are not liable because of what is called the
19 intervening negligence of third parties or party.

20 What in the world do we mean by that? Well, ladies
21 and gentlemen this I am now going to define for you this
22 particular defense called intervening negligence of third
23 party. Ladies and gentlemen by this we mean that the
24 chain of causation between the defendant's negligence and
25 the plaintiff's damage may be broken by the independent

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1 intervening acts or omissions of another person or
2 obviously persons over whom the defendant has no control.
3 In order to decide whether an intervening act breaks the
4 chain of causation you must determine whether the
5 intervening act or omission was reasonably foreseeable by
6 the defendant.

7 If the intervening act or omission was a probable
8 cause of the defendant's negligence the defendant is
9 responsible for the plaintiff's damage. If however, you
10 find that the intervening act or omission was not
11 foreseeable the defendant is not liable unless its
12 actions alone would have caused the plaintiffs injury
13 even without the intervening act or omission. Now, I'm
14 finished with negligence.

15 I'm now going to talk about other causes of action.
16 The next cause of action that has been pled by the
17 plaintiffs is a cause of action which I am going to call
18 strict liability, strict liability. The plaintiffs claim
19 that the defendant should be held strictly liable for the
20 plaintiff's damages. Strict liability means liability
21 without fault. Under the theory of strict liability even
22 if the defendant used due care the defendant may be
23 responsible for the plaintiff's damages. In other words
24 it does not matter whether the defendant was negligent or
25 not negligent. If the product was defective and

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1 unreasonably dangerous when it left the defendant's
2 control the defendant is liable even if all reasonable
3 care was used in making and selling the product and even
4 if the plaintiff's did not buy the product from the
5 defendant or enter into any contract with the defendant.
6 Because the defendant -- excuse me, the plaintiff does
7 not have to show negligence your focus should be on the
8 product itself; not the conduct of the defendant.

9 To recover under a claim for strict liability the
10 plaintiff must prove three things by the greater weight
11 or the preponderance of the evidence. Number one that
12 the product was in a defective condition unreasonably
13 dangerous to the plaintiffs, number two that at the time
14 of the damage the product was in essentially the same
15 condition as it was when it left the control of the
16 defendant and three, that the plaintiff was damaged by
17 the product.

18 Let me define for you what it means defective. What
19 is the definition of defective condition? Defective
20 condition, to prove defective condition the plaintiffs
21 must prove that the defendant who was in the business of
22 selling the product sold which at the time of the sale
23 was in a defective condition that was unreasonably
24 dangerous to the user. A defect, a defect is a condition
25 which makes a product inadequate, inadequate. A defect

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1 does not have to be an error in the manufacture of the
2 product. There are three types of defects. It can be a
3 manufacturing defect, it can be a design defect, or a
4 failure to warn or the failure to provide adequate
5 instructions can be a defect.

6 Now, ladies and gentlemen when I gave you the three
7 elements defective condition, unreasonably dangerous that
8 proximately or directly caused damage to the plaintiff
9 those were the elements. I call your attention again to
10 the definition that I gave you earlier regarding what we
11 mean by proximate cause. The plaintiff to prove strict
12 liability must prove that the defective condition in the
13 product was a proximate cause of the plaintiff's damage
14 or damages.

15 Again, the same definition applies. Proximate cause
16 is something that produces a natural chain of events
17 which in the end brings about the damage. It is a
18 direct cause of the injury. But for, the but for test,
19 but for the defendant having a defective product
20 unreasonably dangerous the plaintiff would not have
21 suffered damages.

22 And just as before proximate cause does not mean the
23 only cause; the defendant's act can be a proximate cause
24 of the plaintiff's damages if it was at least one of the
25 direct concurring causes of the injury. Now I want to

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1 talk to you about the cause of action called implied
2 warranty. It's another cause of action called implied
3 warranty. The plaintiffs claim that the defendant
4 breached an implied warranty. A warranty is a promise by
5 the defendant that the product is what the defendant says
6 it is.

7 An implied warranty is one which is presumed to be
8 included in every sale whether the defendant actually
9 stated the promise or not. If the defendant normally
10 sells a certain type of product there is an implied
11 warranty of merchantability. This means that the product
12 passes without objection in the normal trade or business
13 under the contract description, is fit for the ordinary
14 purpose for which the product is used, is of even kind
15 quality and quantity within each unit and among all units
16 involved and is adequately contained, packaged and
17 labeled as the contract requires.

18 Implied warranty of fitness for a particular purpose
19 is as follows: If the defendant knows or has reason to
20 know of the particular purpose for which the person
21 buying the product requires the product and the buyer
22 relies on the defendant's skill or judgment to select a
23 product suitable for this purpose there is an implied
24 warranty that the product will be suitable for that
25 purpose. This warranty covers the person who buys the

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1 product as well as any other person who is expected to
2 use the product. If you find that the product is not fit
3 for the buyer's particular purpose because that use is or
4 is likely to be dangerous due to a defect in design, a
5 defect in manufacturing, or the lack of an adequate
6 warning you should find that the defendant breached the
7 implied warranty of fitness for a particular purpose.
8 You must then determine the damages which were directly
9 and proximately or directly caused by the breach, the
10 violation of the warranty. I'm done with that cause of
11 action.

12 Now the plaintiffs last cause of action which is
13 breach of express warranty. The plaintiffs claim that
14 they are the beneficiaries of an express warranty and the
15 defendant breached the warranty. The warranty is a
16 promise by the seller of a product that the product is
17 what the seller says it is. Plaintiff must prove by the
18 preponderance or greater weight of evidence that an
19 express warranty existed and what the terms of the
20 warranties were.

21 An express warranty may be created in several ways.
22 First, an affirmation of fact or promise including those
23 on containers or labels made by the defendant to the
24 plaintiff directly or indirectly which relate to the
25 product and become a part of the basis for the bargain

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1 and creates an express warranty that the product is what
2 is promised. In addition a description of the product
3 which is made a part of the basis of the bargain creates
4 an express warranty that the product will conform to the
5 description. A sample or model which is made a part of
6 the basis of the bargain also creates an express warranty
7 that the product will conform to the sample or model. It
8 is not necessary that the defendant use words like
9 warrant or guarantee in order to create an express
10 warranty.

11 In addition the defendant does not have to have a
12 specific intention to create a warranty, however a mere
13 statement of the value of the product or a statement
14 which is only the defendant's opinion, belief, judgment,
15 estimate or recommendation of the product does not create
16 an express warranty. If you find that the defendant
17 breached or violated the express warranty you must decide
18 what damages the plaintiff suffered.

19 The measure of damages for breach of an express
20 warranty is the difference of the value of the product at
21 the time and place that the product was given and the
22 value the product would have had if it had been as the
23 defendant warranted it would be unless special
24 circumstances show proximate damages of a different
25 amount. We'll talk more about damages in just a few

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1 moments. The defendant is not liable for a breach of
2 warranty unless the plaintiff gives the defendant notice
3 of the breach within a reasonable time after the
4 plaintiffs knew or should have known of the breach of
5 warranty. What a reasonable time is depends on the
6 circumstances and the kind of product involved. Notice
7 of the breach of warranty may be oral or in writing and
8 no specific form is required. A notice must simply
9 inform the defendant of the breach of warranty and of the
10 plaintiff's intention to seek damages for the breach.

11 You must decide whether the plaintiff gave notice to
12 the defendant of the breach of warranty and whether the
13 notice was given in a reasonable time. Ladies and
14 gentlemen a seller's warranty whether express or implied
15 extends to any natural person who may be expected to use
16 or be affected by the product and who suffers damages
17 from the breach of the warranty.

18 Now I am going to talk about damages ladies and
19 gentlemen and I want to tell you that with regard to
20 these causes of action I have just been over breach of
21 implied warranty, breach of express warranty, and strict
22 liability the defendant has answered in the first defense
23 and the general denial. In the general denial the
24 defendant has answered the plaintiff's complaint and
25 perhaps admitted certain matters such as we're in

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1 Charleston County and the like the defendant has denied
2 each and every claim that would make the defendant
3 responsible for the plaintiff's injury. This general
4 denial places the burden to prove each and every element
5 of each of the causes of action and the burden of course
6 for those causes of action is on the plaintiff. You
7 consider, of course, each of the causes of action
8 separately. Now, ladies and gentlemen as to each of the
9 causes of action to include negligence the defendant has
10 pled the defense of statute of limitations.

11 Ladies and gentlemen under what is called the
12 discovery rule the applicable statute of limitations
13 begins to run on the date that the plaintiffs either knew
14 or should have known of an underlying damage, thus the
15 statute of limitations starts ticking on the date the
16 party damaged either knows or should know or should have
17 known by the exercise of reasonable diligence that a
18 cause of action arises from the wrongful conduct.

19 This determination is objective rather than
20 subjective and as such you, the jury, must decide whether
21 the circumstances of the case would put a person of
22 common knowledge and experience on notice that some right
23 of his or her or theirs has been invaded or that some
24 claim against a party might exist. The burden of
25 establishing a statute of limitation defense lies with

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1 the party asserting it; in this case the defendant. And
2 when testimony is conflicting on the question it becomes
3 an issue for the jury, for you to decide. There is often
4 more than one reasonable inference as to when one knows
5 or should know or should have known that he or she or
6 they have a claim. Although there may be evidence to
7 support a damaged party filing a claim at an earlier date
8 the limitations period does not begin to run until the
9 damage rises to a level substantial enough so as to put
10 the damaged party or parties on notice that they are
11 being wronged.

12 Ladies and gentlemen the applicable statute of
13 limitations for breach of express warranty claim is six
14 years. The applicable statute of limitations for
15 negligence and strict liability and implied warranty for
16 each of these three claims is three years. Now the
17 burden of proof applicable for establishing this defense
18 is by the greater weight or the preponderance of the
19 evidence.

20 Ladies and gentlemen when you have considered the
21 plaintiff's claim and the defendant's defenses if you
22 determine that the plaintiff has met their burden of
23 proof with regards to any of the causes of action in
24 other words if they have made out their burden of proof
25 and have proven the elements of one or more of their

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1 causes of action after you have considered the
2 plaintiff's claims and the defendant's defenses then you
3 would consider the issue of actual damages, of actual
4 damages. What does that mean? Well, that means how much
5 money should the defendant be required to pay?

6 Ladies and gentlemen actual damages are also called
7 compensatory damages and that's a good name for them,
8 compensatory damages. It means to compensate, to make
9 the injured party whole, to put the injured parties in
10 the same position that they were in before the damages
11 occurred. In other words actual damages would be the
12 actual losses and expenses which the plaintiff has
13 suffered because of the defendant's wrongful conduct.
14 Now the measure of damages to which the plaintiffs would
15 be entitled to recover would be the cost of repairs plus
16 the value of the loss of use of the buildings.

17 Ladies and gentlemen I further charge you that when
18 plaintiffs are damaged by the wrongful act or acts of
19 another it is the duty of plaintiffs to reasonably try to
20 avoid and lessen the damages. Those damages which may be
21 avoided by the use of reasonable efforts, care, and
22 prudence by the plaintiffs cannot be the proximate or the
23 direct result of the defendant's wrongful conduct.
24 Therefore the plaintiffs cannot recover for damages which
25 reasonably might have been avoided. The efforts required

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1 by the plaintiffs must be determined by the rules of
2 common sense and fair dealing and what a person of
3 ordinary reason and prudence would do under the same
4 circumstances.

5 Plaintiffs are not required to use unreasonable
6 effort or great expense to avoid and lessen the damages.
7 The defendant has the burden of proving a failure to
8 lessen damages on the part of the plaintiff or plaintiffs
9 I should say by the greater weight or the preponderance
10 of the evidence. In other words the burden to prove that
11 the plaintiff's should have mitigated their damages that
12 burden of proof is on the defendant.

13 Ladies and gentlemen I have advised you now and
14 given you the charge on the law as it is my duty. I
15 further charge you that the fact that I have instructed
16 on many topics to include damages must not be taken by
17 you as being some comment on the facts or should be taken
18 by which of these sides ought to receive your verdict.

19 I caution you that our law requires that I instruct
20 you regarding the law applicable to this case and
21 therefore you must not take the words that I have just
22 given you and charging you regarding the law as being an
23 opinion of the court regarding what you should find to be
24 the fact of which of these sides is entitled to your
25 verdict. It is simply reality; I must tell you what the

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1 law is so I must talk to you about a number of topics and
2 you must not take the fact that I have instructed you on
3 various topics to be an expression of the opinion of the
4 court regarding these facts or which of these sides is
5 entitled to your verdict because remember I have no
6 opinion regarding what should be your determination of
7 facts or your verdict. And that segues me into your
8 verdict form.

9 Ladies and gentlemen in a moment I am going to go
10 over with you your verdict form. However, before I do
11 that there are a couple of things I need to go over with
12 you. Number one, don't you take any hidden meaning from
13 the order in which these things have been placed on
14 paper. It's just if I am going to put stuff on paper
15 something has got to be first and something has got to be
16 next. There is no inside baseball. There is no hidden
17 meaning in the order in which these matters have been
18 placed on paper so please don't think that there is
19 because there isn't. I've just go to put something first
20 and then got to put something next.

21 Secondly, I want you to understand that your verdict
22 must be unanimous. This must be the verdict of each and
23 every one of you. This is not majority rules and this is
24 not to be the verdict of any one of you. This must be
25 the verdict of each and every one of you. Your verdict

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1 must be unanimous. So that should be a hint to my
2 alternates stay with me when my jury leaves me at this
3 next occasion. Now ladies and gentlemen the verdict is
4 set up in the following manner. It says -- I'm going to
5 walk over there. I feel more comfortable over there.

6 Ladies and gentlemen the verdict form says, this is
7 the caption, this is just the heading and the title. We
8 talked about that our first day and it says this: We the
9 jury find for the plaintiffs on the following causes of
10 action. And you would simply check or circle, put an X
11 or whatever; it just needs to be clear. It could be one,
12 it could be two, it could be three, it could be none and
13 those will be your options.

14 The first cause of action is negligence, the second
15 one strict liability, and the third is breach of
16 warranty. If it is breach of implied warranty you check,
17 if it is breach of express warranty you would check. So
18 negligence, strict liability, breach of warranty.

19 Now, in the event that this jury determines
20 unanimously that the plaintiff has made one or more of
21 the causes of action by the greater weight or the
22 preponderance of the evidence then your next
23 consideration would that of damages, which segues me into
24 the next sentence. We award the plaintiffs X dollars in
25 actual and compensatory damages. If the jury determines

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1 that the plaintiffs are entitled to a verdict then you
2 write out the amount of damages in words and numbers like
3 you do a check. In other words once a determination of
4 actual damages has been made then you would just enter it
5 here and do it like you would a check in numbers and
6 words. And then we've got or, or we the jury find for
7 the defendant. And if this is found to be your unanimous
8 verdict of the jury you would check it, you could circle
9 it, you can check it and circle it. You just want to be
10 sure of the intention of the jury.

11 Now once you have completed your deliberations and
12 you have filled out your verdict form then you will sign
13 where it says presiding juror and you will date it. You
14 know who you are and for your reference, for you
15 information today is September the 1st, 2016.

16 Now, I need to give you a little bit of information.
17 In a moment I'm going to ask you to step back to your
18 jury room. Not my alternates; I want y'all to stay with
19 me just a moment but I'm going to ask my 12 jurors to go
20 back to the jury room. And I'm going to instruct you do
21 not discuss this matter or allow anyone to discuss this
22 with you. You ought to be on me going you have been
23 telling me for days this is the time for us to deliberate
24 so I am going to quickly tell you what is going to happen
25 next. When you step back to your jury room on this next

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1 occasion I'm going to turn to these lawyers and I'm going
2 to ask them two questions; have I given this jury all of
3 the law that they may need for the deliberations and have
4 I stated it to them correctly.

5 Now ladies and gentlemen these lawyers will help me
6 know that. And in the event that I need to bring you
7 back out because I have failed to give you an instruction
8 that you may need for your deliberations I'm going to ask
9 you in advance please do not consider that instruction
10 with any emphasis. Just know that I want to get this
11 right and y'all have what you might need.

12 Now if I have said something wrong these lawyers
13 help me know that. That gives me an opportunity to
14 review that and correct my error. In the event that I
15 need to bring you back out for that reason I ask you in
16 advance please allow me to correct my error in your
17 minds. In the event that I do not need to bring you back
18 out you will be brought the verdict forms, the exhibits,
19 and an instruction to begin your deliberations.

20 So let's talk about the deliberations. Ladies and
21 gentlemen all 12 of you must be present to deliberate.
22 So if one of you needs to take a comfort break stop your
23 deliberations during the comfort break then convene your
24 deliberations when all 12 of you are together again. I'm
25 looking at you Madame Presiding Juror because I want you

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1 to be the counter and make sure all 12 are there with you
2 as you deliberate. Now, ladies and gentlemen I want to
3 leave you with one last step and it is this. The word
4 verdict comes from the Latin phrase veredicto which means
5 to speak the truth, to speak the truth. Ladies and
6 gentlemen that is now your task; to speak the truth.
7 Please step to your jury room and leave your notebooks in
8 your chairs. They will be brought to you. Do not
9 discuss this matter or allow anyone to discuss it with
10 you.

11 [Whereupon, the jury exits at 6:01 p.m.]

12 THE COURT: All right. Now let me tell you what I
13 am going to ask of you. I am of the opinion that if
14 something should happen to one of our jurors, and believe
15 it or not that can happen, as they begin to deliberate I
16 can stop those deliberations seat one of you and save
17 this trial. Because I think I can do that I'm going to
18 ask you guys for 15 more minutes -- guys, you ladies for
19 15 more minutes once they begin their deliberations.
20 Y'all have given me so much time I keep pushing, pushing
21 but I'm going to ask you for 15 more minutes when they
22 begin their deliberations. So if you will take our
23 ladies and put them in another spot; not with the jury.
24 Got it? Wonderful.

25 [Whereupon, the alternate jurors exit at 6:02 p.m.]

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1 THE COURT: All right. Exceptions, additions from
2 the plaintiff?

3 MR. LUCEY: Yes, Your Honor. Plaintiffs believe
4 that the six year statute of limitations also applies to
5 implied warranty. The both arise underneath Chapter 36
6 and we believe they are both covered by 2-725. And we
7 believe the Green v Bradley case would support us where
8 it discusses this.

9 It sets forth that regarding breach of warranty
10 claims, and I'm quoting, the Uniform Commercial Code, the
11 UCC six year statute of limitations prevails over the
12 general three year statute of limitations when the UCC
13 applies to the cause of action as in the pleading end
14 quote: Would you like me to move on or are you going to
15 call for a response?

16 THE COURT: Yes. I'll hear from you.

17 MS. DYER: I don't have a response.

18 THE COURT: Got it. Okay. I'll correct it then.
19 No problem. What else you got?

20 MR. LUCEY: Thank you. Secondly, Your Honor on
21 page 22 of the charge the charge indicated a requirement
22 to the jury that the plaintiff gives the defendant notice
23 of breach within a reasonable time. We had actually
24 briefed this issue in our pretrial brief but then we were
25 instructed not to deal with that; it had not been filed.

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1 We have -- so I don't have a case but I have the work we
2 did on it. South Carolina courts have recognized that a
3 buyer's duty to notify the seller of a breach of warranty
4 under South Carolina code 36-2-607 mandates that buyers
5 give notice to their direct sellers only. And we cited
6 the Thomas v Louisiana Civic Corporation [phonetic]
7 decision in a case I was involved in in front of Judge
8 Duffy, which the proposition is quote plaintiffs were not
9 required to notify defendants of the breach -- insert for
10 cause -- defendants did not sell trim board directly to
11 the plaintiff.

12 And we also cite the Seaside Resorts case, a South
13 Carolina state case 308 S.C. 2.d 47. And the proposition
14 of that second case, Your Honor, is finding that a
15 substantially similar North Carolina statute requires a
16 retail buyer to notify only the retail seller who
17 tendered him the goods, not wholesalers, distributors,
18 manufacturers or others so that ---

19 THE COURT: --- got it. Any response?

20 MS. DYER: No.

21 THE COURT: Okay. That's why I gave it -- give
22 this thing -- I know y'all didn't have a lot of time but
23 this is why I give it to lawyers in advance so they can
24 certainly help me but y'all were awfully limited on time
25 so I get it. Anything else?

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1 MR. LUCEY: Yes, Your Honor. I'm still trying to
2 check this, I didn't quite follow but we had submitted
3 charge number 24 that breach of warranty does not require
4 proof of negligence. I didn't hear or see it. It may
5 have occurred but I didn't -- we believe that should be
6 charged because clearly there is a distinction.

7 We had also offered charge 28, duty of care created
8 by contract that simply provides that a duty of care can
9 be created by a contract given 44-A page 2 that is
10 actually a huge part of plaintiff's case and we believe
11 that law would be applicable to our claim. And I have
12 extra copies of these I could hand up if that would make
13 it easier for the court.

14 We also submitted charge number 34 that the cost of
15 repair includes bringing the structure or complying with
16 current code requirements when you make the repairs.
17 That's relevant because Doctor Whitlock testified that
18 under the code as written that these windows could not be
19 reused during repair if they were removed from the
20 structure.

21 And we had also submitted a request to charge number
22 36 uncertain damages. The rule that damages which are
23 uncertain or contingent cannot be recovered does not
24 apply as to the uncertainty of the amount but only to the
25 uncertainty as to whether any damage or benefit has

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1 resulted in the breach of the contract involved. We
2 believe that given Builders First Source's closing
3 argument that law is very applicable to the matters
4 before the jury. Would you like those four?

5 THE COURT: Sure.

6 [Whereupon, Mr. Lucey provides documents to the
7 court]

8 THE COURT: Any response at this time?

9 MS. DYER: As far as damages I don't know if it is
10 appropriate as a response or just in conjunction with
11 your review of the damages charge but the defense would
12 like to make certain that the charge included that the
13 damages not be based on guesswork or speculation or
14 presumed rather supported by the preponderance of the
15 evidence which satisfies each juror that any such damage
16 represents a just and reasonable compensation for the
17 particular item under consideration, which is part of one
18 of our proposed charges.

19 THE COURT: Let me -- got it. This is what I will
20 do. I'll go in on implied contract -- implied warranty
21 and talk about that six years so I'll correct that. I
22 will additionally charge that duty of care can be created
23 by a contract. I am not going to charge your 24 to
24 recover for breach of warranty that it is not necessary
25 that the plaintiff prove that the defendant was

1 negligence. I don't know any better way to separate
2 negligence from warranty than the way I did it and I am
3 satisfied that they were definitely separated. And I
4 didn't use the word negligence or lack of due care when I
5 charged on the issue of warranty so I am not going to do
6 that. I think if I do it now I am making a mess so I'm
7 not going to do it because I'm satisfied that it is
8 separate at this point so I'm not going to do that and
9 that's why.

10 I will however, I will charge that the seller of a
11 product can create an affirmative legal duty by contract.
12 And I will not charge the reasonable cost of repair is
13 competent and probative at evidence on the issue of
14 damages. The cost of repair may include the expense
15 necessary to perform the repairs to existing building
16 codes. I believe that is a charge on the facts and I
17 will not do that.

18 And your 36 is the negative of what I consider to be
19 the positive statement. And the positive statement is
20 you must prove your damages by the greater weight or the
21 preponderance of the evidence. I didn't go into you
22 can't have speculative damages. I did not go into that
23 line with regard to damages. I simply said that in this
24 instance the damages were repairs and loss of use and you
25 had to prove it by a greater weight or preponderance of

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1 the evidence. I did the positive rather than the
2 negative so I think if I go into that at this point it is
3 going to be confusing. And I'm certain that the way that
4 it is charged I think adequately imparts to the jury what
5 the damages are but in a positive way rather than talking
6 about the negative if you will. So that's what I will
7 do. Anything on behalf of -- yes?

8 MR. LUCEY: I'm not sure I heard a decision on is
9 the court going to clarify the requirement of notice
10 under the warranty? Is the court going to clarify ---

11 THE COURT: --- sure, no notice. I'll do that too.
12 No notice got it. Yes?

13 MS. DYER: We're satisfied, Your Honor.

14 THE COURT: Okay. Jury.

15 [Whereupon, the jury enters at 6:13 p.m.]

16 THE COURT: Ladies and gentlemen I do have a couple
17 of additions and clarifications. First of all I will
18 tell you that with regard to the statutes of limitations
19 we talked about the different periods. Let me go over
20 with you again breach of warranty be it express or
21 implied warranty is six years; not three years for
22 implied warranty. Either breach of warranty be it
23 express or implied is six years. Negligence is three
24 years; strict liability is three years so I wanted to
25 clarify that. Secondly ladies and gentlemen I would

1 further charge you that the seller of a product can
2 create an affirmative legal duty by contract and ladies
3 and gentlemen I talked to you about the need for a
4 plaintiff to notify one of a breach of express warranty.

5 And with regards to that ladies and gentlemen I
6 retract that; there is no duty of a plaintiff to give a
7 defendant notice of the breach of warranty, of a breach
8 of warranty within a reasonable period of time. So I had
9 gone into some discussion about that but I retract that
10 and tell you that a defendant would not receive as a
11 requirement for a plaintiff to recover notice.

12 So, that I retract from your consideration. And let
13 me just be clear that the plaintiff is not required to
14 give a defendant notice of the breach of a warranty, of a
15 warranty. All right. Counsel, do you need to approach?
16 Do you think I have covered the matters that we
17 discussed?

18 MR. LUCEY: No, Your Honor. Thank you.

19 THE COURT: Very well. Ladies and gentlemen I am
20 going to ask you to please retire to your jury rooms. My
21 alternates please stay where you are. If you all will
22 please retire, take with you your notebooks and in just a
23 moment you will be brought the verdict forms, the
24 exhibits. When you have your verdict form, when you have
25 your exhibits it will be time for you to begin your

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1 deliberations. Very well. Please retire to your jury
2 room.

3 [Whereupon, the jury exits at 6:16 p.m.]

4 THE COURT: Now, 15 minutes; who has a stop watch?

5 [Whereupon, the alternates exit at 6:17]

6 THE COURT: Please check the exhibits to be sure
7 that what is going to the jury is supposed to be going to
8 the jury. Then we will be in recess until we hear from
9 our...

10 [Whereupon, counsel and the court reporter review
11 exhibits]

12 [Whereupon, evidence out to the jury at 6:25 p.m.]

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Verdict
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1 VERDICT

2 THE COURT: Thank you so much. Please be seated.
3 It my understanding that the jury has reached its
4 verdict. Anything from the plaintiffs before we bring
5 the jury out?

6 MR. LUCEY: Yes, Your Honor. There is a second
7 phase. Ms. Dyer and I have stipulated as to the net
8 worth of BFS and I will use that for the jury and that
9 will speed things up.

10 THE COURT: Okay. Very well.

11 [Whereupon, the jury enters at 10:20 p.m.]

12 THE COURT: Thank you so much. Ladies and
13 gentlemen it is my understanding that you have reached
14 your verdict. If you would, please pass it along?

15 [Whereupon, the verdict is provided to the court]

16 THE COURT: All right. I find the verdict is in
17 due form.

18 [Whereupon, the verdict is provided to the Clerk of
19 Court]

20 CLERK OF COURT: The State of South Carolina Court
21 of Common Pleas County of Charleston for the Ninth
22 Judicial Circuit case number 2012-CP-10-7594 One Belle
23 Hall Property Owners Association, Inc. and Marvin T. Meek
24 and Francis B. Hill individually and on behalf of all
25 others similarly situated plaintiffs versus Builder's

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1 First Source Southeast Group, LLC. We, the jury, find
2 for the plaintiffs on the following causes of action
3 strict liability and breach of contract and we award the
4 plaintiffs two million one hundred sixty three thousand
5 four hundred ninety three dollars in actual and
6 compensatory damages signed Ms. Foreperson September 1,
7 2016.

8 THE COURT: Ladies and gentlemen if this was your
9 verdict in your jury room and continues to be your
10 verdict here in the courtroom please indicate by raising
11 your right hand.

12 [Whereupon, all jurors comply]

13 THE COURT: Let me observe for the record that all
14 of our jurors have their right hands raised. Thank you
15 so much. You can put your hands down. On behalf of the
16 plaintiffs anything else?

17 MR. LUCEY: Nothing, Your Honor. Thank you.

18 THE COURT: Very well. And from the defense?

19 MS. DYER: No.

20 THE COURT: Very well. It is my intention to
21 dismiss the jury.

22 MR. LUCEY: Yes, ma'am.

23 THE COURT: Very well. Ladies and gentlemen I
24 would tell you what time it is but my watch has died so I
25 can't. But look up here it is now 10:22. You have been

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Verdict
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1 terrific. I am so grateful for every tick of the clock.
2 It is not my policy to ask jurors to remain this late but
3 due to the weather I really appreciate you all hanging
4 with us and working so hard. I would love to be able to
5 take lots of time on each and every one of our behalf
6 tell you how grateful we are but I'm going to speed it
7 up.

8 A couple of things I need you to know you are at
9 liberty to talk about this case if you want to talk about
10 it. Talk about it. Now the practice of law is an art
11 and not a science and sometimes folks that try cases want
12 to have a conversation with jurors because it helps them
13 get better. If you're fine about that, that's fine. If
14 you're not fine about it, just tell them I don't want to
15 talk about it. And these lawyers certainly aren't going
16 to press you if you tell them you do not want to talk
17 about the case.

18 Should anyone ever want you to talk about this case
19 and you have explained to them that you don't want to
20 talk about it if that person doesn't want to accept what
21 you have said then just contact your Clerk of Court, Ms.
22 Julie Armstrong, and she'll contact me and I will of
23 course intercede on your behalf. That's not going to
24 happen but the first time I don't tell a jury that that's
25 exactly what is going to happen so I do that in an

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1 abundance of precaution. Now remember you are now not at
2 liberty to serve on a jury in a court of record the
3 balance of 2006 [sic]. Oh, I know you are upset. I feel
4 your pain but there is hope for you in magistrate's court
5 and municipal court. Remember you have an exception for
6 your service in any court of record Common Pleas, General
7 Sessions for 2017 and 2018 should you choose to exercise
8 that exemption.

9 I would tell you also that the check is in the mail
10 except it isn't. But it will be shortly for your big fat
11 jury service check. However you will learn very quickly
12 that it is a very small token of all that you have given
13 to us which of course is your dear and precious time and
14 for that we are so incredibly grateful.

15 I would tell you it has been an honor and a
16 privilege of mine to serve with you in this capacity. I
17 hope you have found your jury service to be interesting.
18 I can assure you it has been critical to our way of life,
19 to our democracy and for that I am forever grateful to
20 you. I know the hour is late. I know that you are parked
21 nearby and it's safe for you to walk over there. They
22 don't need a lot of escorts or whatever.

23 THE BAILIFF: We'll escort them.

24 THE COURT: Ladies and gentlemen again I thank you.
25 Please stay dry tomorrow -- high and dry so that your

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1 tootsies don't get wet and thank you again so much. Be
2 well. You are free to go.

3 [Whereupon, the jury exits at 10:24 p.m.]

4 THE COURT: All right. Nothing further from the
5 plaintiff?

6 MR. LUCEY: Nothing further.

7 THE COURT: From the defense?

8 [Whereupon, court's exhibit numbers 3, 4, and 5 are
9 marked by the court reporter]

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Post Trial Motion
September 1, 2016

1 POST TRIAL MOTION

2 MS. DYER: The defense would move for a judgment
3 notwithstanding the verdict. We renew our grounds for
4 the directed verdict motion previously heard by the
5 Judge.

6 THE COURT: Thank you ever so kindly. As you know
7 at this juncture all presumptions are of course in favor
8 of the jury in having reached this verdict. The jury
9 issues I believe were properly placed before the court.
10 It was certainly a well tried, hard fought matter on both
11 sides and I would respectfully deny your motions noting
12 your exception hereto.

13 MS. DYER: One question as well, Your Honor. It
14 was breach of warranty as to liability not breach of
15 contract.

16 THE COURT: Not breach of contract, breach of
17 warranty.

18 MS. DYER: I just heard contract and I wanted ---

19 THE COURT: --- yes, breach of warranty and strict
20 liability.

21 MS. DYER: Okay.

22 THE COURT: All right. Thank you, thank you,
23 thank you.

24 MR. LUCEY: Thank you, Your Honor.

25 [Whereupon, the jury trial concludes at 10:30 p.m.]

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

PLAINTIFF(S)

v.

Builders FirstSource -)
Southeast Group, LLC)

DEFENDANT(S)

TRANSCRIPT OF RECORD

ORIGINAL

Friday, November 18, 2016

COMMENCING AT:
Dorchester County Courthouse
St. George, South Carolina
Before The Honorable Diane Schafer Goodstein, Judge

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Official State Reporter

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EXHIBITS

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NO EXHIBITS INTRODUCED

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 filed; the setoff motion was not timely filed. And I
2 believe that's incorrect, Your Honor. The key thing they're
3 focusing on there is when the Form 4 was filed, which was on
4 the 22nd, they're saying we had to make a couple -- one
5 argument is we had to make the motion before that was filed;
6 or this was made before and that motion substantively was a
7 ruling on our setoff motion. But if you actually look at
8 the Form 4 that was filed, a very key point in there is that
9 it was done nunc pro tunc. So the effect of the order was
10 not a ruling on the merits or any kind of judgment about
11 what had been argued before. What it basically did was
12 enter the judgment back effective September 1 so that the
13 motions filed after that would attach to that particular
14 Form 4. And that's in keeping with the civil rules, Your
15 Honor. Civil Rule 58 talks about when a judgment to Form 4
16 is to be filed; it's the ministerial act when it's a general
17 verdict like we had in this case. It's something that can
18 be done by the clerk. My understanding -- I wasn't there
19 for trial. Ms. Dyer handled that and did well.

20 THE COURT: Yes, she did.

21 MR. WOOD: My understanding is it was a late night and
22 everybody was ready to get home before the big storm. And
23 the judgment was entered that night where rule 58 talks
24 about it. And it got entered a little bit later but the
25 substance of Form 4 made it get back nunc pro tunc, back to

1 September 1. So the effect of the order was to put things
2 back where they were, which is when it should've been
3 ordered when the verdict was done. So I don't believe
4 there's any issue here at all, Your Honor. And then the
5 motion was in a very timely fashion after that. She filed
6 the motion for setoff well within the ten days of the
7 verdict. We filed the JNOVs and the other motions within
8 the ten-day window. So I think all of motions are timely in
9 that regard, Your Honor.

10 And then to the extent -- there was some argument based
11 on a case Smith v. Widener, I believe was cited in their
12 brief. And in Smith v. Widener, there's a phrase in there
13 that says before the judgment is entered, you do the setoff.
14 That wasn't the point of that case at all, Your Honor. That
15 wasn't an issue raised in the case. It's in a general
16 discussion about it. There is no rule anywhere that says
17 the setoff has to be entered before the Form 4 is entered.
18 It's an issue that can be addressed. It's not governed by,
19 directly, by Rules of Civil Procedure. There's a case, and
20 I believe we cite it in our brief, Ellis v. Oliver that
21 addresses this very issue. Ellis v. Oliver is 515 Southeast
22 2nd 268. It was out of the Court of Appeals in 1999.
23 Apparently, according to it, it was one of the first cases
24 that addressed the statute on setoff and the idea of the
25 statute. And it said -- it talks about how the statute, to

1 the extent you're proceeding under the statute, doesn't
2 prescribe a procedure. It's just a matter of getting it in
3 timely, getting it argued. Let's see here. There was a
4 particular place I was going to -- I thought I had it
5 highlighted, but maybe I didn't. Anyway, it then talks
6 about -- the person there was arguing something very
7 similar; that you had to file it within a Rule 59 time, I
8 believe, if I'm correct. I couldn't find my spot. But
9 anyway, Your Honor, I think Ellis v. Oliver settles this
10 issue about timeliness. Our motion was filed very promptly
11 after that, I believe. From speaking with Ms. Davey, there
12 were discussions ---

13 THE COURT: It's at the top -- just for your -- it's
14 the top of page three.

15 MR. WOOD: Oh, okay. Very good.

16 THE COURT: It says, "Mrs. Ellis first argues that the
17 trial court erred by not requiring Dr. Oliver to follow the
18 Rules of Civil Procedure in requesting the setoff. She
19 contends the trial court erred by not treating Dr. Oliver's
20 motion for setoff as an untimely Rule 59(e) motion." Is
21 that what you were talking about?

22 MR. WOOD: Yes, ma'am. That was the argument that was
23 made and the Court rejected that argument. And I believe
24 that same principle applies in this situation. There was no
25 need to do it before. I know it was -- from discussions

1 with Ms. Davey, I don't know that they're on the record. I
2 think they were maybe back in chambers. Y'all discussed how
3 to handle the setoff motion. They're obviously contending,
4 you know, no setoff was to be allowed at all. Ms. Davey was
5 wanting to assert setoff. And it was -- I think the
6 discussion was sort of, well, we'll deal with that issue
7 with motions. And that's where we are today, Your Honor,
8 procedurally. I think we're there. And the motions are
9 proper procedurally.

10 What I would like to do at this point, unless Your
11 Honor has any questions about the procedure and timing of
12 the motions, let's deal with the question that go more to
13 the merits of the setoff. And we discussed this in our
14 briefing. When you look at the state law, the cases are
15 kind of -- what's the word I want to use? They're not all
16 over the place, but they're talking about two different ways
17 you can get setoff. There's a statutory setoff under the
18 statute; it's 15-38-50. And then there's always been a
19 common-law setoff that can be applied. I think either one
20 should result in a setoff of all or some portion of the
21 settlements that were rendered in this case before Builders
22 FirstSource was the last man standing for trial. And first
23 off, if we go under the statute, it talks in there about if
24 you have -- let me find my copy. I don't want to misquote
25 it here. And I apologize for the old-fashion look here; I'm

1 an old bookworm, Your Honor.

2 THE COURT: Good. Well, I like books too. Books are
3 great.

4 MR. WOOD: I keep them back behind my desk. So I
5 apologize for not having a paper copy. But it talks in 50,
6 when release or covenant not to sue or not to enforce
7 judgment is given ---

8 THE COURT: You got to slowdown.

9 MR. WOOD: I'm sorry.

10 THE COURT: That's okay.

11 MR. WOOD: I will slow down.

12 THE COURT: Thank you.

13 MR. WOOD: When I lived in Connecticut, they said I
14 talked too slow. Now that I live down here in South
15 Carolina, they say I talk too fast.

16 THE COURT: Well, you know it's really interesting, you
17 know, lawyers are just by in large, and it's pretty uniform
18 that lawyers are so bright, that when they read, they read
19 so fast that their mouth is really just trying to keep up
20 with their brain. And what happens with that is my court
21 reporters quits. When my court reporter quits, I'm like
22 done.

23 MR. WOOD: We don't want that.

24 THE COURT: We're probably pretty safe because it is
25 Friday. But nonetheless, I have to go on to the next week.

1 So that would be terrific.

2 MR. WOOD: Absolutely. It talks about when a release
3 or a covenant not to sue or not to enforce judgment is given
4 in good faith to one of two or more persons liable in
5 tort -- that's an important point here -- for the same
6 injury or the same wrongful death, it does not discharge.
7 There's no argument we're making that we should be
8 discharged from liability, but it reduces the claim against
9 others to the extent of any amount stipulated by the release
10 or covenant or an amount in the consideration paid for that
11 covenant. There's two different measures that can be
12 applied there. And then because that happens, we lose. If
13 that takes place, we lose the right to go seek contribution
14 under other provisions of the statute.

15 A couple of things. We got two -- at trial, it went to
16 trial on two causes -- or actually, it went to trial on
17 three causes of action, negligence, strict liability -- the
18 classic products liability three causes of action. The jury
19 came back with a verdict for defendant on the negligence
20 claim; came back, entered a verdict, 2,136 -- 2,136,000 and
21 something. I can't remember the last couple of numbers.
22 But it entered that general verdict for each claim, you
23 know, the same amount for each claim for strict liability,
24 for breach of warranty. And that breach of warranty, if I
25 recall from your jury charges, was on an implied or an

1 expressed warranty; either one. There was not -- you
2 charged the jury on both. It wasn't one or the other. Your
3 Honor, here it talks about being in tort. Strict liability
4 is a tort claim. There was some argument in one of the
5 briefs about there's no fault assessed. But that's not --
6 it's still a tort. And you can be a tortfeasor if you have
7 strict liability. Being a tortfeasor is not contingent on
8 having been assessed fault for the thing. It's on the basis
9 of, "Did you commit a tort?" You're a tortfeasor if you
10 commit a tort. And strict liability, if I remember right
11 from my Prosser and all those, is in the Prosser tort book.

12 Interestingly, if I go look at that case law, breach of
13 warranty, if you look at it, typically they talk about it as
14 being a contract claim. They hear -- what's interesting is
15 there is no direct contract between my client and
16 Mr. Lucey's clients. What we've got, if you go -- this goes
17 back to the Terra Linda case in our Supreme Court. And that
18 case is -- that one I did print out, Terra Linda 271
19 Southeast 2nd, 768-1980. And that was one where they
20 abolished in the warranty context, they said you can reach
21 back. We're implying at law, not by contract, but at law
22 we're putting liability on builders and others to do,
23 builders and vendors, to do good construction. I would
24 argue, Your Honor -- and again, I will admit, there's a lot
25 of case law out there that talks about implied warranty and

1 warranty being in contract. But I think if you look at
2 those cases carefully, they're going to be ones where there
3 is a contract directly between the people. If that were
4 true here, I would agree with that. Here, the duty is not a
5 duty coming -- it's one imposed by loss. Separate -- it's
6 not arising directly out of my contract. It's one imposed
7 by law. In this case, it's imposed in terms of statutory
8 law much like strict liability is imposed by law. But it's
9 creating a duty apart from my contract. Because normally,
10 there would have to be privity for me to have liability on
11 my warranty. But instead, the law, statutory law, imposed
12 an implied warranty; may have been one at common law too.
13 And also by expressed warranty, it makes my express warranty
14 flow through under a 36-23-18 over to remote parties who are
15 foreseeable users.

16 So having a knowledge of that, I think we can fit
17 within the statute even on the warranty claim. But I think
18 the statute should apply. And the statute talks about --
19 and here's where there is some tension or maybe some -- some
20 of the cases I've been reading on this setoff talk about --
21 all they talk about is the equitable nature of it and all
22 this. And then there's others -- and I think now Justice
23 Few. He was Chief Judge Few back when this one came out,
24 talked about how no discretion here. You know, the statute
25 says you got to apply the setoff. Either way you go on.

1 this, I think the statute encompasses all the two claims;
2 strict liability, breach of warranty that are here. But
3 even if it doesn't reach the two breach of warranty claims,
4 I think the equitable power of the Court, which hasn't been
5 abolished because of the statute, but the equitable powers
6 there to allow the Court to do the setoff appropriately to
7 make sure there is not double recovery in the case.

8 Now, having said that, I'm a little at a disadvantage
9 here because I don't have the settlement documents. So I
10 can't tell who paid what amount, who did what for this. But
11 if you go back and look at the complaint, which I do have
12 that's on file, you'll see there all of the defendants,
13 every single one of them, had a warranty claim made against
14 them. On the strict liability, there were certain folks,
15 there were certain parties, who did. And they were mostly
16 entities, if I recall correctly, who supplied a product in
17 some fashion to the thing. And so there was BASE, which
18 supplied the stucco. And as I understand, the trial, the
19 way it worked before they settled out, they were being
20 accused of you put stucco up; the stucco was put up wrong;
21 it was the wrong quality; it wasn't put up right; it leaked
22 that allowed the water to come in and ruin all things. And
23 that was even argued. And I think it was brought up in the
24 memorandum that was just submitted. Mr. Lucey argued about
25 that. And in fact, didn't present some of his damages,

1 chose not to, to the jury saying, you know, some of this was
2 probably stucco and we're not asking for that. We want -- I
3 believe he asked for 4.7 million or something like that from
4 the jury. So there was stucco that came -- that they
5 supposedly contributed to the damages. I think it was the
6 one of the other companies, and the name escapes me,
7 supplied shingles. And then there was the company that
8 actually manufactured the windows. We didn't manufacturer
9 them.

10 THE COURT: Right.

11 MR. WOOD: All we did was supply them. So I think
12 there were four; there might've been a fifth whose name is
13 escaping me right now. But some of those, the way this case
14 was plead was they all contributed to the same damages. It
15 was a joint damage. And I think the evidence bore that out
16 in the way the case was tried. So for instance, the water
17 came through the stucco. It was alleged water came down
18 from the windows, the windows were leaky; and it jointly
19 caused damage. So I think at the very least, even if say we
20 couldn't get a setoff for the window -- I mean the shingle
21 people, and whatever settlement was for them. Because there
22 was no indication that the shingles or water or whatever the
23 damage was resulting from the shingles, made its way down
24 and contributed to the damage same as this. I think we've
25 got it on the stucco based on the evidence that was

1 presented at trial. Certainly, we have it, whatever the
2 settlement amount was for the window manufacturer. They
3 made them; we did them; they both contributed to the exact
4 same set of damage. So whatever settlement was available
5 for them, I believe should be setoff. It's settling for the
6 same exact damage that was in that. And it prevents -- so
7 again, I'm at a disadvantage, Your Honor. I can't give you
8 a dollar amount because we don't have the document. But if
9 you hold that we're entitled to it, I'd love to brief some
10 more and talk about, you know, whether it's all or a part,
11 and we can discuss that with you.

12 So on the strict liability, that deals with the strict
13 liability part. Again, on the warranty, there are going to
14 be certain parties who settled warranty claims that lead
15 directly to the same kind of damage. For instance, the main
16 developer in this -- everybody's whose in the chain, strict
17 liability is about you were in the chain of selling the
18 product -- I said strict -- breach of warranty, excuse me --
19 you're in the chain of selling the product. In their
20 briefing, both on summary judgment and even here, they talk
21 about how the warranty we gave to the people who bought it
22 from us passed through that person down. So it was in
23 essence a joint warranty of what was happening here. So I
24 believe at the very least, we would be entitled to everybody
25 in that chain as it passed down through to take into

1 consideration and setoff monies they used to settle the
2 claims that are about the exact same damage that was dealt
3 with in this case. At the very least, those folks. Then
4 there's gonna be ones who gave warranties about stucco where
5 it was shown that the damage, the injury, that was incurred
6 is the same injury. They were joint injuries. It was
7 combined. It was -- what's the word I'm thinking? Not
8 joint tort, but joint causation of the same injury. And the
9 point under the equitable principle or under the statute is
10 to prevent a double recovery. So I think unless you have
11 any other questions about the setoff issue, I'll pass from
12 that and then move over to our JNOV.

13 THE COURT: Well, what was interesting about the way
14 that the case was tried -- and I guess I'll ask this
15 question. The way that the case was tried is that there
16 obviously -- it was a large project. Obviously, there were
17 many problems with the project. And yet the jury only heard
18 about the windows, and the alleged problems that were
19 associated with the windows. I think what you're telling me
20 is that you believe -- and this is something that I learned
21 at judicial classes; it's called reflective listening. But
22 here it is. What I think you're telling me is that you have
23 a concern that some of the evidence that was offered and was
24 proposed as being damages associated just with the windows
25 and the damages caused by the leaky windows, and the

1 whatever flash, whatever, that was associated with the
2 windows, your concern is that in fact that went beyond the
3 problems caused simply by the windows and their
4 installation. Yes?

5 MR. WOOD: Yes, absolutely, Your Honor.

6 THE COURT: Okay.

7 MR. WOOD: I mean, I don't think anybody could've said
8 well, this drop of water that caused this damage under the
9 windows came from the stucco but this drop of water came
10 from there. No; it was a combined injury, Your Honor. Now
11 there was an attempt to segregate -- there some things
12 obviously you can segregate out. The stucco manufacturer
13 didn't supply the windows so the cost of the window would be
14 different. And again, this goes in where -- maybe, I
15 haven't seen the documents, I don't how they're structured
16 and all that. I might not be entitled to all of it, but I
17 think I'm entitled to a substantial portion of whatever may
18 be out there in terms of the settlement. I really have no
19 idea -- my understanding is the insurance involved here was
20 what's called wrap insurance. And I don't if you're
21 familiar with that, but it's one where the insurance for all
22 of the parties involved, they don't build it into their
23 contract to do the work. But instead, it's supplied by the
24 developer to all of them. And so there may be something odd
25 about that. And I just don't know how that will work its

1 way in. But be that as it may, I believe you got an issue
2 of double -- these people settled, some of them, on the same
3 cause of action for the same injury. The injuries were
4 combined injuries. There was no hermetically sealed off
5 thing where it was the window leaking and only water coming
6 from the leaking window went down in there. There was water
7 coming in around the sides of the window because the
8 installer didn't put them in right; maybe broke them. There
9 was window damage there that was from the architect because
10 the allegation is, as I understand it, was that he set the
11 window too far back in and recessed it so that the water
12 couldn't clear from the window. There's damage there from
13 the stucco supplier. Probably from the -- if there was a
14 separate stucco -- all that.

15 THE COURT: Yeah. So let me ask you this question.
16 How do you propose that the issue, that the setoff, be
17 resolved?

18 MR. WOOD: A couple -- one, you may just get it all,
19 Your Honor. There's actually one case that was very
20 interesting and in some ways it was similar to this. There
21 was a case, and the name is escaping me at the moment. I'll
22 try to look it up while Mr. Lucey is speaking. There was
23 one where the Court said you're just entitled to the setoff
24 period, the people that have a related thing. So in that
25 particular case, the plaintiff deliberately didn't put in

1 evidence of bills that the injured party had paid on the
2 thing. And then tried to argue after the fact, you're not
3 entitled to a setoff because I didn't put those bills in and
4 I didn't put them at issue. And the Court said, no, you get
5 the whole thing. And I think in that particular case, it
6 may be Welch v. Epstein. It's Welch; yeah, okay. I was
7 remembering. Welch v. Epstein, I mean, there was a question
8 in there also about apportioning it between two different
9 causes of action. Because the parties have stipulated some
10 was for survival, some was for wrongful death, which is two
11 different kinds of injury. But the bottom line was, they
12 allowed that whole thing. That's one approach. Not seeing
13 the document, I'm not sure. But I think you can look at the
14 things and do some proportionality that's in the equitable
15 -- or I think we get to make both, I and Mr. Lucey, get to
16 make our best arguments. And then in equity, you look and
17 decide what's necessary to prevent a double recovery in the
18 matter. They're even -- despite just his fused comments in
19 the one case about no discretion at all in this.

20 There's other case law that talks about, well, it's
21 equitable. The Court hasn't really nailed that down whether
22 it's no discretion or not. And, you know, I just think we
23 need an opportunity to work that out. And I think we're
24 entitled to setoff, if we're not entitled to judgment, which
25 I'll move on to if you -- unless you have any other

1 questions about setoff, Your Honor.

2 THE COURT: Can we stop here? Because setoff, I think
3 we're sort of done with setoff at this moment.

4 MR. WOOD: Yes, ma'am.

5 THE COURT: And what I would like to do is just hear
6 from Mr. Lucey if he's prepared because ---

7 MR. WOOD: Absolutely.

8 THE COURT: To address it because I want to hear about
9 the procedural part and then the substantive part on the
10 setoff if that won't mess your argument up.

11 MR. WOOD: It will not mess me up at all. I was
12 prepared either way.

13 THE COURT: Okay. Great. All right. And those two;
14 number one, the procedural part of it, and then the other
15 part.

16 MR. LUCEY: Yes, ma'am.

17 THE COURT: And good afternoon.

18 MR. LUCEY: Good afternoon. First of all, the concept
19 of setoff, yes, it does involve avoiding double recovery, a
20 windfall as a double recovery. But as recognized by the
21 courts, you also have to avoid the other windfall, the
22 defendant escaping responsibility for damage it has caused.
23 And, obviously, there's a balance there. We're getting to
24 the procedural aspect first, Your Honor. Actually, Builders
25 FirstSource did a great job at trial. They got rid of the

1 negligence count; they won on negligence. And they dodged a
2 punitive damage phase. According to my memory, we just
3 stipulated as to what evidence would be coming in at that
4 phase because it was getting late, the storm was coming in;
5 we all wanted to get this trial done. And so they did a
6 heck of a job. They dodged a punitive damage phase. They
7 won on negligence, which is what we presume led to the Court
8 entering and enrolling the verdict without the statutory
9 automatic offset for joint tortfeasors. The double-edged
10 sword, once they won on negligence, there was no joint
11 tortfeasor left. They're not entitled; they don't come
12 under the act. They're not a joint tortfeasor and it does
13 not arise by operation of law any longer.

14 And there was a reference to the courts being all over
15 the place on setoff. We don't really believe they're really
16 all over the place. That there is setoff under the act,
17 which is automatic and it's supposed to occur before for the
18 verdict, the judgment, is enrolled. And there is still the
19 common law equitable setups that courts retain even after
20 the act in the appropriate situations. What's notable, Your
21 Honor, is there was a description of your Form 4 order as
22 being some sort of ministerial act. The check mark -- the
23 last check mark on that Form 4 order says this ends this
24 case. That case ended two months ago. There's been no
25 motion to reconsider on the ending of that case. There's

1 been no appeal from the ending of the case. That ship
2 sailed. There's actually, technically speaking, not even a
3 motion for a setoff. Those are motion to compel documents.
4 It's labeled as a motion to compel and then a motion for a
5 setoff, but the very last line of the motion reads once the
6 documents are produced, we will move for a setoff under the
7 act. It is strictly a motion to compel. To the extent that
8 that is the setoff motion, they have not plead equitable
9 setoff, and that's not before the Court today. The only
10 thing that would be before the Court today if setoff at all
11 isn't before the Court would be the automatic setoff under
12 the act, which they don't get because they're not a joint
13 tortfeasor.

14 To the extent there's anything left to discuss after
15 that, and I managed to segue into several other related
16 topics. First of all, the Court is obviously aware of the
17 two-issue rule. In this case, we actually have the
18 three-issue rule. Because not only do we have a general
19 verdict on both strict liability and warranty, but we have a
20 general verdict on both expressed warranty and implied
21 warranty. So if we can defeat the right to setoff under any
22 of those three causes of action, the rest doesn't matter.
23 We retain our verdict completely. As to strict liability,
24 Your Honor, there were some discussion about it being in
25 Prosser's tort book, the law in this case is

1 well-established. The Court charged the law of this case to
2 the jury during the trial without objection. Actually,
3 plaintiff's asked for several other charges; they were made.
4 But there was never an objection from the defendant. The
5 law in this case clearly establishes that strict liability
6 is not a tort and it's not a fault-based claim. The Court
7 charged, "Strict liability means liability without fault.
8 Under the theory of strict liability, even if the defendant
9 used due care, the defendant may be responsible for the
10 plaintiff's injuries." In other words, it does not matter
11 whether the defendant was negligent or not to. The product
12 was defective and unreasonably dangerous; end of story.
13 That's the charge. That's the law of the case. And in
14 fact, it's the proper law. And why do we care? Because our
15 common law, and to the extent that they don't qualify under
16 the act and to the extent that they even qualify under
17 common losses, they didn't move for it, our common law,
18 especially the Voykin case in the Fourth Circuit that we
19 cited to the Court, explains at length why in the common law
20 you do not offset on a cause of action that is not a
21 fault-based cause of action. The underpinnings of setoff no
22 longer apply when it's not a fault-based cause of action.
23 The Voykin case was in fact a maritime dispute and the ship
24 owner was held liable regardless of fault. And the issue of
25 setoff was brought up and it was denied because the verdict

1 had come in on a faultless cause of action. The equitable
2 cause of action would no longer apply.

3 As to warranty, Your Honor, the express warranty arose
4 out of contract. A contract with solely one other party
5 that was Builders FirstSource. There's two expressed
6 warranties in the case if the Court recalls. There is an
7 express warranty provided by Builders FirstSource to the
8 developer that was assigned in the purchase contracts to the
9 association of the homeowners. Then there is a second
10 express warranty that was delivered directly to the
11 homeowners in their homeowner manual. And that created
12 contractual relationships that were independent and
13 exclusive of any other relationships in the whole wide
14 world. And we recovered in that relationship. They can't
15 and no way can they show this court that a stucco applicator
16 should be responsible for a contractual obligation.
17 Builders FirstSource voluntarily undertook in an independent
18 contract. Not only that, as we bring to the Court, one of
19 the terms on the back of that contract says that Builders
20 FirstSource will be solely responsible for correcting any
21 problems, any damages, or replacing the product. They
22 assume responsibility for the entirety of any failure of
23 their product within that contract. Implied warranty, we
24 prevailed on that also. It does arise by operation of law.
25 But it arises by the sales transaction, by the placing of

1 the product into the stream of commerce. Again, there's
2 only one party that did that; that's Builders FirstSource.
3 It's a separate activity. No other party was involved in
4 that.

5 To the extent that -- and on the express warranty, Your
6 Honor, I can't stress enough that that situation was
7 addressed in detail in the Terminex case; the Orkin and the
8 Terminex case, the Atkinson case, whether it was two
9 independent termite contracts. And the court, and we
10 actually quoted from the trial court opinion in our brief
11 because it's even more specific. What the court said,
12 there's no way in the world that Terminex could have had any
13 responsibility for Orkin's contractual failures. There is
14 no setoff. In fact, given that the negligence in the case
15 was actually arising out of two different contracts, the
16 duties of two different contracts, the court went on to, the
17 appellate court, went on to reverse the lower court's
18 application of a setoff on a negligent verdict saying
19 they're negligence were completely independent of each
20 other. And one occurred before closing, and one occurred
21 after closing. The fact that the combined negligence may
22 have eventually contributed to the same damage, or cumulated
23 damage, was irrelevant to that determination.

24 If you get past all of that, if you get past all of
25 that, I would acknowledge to the Court that generally

1 speaking under the common law of this state, to start with,
2 if you have identical causes of action and identical
3 injuries and identical faults, yes, there's a setoff and
4 tortfeasors and it rises under the act. Once you put that
5 act aside, if you no longer have that, once you have some
6 overlap as they're trying to claim, but not complete
7 overlap, then it becomes the Court's discretion; the Court's
8 discretion as to whether or not there should be some
9 allocation as between or what have you, as between the
10 amounts previously paid in the verdict. But let me give the
11 Court six reasons why equitable setoff in this partial,
12 alleged partial, overlapped situation should not be applied.

13 First of all, again, equitable setoff is not pled in
14 the motion. In fact, there is not a motion for setoff and
15 there's certainly not a motion for equitable setoff. They
16 completely move underneath the act. Secondly, and most
17 important to me, most important to me in my perception, the
18 issue of what other people paid in this case was already
19 tried to the jury by the consent of the parties. The very
20 lead opening statement by defense counsel was the reason
21 we're here today -- it used to be 40 parties in this case.
22 And the reason we're here today is because Mr. Lucey and I,
23 the reason we're still in, we're the only ones still in, is
24 Mr. Lucey and I couldn't reach an agreement. The only take
25 away possible, the only implication possible to the jury is

1 that the other 39 defendants have paid their money and left.
2 Plaintiff's has been paid, and we're only here to decide
3 what Builders FirstSource is responsible for. Once that
4 statement came out, that was the end of any setoff argument.
5 And actually, continuing through the trial, she didn't
6 mention the failure to reach agreement again, but she
7 continued to reference the 40 other defendants, at all
8 points during the trial, that are no longer in the courtroom
9 including closing argument. She further argued the
10 allocation of damage and trying to argue that damages should
11 be allocated to these other parties; these architects, it
12 was all their responsibility. So the issues have already
13 been tried to the jury. That's the second reason why this
14 would not fall into the normal rule.

15 The third reason is to contractual differences we've
16 already discussed. This is Builders FirstSource's only
17 contract; the only contractor here. And they have a
18 contractual provision saying they're responsible for all
19 damages they caused. The fourth reason, Your Honor, is
20 there is no recovery -- excuse me, no double recovery. I
21 was candid with the Court at approximately the time of jury
22 selection. And I informed the Court at that time that
23 plaintiff's had received a little under ten million dollars
24 in this case. I might've even said 9.7, which I believe is
25 fairly accurate. And we have those records with us if we

1 need to. And that our estimate, our complete damage
2 estimate, was 14.5, 14.6 million. We were never at any time
3 seeking to obtain anything more than what we had estimated
4 our damages were. In fact, that didn't even include the
5 loss of use damages. So there is going to be no recovery,
6 double recovery. And there's no double recovery for the
7 Court to solve or prevent here. We've already discussed
8 that because this is a strict liability, a strict liability
9 claim, it's a faultless claim that the equitable setoff
10 should not apply under the Voykin case. And that Voykin
11 case is not unique. There's other cases out there that have
12 that exact same analysis. It's just that the Voykin case
13 goes into the theoretical underpinnings in it's discussion
14 in such detail, it helps you understand why.

15 And lastly, Your Honor, we believe they just simply
16 just have not met their burden as to showing, proving that
17 this damage was caused by the other parties. They haven't
18 met it; didn't meet it at trial and haven't met it here.
19 And as a side, we believe that the Court would, could,
20 should probably recognize that in their pretrial motions,
21 Builders FirstSource said itself to the Court, we believe
22 the damages are divisible. We should only be held liable
23 for our own damages and we're moving in limine for that.
24 They themselves having said the damages are divisible, I
25 think they're hard-pressed. And I represent to the Court

1 that they're indivisible and that we recovered on an
2 indivisible damage.

3 So the order ending this case is now two months old.
4 There hasn't been a motion for a setoff. There's a motion
5 to compel documents. We believe a motion, a new motion, for
6 a setoff would be untimely now to the extent that the old
7 motion is construed as a motion for a setoff if purely moved
8 under the act. We don't have a joint tortfeasor; they're
9 not entitled to move under the act. Thank you, ma'am.

10 THE COURT: Thank you. All right.

11 MR. WOOD: A couple of things, one is a tort. Our
12 statute doesn't talk about fault. The statute talks about
13 if they're jointly liable. If so, here we've got joint
14 liability on a tort, strict liability, so the statute, I
15 believe, clearly applies there. Whatever a common-law
16 admiralty claim may have about faultlessness and the
17 equitable issue, our statute makes it torts and you divide
18 it up. So I think the statute would override -- I think he
19 said Voykin case from the Fourth Circuit; not applying South
20 Carolina law, but admiralty law. So taking that one out,
21 then this issue of we argued a motion in limine to have it
22 divided up. Well, it was denied. So Ms. Dyer has to try
23 the case she's got. She's of course going to point at the
24 other folks and say it's all -- she's not going for a
25 division of the damages. She wanted to be zeroed out. I

1 mean, we had an intervening causation argument in there. So
2 she's trying the case that she was handed. And I'm glad it
3 was only a \$2 million verdict. Let me go back to that, too.

4 He's saying, we only, you know, we settled for 9.7 and
5 got 14 and we asked for the difference. Well, the jury in
6 this case didn't even give him what he asked for. So to say
7 therefore there's no double recovery, they might not have --
8 if they had tried the 9.7 millions worth of the other --
9 they may not have given it either. And that's where the
10 equity comes in and we talk about it; we have a trial
11 transcript. You look at it, Your Honor; you weight it; you
12 look where the damages overlap and there might be double
13 recovery in this; and then you make a ruling and do the
14 setoff. That's the way that works. You don't just assume
15 he was going to get the 14.4 upfront especially in light of
16 what the jury did in this case.

17 Let see what -- I can't even read my own writing,
18 Judge. I wrote so fast. That's pretty terrible. (Brief
19 pause.) Your Honor, we talked about the motion. The way
20 the motion is drafted, there's a procedural argument being
21 raised. The motion is a motion to compel. It talks about
22 doing it. Your Honor, if that's where it -- I'm making the
23 motion now and I believe, again, under the case that I cited
24 earlier, there's no set time for making that motion. So I
25 think I make it verbally to the extent it is made. And I

1 believe it's perfectly timely. No one has been fooled by
2 it. No one has been prejudiced by. We don't have the
3 documents to argue it out fully. I'm kind of one hand tied
4 behind my back because they wouldn't give us the settlement
5 document to see if they were provisions apportioning it
6 among people, anything like that. So we made the motion to
7 the extent it is not deemed to have been made. It's not
8 governed by Rule 59 and the 10-day rule according to the
9 case. We make the motion now, we make it on both grounds.
10 And we believe it should be granted, obviously, for the
11 reasons I've talked about earlier.

12 I believe the other thing he talked about was this
13 notion of the warranties in the Atkinson case. Atkinson is
14 a really interesting case. Only in this sense, if you look
15 at the holding in the case, I think what the trial court in
16 that case, said that there was a joint negligence claim.
17 And the Court -- and this is on page 394 of the Southeast
18 2nd site where it stats discussing this. It talks about,
19 they had different contracts and they were doing different
20 things. But there was a negligence plead against them but
21 different activity for each one. And the Court gets to the
22 end and said I really don't believe -- and this is sort of
23 like mentally doing what we've talked about apportioning it
24 out. They said, you know, the trial court said that it
25 looks like it could have contributed; didn't make a finding

1 it did. And they said we don't even think there's really
2 evidence it could have been a contributing cost of the same
3 damage. So there's no -- it's not appropriate to give an
4 offset in the case. It was a very interesting approach they
5 did. It's addressed right at the end of the opinion after a
6 long opinion about the merits of the case. It said we see
7 no indication the claims against Terminex constituted a
8 contributing factor to Orkin's negligent inspection of the
9 house. That's not -- here we've got a common source for all
10 of these things. All of the people who are giving
11 warranties are people giving warranties to a building that
12 is managed by the main developer/contractor who then
13 aggregates their warranties and they pass through to
14 Mr. Lucey's clients. Those different things that each one
15 of them warranted they were doing, come together -- not
16 every single one of them, maybe not the shingle guy or maybe
17 not the carpet people. I don't know who -- they're
18 obviously going to be people in an equitable who won't
19 relate to our damages, but there are a lot. The case was
20 tried this way. And that was part of the defense that Ms.
21 Dyer raised was, hey, the evidence is clear. The water was
22 coming in around the windows; that's not our fault. We
23 didn't put them in. That's somebody else's fault. It was
24 coming through the stucco. That's the stucco guy's fault.
25 All that should be taken into account to prevent double

1 recovery in this case. And I think it's totally appropriate
2 either under the statute or as a matter of equity for the
3 Court. So unless you have any other questions, I'll on to
4 JNOV.

5 THE COURT: Mr. Lucey jumped up. He wanted to respond
6 to something. So, yeah, just on this issue.

7 MR. LUCEY: Yes, ma'am. I don't recall the Court
8 denying any of the Builders FirstSource's motion in limine.
9 I can't tell you a hundred percent that that's the case.
10 And the reason for that is the movant hasn't ordered a
11 transcript. I don't think it's fair to the Court for the
12 movant to try and say what happened when some of the
13 movant's representatives weren't there, and they didn't
14 order a transcript. To be absolutely clear, we got a
15 blue-chip defendant who can afford a transcript. We have --
16 Liberty Mutual sat in the courtroom all week long behind the
17 defense table. There was a woman back in the audience
18 representing them. And we know have a huge southeastern law
19 firm representing Builders FirstSource. All three of them,
20 or any of those three, have the ability to order a
21 transcript. The response ordered the portions of the
22 transcript they thought were relevant. It's been two
23 months. And I just don't think it's fair there for a movant
24 to come here before the Court and say something happened
25 without a transcript to back it up. I don't recall a motion

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 being given. And, Your Honor, there was a charge given as I
2 understand it, but then that charge was withdrawn. The jury
3 was brought back in, said no notice was required. We
4 believe the law requires notice to be given before you can
5 bring the warranty claim or you lose your remedies. Why do
6 I say that? There's a case we've cited in our brief,
7 Brooks. It was cited by Judge Child's in the District Court
8 here. She cites a South Carolina Supreme Court case that's
9 supporting -- that element with an implied warranty action
10 is that you provided notice to the client, to the party.
11 You have to give them notice. Now, quite apart from that,
12 the statutes require it. In South Carolina law, the Supreme
13 Court has said you must give notice citing the statutes. And
14 the case I found it oddly enough this morning while I was
15 prepping for this. It's a Hitachi case. And I've got
16 copies here, Your Honor. Let me dig them out; give one to
17 Mr. -- and pass one up to the Court. I apologize for being
18 slightly disorganized here.

19 (Brief pause.)

20 MR. WOOD: Your Honor, May I approach?

21 THE COURT: Sure.

22 MR. WOOD: Here's a copy of Hitachi.

23 THE COURT: Okay.

24 MR. WOOD: And the Brooks case.

25 THE COURT: Okay.

1 MR. WOOD: Your Honor, in the Hitachi case, which is
2 Justice Pleicones I believe was speaking for the Court, now
3 Chief Justice. He talks about in this particular case, it
4 was a case on a warranty. And it talks about what notice is
5 required. And they cite two -- one statute they focus on.
6 There's actually three statutes that work in conjunction in
7 the warranty here. The first one is 36-26-073(a) which
8 requires that you give notice. That's what it says. If
9 there's a defect, if you accepted goods, you find them to be
10 defective, you've already taken possession of them and
11 hauled it -- first you can reject them, it talks about doing
12 that, when they arrive. But if you discover the problem
13 later, 36-26-073(a) requires you to give notice. And the
14 Court said if you don't give that notice, you'll lose your
15 remedies both under the statutes, the warranty statutes,
16 under title -- or under Title 36, Chapter 2, the UCC, you
17 lose your remedies there. And then Hitachi says you not
18 only lose those, you lose common law remedies. You have no
19 remedy. Notice is -- South Carolina General Assembly has
20 required notice.

21 And the three statutes that sort of work together on
22 this notice issue are 36-2-602, 36-2-607-3(a) and
23 36-2-714(1). Hitachi focuses on 36-2-607-3(a). And
24 describing that statute it says as we have stated the phrase
25 any remedy in section 36-2-607-3(a) is plain and

1 unambiguous. It has brought enough to encompass common law
2 remedies, thus a party to an article II contract must give
3 seasonable 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 seasonable 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 given, showing no seasonable notice. The only notice I'm
2 aware of is we got sued. That's notice, but it's late
3 notice. It's not notice that gives us an opportunity to
4 correct the issue under the warranty. And so, according to
5 Hitachi, all remedies are gone. So I believe we're entitled
6 to JNOV on the warranty.

7 THE COURT: Okay. Yes, sir.

8 MR. WOOD: Statue of limitations on ---

9 THE COURT: Hold on. Let me hear about that.

10 MR. WOOD: Oh, you want to take them one at a time?

11 THE COURT: If you don't mind.

12 MR. WOOD: Absolutely, Your Honor.

13 THE COURT: Yes.

14 MR. LUCEY: Your Honor, this isn't where we're supposed
15 to start from scratch and re-litigate this case. This is a
16 JNOV. We have strict rules. None of them are being
17 followed. This was not -- this is proffer to the Court in
18 the directed verdict motion in close of plaintiff's
19 evidence. There was no directed verdict motion made at the
20 close of evidence. The JNOV was made orally at night after
21 the verdict came back and when the jury was excused. A JNOV
22 couldn't have been granted anyway because there was no
23 directed verdict motion made at the close of all the
24 evidence renewing the grounds from the directed verdict
25 motion at the close of plaintiff's evidence, which didn't

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 (Brief pause.)

2 THE COURT: All right. Now, where is it? Which tab is
3 the . . .

4 MR. LUCEY: Exhibit B are the transcript excerpts.

5 (Brief pause.)

6 MR. LUCEY: I have the pages tagged if that would make
7 it easier for the Court, Your Honor.

8 THE COURT: Well, I just hate -- if counsel doesn't --
9 if you'll give me the pages. I think I'm there. I'm at 49
10 and 50. Isn't that where I need to be?

11 MR. LUCEY: Yes, ma'am.

12 THE COURT: Okay.

13 MR. LUCEY: That's the close of all evidence. And the
14 JNOV is at page 129.

15 THE COURT: Okay.

16 MR. LUCEY: And honestly, Your Honor, it appears to me
17 as though the first directed verdict motion, which is at
18 page 39, might not be in the package and I have an extra
19 copy of it.

20 THE COURT: Okay.

21 (Brief pause.)

22 MR. WOOD: Your Honor, on the first one, if I may point
23 out, and I don't know if this is a transcription error, the
24 49 through 51, it says Ms. Dyer but it sounds like Mr. Lucey
25 arguing because he keeps talking about there's enough facts

1 to go to the jury.

2 THE COURT: Interestingly enough, I'm just having that
3 thought process myself as I go through it. Although . . .

4 MR. WOOD: Although, parts of it sound like Ms. Dyer.
5 I'm not sure what's going on there.

6 MR. LUCEY: What's going on there, Your Honor, is the
7 Court had expressed a lot of interest in our argument as to
8 that plaintiff's were entitled to a directed verdict because
9 the twin windows were never certified and were illegal under
10 any analysis. And so that's what Ms. Dyer at that point is
11 arguing against. She's arguing against my directed verdict
12 which I had argued several times further responding to the
13 Court's inquiries.

14 THE COURT: Well, it is interesting because obviously
15 as the bottom of the page 49 as far as the negligence cause
16 of action, there is a failure to prove what duty Builders
17 FirstSource had with regards to an inspection of the
18 certification supporting the windows. And the breach -- and
19 the breach warranty, we would argue that there has been . . .

20 .

21 (Brief pause.)

22 MR. WOOD: I don't think she was ever arguing the
23 windows were defective, Your Honor. So I'm not sure what's
24 going on with this transcript.

25 (Brief pause.)

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 transcript here.

2 THE COURT: I understand. I understand.

3 MR. WOOD: So that's a little odd. If I could, I will
4 address the merits of these because as we point out in our
5 motion, our new trial motion, made ten days after the
6 verdict, within ten, even if the JNOV is not there, the
7 grounds we're raising in this would deal with 13th juror and
8 the other new trial type of grounds that we've raised.

9 THE COURT: Let me ask you this question because if in
10 fact -- and I am looking at the transcript. And I'm happy
11 to share with you this. I got it, Mr. Lucey, so I can share
12 it. It does -- while there was certainly argument in
13 opposition to Mr. Lucey's motion for directed verdict at the
14 end of all of the evidence, on page -- I got to get back to
15 the page. And you can help me ---

16 MR. LUCEY: Fifty-nine, Your Honor.

17 THE COURT: I'm sorry?

18 MR. LUCEY: Fifty-nine where they decline the motions.

19 THE COURT: On page 59.

20 MR. LUCEY: On September 1st.

21 THE COURT: Yeah. On page 59, it's motion for directed
22 verdict. And I'm addressing the plaintiff's motion for
23 directed verdict and I say taken the evidence and the like
24 most favorable to the nonmoving party, which of course would
25 be the defendant, I believe what has been layed out are

1 issues for the jury, and I'm respectfully going to deny the
2 motion for it. And then there's -- I think it's an
3 involuntary nonsuit with prejudice but a directed verdict is
4 what is commonly called at this juncture, so I would
5 respectfully deny your motion noting your exception thereto
6 any motions. Now this one would've been at the close though
7 of the plaintiff's case. So hold on. Where's the one that
8 comes ---

9 MR. LUCEY: Fifty-nine, Your Honor, is actually the
10 close of the entire evidence.

11 THE COURT: I don't think so.

12 MR. LUCEY: If I may approach the Court with the
13 August 31st transcript.

14 THE COURT: Okay.

15 MR. LUCEY: And it has some marks on it.

16 THE COURT: Okay.

17 MR. LUCEY: And just to refresh the Court's memory, we
18 didn't actually start on Monday. We struck a jury but there
19 was pretrial stuff. We started on Tuesday; plaintiff went
20 Tuesday and Wednesday. We were worried about a storm coming
21 so we rushed and closed. I think we rested Wednesday.
22 Builders FirstSource went Thursday morning and we argued to
23 the jury late Thursday. The storm came Friday.

24 (Brief pause.)

25 THE COURT: Okay.

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 jut 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.

1 MR. WOOD: Will you be holding the motion as to offset
2 in abeyance.

3 THE COURT: I kind of want to talk about that some
4 more. I really -- and I know that you all have argued that
5 portion of it because one of the things that I haven't asked
6 you, Mr. Lucey, is is it an issue that I have got to
7 determine when you look at the case law is the issue one of
8 being tort or one of being at fault under the statute?

9 MR. LUCEY: Tortfeasors are at fault.

10 THE COURT: How about the strict liability? Is strict
11 liability not a tort? I think it is a tort. It's product
12 liability.

13 MR. LUCEY: It's a statute for liability without fault.
14 And under the analysis of that case that I mention to your
15 Court -- to the Court, there's not a joint tortfeasor to
16 allocate between because there is no fault. It is a cause
17 of action; it's not a fault action. (Brief pause.) And as
18 a side, Your Honor, there was no strict liability claim
19 against the stucco installer. So to the extent that you
20 want to consider their argument that it's a quasi tort,
21 there's a different cause of action. The stucco installer
22 was never sued for strict liability in tort. Different
23 theories. You cannot hold an installer, a craftsman, liable
24 for strict liability in tort. It just doesn't work.

25 (Brief pause.)

1 MR. WOOD: Your Honor, if I said installer, pardon me.
2 It's BASF is who strict liability -- my understanding is
3 they are the ones who made the stucco that went on the
4 building. So there was a stucco party involved in the
5 strict liability claim. So if I said manufacturer, I was
6 mistaken.

7 MR. ANZELMO: You were right on manufacturer.

8 MR. WOOD: Manufacturer, I'm right. Installer, I would
9 be wrong.

10 THE COURT: Got it.

11 MR. LUCEY: To the extent that that's clarification,
12 BASF paid us \$75,000, so.

13 MR. WOOD: That's why I think it's important I see the
14 document, Your Honor. I think it might help us if you need
15 some more briefing on this tort in full and other issues on
16 this. It would also help that; we could go all the way to
17 the end. You may ultimately decide we don't have it. But
18 if we have the breakdowns, we'd know what we were talking
19 about here in terms of setoff. We'll keep it, if there's a
20 confidentiality provision, it'll be -- you know, we'll keep
21 it confidential. We're not going to publish it or stick it
22 in the ---

23 THE COURT: I understand.

24 MR. WOOD: We'll protect the information to whatever
25 extent is necessary to comply with the settlement.

1 THE COURT: Okay.

2 MR. LUCEY: We believe, plaintiff's believe, they've
3 fully briefed this issue. It's been two months and we
4 served our briefs two and a half days in advance of the
5 hearings so everybody would have the benefit of them. We're
6 happy with the Court deciding this on briefs as is. We
7 believe the issues are our briefs.

8 (Brief pause.)

9 THE COURT: Let me tell you what -- let me just share
10 with you what I'm considering. I really do want Court's --
11 on that issue followed up as opposed to the language that
12 says joint tortfeasors. If it says joint tortfeasors and
13 strict liability is a tort then why do I inject fault? That
14 would be my question. So I really need Court's -- on that
15 one. So if you want to add to it, you don't have to; you
16 absolutely can stay right where you are. But that issue has
17 been raised. And so I'm going to give that some additional
18 consideration.

19 The other piece of this that's important for me, and
20 I'm just letting you see the sausage being made, what's
21 around and around in my head, quite frankly, is that this
22 case was tried I believe with an intention to separate the
23 damages attributable solely to these windows. And the
24 reason that I say that is because I had -- coming into this
25 case, this was not a complex case designation. Not that it

1 wasn't complex; it was complex. But it did not come to me
2 under a complex case designation. So I didn't know anything
3 when I arrived to try this case. And I never knew quite
4 frankly because with these lawyers, I had enough to do with
5 just hanging tight with the trial. I didn't plunder through
6 the file, I didn't, to see who had been in the file. I
7 didn't take the time and energy and effort to do it. So the
8 case that I tried was limited to the windows. Now without
9 question Ms. Dyer did a marvelous job and did a lot of
10 pushback about, oh people, there were lots of people
11 involved here; there were lots of other defendants; we got
12 lots of other people; you know, we got stucco going on,
13 we've got installers going on; and there was a lot of
14 pushback about that. There was an architectural issue about
15 the way the windows were replaced. There's no question that
16 there was pushback about that. No question about it. And
17 there was pushback about the damages as well.

18 And so in one of the issues, quite frankly, that I was
19 concerned about is I know absolutely nothing other than this
20 case I'm trying, what about -- and I pondered as we were
21 trying the case what about, I wonder if there is any setoff.
22 But it was real clear to me that this case was being tried
23 from the plaintiff's perspective with trying to limit the
24 damages with regards to the windows only. I think the
25 expert talked about that. But there was absolute pushback

1 in cross examination. And there is no question that the
2 information came out about the design, that they were, as I
3 remember, that the way the architect had designed these
4 Windows was not efficacious to the units remaining dry,
5 things like that. No question about that.

6 So it's interesting place to come in a case when there
7 is little to no information about the other issues. And to
8 apportion it would be, as I sit here, another trial. So I
9 wonder if the statute contemplates that, quite frankly. Or
10 whether the -- and I'll leave it at that. But those are the
11 things that are going through my mind. So this is what I
12 think is probably appropriate just knowing the way that I
13 usually proceed. What I would like to do is go ahead and
14 get the transcript. And I don't want to proceed on the
15 setoff issue at this point. I just want to continue --
16 because I may have more questions at that point. So I'll
17 just live with it for a little bit. If you wish to address
18 that particular issue anymore, I'll just wait to get those
19 briefs from you. And I'm just going to continue my review.
20 And then we'll reconvene when you have the transcript, okay.

21 MR. WOOD: We'll make it available as soon as we get
22 it.

23 THE COURT: I don't know that you have to do anything
24 else. You've sort of done it. You know, the happy news for
25 you is that interest is continuing. It's better vested than

1 treasury bonds, that's for sure. Very well. Delicious;
2 wonderful. To have brilliant lawyers on a Friday afternoon,
3 is there anything better in the world? I think not.

4 All right. So can I rely on you guys to get together?
5 Guys and ladies get together when you have the transcript
6 and then just let me know?

7 MR. LUCEY: Absolutely.

8 MR. WOOD: Absolutely.

9 THE COURT: And we'll get back together. Yeah?

10 MR. LUCEY: We'll contact George and get something
11 scheduled.

12 THE COURT: That would be great. Thank you.

13 (The proceeding concluded at 3:57 p.m.)
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