

2012-212850

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

S.C. Supreme Court

Case No. 07-CP-40-8435
(S.C. Ct. App. Op. No. 2012-UP-270)

National Grange Mutual Insurance Company, ... Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham Defendants,

Of Whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, and
Susan F. Clark, are Petitioners.

APPENDIX
(Volume 1 of 3)

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APPENDIX DIVIDER

A

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S.C. Ct. App. No. 2010150106

National Grange Mutual Insurance Company, ... Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, ... Defendants,
of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and
Susan F. Clark are Appellants.

FINAL APPELLANTS' BRIEF OF THE CLARKS

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STATEMENT OF ISSUES ON APPEAL

1. Was it an abuse of discretion to grant National Grange a new trial based upon the jury only awarding National Grange a partial recovery, when the Circuit Judge intended for the jury to be able to only award a partial recovery, when the Circuit Judge charged the defense of bad faith, when the Circuit Judge intended for the jury not to perceive bad faith as necessarily a total bar to recovery, and the Circuit Judge specifically denied requests to charge which would have presented bad faith as a total bar?

2. Where the jury was specifically instructed that it could find bad faith to be a defense to the claims of National Grange, was it error to conclude that the jury's decision not to award a 100% recovery to National Grange was "a failure to follow the Court's instructions in returning their verdict"?

3. Was it error, and therefore an abuse of discretion, to grant National Grange a new trial based on law applicable to inadequate verdicts in cases in which liability is uncontested, when the instant case was one of contested liability and the jury was charged on the defense of bad faith?

4. Was it error for the Circuit Judge to state, in granting National Grange a new trial, that the evidence of National Grange's bad faith was not "credible" when the basis of National Grange's motion for new trial was not credibility, but, rather, that there was no dispute as to liability or damages?

5. Was it a failure to exercise discretion, and therefore an abuse of discretion, for the Circuit Judge to state that the evidence of National Grange's bad faith was not "credible" without identifying what was meant by bad faith, without identifying the evidence referred to, without stating what about it was believed to be not credible, and without discussing it in any way?

6. To the extent the trial Judge granted National Grange a new trial based on insufficiency of evidence rather than upon the reasons stated, was it error to do so when insufficiency of evidence of bad faith was not raised by National Grange as a ground for directed verdict or JNOV, and was it further error not to measure the sufficiency of the evidence against the law charged to the jury rather than as against some other unidentified standard or perception of the law?

7. Was it error, when considering and granting new trial, for the trial judge not to consider the greater weight of the evidence while viewing the evidence and the inferences to be drawn from it in the light most favorable to the nonmoving party, the defendants?

8. Was it error, when considering and granting new trial, for the trial judge to actually not consider or mention any evidence at all in favor of the nonmoving party, the defendants, including dishonest positions taken by National Grange in denying the validity of the bond?

9. Was granting new trial under the circumstances, a violation of due process under the State and federal constitutions, and a violation of the right to trial by jury under the State constitution?

SCOPE AND STANDARD OF REVIEW

Rule 50(a), SCRCP requires a party moving for directed verdict to state specific grounds for the motion. Rule 50(a), SCRCP; Thomas v. Olson, 220 S.W.3d 627 (Ark. 2005).

A motion for directed verdict or JNOV based on “insufficiency of evidence” does not state “specific grounds for the motion” unless the moving party actually identifies and marshalls all the evidence in support of the challenged verdict and demonstrates that the evidence is insufficient when viewed in the light most favorable to the verdict. Dejavue, Inc. v. U.S. Energy

Corp., 299 Ut. App. 355, 993 P. 2d 222 (Ct. App. 1999). When a moving party on such a motion ignores the contrary evidence or simply states the facts most favorable to its own position, the court will refuse to consider the motion. Dejavue, 993 P. 2d at 225-226.

A motion for directed verdict is a prerequisite for a motion for JNOV. Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E. 2d 823 (Ct. App. 1993).

A motion for JNOV is a renewal of a directed verdict motion and, as such, cannot raise grounds beyond those raised by the directed verdict motion. Roland v. Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992).

Failure to argue a specific ground of a directed verdict motion precludes that argument on a motion for JNOV or appeal. Benton & Rhodes, Inc. v. Boden.

An objection to the sufficiency of evidence cannot be raised for the first time in a motion for new trial. Peay v. Ross, 292 S.C. 535, 357 S.E.2d 482 (Ct. App. 1987).

A pro forma request for directed verdict is insufficient. Sierra v. Skelton, 307 S.C. 217, 169, 414 S.E.2d (Ct. App. 1991). Cf. Connolly v. People's Life Ins. Co., 299 S.C. 348, 384 S.E.2d 738 (1989) (motion not saved by being directed to lack of evidence on one of many particular potential material issues; court should not be left to "grope in the dark, searching the record to ascertain the issue being raised").

Making a general motion for directed verdict which states no specific ground preserves nothing for review. In the Matter of the Care and Treatment of Donald Lee McCracken, 346 S.C. 87, 551 S.E. 2d 235 (2001) (Pleicones, Justice). Further, since only grounds raised in the directed verdict motion may properly be reasserted in the JNOV motion, when no grounds are raised in the directed verdict motion, no JNOV claim is preserved for appellate review. Id.

Where a party claims a jury verdict is not supported by the evidence, but asserts no error

in the jury instructions, the adequacy of the evidence must be measured against the instructions given to the jury. Null v. City of Los Angeles, 254 Cal. Rptr. 492 (Cal. App. Dist. 3 1988).

Directed verdict and JNOV-- not a direct issue here -- are only available when, upon meeting the other legal requirements of the rule, the moving party is "entitled to judgment as a matter of law." Rule 50, SCRPC. Errors in the rule of law or application of law to fact are reviewed using an independent judgment standard. It is an appellate court's duty to correct errors of law. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984).

With regard to whether to grant a new trial, the trial judge must view the evidence and all reasonable inferences which can be drawn therefrom in the light most favorable to the nonmoving party. Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984). A judge considering whether to grant a new trial may not substitute his or her own judgment for that of the jury. Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 360 S.E.2d 775 (Ct. App. 1987).

With regard to review of grant of a new trial, it is well established that such an order is reviewed for abuse of discretion, which is found when the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Hyload, Inc. v. Pre-engineered Products, Inc., 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992); Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989); State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983).

An abuse of discretion occurs when the decision reached by a circuit judge was influenced by an error of law, Bettis v. Busbee, 283 S.C. 502, 323 S.E.2d 536 (Ct. App. 1984), and also occurs when the circuit judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987).

As stated in Watford v. South Carolina State Highway Dept., 269 S.C. 130, 236 S.E.2d

558 (1977):

Ordinarily, the order of a trial judge granting a new trial on the ground that the verdict is contrary to the evidence is nonappealable. However, when it is manifest that the order for the new trial is founded upon fundamental error of law, it is axiomatic that this Court may review the decision. S. C. State Highway Department v. Terrain, Inc., 267 S.C. 186, 195, 227 S.E.2d 184 (1976).

Watford, 269 S.C. at 132.

An abuse of judicial discretion, appearing in the record as a matter of law, warrants setting aside the grant of a new trial. Id. (citing Jones v. Thomas and Hill, Inc., 265 S.C. 66, 216 S.E.2d 871 (1975) and Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966)).

A trial judge may not invade the province of the jury or substitute his verdict for theirs. Watford (citing Turner v. Carey, 227 S.C. 298, 87 S.E.2d 871 (1955)).

Where the trial judge's reasons for granting a new trial are without evidentiary support, the new trial order is erroneous as a matter of law. Watford (citing South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976)).

As stated in Brabham v. Southern Asphalt Haulers, Inc., 223 S.C. 421, 76 S.E.2d 301 (1953):

The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of the jury rather than that of the Court and this Court will not interfere with the verdict of a jury simply because it is greater than its own estimate; only where the verdict is so grossly excessive as to shock the conscience of the Court and clearly manifest that it was the result of caprice, passion, partiality, prejudice, corruption or other improper motives, will this Court intervene.

Id. at 430, 76 S.E.2d at 306, cited in Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993).

As stated in Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (S.C. 1973):

It is well settled in this State that in actions for tort, where the verdict is grossly

inadequate, a new trial may and should be granted for the same reasons and under the same principles as govern when a verdict is similarly excessive. Where a verdict gives grossly inadequate damages, it is as much a ground for a motion for a new trial by the plaintiff as a grossly excessive verdict would be a ground for such a motion by a defendant.

This Court has repeatedly quoted with approval from McDonald v. Walter, 40 N.Y. 551, the following language:

'A verdict for grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law and justice, than a verdict for excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged.'

See Bodie v. Charleston & W.C.R. Co., 66 S.C. 302, 44 S.E. 943, 947; McKibben v. Anthony, 185 S.C. 459, 194 S.E. 446; Fuller v. Bailey, 237 S.C. 573, 118 S.E.2d 340.

Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge. His exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law. Williams v. Williams, 246 S.C. 158, 142 S.E.2d 858.

Toole v. Toole, 260 S.C. at 239.

Toole v. Toole further describes the standard as follows:

'[A] verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence.' Watson v. Paschall, 100 S.C. 281, 84 S.E. 531, 532; Nelson v. Charleston & W.C.R. Co., 231 S.C. 351, 98 S.E.2d 798. There are numerous cases holding that a verdict is capricious when it is without any rational basis in the evidence and/or the instructions of the court. 6 Words and Phrases, p. 218 et seq. Regardless of the terminology used, the test which guides this Court in the exercise of its power and duty to set aside a verdict on the ground of either excessiveness or inadequacy is whether the verdict is so shockingly so as to manifestly show that the jury was actuated by considerations not founded on the evidence and/or the instructions of the court. More often than not it would be impossible to determine precisely the nature of such improper considerations.

Toole v. Toole, 260 S.C. at 240.

Every reasonable presumption should be exercised in favor of the validity of a general

verdict. Gold Kist, Inc. v. The Citizens and Southern National Bank, 286 S.C. 272, 333 S.E.2d 67, 333 S.E. 2d 667 (Ct. App. 1985).

STATEMENT OF THE CASE

This case arises from a contract of surety. In the surety contract, Phoenix Contract Glass, LLC was the principal, and National Grange was the surety. Under this surety contract, National Grange issued payment and performance bonds covering Phoenix's glass and glazing work on a high-rise condominium project in Mt. Pleasant, South Carolina. As part of the contract of surety, Phoenix, its principals and their wives gave an indemnity agreement to National Grange.

The project had a number of disputes and problems, eventually involving numerous parties. Among others, claims were made on the bonds issued by National Grange. Various litigation occurred. Eventually, on December 17, 2007, National Grange sued the defendants on the indemnity agreement. The defendants were Phoenix, its principals, and their wives.

In defense to the claim by National Grange for almost a million dollars under the indemnity agreement, the Clarks denied liability and damages, alleged the breach by National Grange of its duties under the relationship, and contended that National Grange was not entitled to any indemnification or other relief under the indemnity agreement.¹

The case was tried to a jury of twelve, plus an alternate. The jury was allowed to take notes, and did so.

The case was tried for almost three days (April 6, 7 and 8, 2009), and involved 13 exhibits, the excerpts of 6 depositions, and the live testimony of 6 witnesses.

¹ The Complaint of National Grange styled its cause of action as one for "contractual and/or equitable indemnification." The answer of the Clarks denied many of the material allegations of the Complaint, alleged that National Grange breached obligations under the relationship, contended the indemnity obligation was destroyed, and enumerated ten defenses. (R. pp. 22-25.)

At the conclusion of evidence, none of the Clarks' defenses had been dismissed or withdrawn. All the Clarks' arguments as to the contractual or equitable claims of National Grange remained available. National Grange moved for directed verdict on the sole "grounds that there was no dispute as to liability or damages." (Transcr. 4-8-10, R. p. 322, lines 17-22.) The defendants opposed. The Circuit Judge proceeded to send the case to the jury.

During the charge conference, the trial judge expressed specific concern with a proposed jury charge on bad faith which indicated that the presence of bad faith would require a denial of all recovery to the party seeking indemnification.

National Grange argued against charging bad faith as a total bar. The trial judge determined that the charge should not explicitly prevent the jury from apportioning or allocating any bad faith of National Grange rather than applying such bad faith, if at all, as a total bar. The requested charge was altered. National Grange agreed. The altered charge was given.

Among the instructions given by the Circuit Judge to the jury was the following charge on the defense of bad faith:

Every contract or indemnification agreement imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Plaintiff entered into an indemnification agreement with Defendants and therefore owed the Defendants a duty to discharge its obligations with respect to the indemnification agreement in good faith and to deal fairly with Defendants in all matters appurtenant thereto.

Good faith means honesty in fact in the conduct of the concerned transaction. Good faith performance means good faith performance or enforcement of the contract and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of either party, of the other party. It excludes a variety of types of conduct characterized as bad faith because they violate community standards of decency, fairness or reasonableness.

Now, under our law a principal may assert a surety's bad

faith refusal to pay as a defense to indemnification. In order to prove this defense, the Defendant must prove the surety company refused to perform its obligations under the bond because of bad faith or unreasonable action, which is a violation of the implied covenant of good faith and fair dealing under the bond.

(Transcript, 4-8-09, R. p. 421, line 1 - p. 422, line 1.)

During the trial, National Grange took no exception to the charge delivered by the trial judge to the jury, agreed with the charge (Tr. 4-8-09, R. p. 427, lines 9-11), requested no additional or curative charges on bad faith or breach of contract, and also took no exception to the form in which the verdict was to be delivered.

The jury deliberated for about three and a half hours (from approximately 2:55 p.m. to 6:30 p.m.) on Wednesday, April 8th, and, having been prodded gently by the trial judge around 6:00 p.m. with no objection, returned a verdict in favor of National Grange for \$10,000. (R. pp. 566-567.)

National Grange timely filed post-trial motions dated April 14, 2009.

National Grange renewed its motion for a directed verdict for a specific dollar amount of \$968,332.29. National Grange moved for judgment notwithstanding the verdict for the same amount on the sole "grounds that neither liability nor damages were disputed." (NG Mot., ¶2, R. p. 538.) National Grange moved in the alternative for new trial. National Grange stated that the jury "determined that the defendants were liable under the agreement." (R. p. 539.) National Grange moved for new trial nisi additur. National Grange additionally moved for an increased money judgment under the 13th juror doctrine. National Grange did not mention "bad faith," "evidence of bad faith," or the believability of any evidence presented by the defendants. (R. pp. 538-539.)

The Circuit Judge granted a new trial absolute on the grounds that the defendants "did not

offer any credible evidence as to any bad faith by National Grange,” that the verdict of only \$10,000 in the case was irreconcilably inconsistent with “the evidence presented at trial,” that the verdict of only \$10,000 suggested “that the jurors were motivated by improper considerations,” and that “the jury failed to follow the Court’s instructions in returning their verdict.” (8-17-09 Order, R. pp. 4-5.)

The defendants received written notice of entry of the August 17, 2009 order on October 23, 2009, and timely moved to reconsider on November 2, 2009.

The Circuit Judge denied the motion in an order dated November 13, 2009, but amended the order November 24, 2009. The defendants received written notice of entry of the amended order not before December 2, 2009. The Chitwood defendants served notice of appeal of the November 24, 2009 order on December 31, 2009. The Clark defendants timely served notice of appeal on January 4, 2010.

ARGUMENT
**(With Preliminary Statement of Additional Facts Relevant
to the Issues Presented for Review)**

At trial, the Clarks presented evidence that from the very first claim on the surety bond it issued, the surety, National Grange, denied the validity of the bond. (Def. Exh. 1, R. pp. 533-536.) In denying the validity of the bond, National Grange claimed the amount of the bond exceeded the issuing agent’s authority because a clause in the construction contract allowed the scope of work and price to increase substantially. (Def. Exh. 1, R. p. 534.) National Grange also denied knowledge of the contents of the underlying construction contract, despite the fact that the bond explicitly incorporated the contract as a part of the bond. (E.g., R. p. 118, line 4 - p. 120, line 18; R. p. 180, line 13 - p. 181, line 3; R. p. 153; cf. R. p. 305, line 23 - p. 306, line 10.) The issuing agent testified at trial that he specifically discussed the contract with National Grange’s

underwriter, including the aspect allegedly causing National Grange concern. (R. p. 273, line 15 - p. 277, line 16.)

The issuing agent also testified that National Grange approved the issuance of the bond, and that the issuance of the bond was within the typical authority granted by the power of attorney under which he signed the bond for National Grange. (R. p. 293, line 20 - p. 295, line 14.) The evidence showed that National Grange continued to deny validity of the bond, defended litigation for years, did not consult its principal, Phoenix, on anything, and then settled -- in secret, no less -- with the claimant. Then -- after Phoenix was financially ruined -- National Grange essentially sent Phoenix a bill for all National Grange spent, and more.

National Grange sued Phoenix and all its principals and their wives for almost a million dollars. At trial, National Grange claimed as its damages, money it spent or owed. Some of the money it claimed it owed was money which, in a lawsuit with another party, National Grange still denied it owed.

At trial, the defendants asserted that National Grange acted in bad faith, among other defenses. Toward the conclusion of the lengthy charge conference which followed the close of the evidence, the Circuit Judge stated, "I do think certainly you've got a good faith and fair dealing argument." (Transcript, 4-8-09, R. p. 369, lines 18-19.)

The foregoing and other trial evidence relating to bad faith -- too voluminous to exhaustively state again here -- was comprehensively summarized by the Clarks' counsel at various junctures in the case, including in a July 15, 2009 Memorandum in Opposition to National Grange's Post-Trial Motions. (R. pp. 554-559.) Any number of reasonable people might reasonably find that the foregoing actions of National Grange constitute:

1. unfair dealing; or

2. lack of honesty in fact; or
3. lack of faithfulness to an agreed common purpose; or
4. lack of consistency with the justified expectations of the other party; or
5. a violation of community standards of decency; or
6. a violation of community standards of fairness; or
7. a violation of community standards of reasonableness –

– all as charged to the jury by the trial judge. (Charge, R. p. 421, lines 3-18.)

Were it not for the fact that any such issues do not need to be decided, this might be an interesting appeal about the legal theories behind the elements of bad faith² and the remedies for bad faith.³ A working knowledge of these theories may be necessary for a proper understanding of the appeal. However, to fully appreciate the injustice of granting a new trial based upon the jury awarding a recovery, but not a total recovery, to National Grange, one must first understand

² The Circuit Judge's charges on the duty of good faith in all contracts, and on the definition of good faith and bad faith, and on a principal's defense of bad faith against a surety seeking indemnification (quoted in the foregoing Statement of the Case) were supported by the following authorities, among others: Restatement (Second) of Contracts § 205 and *id.*, cmt. a (1981); Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 377 (2001) (citing Bernard L. Balkin & Keith Witten, Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety, 28 Tort & Ins. L.J. 611, 623 (1993), Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1998), and American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998)).

³ The following authorities support the availability of the defense of bad faith as a total bar to recovery: Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200 (1993) (bad faith as total bar if materially related to relief sought); Associated Indemnity Corporation v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1997) (good faith as condition precedent, absence of which bars all relief); Hartford v. Tanner, 910 P.2d 872 (Kan. App. 1996) (circumstances of case required conclusion that "nothing was recoverable"); PSE Consulting, Inc. v. Frank Mercede and Sons, Inc., 838 A.2d 135 (Conn. 2004) (affirming jury verdict for nominal damages for surety accompanied by jury finding that principal had not breached indemnity agreement); and Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 376-377 (2001) (implying use as bar and citing Associated Indemnity). However, the trial judge did not charge total bar, and took pains not to, as discussed herein.

the downright extensive attention earlier given to making sure that the jury was allowed to do exactly what it did.

In this vein, the Circuit Judge – erring in National Grange’s favor – took pains to assure that the jury would not perceive bad faith to be a total bar to recovery by National Grange.

Consistent with this precaution, and consistent with the Circuit Judge’s view of the law in the charge conferences, the jury awarded National Grange a partial recovery, rather than no recovery at all. This was what National Grange complained about when requesting a new trial and other post-trial assistance.

Yet, the jury acted precisely within the province the Circuit Judge intended. The jury allocated bad faith to the damages claimed by National Grange, and reduced, rather than eliminated, National Grange’s recovery.

During the trial, the Circuit Judge explained his concerns and intent as follows, when considering a charge on bad faith proposed by the Clarks:

THE COURT: All right, Good. Now, good faith and fair dealing?

MR. MACK: No objection to number 2.

THE COURT: Number 3?

MR. MACK: No objection.

THE COURT: Number 4?

* * *

MR. STANTON: Here’s what I think. I think first of all, from the case, that term “scrupulously” is not in the case.

THE COURT: I’m not sure the case says to deny the surety’s claim for indemnification because that’s your damages argument. I don’t think the case holds that if they’re found not to have acted in good faith that that automatically by law is a denial of the claim for indemnification. You can certainly argue that. But I don’t think the case holds that.

MR. STANTON: I don’t know what else – what other good there would be in

having the duty and pointing out the breach if there were no consequences.

THE COURT: I didn't say there were no consequences. I said as a matter of law, I don't think I can instruct the jury to deny the indemnification if they find bad faith. That's what you certainly can argue. They may find there are other reasons. I don't know. I'm saying we can talk about it, but I don't think the case holds that.

MR. STANTON: And, you know, I'm not sure I have -- can put my hands on it, right now but Masterclean does --

THE COURT: If you can't put your hands on it, you certainly quoted it almost verbatim an hour ago.

MR. STANTON: Yeah. I'm trying to picture in my mind the last page of it that says, you know --

THE COURT: Well, I'll let you see the last page.

MR. STANTON: -- says you can't sue for damages but you can certainly raise it as a defense against indemnification. If you say it is a defense against indemnification that would mean it would defeat indemnification. May I, Your Honor?

THE COURT: Sure.

MR. MACK: Your Honor, we have an extra copy we can hand to him. We have an extra copy for him.

MR. STANTON: Yeah. The Court points out several courts, including those not recognizing the principal's right to sue on bad faith in tort, allow the principal to assert a surety's bad faith as a defense to indemnification. And while [a] principal may not use bad faith as a sword to extract damages from a surety in tort, a principal is not precluded from using bad faith as a shield in contract against a surety seeking indemnification.

To me, they're saying if you show that there is bad faith that they're not entitled to indemnification. I can't understand how else we could let them know that except to charge it to them.

MR. MACK: I think that's an argument that goes to damages, not an element of the case.

THE COURT: You can always read the sword and the shield to the jury. But you've taken it one step further in my opinion. And you're asking me to -- if they find bad faith -- to ignore the damages issue and just automatically jump over the

whole issue of damages to nullify the – you see what I’m saying? The entire claim for damages you’ve made, bad faith may get them out of a portion of it. I don’t know. They may have acted in bad faith for this settlement but not for that settlement. But to just automatically say it precludes indemnification, I don’t believe the case says it and I don’t believe that’s the law.

MR. STANTON: Maybe we could craft something that –

THE COURT: Well, it’s crafting time.

(Transcript of Trial, 4-8-09, R. p. 355, line 16 - p. 358, line 17 (emphasis added).)

National Grange agreed with the Circuit Judge’s concern and objected to charging bad faith as an all-or-nothing defense:

MR. MACK: Your Honor, just using the terminology from the case, he’s wanting to use it as a sword to completely cut off the head of National Grange.

THE COURT: Right.

MR. MACK: Rather than a shield to –

MR. STANTON: We just want to keep our own head, Your Honor. That’s all we want. We want to keep our own head. We don’t want theirs. Let me see what that language is then.

(Transcript of Trial, 4-8-09, R. p. 358, line 19 - p. 359, line 3.)

It was obvious to all that there was a pending defense of bad faith – supported by evidence in the record – which could reduce or eliminate liability of the defendants to National Grange. Numerous times, National Grange’s counsel and the Circuit Judge acknowledged that the defense of breach of the contractual duty of good faith and fair dealing was “going to the jury.”

National Grange acknowledged this in the following exchange:

THE COURT: What I’m trying to ferret out in all respects to the Defendant is whether his second cause of action could be interpreted as a claim of breach of fiduciary duty. Now, he claims that National Grange failed to timely pay on a payment bond.

MR. MACK: And I think all of that is covered by the good faith required under the bond, which there is a charge on.

(Transcript, 4-8-09, R. p. 362, lines 7-14.)

National Grange acknowledged it again in the following passage:

THE COURT: We're talking about whether this paragraph creates a – at least puts you on notice that they are making a fiduciary duty claim.

MR. MACK: It does not, Your Honor. That's again simply, did National Grange act in good faith. And there's already a charge on that, nothing about fiduciary duty.

(Transcript, 4-8-09, R. p. 365, lines 4-10.)

National Grange again acknowledged that lack of good faith and fair dealing would be charged, in the following exchange with the Circuit Judge on the manner in which good faith was defined:

MR. MACK: And I think the Masterclean case discusses the contract bonds in the context this is a commercial transaction. The parties are free to contract or not contract and so forth. So I think there is a distinction there between the fidelity bonds and the contract bonds. Obviously, the Court in John Land Johnson did not need to address that. There are certain elements of a fiduciary relationship.

But I think you quoted the language about the good faith dealing and I think that is covered in a previous charge. I don't think the Defendants have pled the breach of fiduciary duty, whether or not some element of it may be –

THE COURT: Well, what would be the effect of recognizing that there is a fiduciary duty? Would that be – does that impose greater duties than good faith and bad dealings? I mean, does it impose a higher standard? And this John Johnson says, "Utmost degree of faith in all transactions." Good faith.

MR. MACK: I think a fiduciary duty can give rise to the higher standard than simply good faith. As the Court says, "Utmost good faith." But I don't see any element of that. I don't think it's appropriate under the facts of this case.

(Transcript, 4-8-09, R. p. 367, line 10 - p. 368, line 9.)

The Circuit Judge acknowledged his willingness to charge lack of good faith and fair dealing based on the facts of the case:

THE COURT: All right. Well, I may be wrong, Mr. Stanton, but I tend to agree with the Plaintiff. I do think certainly you've got a good faith and fair dealing argument but I don't think I'm going to extend it to a fiduciary duty argument. So with regard to 6, 7, 8, and 9, I deny your request to charge.

(Transcript, 4-8-09, R. p. 369, lines 16-22 (emphasis added).)

Finally, the Circuit Judge determined not to charge breach of fiduciary duty, did determine to charge bad faith, did determine to alter the defendants' proposed charge so as not to imply bad faith was an all-or-nothing bar to recovery by the plaintiff, and both National Grange and the defendants concurred in the charge:

THE COURT:

* * *

Now, I don't have any charge on – any of your charges on good faith and fair dealing.

MR. MACK: I think that was charge number 2, is the good faith and fair dealing charge.

THE COURT: On yours?

MR. MACK: Defendant's.

THE COURT: Oh, I'm sorry.

MR. MACK: Defendant's.

THE COURT: Well, yes, I see that. Is that satisfactory?

MR. STANTON: We've got charge 2.

THE COURT: Yeah.

MR. STANTON: To which there's no objection. Charge 3, no objection.

THE COURT: All right. If you feel that's satisfactory to define bad faith or good faith and fair dealing, I'll agree to charge those.

MR. STANTON: Right. And I just need to – my main problem is there was one of mine that – it was number 6, I think – the one where I said we needed to craft something or have them charged on something if they weren't going to be told that bad faith would discharge the indemnity.

THE COURT: Well, you've got --

MR. STANTON: No, it's not number 6.

MR. MACK: It's number 4.

MR. STANTON: Number 4. I mean, essentially --

THE COURT: Just hold up.

(Pause)

THE COURT: This may be a semantic argument, but is there a difference between lack of good faith and fair dealing and bad faith?

MR. MACK: There is a difference, Your Honor. Bad faith connotes some, for lack of a better term, evil motive or egregious conduct. Lack of good faith can simply be not doing a good job, doing things negligently or --

THE COURT: Well, what do we have in this case? Do we have bad faith refusal to pay or do we have lack of good faith and fair dealing?

MR. MACK: The claim has been basically lack of good faith. There are no allegations, nothing set out saying bad faith.

THE COURT: No bad faith.

MR. STANTON: I tend to believe it's synonymous.

THE COURT: That's fine. I just wanted to put it on the record. All right. Anything further?

MR. MACK: Nothing further from the Plaintiff, Your Honor.

THE COURT: I'm going to go put these charges together.

MR. STANTON: I was thinking on number 4 something like -- I'm having a hard time coming up with words. That a surety's breach of his obligation to its principal to honor the terms of a bond or contract or good faith.

THE COURT: All right. I'm going to let you -- we don't need to -- we'll reconvene at 1:15 if you've got something that -- let Mr. Mack look at it. I'll either insert it or not.

MR. STANTON: That will be fine, Your Honor.

THE COURT: All right. Thank you.

MR. STANTON: Thank you.

THE COURT: We'll stand at ease until 1:15. (Whereupon, a lunch break is taken)

THE COURT: Anything further?

MR. MACK: Nothing further from the Plaintiff, Your Honor.

MR. STANTON: May it please the Court. Your Honor, during the lunch break I took a stab at a request number 12 on the general subject that was our former request number 4 on what is the remedy for the bad faith or breach of duty of good faith and fair dealing. If I could present that to the Court. What I did was took out just the general language lifted out of page 7 of the Masterclean case. And I thought at a minimum we need to tell the jury something.

THE COURT: All right. Have you shown it to Mr. Mack?

MR. STANTON: I've shown it to Mr. Mack.

MR. MACK: And, Your Honor, we have an objection to it. One, he has added language that is not in the case which will tend to confuse bad faith – which again as I've indicated connotes some evil motive – with simply lack of good faith. And quite honestly, we don't see that there has been any evidence of bad faith. So we would object to this charge.

MR. STANTON: Well, again, Your Honor, the request – the part Mr. Mack refers to is the last sentence which I thought was necessary for clarification.

THE COURT: Well, one place you say it's a shield and one place you say it's a defense.

MR. STANTON: Yes, Your Honor.

THE COURT: What's that tell the Jury?

MR. STANTON: That it's a defense, it may be used as a shield. And the language of the Masterclean case, they're saying you can[not] use it as a sword to go get damages. Masterclean says there's no tort action.

THE COURT: I understand that.

MR. STANTON: But that it's a contractual defense pled to defeat their contractual claim.

THE COURT: Look at this both of you, please. (Pause)

MR. MACK: We would be fine with that, Your Honor.

MR. STANTON: I think that's a fair statement, Your Honor.

THE COURT: All right.

(Transcript, 4-7-09, R. p. 371, line 6 - p. 375, line 18; and see def. request to charge no.4, R. p. 460, and def. req. chg. no. 12, R. p. 466.)

- I. It was an abuse of discretion for the trial judge to grant National Grange a new trial based upon the jury only awarding National Grange a partial recovery, when the trial judge intended for the jury to be able to only award a partial recovery, when the trial judge charged the defense of bad faith, when the trial judge intended for the jury not to perceive bad faith as necessarily a total bar to recovery and when the trial judge specifically denied requests to charge which would have presented bad faith as a total bar.**

It is beyond question that the Circuit Judge was specifically concerned that the jury not perceive National Grange's bad faith as necessarily a total shield against the defendants' liability.

It is beyond question that the Circuit Judge was specifically concerned that his charge not be categorical – and that the jury be allowed to apply the bad faith as a partial shield. In returning a verdict of only \$10,000 on National Grange's claim of almost a million, this is exactly what the jury did. There was no basis whatsoever to conclude that in finding for National Grange, but not 100%, the jury stepped out of its province, or failed to act within the range intended to be allowed by the Circuit Judge.

Yet, in granting a new trial, the Circuit Judge accepted National Grange's argument that, had the jury found bad faith on the part of National Grange, the jury necessarily would have applied the bad faith as a total shield and would have found completely for the defendants.

This was fallacy, as bad faith was never charged as an all-or-nothing defense. This fallacy-based decision of the trial judge is abuse of discretion, and the grant of new trial should be reversed.

II. Where the jury was specifically instructed that it could find bad faith to be a defense to the claims of National Grange, there was no basis to conclude that the jury's decision not to award a 100% recovery to National Grange was "a failure to follow the Court's instructions in returning their verdict."

Proceeding on the fallacious assumption that a verdict of anything at all for National Grange indicated a finding of no defense and complete "liability," the Circuit Judge then treated the money which was awarded by the jury to National Grange as inadequate for a case of total liability. This was confusion and not a proper exercise of discretion. It is not a proper exercise of discretion to grant a new trial based upon a jury's not following a charge which was opposed, refused, and not given.

The jury followed their instructions. There was no reasonable basis to conclude they did not. It was error to lightly conclude that they disregarded their duty and the trial judge's instructions. The jury was instructed on bad faith. The jury was not instructed that bad faith had to be applied as a total bar. The jury was presented with evidence of bad faith. The jury returned a verdict for only a partial recovery for the plaintiff. It was an abuse of discretion to base new trial on a dereliction of duty of the jury.

III. It was error, and therefore an abuse of discretion, to grant National Grange a new trial based on law applicable to inadequate verdicts in cases in which liability is uncontested, when the instant case was one of contested liability and the jury was charged on the defense of bad faith.

In granting a new trial some months after the verdict, the Circuit Judge also misapprehended and consequently misapplied the procedural law pertaining to new trials based on inadequate verdicts. The Circuit Judge erroneously based his grant of a new trial on Dillon v. Frazer, 383 S.C. 59, 678 S.E.2d 251 (2009). Dillon, a car wreck case, was a case in which liability was admitted. There was no affirmative defense. There was no special jury charge pertaining to any such defense. The basic tier of damages, the "hard, blackboard damages" (such

as actual medical bills), were truly not controverted. The credibility and behavior of the plaintiff had not been seriously questioned.

In Dillon, following repetitive inquiry by the jury about insurance it had specifically been instructed to disregard, a jury verdict drastically and incongruently below the lowest certain damages was viewed as a dereliction warranting a new trial. Further, in Dillon, there was no emphasis in the record of self-contradiction, error, or falsehood in the evidence presented by the plaintiff.

In the instant case, the Circuit Judge's reliance on Dillon was simply misplaced, amounting to an abuse of discretion. With all of the foregoing factors present, the Dillon jury returned a verdict for less than the amount of damages clearly established by the damages evidence. Neither Dillon nor other inadequate verdict cases involve an affirmative defense and the jury being instructed and allowed to take into account the extent or degree of liability established by the plaintiff. In Dillon, relied on by the Circuit Judge, liability was admitted in toto. The instant case was a dispute of liability and was not a three-day trial on damages alone.

The briefest review of the background of the instant case immediately reveals that it was not a case of undisputed liability. The Circuit Judge simply made an error in applying the law of new trials, and because his decision was influenced by an error of law, the decision necessarily meets the standard of an abuse of discretion, and should be reversed. Accordingly, the case should be remanded to the Circuit Court with instruction to enter judgment based upon the jury verdict.

IV. It was error for the trial judge to state, in granting National Grange a new trial, that the evidence of National Grange's bad faith was not "credible," when the basis of National Grange's motion was not credibility, but, rather, that there was no dispute as to liability or damages.

National Grange did not move for directed verdict at trial on the basis of lack of

credibility of evidence presented by the defendants. Nor, for that matter, did National Grange argue to the jury or the judge in other contexts that much, if any, of the evidence presented by the defendants was untrue or of questionable believability. National Grange did not move for JNOV or new trial on the basis of lack of credibility. (Cf. NG Mot., R. pp. 538-539.) The deadline to move on such basis with a specific statement of grounds passed no later than April 20, 2009, the end of the ten-day extension period for making post-trial motions. Rules 6(b) and 50(e), SCRCP. National Grange moved solely on the basis of the alleged believability of its own damages evidence, not on the basis of any defect in or shortage of evidence of bad faith. It was an abuse of discretion to grant new trial on a basis not stated in the motion, and therefore, unavailable.

- V. **It was a failure to exercise discretion, and therefore an abuse of discretion, for the Circuit Judge to state that the evidence of National Grange's bad faith was not "credible" without identifying what was meant by bad faith, without identifying the evidence referred to, without stating what about it was believed to be not credible, and without discussing it in any way.**

The trial judge did not identify a single thing he had trouble believing, much less, why he had trouble believing such unidentified evidence. (Cf. 8-17-09 Order, R. pp. 2-5.)

Entrusting such a serious thing as setting aside a conscientious jury's verdict to the "sound discretion" of the trial judge presupposes that the parties are entitled to the actual exercise of that discretion. Fontaine v. Peitz. No discretion was exercised in the trial judge merely stating the evidence was not credible without telling what he was talking about.

- VI. **To the extent the trial judge granted National Grange a new trial based on insufficiency of evidence rather than upon the reasons stated, it was error to do so when insufficiency of evidence of bad faith was not timely raised by National Grange as a ground for directed verdict or JNOV, and it was further error not to measure the sufficiency of the evidence against the law charged to the jury rather than as against some other unidentified standard or perception of the law.**

National Grange may argue to remove the affirmative defense of bad faith from the analysis. National Grange may argue that under a definition of bad faith different from that

charged by the judge, there was insufficient evidence on the affirmative defense, and that, therefore, liability was established. However, to so argue would be fallacious on a number of levels.

First, a point that need not be discussed at length here, the judge's charge on the definition of bad faith was correct.⁴

Second, insufficiency of evidence was never sufficiently raised in National Grange's motions for directed verdict and JNOV in the first place and cannot be allowed now as the basis for new trial.⁵ These motions require a specific statement of grounds. Rule 50(a), SCRCPP; Thomas v. Olson. Even if the motions had mentioned these grounds, mention, without marshalling of evidence, is insufficient to raise and preserve the issue. Dejavue, Inc.

In its written motion for JNOV, which was subject to deadline,⁶ National Grange ignored the presence of the defenses, assumed liability, and focused on the evidence that National Grange spent money in amounts represented in various questionable exhibits. There was no mention of the defense's evidence of bad faith or how to apply the jury charge to it. (Cf. NG Mot., R. pp. 538-539.) There being no issue sufficiently raised in National Grange's written directed verdict

⁴ The Circuit Judge's charges on the duty of good faith in all contracts, and on the definition of good faith and bad faith, and on a principal's defense of bad faith against a surety seeking indemnification (quoted in the foregoing Statement of the Case) were supported by the following authorities, among others: Restatement (Second) of Contracts § 205 and id., cmt. a (1981); Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 377 (2001) (citing Bernard L. Balkin & Keith Witten, Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety, 28 Tort & Ins. L.J. 611, 623 (1993), Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1998), and American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998)).

⁵ The insufficiency of the directed verdict and JNOV motions was discussed at length in the Clarks' 7-15-2009 memorandum in opposition.

⁶ The ten day limit for post-trial motions with a Rule 50(a) specific statement of grounds may not be extended. Rule 6(b), SCRCPP, and see Rules 50(e) and 59(b), SCRCPP.

motion, there was no issue to support a motion for new trial either. Peay v. Ross.

Third, Plaintiff did not object to the charge on bad faith and it is the established law of the case. Null v. City of Los Angeles; Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E. 2d 66 (Ct. App. 1994); Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E. 2d 66 (Ct. App. 1994). Quite simply, the charge, when applied to the evidence, very reasonably results in the finding made by the jury.

VII. It was error, when considering and granting new trial, for the trial judge not to consider the greater weight of the evidence while at the same time viewing the evidence and the inferences to be drawn from it in the light most favorable to the nonmoving party, the defendants.

(Issues 7 and 8)

The Circuit Judge did not consider and did not address or discuss the evidence of bad faith in reaching his decision, including specific evidence of disingenuous positions of National Grange concerning the validity of the bond in processing the claim, and evidence clearly evincing "unfaithfulness to a common purpose" and "inconsistency with the justified expectations of Phoenix," as charged to the jury. (Cf. 8-17-09 Order, R. pp. 2-5.) This and other evidence not only was required to be considered and carefully weighed when making such a momentous decision as to disregard a verdict, but also was required to be viewed in the light most favorable to the nonmoving party. Melton v. Williams; Jones v. Ingles Supermarkets, Inc.

The Circuit Judge, instead, summarily, incorrectly and erroneously concluded that there was "no credible evidence" of bad faith on the part of Plaintiff. (Order, R. p. 4.) If there was not even mention of the evidence in question, then as a matter of law and logic, there was a failure to consider the inferences to be drawn from it and view the evidence and the inferences in any light at all. This was not an exercise of discretion. Failure to exercise discretion is an abuse of discretion. Fontaine v. Peitz.

The Circuit Judge's statement about "no credible evidence" of bad faith in his August 17, 2009 order granting new trial is impossible to reconcile with his statement four months earlier on April 8, 2009 freshly after having heard three days of evidence: "I do think certainly you've got a good faith and fair dealing argument." (Transcript, 4-8-09, R. p. 369, lines 18-19.)

Having failed to consider or discuss the evidence or law of the case on the defense of bad faith, the Circuit Judge then incorrectly concluded that the jury failed or refused to follow the law in reaching its decision. (Order, R. p. 4.) Instead, there is no indication other than that the jury followed every instruction given to it, took notes throughout all phases of the proceeding, duly deliberated, committed no misconduct, asked the Court no questions indicating any misapprehension of the law or any concern with matters not charged, and returned, as instructed, a general verdict, with no special answers and no special interrogatories. (R. pp. 566-567.) It was error, and abuse of discretion, to grant new trial.

In the instant case, the Circuit Judge states that "no plausible reason is advanced" for the jury's verdict. In the instant case, the jury was not asked for a reason: in the instant case, the jury returned a general verdict, as instructed. (Verdict, R. p. 11, and see instructions, R. p. 424, line 20 - p. 425, line 7.) The likely reason for the jury's verdict is that they applied the charged law of bad faith to the evidence, determined that National Grange acted in bad faith, and determined that bad faith barred indemnification for all except \$10,000 of what National Grange spent. Every reasonable presumption should be exercised in favor of the validity of a general verdict. Gold Kist, Inc.

The evidence supported a defense of bad faith.⁷ The jury was charged on the law of bad

⁷ There was evidence, for example, that the very first response of National Grange to a claim on the bond, was to threaten repudiation of the bond in its entirety, and that all actions and expenditures thereafter were affected by that repudiation and were unreasonable. There was evidence that National Grange's manner of handling the first claim from the beginning changed

the course of action of other parties and resulted in expenditures which could have been avoided. There was evidence that Phoenix's ability to respond to these changes was also affected by National Grange's course of action and inaction and that Phoenix and the other indemnitors were damaged in at least this amount as a result.

The record contains, for example, the following evidence of lack of good faith and fair dealing by National Grange:

a. When a bond claim was made, National Grange contended it had not been timely provided with a copy of the contract, which National Grange admitted contained an option for Bovis (the general contractor) to add an additional building ("Building B") to the scope of work. (See, e.g., Def. Exh. 1, R. pp. 533-536.) To the contrary, the contract was available to, and had been provided to, National Grange. (E.g., Testim. of Chitwood, R. p. 215, line 11 - p. 219, line 12.) Regardless of any pretense as to timely possession of the contract, the entire contract was explicitly incorporated by reference by National Grange into the bond which National Grange signed and issued. (See, e.g., Pl. Exh. 2., R. pp. 477-482.) In any event, the addition of Building B did not alter the stated penal sum of the bond. Yet, National Grange used the incorrect and untrue implication that it had lacked a copy of the contract, in order to argue that National Grange had no liability whatsoever under the bond, or that, if there was liability, it was limited to liability pertaining to Building A. (Testim. of Cinq-Mars, e.g., R. p. 180, lines 13-24; R. p. 153; Def. Exh. 1, R. pp. 534-536.) During the trial, Mr. Chitwood and Mr. Brownlee explained how the contract and the prospect of including Building B were discussed at length with the National Grange field underwriter. (Testim. of Chitwood and Brownlee, e.g., R. pp. 214-219; R. pp. 274-277.) The field underwriter, implying that she did not have a full copy of the contract, was asked on cross examination approximately three times by Mr. Chitwood, if she did not have a copy of the contract, why did she not ask for it. She never answered the question. (Testim. of Day, e.g., R. p. 306, line 11 - p. 310, line 1.)

b. National Grange armed its independent agent with a power of attorney to sign bonds, but incorporated a \$1,000,000 limit into the power of attorney. (Pl. Exh. 2; Def. Exh. 1.) National Grange tried to use this limit to repudiate the bond, based on inclusion of Building B in the construction contract. (Testim. of Cinq-Mars, R. p. 174, line 16 - P. 175, line 9; Def. Exh. 1, R. p. 534.) Yet, the inclusion of Building B did not change the limited penal sum of the bond. Further, National Grange's claims manager testified that if payment and performance bonds were written for only one building and were written for a limited penal sum of, say, \$900,000, the exposure could still theoretically be \$900,000 on the performance bond and \$900,000 on the payment bond, for a total exposure beyond the cap placed on the power of attorney. (Testim. of Cinq-Mars, R. p. 181, line 4 - p. 182, line 21.) Further, Mr. Brownlee explained the way a surety used a work-in-progress analysis to keep the general exposure of the surety "under limit," although this was not a mathematically precise process and the existence of multiple bonded jobs could result in both higher risk and exposure for more than the limit. (Testim. of Brownlee, R. p. 276, lines 14-24.) Despite the foregoing facts, National Grange attempted to use the \$1,000,000 limit on the power of attorney to evade any responsibility under the bond at all, or to, at a minimum, evade all responsibility relating to Building B. (Testim. of Cinq-Mars, R. p. 174, line 16 - p. 175, line 9; Def. Exh. 1, R. p. 534.)

c. National Grange, through its claims manager, and its letter to Bovis, simultaneously implied a lack of prior knowledge of the contract (and its inclusion of Building B), while exhibiting an acute awareness of a deadline in the contract for electing to proceed with

Building B. (Def. Exh. 1, R. p. 534.) Again, not only did the bond itself expressly incorporate the entire contract, but the pretense of lack of knowledge of the contract was never explained. (Pl. Exh. 2, R. p. 477, and cf. Def. Exh. 1, R. p. 534.) The denial of liability under an entire bond, based in part upon the alleged missing of a deadline under a contract, could also be viewed as “unfaithfulness to a common purpose,” or “inconsistency with the justified expectations of Phoenix,” or as “a violation of community standards of decency, fairness, or reasonableness.”

d. On cross-examination, the claims manager for National Grange – National Grange’s sole witness at trial – was unable to state any duty or obligation that National Grange felt it owed to its principal (Phoenix) – other than to “investigate.” (Testim. of Cinq-Mars, R. p. 132, line 8 - p. 133, line 11.) The evidence at trial showed that the “investigation” continued for four to five years, before National Grange paid out one dime in claims on either Building A or Building B.

e. Mr. Chitwood testified that he received virtually no contact from National Grange with regard to the handling or defense of the bond claim, and that he could only find one letter in all of his records over the years that he received from National Grange. (R. p. 230, line 9 - p. 235, line 3.) He testified that he could not find any mention of any offer to pay \$120,000 or any other sum during the several years after the first claim was made on the bond, and that the first time he heard National Grange claim it had offered \$120,000 was at this trial in 2009, some 7 years later. (*Id.*) The jury could have treated National Grange’s claim to have made such an offer as a false statement or mischaracterization at trial, or could have concluded that if there truly was any discussion on the subject, it was without Phoenix and in total disregard for any information to, or input from Phoenix. Even the purported litigation settlement agreement entered into between National Grange and Bovis contained a confidentiality clause not allowing the agreement to be shown to Phoenix or the other indemnitors. (Pl. Exh. 4 at 9, R. p. 493.)

f. Mr. Chitwood and Mr. Clark testified as to the fault of Bovis, the general contractor, in constructing the building out of plumb and with openings out of square, and in specifying and insisting on corrective and adaptive work which was not in the original scope or specifications of the contract (e.g., placing doors down in grooves jackhammered into the concrete, and attaching windows to masonry which the mason could not lay close enough to the out-of-plumb frame of the building). Mr. Chitwood also explained limits on the actual severity of the alleged mistakes made by Phoenix on the installation of some of the bay windows, and ways those mistakes could have been fixed by Phoenix. Mr. Chitwood also pointed out that Phoenix’s work on Building A was apparently satisfactory enough to Bovis that Bovis asked and required Phoenix to proceed with Building B. On the other hand, National Grange provided virtually no evidence of the reasonableness or even the thought process involved in allegedly deciding ultimately to pay on the bonds only after years of supposed investigation, other than to produce a sort of spreadsheet authored by Bovis. (See, e.g., Pl. Exh. 3, R. pp. 483-484.) National Grange’s witness was unable to locate any allocation of any fault to Bovis on that document, which might have been perceived by the jury as deliberate indifference by National Grange. (R. p. 143, line 9 - p. 144, line 19.)

g. Mr. Chitwood testified that the failure of National Grange to affirm the bond, or to pay or otherwise assist in good faith with the resolution of the initial payment bond claim by EFCO resulted in Phoenix not getting paid by Bovis, being unable to pay EFCO, and being shorted on operating funds. (R. p. 233, line 16 - p. 237, line 21.) National Grange did nothing to mitigate the situation. There was further testimony that this lack of good faith resulted

in Phoenix being unable to perform other bonded work, and ultimately going out of business. (Testim. of Chitwood, R. p. 237, line 22 - p. 240, line 4.) This not only compromised Phoenix's ability to perform the job in question and protect its rights in the various controversies, but also prevented Phoenix from earning money on other jobs, and ultimately resulted in Phoenix going out of business. (Testim. of Chitwood, *id.*) Mr. Chitwood and Mr. Clark (e.g., R. p. 315) testified that there were repair and correction issues which could have been addressed before tropical storm Gaston, and might have mitigated or avoided the emergence of large water intrusion claims after that storm. National Grange's claims manager also testified that, even after tropical storm Gaston, there was a possibility of correcting alleged mistakes by Phoenix or defects in the product provided by Phoenix's supplier, but that, by then, Bovis decided to "go ahead on its own" with a wholesale stripping of the "skin" of the building. The record shows that the decision by Bovis to go ahead on its own came only after – and long after – National Grange had gone on record as threatening to repudiate any liability under the bond whatsoever. (Cf. Def. Exh. 1, dated 2/12/02.)

h. The evidence in the record allows a reasonable inference that National Grange's actions and attitude were driven not simply by caution, but by improper motive or a dishonest purpose, with total and complete self interest, with little or no information to Phoenix, and with not one concern for the effects of National Grange's claims handling (or lack thereof) upon Phoenix. Under this view of the evidence, National Grange acted in bad faith, breached its fiduciary duties to Phoenix, failed to mitigate its damages, was estopped by its conduct from asserting the indemnity agreement, was estopped by its conduct from asserting a settlement payment to Bovis and other alleged expenditures, excused the indemnitors from performance by National Grange's repudiation of contract and prior substantial breach, failed to perform conditions precedent, and suffered questionable damages.

Accordingly, even if National Grange had stated grounds for its motion, the trial court would have been required to deny the motion for directed verdict.

Of course without liability, there can be no damages. And in most instances, without causation there can be no damages. But there was also a credibility problem causing National Grange to fail in its burden of proof as to the rationale for, and existence of, many of its alleged damages.

National Grange introduced some very limited damages exhibits and adduced some very limited damages testimony, but the defendants did not admit the truth of all this limited evidence.

Among the exhibits was one summary exhibit which claimed payments made "or monies owed" as a result of an order in other litigation. (Pl. Exh. 8, R. p. 515.) It was later admitted on cross examination that National Grange was claiming the money was not owed -- that the order was still on appeal, that the opposing party in that litigation had not accepted a check, and that National Grange was contending on appeal that it did not owe any of the money in the order. (Testim. of Cinq-Mars, e.g., R. p. 126; R. p. 131, lines 1-17; and see R. p. 327, pp. 16-21.) If the jury did not trust any of the damages evidence presented by National Grange, the distrust came from within the case and not from any outside caprice, passion, or prejudice. The jury learned -- through the evidence -- of the positions taken earlier by National Grange and learned -- through the evidence -- of the positions taken by National Grange in the trial.

Another exhibit simply listed in an elaborate spread-sheet fashion, damages allegedly sustained by the general contractor, Bovis, rather than National Grange. (Pl. Exh. 3, R. pp. 483-484.) That exhibit was actually prepared by Bovis. (Testim. of Cinq-Mars, R. p. 142, line 17- p.

faith. The jury asked no questions revealing its thinking on damages. No one asked the jury any questions to reveal its thinking on damages -- no special interrogatories, nor special form of verdict were requested.

Having been presented with instructions on the defense of bad faith and having considered the evidence the jury returned a general verdict for less than the amount sought by National Grange in a case in which both liability and damages were disputed. The plausible

151, line 16.) On direct examination, National Grange's witness indicated that the exhibit represented the potential liability faced by National Grange, as allocated by Bovis, but on cross, admitted some lack of credibility of the document, as it indicated no fault of Bovis in the allocations of fault it purported to make among those working on the crooked building. (*Id.*) On cross, National Grange's witness was unable to explain how the total purported exposure of National Grange could be as high as indicated in the exhibit and in his testimony, if the bond was limited to \$1,000,000. (*Id.*) Asked if the exposure was based upon National Grange's bad faith, the witness did not know the answer. (*Id.*)

Another exhibit purported to be a settlement agreement between National Grange and Bovis, which was not reached until after National Grange went many years without paying out a dime in claims, and after National Grange did purport to have spent much money on lawyers. (Pl. Exh. 4, R. pp. 485- 496.) However, the exhibit contained a confidentiality clause indicating it was not intended to be shown to Phoenix or the other indemnitors. The exhibit was not signed by National Grange and no explanation for the absence of an original or a signature was offered. The exhibit also contained a release which could have been construed as including a release of a bad faith claim by Bovis against National Grange.

There was another exhibit which was a check, but not a cancelled check. (Pl. Ex. 5, R. p. 497.)

There was another exhibit which was simply a printout which purported to include references to checks written by National Grange to the law firm representing it, for "legal expense." There was little testimony about the circumstances of the purported expense, the circumstances of the creation of the document, the person who created the document, or the methodology of creating it. There was little, if any, testimony concerning whether the document was kept in the course of a regularly conducted business activity or even whether it was made from records kept in the course of a regularly conducted business activity. If the document was intended as a summary, there was similar paucity of testimony concerning whether it was a fair and accurate summary, and the underlying matters purportedly summarized were not put into evidence. The elements of the foundation for admissibility of evidence also relate to credibility, and reliability, regardless of the fact that an exhibit is admitted into evidence or testimony is allowed.

Accordingly, even if there had not been such vigorous dispute of liability as there was, there still would have been an issue on the damages not being \$968,332.29. For this reason as well, the jury's verdict deserved respect "in fact, as well as in pretense."

reason for the jury's verdict is that the jury quite simply considered the evidence and followed instructions. This plausible reason was advanced by the defendants any time the question was asked.

Contrary to the Circuit Judge's ruling, this trial was the very picture of a trial for which no new trial was warranted; the trial presents a case in which both the Circuit Judge and the jury were cautious, attentive, conscientious, and careful. The record, with respect to any error affecting National Grange, was "clean"; there were virtually no evidentiary objections, evidentiary rulings were supported and sustainable on numerous grounds, deliberative charge conferences were held, National Grange took no exception to the charge, and there were no issues regarding the behavior or deliberations of the jury.

The general verdict should not have been disregarded and new trial should not have been granted.

VIII. Granting new trial under the circumstances was a violation of due process under the State and federal constitutions, and a violation of the right to trial by jury under the State constitution.

Where there was no preserved basis for a motion for new trial by National Grange, and no analysis of the evidence summarily disregarded by the Circuit Judge, the granting of a new trial was a disregard of the defendants' right to trial by a jury, which included their right to the particular trial they had already been put through. There were conclusory post-trial statements concerning the absence of evidence, the credibility of evidence, and the caprice of the jury, but there was not a scintilla of analysis of the actual defense presented. Under these circumstances, disregard of the three-day trial and jury verdict was a denial of due process under the State and federal constitutions and the right to have one's disputes settled by jury rather than judge. See Brabham v. Southern Asphalt Haulers, Inc. (recognizing constitutional right to trial by jury in

new trial context).

CONCLUSION

The judge intended for the jury to allocate bad faith to the damages claimed by Plaintiff, but then erroneously granted a new trial because they did so.

The judge also misapprehended and misapplied the law of new trial. Namely, he applied the law applicable to an inadequate verdict in a case of undisputed liability, lack of affirmative defense, and credible damages, when, instead, in the instant case, liability was disputed, the defendants asserted and vigorously tried a defense of bad faith, and the plaintiff lacked credibility.

A definition of bad faith different from that charged by the judge, may not be used to determine that the evidence of bad faith was insufficient, and suddenly bootstrap the post-trial case into one with established liability, and a derelict jury. The judge's charge on the definition of bad faith was correct. Plaintiff also did not object to the charge and it is the established law of the case.

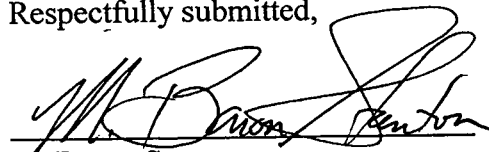
To argue there was insufficiency of evidence would be to argue a point not raised or supported in a motion for directed verdict and JNOV. Insufficiency of evidence was never sufficiently raised in these motions in the first place and cannot be allowed now as the basis for new trial. Peay v. Ross.

Despite all the reasons why the issue of sufficiency of evidence was unavailable as a ground for new trial, it must be added that the evidence in question was not just sufficient, but downright heavy. Yet it was never discussed or weighed.

All of the foregoing constitute an abuse of discretion, requiring reversal of the Circuit Judge's order granting new trial, and instruction to enter judgment on the verdict.

Accordingly, the Circuit Judge's grant of a new trial should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Baron Stanton", written over a horizontal line.

M. Baron Stanton
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RONALD AND SUSAN CLARK

April 1, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
S.C. Ct. App. No. 2010150106

National Grange Insurance Company Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and
Renee L. Graham, ... Defendants,

of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and
Susan F. Clark are Appellants.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on April 1,
2011, served the foregoing Final Appellants' Brief of the Clarks upon the Respondents by
causing copies thereof to be mailed with proper postage to the addresses indicated below:

Francis M. Mack, Esquire
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M. Baron Stanton

*and also certify that the brief is identical to the
brief previously served except for correction of typos
and addition of references to the Record.*

APPENDIX DIVIDER

B

12/15/85
12/15/85

UNITED STATES OF AMERICA
THE COURT OF APPEALS

IN RE: FROM: [REDACTED] AND CO. LTD.
[REDACTED]

THE HONORABLE [REDACTED]

[REDACTED]

[REDACTED]

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The trial judge's decision to grant a new trial was a proper exercise of his discretion.

II. In arguing the trial judge granted a new trial solely because the jury awarded National Grange only a partial recovery, the Appellants have misapprehended the court's ruling.

III. The trial court properly cited to Dillon v. Frazer in support of its decision to grant a new trial.

IV. The trial court properly concluded the defendants did not offer credible evidence as to any bad faith by National Grange that could possibly justify a reduction of the damages award from \$968,332 to \$10,000.

V. The trial judge considered all of the relevant evidence in the record in granting a new trial.

VI. The grant of a new trial did not violate the defendants' right to a jury trial.

STATEMENT OF THE CASE

This is an indemnification action brought by a surety related to payments it made and expenses incurred in satisfying the principals' debts and obligations that arose out of a construction project.

National Grange Mutual Insurance Company ("National Grange") initiated this case on December 17, 2007, by filing an action for indemnification in the Richland County Court of Common Pleas against Phoenix Contract Glass, LLC ("Phoenix"), C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham. [Complaint, R. pp.13-16.]

An Order of Default was entered against Phoenix Contract Glass, LLC, and Renee L. Graham for failure to file responsive pleadings. The remaining defendants filed Answers generally denying any liability. [Answers, R. pp.18-20.]

A jury trial was held April 6-8, 2009, with the Honorable G. Thomas Cooper, Jr., presiding. During the course of the trial, National Grange presented evidence that each of the defendants had executed a written Indemnification Agreement in favor of National Grange. National Grange presented damages of Nine Hundred Sixty-Eight Thousand Three Hundred Thirty-Two and 29/100 (\$968,332.29) Dollars in the form of settlements of underlying lawsuits and expenses incurred in defending lawsuits brought by claimants under the surety bonds. At the close of National Grange's case, the trial court granted it a directed verdict of \$968,332.29 as to Phoenix and Renee Graham since they failed to appear. At the trial's conclusion on April 8, 2009, the jury returned a verdict of \$10,000 for National Grange as to Brent Chitwood, Linda Chitwood, Ronald Clark and Susan Clark. On April 14, 2009, National Grange filed timely post-trial motions including a motion for a new trial, or in the alternative, a motion for a new trial nisi additur. [National Grange's Post Trial Motions, R. pp.538-40; Memorandum in Support of Post Trial Motions, R. pp.569-73.] National Grange argued that the grossly inadequate verdict indicated the damages award was the result of an improper motive or consideration by the jury and was irreconcilably inconsistent with the evidence presented at trial. [Id.]

A hearing on the post trial motions was held before Judge Cooper on July 22, 2009. He subsequently issued an Order dated August 17, 2009, granting a new trial absolute on the grounds that the damages awarded were irreconcilably inconsistent with the evidence presented at trial. [Order (Post Trial Motions), R. pp.1-5.] Judge Cooper found that the defendants had admitted executing the Indemnity Agreement and they had not offered any evidence in opposition to the damages established by

National Grange in the amount of \$968,332.29. He further found the defendants had not offered credible evidence to support their asserted defense of bad faith. The defendants thereafter moved for reconsideration of the decision, but Judge Cooper denied the motion to reconsider by order dated November 24, 2009. [Order Denying Reconsideration dated 11/13/09, R. p.7.; Order Denying Reconsideration dated 11/24/09, R. p.9.]

Brent and Linda Chitwood served a notice of appeal on December 31, 2009, and Ronald and Susan Clark served their notice of appeal on January 4, 2010. The Clarks have filed an Appellant's Brief, while the Chitwoods have filed a notice joining in the arguments asserted by the Clarks.

STATEMENT OF FACTS

On September 30, 2000, Bovis Lend Lease, Inc. (Bovis), a general contractor for a condominium construction project known as Renaissance on Charleston Harbor ("the project"), entered into a Subcontract with Phoenix which called for Phoenix to perform glass installation and glazing work for the project. [Pl.'s Exhibit 6, Order, R. p.499.] As part of the agreement between Bovis and Phoenix, Bovis required Phoenix to "furnish performance, and labor and material payment bonds each for one hundred percent (100%) of the price, said bonds to be on Contractors (Bovis') standard bond forms" [R. p.500.]

The project involved two distinct phases known as Phase I and Phase II. The Subcontract between Bovis and Phoenix made clear that it was being awarded to

Phoenix on the basis of Phase I only.¹ [Order ¶ 7, R. p.499.] The price to be paid by Bovis to Phoenix for the window systems under the Subcontract for the first phase of the project was \$914,835.00. [Subcontract] Phase I of the project was comprised of Building A, a pool, a clubhouse and the parking deck needed to accommodate Building A. [R. p.499.] Building A is eight stories in height and contains fifty condominium units. [Id.] Phase II was comprised of Building B and the remainder of the parking deck. [Id.] Building B is a duplicate of Building A and also contains fifty condominium units. [Id.] Soon after entering into the Subcontract agreement with Bovis, Phoenix contracted with EFCO Corporation ("EFCO"), a manufacturer of glass products, to purchase materials for the window systems. [R. p.500.]

Prior to beginning work on the project, Phoenix made arrangements through its insurance agent, John Brownlee, to obtain the required surety bonds from National Grange. Brownlee, an employee of the Ellison Insurance Agency, had handled all of Phoenix's insurance matters since Phoenix's inception. Brownlee had set up lines of insurance for the company, including property insurance and workers compensation insurance. [R. p. 277, lines 10-17; R. p.281, line 15- p.282, line 6.] As Phoenix grew larger, Brownlee began to help the company obtain bonds. [Id.] Brownlee is an independent insurance agent who was authorized by a Power of Attorney to write surety bonds for National Grange. [R. p.270 line 18-p.271, line 9.] However, his authority under the Power of Attorney was subject to the express limitation that no bond written by him could exceed \$1 million [R. p.271, lines 1-9; Power of Attorney attached to Bonds, R. p.482.]

¹ The Subcontract between Bovis and Phoenix specifically stated that it was being "awarded on the basis of Phase I only." [Order ¶ 7, R. p.499.]

On December 1, 2000, as requested by Phoenix, a performance bond and a payment bond were issued on Bovis' standard bond forms. [Performance Bond and Payment Bond, R. pp. 477-482.] Each bond had a penal sum of Nine Hundred Fourteen Thousand, Eight Hundred Thirty-Five and 0/100 (\$914,835.00)², which reflects the price for the work to be performed by Phoenix for Phase I. [Id.]

In order to obtain the bonds from National Grange, the principals of Phoenix (Brent Chitwood, Ronald L. Clark, and Henry J. Graham III) each individually signed an Agreement of Indemnity. In addition, the principals had their wives, Susan Clark, Linda Chitwood and Renee Graham, also sign the Indemnity Agreement. [Agreement of Indemnity, R. pp. 468-476.] Under the terms of the Agreement, these defendants agreed to indemnify and hold harmless National Grange from all liability it incurred resulting from any defaults of the defendants related to the project. [Id.] More specifically, the Agreement provided the defendants would exonerate, hold harmless, indemnify and keep indemnified National Grange from and against any and all claims, demands and liability for losses, costs and expenses of whatsoever kind of nature, including court costs, counsel fees, investigative costs, and from and against and any all other such losses and expenses which National Grange may sustain or incur:

- a. By reason of having executed or procured the execution of Bonds;
- b. By reason of the failure of the Defendants to perform or comply with any of the covenants or conditions of the Agreement of Indemnity;
- c. In enforcing any of the covenants or conditions of the Agreement of Indemnity;

² The premium for the bond was for a total amount of \$8,188. [R. p.477; R. p.169, lines 1-2.]

- d. In making any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid bond premium in connection with any Bond;
- e. In prosecuting or defending any action or claim in connection with any Bond, whether Plaintiff at its sole option elects to employ its own counsel, or permits or requires Defendants to make arrangements for the Plaintiff's legal representation. [Agreement of Indemnity, R. pp.468-476.]

After the bonds were issued, Phoenix began work on Building A. On March 22, 2001, Bovis prepared a change order to Phoenix's Subcontract to add Phase II, which included Building B. [Pl.'s Ex.6, Order, R. p.501.] The value of the change order for Phase II was \$719,920. [Id.] The addition of Phase II by change order increased the total of the Phoenix subcontract to \$1,634,755, which was 79% more than the original contract. Phoenix, however, never took any action to have the penal sum of the payment bond or performance bonds increased. [Order ¶ 34, R. p.503.] Neither Phoenix nor Bovis notified National Grange of the change order at that time, and neither attempted to pay a premium to National Grange to try to add coverage for Phase II to the bonds. [Order ¶¶ 29-36, R. p.503.]³ Furthermore, this increased contract price greatly exceeded the \$1 million limitation on John Brownlee's Power

³ The addition of Phase II to the Bovis-Phoenix Subcontract by change order practically doubled the scope of the work to be completed by Phoenix. Cynthia Day, National Grange's field underwriter for the bonds, was called as a witness at trial by the Clarks. Ms. Day testified that a change order to add an eight (8) floor building is extraordinary and not in the normal course of business [R. p.310, line 22- p.311, line 9], and therefore National Grange should have been notified by Phoenix and/or Bovis of the proposed change order to add Phase II. [R. p.304, line 20 -p.305, line 22.] She explained that a change order to add an additional door to a project would be normal and customary but that a change order to add an entire building would not. [R. p.311, lines 1-9.] Day testified that the price of the work to be completed by Phoenix on Phase I (\$914,835) was more than twice as much as Phoenix had ever done previously. [R. p.307, line 10-p.308, line 317.] She indicated that National Grange would never have approved of issuing performance and payment bonds to cover both Phase I and Phase II at the same time because the price of Phoenix's work for both phases together was over \$1.6 million. [R. p.308, lines, 10-17.]

of Attorney related to surety bonds, and the Subcontract between Bovis and Phoenix had specifically required that all bonds must be accompanied by a valid Power of Attorney "with sufficient limits for the full contract amount." [Order ¶ 27, R. p.503.]

A number of months later, Bovis notified National Grange that it was concerned Phoenix would not be able to complete its work on time. [R. p.78, lines 4-14.] After receiving this notification, National Grange hired a consultant to determine if Phoenix could perform and install the remainder of the windows for the project. [Id.] At that time, Phoenix had completed most of its work on Building A with the exception of some glass in a breezeway in the garage area, and it had already begun installing glass in Building B. [R. p.78, line 18-p.79, line 2.] Phoenix eventually completed all of the glass work in both buildings. [Id.] However, in 2002, EFCO, the glass products supplier, filed a mechanic's lien on the project for materials that it provided to Phoenix but for which it was never paid. [R. p.79, lines 3-24.] EFCO then asserted a claim against National Grange on the payment bond for \$779,892.49. [Order ¶ 44, R. p.505; R. p.79, lines 18-24.]

Some time later, after certificates of occupancy were issued and the owner of the project had sold the condominium units, the condominium homeowners complained about defects in the windows, such as spots and wrinkles that appeared in the reflective film within the windows. [R. p.85, lines 1-p.86, line 15.] In the years following completion, significant condensation occurred on and around the metal parts of the windows. [Id.] In 2004, a tropical storm, Gaston, passed through the Charleston area which resulted in significant leaks occurring in the buildings in areas around windows. [Id.]

As a consequence of the window problems as well as other deficiencies, the homeowners filed a construction defects lawsuit against Bovis. Bovis repaired the buildings and settled the homeowners' claims. Bovis then asserted a claim against National Grange on the performance bond for \$11,707,033. [R. pp.483-84.]

A brief discussion of the bond claims brought by EFCO and Bovis is necessary for an adequate understanding of the issues involved in this appeal.

EFCO's Claim Under The Payment Bond

EFCO claimed it was owed \$779,892.49 under the payment bond for materials it had provided to Phoenix for both Phase I and Phase II. Only a portion of this claimed amount, \$120,489.72, was related to materials that EFCO provided for Phase I, while the remainder of EFCO's claim (close to \$660,000) related to materials it provided for Phase II. [R. p.80, lines 11-15; see also Order ¶ 44, R. p.505.] Because the payment bond covered Phase I but not Phase II, National Grange determined that EFCO's claim for payment related to materials provided for Phase I was valid but EFCO's claim for payment related to materials provided for Phase II was invalid. [R. p.81, lines 12-25.] Accordingly, National Grange offered to pay the full amount of EFCO's claim related to Phase I, which was \$120,489.72. [Id.] Because the payment bond did not cover Phase II, National Grange informed EFCO that it would not pay the remaining portion of EFCO's claim. [Id.] EFCO rejected National Grange's offer, and in August 2003, EFCO filed an action in the Richland County Court of Common Pleas seeking payment for the full \$779,892.49. [R. p.81, lines 19-25.] EFCO named National Grange, Phoenix, and others as defendants. The venue of the case was later transferred to Charleston County.

The case was tried before the Honorable Roger M. Young without a jury on January 22 and 23, 2008. [Order, R. p.498.]⁴ By Order dated February 28, 2008, and entered March 6, 2008, Judge Young found that the payment bond covered only Phase I (Building A and associated work), and he held that EFCO was therefore entitled to recover \$120,489.72 from National Grange under the payment bond, plus interest. [Order, R. p.498.] He concluded that the bond did not provide coverage for Phase II. [Id.] Judge Young's Order was admitted into evidence at the trial of the instant matter as Plaintiff's Exhibit 6. [Id.]

Judge Young concluded:

- ▶ the Subcontract between Bovis and Phoenix was awarded on the basis of Phase I/Building A only [Order ¶ 7, R. p.499];
- ▶ the only reference to Phase II/Building B in the Subcontract was made in an attachment to the Subcontract, which Phoenix did not provide to National Grange. [Order ¶ 10, R. p.500];
- ▶ Bovis' addition of Phase II by change order increased the total of Phoenix's contract to \$1,634,755, which exceeded the authority of Phoenix's agent, John Brownlee, who was not authorized to write a bond for National Grange in an amount more than \$1 million. [Order ¶ 23-24, R. p.502];
- ▶ neither Phoenix nor Bovis ever paid a premium to National Grange to add Phase II/Building B to the bonds [Order ¶ 29-30, R. p.503];

⁴ Although Phoenix was named by EFCO as a defendant in this case, Phoenix did not make an appearance at trial. However, Brent Chitwood appeared at trial and testified as a witness for EFCO.

► “Phoenix never took any action to have the penal sum of the payment and performance bonds increased.” [Order ¶ R. p.503];

► the change order did not have the effect of increasing the penal sum of the bond to include Phase II/Building B [Order, R. p.507];

► “If Bovis had intended the payment bond to cover Building B, the [Subcontract] required Phoenix to notify National Grange of the change, to take such action as was necessary to get a bond for 100% of the new contract amount, to get a new Power of Attorney with increased limits, and it required either Phoenix or Bovis to pay a premium for the increased risk undertaken by National Grange Mutual ... Neither Bovis nor Phoenix took any of the required actions.” [Order, R. p.508]⁵;

► “National Grange issued a payment bond for Building A and assumed the risk that Phoenix would not be able to pay for the materials for that building. It would be inequitable to extend that risk to Building B ... Accordingly, I find that EFCO would be entitled to \$120,489.72.” [Order, R. p.511.]

Following the issuance of Judge Young’s Order, National Grange made an offer to EFCO to pay \$154,966, which represented the amount of materials it provided for Phase I (\$120,489.72) plus applicable interest. [R. p.83, lines 20-25.] EFCO refused this offer because it continued to insist that the bond covered Phase II. [Id.]. EFCO then filed a Notice of Appeal with the South Carolina Court of

⁵ The performance and payment bonds each state that the Bovis-Phoenix Subcontract “is hereby referred to and made a part hereof as if fully set forth herein.” [Performance Bond and Payment Bond, R. pp.477-482.]

Appeals to challenge Judge Young's decision. [R. p.84, lines 1-3.] At the time of trial in the instant matter, EFCO's appeal was ongoing; however, the parties have since settled the case.

Bovis' Claim Under The Performance Bond

As a consequence of the window problems as well as other deficiencies, the homeowners filed a construction defects lawsuit against Bovis. Bovis repaired the buildings and settled claims with the homeowners at a cost that Bovis estimated to be over \$13 million. [Pl.'s Ex.3, R. pp.483-484; Order ¶ 42, R. p.504.] As part of the repairs, the metal framing for all of the project's bay windows was removed and replaced because it did not comply with the project specifications. [Pl.'s Ex.3, R. pp.483-84; Order ¶ 43, R. p.504.] Bovis then asserted a claim against National Grange on the performance bond for approximately \$11 million. [Pl.'s Ex.3, R. pp.483-84; R. p.150, lines 6-24; Order ¶ 52, R. p.505.] This \$11 million figure was based upon Bovis' insistence that it was entitled to make claims against National Grange for repair costs it incurred with respect to both Phase I as well as Phase II. [R. p.89, lines 4-25; Pl.'s Ex.3, R. pp.483-84.] National Grange took the position that the bond covered Phase I only and that Bovis was therefore not entitled to recover for costs incurred to repair Phase II.

In 2005, Bovis filed an action against National Grange. A number of related cases, involving 10 defendants and another 10 surety companies, were consolidated into one case in the Charleston County Court of Common Pleas. [R. p.84, line 24- p.85, line 18.] Ultimately, Bovis settled the entire matter with National Grange for

\$450,000 in December of 2007. [Pl's Exhibits 4 & 5, R. p.486-497; R. p.92, lines 6-9.]

STANDARD OF REVIEW

“The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” Brinkley v. South Carolina Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct.App. 2009); See also Boozer v. Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct.App.1988) (Court of Appeals has no power to review trial court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. Dillon v. Frazer, 383 S.C. 59, 678 S.E.2d 251 (2009). When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive. Id.

“[T]he discretion to control juries in respect to the amount of their verdicts in actions for damages is vested in the trial judges, who, it must be presumed, recognize and appreciate their responsibility, and exercise the discretion vested in them with fairness and impartiality.” Steele v. Atlantic Coast Line R. Co., 103 S.C. 102, 87 S.E. 639, 644 (1916). “When an order granting a new trial is before this Court, our review

is limited to the consideration of whether evidence exists to support the trial court's order." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722 (Ct.App. 1996).

ARGUMENT

I. The trial judge's decision to grant a new trial was a proper exercise of his discretion.

The decision to grant or deny a new trial motion is within the sound discretion of the trial court. Dillon v. Frazer, 383 S.C. 59, 678 S.E.2d 251 (2009). Although a jury's determination of damages is entitled to some deference, Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993), the verdict as rendered by the jury in this case was without any rational support in the evidence and was so grossly inadequate as to manifestly show the jury was affected by improper considerations. As discussed below, National Grange presented unchallenged evidence of damages in the amount of \$968,332; yet the jury returned a verdict of only \$10,000. The jury's verdict was grossly inadequate and irreconcilably inconsistent with the evidence presented at trial.

National Grange presented uncontroverted evidence that each of the defendants had executed a written Agreement of Indemnity in favor of National Grange in connection with obtaining the surety bonds.⁶ None of the defendants disputed signing the indemnity agreement. National Grange also presented damages of \$968,332 in the form of settlements of underlying lawsuits and expenses incurred in defending lawsuits brought by claimants after the defendants defaulted on their obligations. Eli Cinq-Mars, who is employed in National Grange's surety bonds department, testified that National Grange had paid \$450,000 to settle the Bovis

⁶ Each defendant individually admitted at trial (either through their live testimony or the introduction of deposition transcripts read into the record) that he/she signed the indemnity agreement.

claim. [R. p.92, lines 6-9.] He further testified that a minimum of \$154,966.49 would be paid to EFCO as a result of the judgment entered by Judge Young in the lawsuit brought by EFCO. [R. p.83, lines 8-25.] Mr. Cinq-Mars also stated that expenses totaling \$363,366.34 had been incurred for such items as consultant's fees, attorneys fees and travel expenses. [R. p.109, lines 7-15.]

In addition to this testimony, National Grange also put into evidence written documentation of its damages. National Grange introduced, without objection, a spread sheet with over one hundred entries verifying the expenses it had incurred and showing a breakdown of these expenses. [Pl.'s Ex. 7, R. pp.512-14.] The settlement agreement between National Grange and Bovis, as well as a copy of the \$450,000 settlement check from National Grange to Bovis, were placed into evidence. [Pl.'s Ex. 4 and 5, R. pp.485-97.] In addition, a copy of Judge Young's Order in the EFCO case was introduced showing a judgment in favor of EFCO for \$154,966.49. [Pl.'s Ex. 6, R. p.498-511.] Conversely, no competent testimony or evidence was offered by the defendants to contest the amount or reasonableness of the settlement payments or the expenses incurred by National Grange. In other words, contrary to the unsubstantiated and empty allegations set forth by the Clarks in their brief, National Grange's evidence of damages in the amount of \$968,332 went unchallenged.

The Clarks suggest that because they asserted bad faith as a defense at trial, the jury was free to reduce the award of damages to National Grange from \$968,332 to \$10,000. The main problem with this argument is that none of the defendants put forth any competent evidence that National Grange acted in bad faith in its handling and settlement of claims brought under the bonds. In addition, the defendants put

forth no evidence of damages they supposedly sustained as a result of the alleged bad faith of National Grange. The defendants did not introduce any evidence whatsoever to substantiate the setoff of over \$958,000 that the jury awarded.

The defendants offered only vague, speculative allegations of being injured by National Grange's handling of the bond claims, but they never offered any specifics as to any damages they actually sustained. Without such evidence, there is no basis that could reasonably support the jury's decision to award an offset of damages to reduce National Grange's recovery from \$968,332 to \$10,000. It is black letter law that the amount of damages cannot be left to conjecture, guess, or speculation. Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981) (in order for damages to be recoverable, the evidence should enable the court or jury to determine the amount thereof with reasonable certainty and cannot be left to conjecture, guess, and speculation). Where a party fails to introduce evidence regarding the amount of their alleged damages, any award or setoff of damages by a jury can only be based upon improper speculation and conjecture.

The only evidence in the record on the issue of the defendants' alleged damages is the testimony of Brent Chitwood, who attempted to place blame for his company's financial difficulties on National Grange. Chitwood testified Phoenix was injured by National Grange's handling of the bond claims, but his testimony amounted to nothing more than unsupported, vague accusations. Chitwood made the baseless claim that National Grange's alleged delay⁷ in paying the bond claims of

⁷ Any delay in the resolution of the bond claims asserted by EFCO and Bovis was a direct result of EFCO and Bovis each unreasonably demanding that the surety bonds issued by National Grange for the project should cover their claims related, not only to Phase I, but also to Phase II. These demands made by EFCO and Bovis led to years of protracted litigation, during which National Grange had every right to defend

EFCO and Bovis caused Phoenix to have difficulties completing the project, caused Phoenix to have trouble landing new jobs, and caused Phoenix to go out of business. National Grange denies that there is any factual basis for any of these claims. However, even if the jury accepted some or all of these unsubstantiated allegations as true, the fact remains that neither Chitwood nor any of the other defendants presented any specific evidence of damages. Nor did the defendants present evidence that payments made by National Grange to the bond claimants were not made in good faith.

The general rule for recovery of damages mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996). "The amount of damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount." Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct.App.2000). "While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation." Minter, 322 S.C. at 528, 473 S.E.2d at 70.

The Supreme Court has held that a party seeking a setoff carries the burden of demonstrating with reasonable certainty the amount of the damages sustained. Diamond's Swimming Pool Company, Inc. v. Broome, 252 S.C. 379, 386, 166 S.E.2d 308 (1969). Here, the defendants offered no evidence that could possibly justify a setoff. There was no evidentiary basis upon which the jury could have properly

itself by taking the correct position that the bonds were issued for Phase I and did not cover Phase II. As previously pointed out, supra, in the EFCO litigation National Grange's stance was proven correct when Judge Young specifically determined that the bond at issue did not cover Phase II/Building B.

reduced its award downward from the uncontested damages of \$968,332 that National Grange sustained and documented at trial. The defendants failed to even state a specific dollar figure range for their supposed damages or to present evidence to substantiate the award of a setoff.

While it is true that proof of damages does not require mathematical certainty, the mere speculation by the defendants that their business was harmed by National Grange's handling of the bond claims and third party lawsuits does not pass muster. Such a generalized accusation, unsupported by any competent proof, is not an appropriate basis for a jury to award a setoff. Because the defendants presented no credible evidence that National Grange made any payments in bad faith and because the defendants similarly presented no evidence of damages, there was no evidentiary basis upon which the jury could have rationally reduced National Grange's award from over \$968,000 to \$10,000.

II. In arguing the trial judge granted a new trial solely because the jury awarded National Grange only a partial recovery, the Appellants have misapprehended the court's ruling.

[Addressing Arguments I and II in Appellants' Brief of the Clarks]

The Clarks argue the trial judge erred in granting a new trial "based upon the jury only awarding National Grange a partial recovery, when the trial judge intended for the jury to be able to only award a partial recovery ..." [Initial Appellants' Brief of Clarks, p.19.] Their entire argument is a mere half of a page and there is no supporting authority provided and only short, conclusory statements are made. The Clarks' argument falls far short of overcoming the abuse of discretion standard of review, and this issue should be deemed as abandoned. See Transportation Ins. Co.

and Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010) (“The Fund failed to cite any authority for its position. Moreover, the half-page argument made by the Fund falls far short of overcoming the substantial evidence standard of review. Hence, the fund has abandoned this issue.”); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where appellant failed to provide arguments or supporting authority for his assertion); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.”).

In any event, there is no merit to the Clarks’ argument. In arguing the trial judge granted a new trial simply because the jury only awarded National Grange a partial recovery, they have misapprehended the trial court’s ruling. Nowhere in Judge Cooper’s Order does it state that he granted a new trial simply because a partial recovery was awarded. Rather, the Order makes clear that a new trial was granted based upon a number of proper considerations including the following findings by the court: “that the verdict in the case is irreconcilably inconsistent with the evidence presented at trial”; “The verdict goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations”; “The Defendants did not contest the amounts of the payments made, nor the reasonableness of the costs incurred”; “No testimony was offered [by the defendants] in opposition to the damages presented”; “The defendants did not offer any credible evidence as to any bad faith by National Grange Mutual Insurance Company”; “The jury returned a verdict of only Ten Thousand and no/100 (\$10,000) Dollars when the undisputed

damages were Nine Hundred Sixty-Eight Thousand Three Hundred Thirty-Two and 29/100 (\$968,332.29) Dollars.”; “The Defendants admitted execution of the Indemnity Agreement ...”; “The jury’s verdict appeared to be the result of passion, caprice, prejudice or partiality, in that it is unsupported by the evidence.” [Order, R. pp.2-4.] Accordingly, in taking into consideration all of these factors, the trial judge ultimately determined that a new trial absolute should be granted. A review of the Order reveals the Clarks’ position-- that a new trial was granted because only a partial recovery was awarded-- is incorrect.

In a separate section of their brief, they also argue there was no basis for the trial court to conclude the jury’s award of a partial recovery to National Grange was a failure to follow the court’s instructions since the jury had been instructed bad faith could be a defense in this case. Again, the Clarks have simply set forth a conclusory argument with no citation of authority and no real discussion of any substance. An abbreviated argument of this sort should be deemed an abandonment of the issue. See Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second, 389 S.C. 422, 699 S.E.2d 687 (2010). Furthermore, the trial judge did not err in concluding the jury failed to follow its instructions inasmuch as there was no evidentiary basis established by the defendants at trial upon which the jury could have rationally reached a decision to reduce National Grange’s damages by over \$958,000.

III. The trial court properly cited to Dillon v. Frazer in support of its decision to grant a new trial.

[Addressing Argument III in Appellants' Brief of the Clarks]

The Clarks claim the trial court, in reaching its decision to grant a new trial, abused its discretion by placing any reliance on Dillon v. Frazer, 383 S.C. 59, 678 S.E.2d 251 (2009). In Dillon, the Supreme Court held the plaintiff was entitled to a new trial where a jury awarded \$6,000 in damages even though uncontested damages evidence of more than \$30,000 had been presented. The Clarks argue Dillon is inapplicable because “the Dillon jury returned a verdict for less than the amount of damages clearly established by the damages evidence.” [Initial Appellants' Brief of the Clarks, p.21.] It is interesting that the Clarks would attempt to distinguish Dillon on this basis since this is precisely what occurred in the instant matter—the jury returned a grossly inadequate verdict that was inconsistent with the damages evidence presented at trial. Each of the defendants admitted to signing the Indemnity Agreement, which made them individually liable for the costs and expenses incurred by National Grange in resolving claims that arose due to the default of Phoenix. None of the defendants disputed signing the agreement.

Also, National Grange presented damages of \$968,332 in the form of settlements of the EFCO and Bovis claims and related expenses incurred after the defendants defaulted on their obligations. No competent testimony or evidence was offered by the defendants to contest the amount or reasonableness of the settlement payments or the expenses incurred by National Grange. Furthermore, no competent evidence was presented by the defendants to substantiate a setoff in their favor. Yet the jury inexplicably reduced the award of damages to National Grange from

\$968,332 to \$10,000. Accordingly, here as in Dillon, the amount of the verdict was grossly inadequate and clearly indicates the figure reached by the jury was the result of an improper motive.

The Clarks argue that, unlike Dillon, the instant case involves a dispute over liability. They also contend that unlike the present case, in Dillon “the basic tier of damages, the ‘hard, blackboard damages’ (such as actual medical bills), were truly not controverted.” [Initial Appellants’ Brief of the Clarks, p.21.] Regarding the issue of whether liability was disputed, as pointed out above, the defendants each admitted signing the Indemnity Agreement which expressly made them liable for the costs incurred by National Grange in handling claims made under the bonds. The defendants failed to present any credible evidence of bad faith on National Grange’s part and further failed to present evidence that would call into question the amount or reasonableness of the settlement payments or the expenses incurred by National Grange, which totaled \$968,332. The defendants never presented evidence that reasonably called into question the propriety of this figure.

The Clarks also purport to distinguish the instant case from Dillon by making the claim that “in Dillon, there was no emphasis in the record of self-contradiction, error, or falsehood in the evidence presented by the plaintiff.” Although the Clarks make this groundless remark, they then utterly fail to provide any discussion or alleged factual basis to support it. Such conclusory allegations by the Clarks, unsupported by any discussion or analysis, are improper and should be disregarded by the court.

Moreover, the Clarks' argument that their assertion of bad faith as a defense makes this case distinguishable from Dillon does not hold water because credible evidence of any bad faith on the part of National Grange was not presented at trial.

IV. The trial court properly concluded the defendants did not offer credible evidence as to any bad faith by National Grange that could possibly justify a reduction of the damages award from \$968,332 to \$10,000.

[Addressing Arguments IV, V, VI, and VII in Appellants' Brief of the Clarks]

The Clarks argue in Argument sections IV and V that the trial judge erred in finding evidence of National Grange's bad faith was not credible. Once again, they have set forth a conclusory argument without including adequate discussion or citation of authority to support an appeal of this issue. This issue should therefore be deemed abandoned on appeal. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner); see also State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct.App.1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

This argument lacks merit as well. The Clarks contend National Grange did not argue to the trial judge that evidence of its alleged bad faith lacked credibility, and therefore the trial judge abused his discretion in concluding in his order granting a new trial that evidence of National Grange's bad faith was not credible. [Initial Appellants' Brief of the Clarks, p.22.] The premise of the Clark's argument—that National Grange did not raise this issue to the trial judge—is false. National Grange raised this issue repeatedly to the trial judge. In its Memorandum In Support of Post-

Trial Motions, National Grange argued to the trial court "The Defendants did not offer any evidence as to any bad faith by National Grange Mutual Insurance Company ..." [National Grange's Memorandum In Support of Post-Trial Motions, R. pp.569-73.] In its written Post-Trial Motions, National Grange asserted that the jury's verdict was not supported by the evidence. [National Grange's Post-Trial Motions, R. pp.538-39.] Furthermore, during the hearing on National Grange's Post-Trial Motion, National Grange specifically raised the issue to Judge Cooper that the defendants had presented no evidence of bad faith other than speculative testimony. [Motion Hearing Transcript, July 22, 2009, R. p.442, line 14-p.442, line 19.] There is, therefore, no basis for the Clarks' argument on this point.

The Clarks further argue it was an abuse of discretion for the trial judge to state in his order that the evidence of National Grange's bad faith was not credible "without identifying the evidence referred to." [Initial Appellants' Brief of the Clarks, p.23.] It is clear from a review of the trial record exactly why Judge Cooper concluded credible evidence of National Grange's bad faith was lacking. At trial, the defendants argued bad faith as a defense but they presented no evidence of bad faith other than speculative testimony of Brent Chitwood who simply surmised that National Grange should have resolved the EFCO and Bovis claims sooner. National Grange, on the other hand, produced uncontroverted evidence that settlement of the EFCO and Bovis claims was delayed by the unreasonable demands of EFCO and Bovis that the surety bonds should cover both Phase I/Building A and Phase II/Building B. National Grange's position that the bonds only covered Phase I/Building A was vindicated when Judge Young ultimately ruled National Grange's

position was correct. The essence of bad faith is unreasonableness. There was no credible evidence that National Grange's handling of the claims was unreasonable.

The fact that EFCO and Bovis demanded payments related to Building B, which was outside the scope of coverage of the bonds, placed National Grange in a position where it had no choice but to defend itself from these invalid claims. When a surety takes reasonable steps to defend itself against invalid claims, such action does not constitute bad faith. Taking all of this into consideration, the trial judge properly concluded there was no credible evidence that National Grange had handled the bond claims in bad faith.

On a related issue, the Clarks argue "To the extent the trial judge granted National Grange a new trial based on insufficiency of evidence rather than upon the reasons stated, it was error to do so when insufficiency of evidence of bad faith was not timely raised by National Grange as a ground for directed verdict or JNOV, and it was further error not to measure the sufficiency of the evidence against the law charged to the jury rather than as against some other unidentified standard or perception of the law." [Initial Appellants' Brief of the Clarks, p.23.] There are several mistaken assumptions made by the Clarks. First, the Clarks seem to imply the trial judge may have granted a new trial on the sole basis that there was a lack of evidence supporting bad faith and that he applied an "unidentified standard or perception of the law." This is not the case. In addition to concluding there was no competent evidence of bad faith, the trial court granted a new trial absolute because the amount of the verdict was grossly inadequate and indicated the figure reached was the result of an improper motive. [Order (Post Trial Motions), R. pp.2-4.] The court

concluded the verdict of \$10,000 was irreconcilably inconsistent with the evidence presented at trial by National Grange that it had expended \$968,332 to resolve claims brought as a result of Phoenix's default of its obligations on the project. [Id.] It was within this context that the trial court stated no credible evidence of bad faith had been presented that could justify the jury's extremely low damages award.

Additionally, the Order under appeal did not grant a directed verdict or JNOV; rather, the Order issued by Judge Cooper granted a new trial absolute due to a grossly inadequate verdict that was irreconcilably inconsistent with the evidence presented. Therefore, whatever arguments may or may not have been raised as a ground for a directed verdict or JNOV are entirely irrelevant to this appeal.

In this section of their brief, the Clarks also argue the jury charge on bad faith when applied to the evidence "very reasonably results in the finding made by the jury." [Initial Appellants' Brief of the Clarks, p.24.] To the contrary, because the defendants presented no credible evidence of bad faith and no reasonable basis upon which to reduce damages, there is no plausible reason that would justify the jury's reduction of National Grange's damages award from \$968,332 to \$10,000.

V. The trial judge considered all of the relevant evidence in the record in granting a new trial.

[Addressing Argument VII in Appellants' Brief of the Clarks]

The Clarks argue that the trial judge did not consider the evidence of National Grange's alleged bad faith in reaching the decision to grant a new trial. They contend the trial court "erroneously concluded that there was no 'credible evidence' of bad faith on the part of the Plaintiff." [Initial Appellants' Brief of the Clarks, p.25.] They

then attempt to support their allegations of bad faith by purporting to explain in a single footnote that comprises four (4) pages how certain conduct by National Grange could be considered evidence of bad faith. These supposed examples of bad faith are largely based upon speculative testimony, factual inaccuracies, and distortions of the trial record.

For instance, the Clarks argue National Grange engaged in bad faith conduct by refusing to pay the claims of EFCO and Bovis that were related to Phase II/ Building B. [Initial Appellants' Brief of the Clarks, p.27.] Even though Judge Young ruled National Grange was correct in denying claims that arose out of Phase II/Building B, the Clarks now assert that it was somehow improper for National Grange to have done so. Bad faith is a knowing failure on the part of the surety to exercise an honest and informed judgment in processing a claim. American Fire and Cas. Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct.App.1998). Under South Carolina law, a surety acts in bad faith where there is no reasonable basis to support its decision. Id. It is disingenuous for the Clarks to claim that there was no reasonable basis for National Grange's refusal to pay claims on Phase II-Building B when a circuit court judge has already confirmed that National Grange's position was correct.

The Clarks further argue that National Grange acted in bad faith by taking the position that the bonds did not include coverage for Phase II because the independent agent, John Brownlee, who wrote the bonds only had authority to write bonds with a penal sum that did not exceed \$1 million. National Grange's position that the addition of Phase II to the bonds would have exceeded Brownlee's authority is indisputably correct. Both the payment bond and performance bond were each

written with a penal sum of \$914,835, which was the price of Phoenix's subcontract for Phase I/ Building A. The authority of Brownlee was expressly limited by the Power of Attorney so that the penal sum of any bond issued by him could not exceed \$1 million. This information was available to anyone who reviewed the bond since the Power of Attorney document was included with and attached to the actual bonds that were issued. In considering the limits of the independent agent's authority, Judge Young specifically found that Bovis' addition of Phase II/Building B by change order at a cost of \$719,920 increased the total of Phoenix's contract to \$1,634,755, which exceeded the authority of Brownlee. [Order ¶¶ 23-24, R. p.502.] Judge Young sided with National Grange on this issue and concluded there was no coverage for Phase II/Building B since Brownlee had no authority to issue a bond with a penal sum exceeding \$1 million. [Id.]

The Clarks also incorrectly contend National Grange repudiated the validity of the bonds in their entirety. [Initial Appellants' Brief of the Clarks, p.26.] This is completely inaccurate. As testified to by Eli Cinq-Mars of National Grange, National Grange has never repudiated or denied that the bonds covered Building A. [R. p.97, lines 9-18.] In fact, at the time of trial in this case National Grange had offered to pay EFCO for its Building A claim on numerous occasions and had settled with Bovis for \$450,000 on its Building A claim. [Id.] When EFCO sued National Grange claiming that the change order adding Building B to the Bovis-Phoenix Subcontract automatically resulted in the bonds providing coverage for Building B, National Grange acknowledged that the bonds covered Building A but asserted that Building B was not covered by the bonds since the addition of Building B to the glass

subcontract by change order was done without the knowledge or consent of National Grange. National Grange also took the position that if EFCO was going to unreasonably insist that Building B was covered, then National Grange would defend against this invalid claim by asserting that the addition of Building B to the subcontract constituted an unauthorized material alteration in the risk that the bonds covered, which effectively discharged National Grange from any obligation to EFCO. [R. p.124, line 21-p.124, line 9.] The position that a surety may be discharged by an unauthorized material change to the underlying contract is supported by well-established case law. See, e.g., Employers Insurance v. Construction Mgt. Eng. of Florida, Inc., 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989) (summary judgment granted in favor of surety inasmuch as execution of second contract which changed nature of work performed by obligor substantially modified original bonded contract and thereby discharged surety). Accordingly, National Grange's position was entirely reasonable. Moreover, although Judge Young did not adopt this position, he found that National Grange's argument on this issue was "persuasive." [Order, R. p.510.]

The Clarks also contend "National Grange used the incorrect and untrue implication that it had lacked a copy of the contract, in order to argue that National Grange had no liability whatsoever under the bond, or that, if there was liability, it was limited to liability pertaining to Building A." The evidence presented at trial does not support their argument. The evidence demonstrated a complete copy of the contract was not provided to National-Grange. The Clarks infer in this part of their brief that John Brownlee testified the complete contract was provided to National Grange's field underwriter, Cynthia Day. However, Brownlee actually testified he

does not know that a complete copy of the contract was ever provided to National Grange. [R.p.298, line 18- p.299, line 4.] Furthermore, National Grange's Cynthia Day testified she never received a complete copy of the contract and that it was never brought to her attention, during her meeting with Brent Chitwood and John Brownlee prior to issuance of the bonds, that Building B would be added to the scope of Phoenix's work. [R. p.307, lines 10-24.] In addition, Judge Young concluded in his Order "The only reference to Building B is found in paragraphs 71, 72 and 73 of Exhibit B to the Subcontract. Neither Phoenix nor its agent, John Brownlee, provided a copy of these provisions to Ms. Day." [Order ¶ 10, R. p.500.]

The Clarks also argue it was a "violation of community standards of decency, fairness, and reasonableness" for National Grange to deny that the bonds provided coverage to Building B on the grounds that Bovis missed a deadline in the contract for adding Building B. [Initial Appellants' Brief of the Clarks, p.27.] There is no credibility to their claim. Once EFCO and Bovis insisted that the change order had effectively added Building B to the bonds, it was entirely reasonable for National Grange to raise the issue that the change order was not issued within the required timeframe stated within the Subcontract (which was incorporated fully into the bonds). Paragraph 72 of the Subcontract provided that Bovis had until January 31, 2001, to award Phase II at a fixed price as set forth in Paragraph 73. [Order ¶ 20, R. p.501.] However, Bovis did not prepare the change order until March 22, 2001, to add Phase II/Building B pursuant to Paragraphs 72 and 73 of Exhibit B to the Subcontract. [Order, ¶¶ 19-21.] Paragraph 73 further provides that Phase II may be awarded after January 31, 2001, only upon certain conditions. [*Id.*] Bovis did not

issue the change order by January 31, 2001, nor did it comply with the provisions for issuing the change order after that date.⁸ [Id.] Phoenix did not sign the change order until August 9, 2001. [Order, p.5 ¶ 22.] Accordingly, the change order to add Building B was not issued in compliance with the terms of the Subcontract, and it was reasonable for National Grange to raise this issue when Bovis and EFCO unreasonably sought to recover for Phase II/ Building B.

The Clarks further argue National Grange pretended to engage in an investigation for "four to five years" before paying out "one dime" to EFCO and Bovis on their claims under the bonds. [Initial Appellants' Brief of the Clarks, p.27.] The insinuation is that National Grange sat on its hands and did nothing to resolve the claims brought by EFCO and Bovis. The reality is that the delay in resolving the EFCO and Bovis claims was the direct result of EFCO and Bovis both unreasonably demanding that the bonds cover Building B when in fact the bonds were issued to cover Building A only. On numerous occasions before the claims were resolved, National Grange made offers to pay EFCO and Bovis for the value of their Building A claims. [R. p.97, lines 9-19.] EFCO and Bovis, for a long period of time, refused to accept these offers and instead sued National Grange which led to expensive and time-consuming litigation.

The Clarks also assert Brent Chitwood's testimony regarding the alleged infrequent contact he had with National Grange supports their claim that National Grange handled the claims in bad faith. They point out that Chitwood testified he had never before heard that National Grange had offered to pay EFCO \$120,000 to

⁸ Judge Young concluded that the change order was not issued in compliance with the requirements of the Subcontract. [Order, ¶¶ 19-21, R. p.501.]

resolve EFCO's Building A claim until he listened to Mr. Cinq-Mars testify about this earlier in the trial. [Initial Appellants' Brief of the Clarks, p.27.] The Clarks state in their brief, "The jury could have treated National Grange's claim to have made such an offer as a false statement or mischaracterization at trial ..." [Initial Appellants' Brief of the Clarks, p.28.] The Clarks also point out that Chitwood claimed he did not receive much written correspondence from National Grange regarding the EFCO and Bovis claims. [Id.] The Clarks' contentions that Chitwood was not receiving adequate information from National Grange and that he was unaware of National Grange's settlement offers to EFCO lack credibility because on cross-examination Chitwood admitted that when his business, Phoenix, began struggling financially after problems with the project arose, he essentially just quit opening his mail. [R. p.256, lines 12-14.] Also, during his cross-examination, it was brought out that Chitwood had been present for much of the EFCO trial before Judge Young and that Mr. Cinq-Mars had specifically testified during those proceedings that National Grange had offered to pay EFCO for Building A. It was also brought out that the president of EFCO had testified in the trial before Judge Young that he had turned down National Grange's offers to settle. [R. p.258, lines 2-19.]⁹

Also, in the same section of their brief, the Clarks argue National Grange did not present adequate evidence of damages. A review of the trial record, however, demonstrates National Grange introduced a substantial amount of evidence to prove its damages, and the defendants did not introduce any credible evidence that undercut the damages evidence presented by National Grange. Nevertheless, the Clarks assert

⁹ Mr. Chitwood claimed that he could not recall this testimony. [R. p.258, lines 2-19.]

“there was a credibility problem causing National Grange to fail in its burden of proof as to the rationale for, and existence of, many of its alleged damages.” [Initial Appellants’ Brief of the Clarks, p.29.] In attempting to attack the credibility of the damages evidence presented at trial, they appear to question the authenticity of National Grange’s settlement check made out to Bovis for \$450,000 because the introduced exhibit was not a cancelled check. This is a useless argument since the authenticity of the check was never called into question at trial and there were no objections made to its admissibility. It is uncontroverted that National Grange paid \$450,000 to Bovis by check to settle its bond claim. There is absolutely no reason to doubt the authenticity of the settlement check introduced at trial.

The Clarks also have attempted to make the nonsensical argument that a spread sheet prepared by Bovis, which was introduced by National Grange to show the amount that Bovis originally claimed it was owed under the performance bond prior to settling the bond claim, calls into question National Grange’s credibility on the issue of damages because Bovis’ spread sheet fails to take into account any fault that Bovis may have had in the defective construction. [Pl’s Exhibit 3, R. p.483-84.] The spreadsheet represented Bovis’ opinion that Phoenix was responsible for over \$11 million in repairs and replacement costs. [*Id.*] Nothing about this spreadsheet could conceivably have damaged National Grange’s credibility at trial. The document was introduced merely to show the amount that Bovis had initially claimed it was owed under the bond and was not introduced or used for any other purpose. [R. p.89, lines 4-9.] There simply is no basis for the Clarks to assert the introduction of

this spreadsheet was in any way injurious to National Grange's credibility on the issue of damages.

They also argue National Grange's credibility on the issue of damages was hurt because the settlement agreement with Bovis contained a confidentiality clause. The Clarks argue this clause implied the settlement agreement was not to be shown to Phoenix. This is simply another red herring thrown out by the Clarks. It is undisputed that when Phoenix settled with Bovis, Mr. Chitwood (on behalf of Phoenix) signed a settlement agreement with the exact same confidentiality clause. [Post Trial Motions Hearing Tr., R. p.455, lines 14-18.]

VI. The grant of a new trial did not violate the defendants' right to a jury trial.

[Addressing Argument VIII in Appellants' Brief of the Clarks]

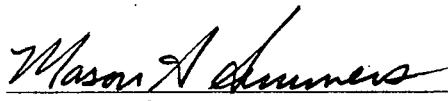
The jury returned a damages award that was grossly inadequate and irreconcilably inconsistent with the evidence presented at trial. The verdict went beyond a merely conservative award and suggests the jurors were motivated by improper considerations. The defendants admitted executing the Indemnity Agreement, and they presented no evidence to contest the amounts of the payments made by National Grange to resolve the bond claims nor the reasonableness of the costs incurred. Additionally, the defendants failed to offer credible evidence as to any bad faith by National Grange and failed to offer any evidence of damages they reasonably sustained as a result of the alleged bad faith by National Grange. The jury's award of only \$10,000 to National Grange, when the undisputed damages were \$968,332.29, appeared to be the result of passion, caprice, prejudice or partiality, or some other improper consideration. Accordingly, the trial court's granting of a new

trial was a proper exercise of his discretion, and there was no constitutional violation of the defendants' due process rights or right to a jury trial.

CONCLUSION

For the foregoing reasons, the Respondent National Grange Mutual Insurance Company respectfully urges the Court of Appeals to affirm in its entirety the Order of the trial court granting a new trial.

Respectfully submitted,



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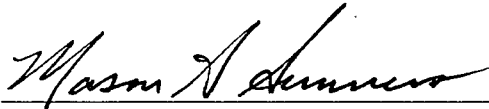
***ATTORNEYS FOR RESPONDENT
NATIONAL GRANGE MUTUAL
INSURANCE COMPANY***

Columbia, South Carolina
March 31, 2011

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

A handwritten signature in cursive script, reading "Mason A. Summers", is written over a horizontal line.

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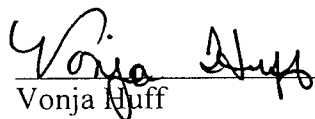
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March 31, 2011

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Respondent National Grange Mutual Insurance Company, do hereby certify that I have this date served the foregoing Final Brief of Respondent National Grange Mutual Insurance Company, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Dated: March 31, 2011

APPENDIX DIVIDER

C

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
S.C. Ct. App. No. 2010150106

National Grange Mutual Insurance Company, ... Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, ... Defendants,

of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and
Susan F. Clark are Appellants.

FINAL APPELLANTS' REPLY BRIEF OF THE CLARKS

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CENTRAL REPLY ARGUMENT

There are a number of fallacious arguments, material omissions, inaccuracies, irrelevant themes, and inapposite matters that run throughout Plaintiff/Respondent National Grange's thirty-two page brief. Space does not permit addressing them line-by-line.

Appellants, the Clarks, have already presented a brief with a comprehensive statement of the scope and standard of review, the unappealed-from law of the case as charged to the jury, the evidence in the record fitting that charge, and the complete absence of any evidence of a dereliction of duty by the jury concerning its verdict.

The Clarks and the other Appellants have already made clear that this case was primarily a three-day trial of a defense raised by the Clarks and the other Appellants. The Clarks have already made clear, the Trial Judge's statement on the last day of trial: "I do think certainly you have a good faith and fair dealing argument." The Clarks have already made clear that the Trial Judge charged the jury on the defense of breach of the implied covenant of good faith and fair dealing. The Clarks have already made clear that there was no exception to the charge. The Clarks have already made clear that the parties agreed to accept a general form of verdict. The Clarks have already made clear that the jury returned a verdict reflecting acceptance, in large part, of the Clarks' defense of bad faith by National Grange. The Clarks have already made clear that a verdict is not "inadequate," when the degree of liability and the damages assessed were the subject of a defense charged without exception at trial. Liability was not admitted. Liability was disputed.

In summary, the case was tried with an amazingly clean record, and National Grange, in whose favor the Trial Judge erred, lost.

The essence of the basis for granting a new trial is clear evidence of a dereliction of duty by the jury. The jury has a duty to follow the instructions given to it by the trial judge. The jury does not have a duty to follow any law or instruction not charged to the jury by the trial judge. It is therefore not a dereliction of duty for a jury to do what it was told to do or to fail to do what it was never told to do. In such a case, there is no reason to blame the jury, and there is no basis for new trial.

There is a fuller and more comprehensive statement of the scope and standard of review in the Clarks' Appellants' Brief. It is a fuller and more comprehensive exposition than the brief references made in National Grange's Brief.

Under the scope and standard of review, there was no evidence of a dereliction of duty by the jury. Further, the Trial Judge was guided by error in applying the law pertaining to "inadequate verdict" cases. He also did not properly exercise any discretion he had to invade the jury's province to determine credibility matters, when he neither identified any uncredible evidence, nor discussed its credibility.

He also erred in signing an order granting a new trial on a basis other than moved for by National Grange. He also erred in granting a new trial if his unstated but true basis was on absence of evidence of bad faith, as these grounds were not preserved by National Grange in its directed verdict and JNOV motions. He also erred in taking his own view of the evidence (if he did assess the evidence) without viewing it in the light most favorable to the a finding of bad faith under the law charged to the jury. He never even stated the evidence. He also erred in depriving the Clarks of their state right to a decision by jury and state and federal rights to due process.

Although space does not permit a detailed discussion of every way in which National Grange's arguments incorrectly distract from the foregoing, a brief clarification of some of the

recurring distractions follows.

OTHER REPLY ARGUMENTS

- A. In justifying a new trial, the burden of overcoming the facts in favor of the Clarks was still on the Trial Judge and is still on National Grange now.**

In justifying a new trial, the burden of overcoming the facts in favor of the Clarks was still on the Trial Judge and is still on National Grange now. In a statement of the standard or scope of review for new trial, in which one defers to “evidence” supporting the trial judge’s decision, the “evidence” is not a reference to evidence adduced on the merits at trial, in the general sense.

Namely, in assessing error in granting new trial, one does not look to see if there was “any evidence” in support of the relief the losing/moving party originally sought at trial. It would be absurd to view the standard in this way, as to do so would invert the longstanding standards in favor of the nonmoving party and in favor of jury trial. The standards for summary judgment, directed verdict, and JNOV, all require that all of the facts and all of the inferences therefrom be viewed in the light most favorable to the nonmoving party. The standard cannot be flipped simply upon a judge deciding to grant the loser another try. See Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984) (evidence to be viewed favorable to party opposing new trial).

The “evidence” one looks for in determining whether to justify a new trial is “evidence” of an outright dereliction of duty by the jury. There is no such evidence in this case. Furthermore, there was ample evidence adduced at trial from which a reasonable jury could have concluded, on the basis of the law charged, that National Grange acted in bad faith in processing and failing to process the claims on the bonds, and in repudiating the bonds, and not paying anything until six or seven years later.

B. The Clarks presented the defense of bad faith in the case and National Grange cannot succeed in this appeal by having ignored the defense.

National Grange's motions for directed verdict and JNOV did not even mention the defense of bad faith.

Instead, the motions proceeded on the facially incorrect assertion that there was "no dispute as to liability or damages." This was incorrect on its face because the parties tried a three-day case primarily on the defense of bad faith, which disputed liability and therefore disputed any damages. There was no dispute that the Clarks signed an indemnity agreement, but this is not to be confused with a lack of dispute of liability. The indemnity agreement and bond contained an implied duty of good faith and fair dealing by National Grange, which the Clarks contended National Grange breached, constituting a defense in whole or in part to liability. Liability was disputed.

National Grange never even preserved for review, questions pertaining to the defense of bad faith. National Grange did not preserve whether there was any evidence of bad faith, whether there was competent evidence of bad faith, or whether there was credible evidence of bad faith. It was the equivalent of not making a motion.

C. National Grange's statement of the case in its Brief is argumentative and incorrect in stating that the Defendants "filed answers generally denying any liability," and in other particulars.

National Grange's statement of the case in its Brief at 1 is argumentative and incorrect in stating that the defendants "filed answers generally denying any liability," and in other particulars. Again, National Grange ignores that there were defenses other than denial. The Clarks did not file what is generally referred to as a "general denial." As pointed out specifically in the Clarks' Appellants' Brief, they filed an answer specifically admitting and denying various allegations, asserting that National Grange breached its duties under the relationship, contending the

indemnity obligation was destroyed, and setting forth ten enumerated defenses. This was a contested case.

Further, contrary to National Grange's Brief at 1, the Clarks disputed that National Grange made payments and incurred expenses "in satisfying the principals' debts and obligations." The Clarks contended, among other things, that National Grange took unreasonable positions, engaged in useless litigation, prejudiced the Clarks' position by repudiating the bonds, disregarded the effect on the Clarks, and, in making any payments at all many years later, proceeded on its own.

National Grange mentions in its Brief at 2 that the trial court granted a directed verdict against defendants who failed to appear in the action. This is permissible as merely an account of the proceedings. It should be noted that this directed verdict was outside the presence of the jury, and the jury was never informed of this matter. The directed verdict was not binding on the parties who appeared and defended, and the parties against whom a directed verdict was entered never moved to reconsider, nor appealed. The directed verdict may present interesting perspective on the case, but has no effect on any issue in this appeal.

In its Brief at 2, National Grange states as a "given," that the verdict was grossly inadequate. As noted, National Grange has argued that the verdict was grossly inadequate, but it was not in fact grossly inadequate. It reflected the effect of the defense raised and tried by the Clarks. In fact, in its statement of the case, National Grange does not mention the presence of a defense by the Clarks at any point in the course of the trial, and first mentions the issue of the defense only in recounting the course of post-trial motions. Here lies the crux of the defects in National Grange's arguments. The Defendants presented a defense. National Grange's post-trial motions and appellate arguments defending new trial largely ignore the fact that there was a

defense presented, that the jury was charged on it, and that the jury's verdict was consistent with the charge.

D. National Grange's eight-page argumentative "statement of facts" is irrelevant to the extent not presented in the light most favorable to the Clarks.

National Grange's eight-page argumentative "statement of facts" is irrelevant to the extent not presented in the light most favorable to the Clarks. Under the standard of review for directed verdict, JNOV, and new trial, the evidence at trial is required to be viewed in the light most favorable to the nonmoving party. Melton. To state the facts in a selective and argumentative manner most calculated to favor the moving party is a failure to marshal pertinent facts and amounts to no more than a jury argument in a case where the jury has already returned a proper verdict.

E. The Trial Judge misapprehended the application of the Dillon case and consequently, the decision to grant a new trial was guided by this error, and must be reversed.

The trial judge misapprehended the application of Dillon v. Frazer, 383 S.C. 59, 678 S.E.2d 251 (2009). Consequently, the decision to grant a new trial was guided by this error, and must be reversed. Among other distinguishing factors, the Dillon case did not include a dispute of liability or a defense on the damages alleged to flow from that disputed liability. In the instant case, a defense to liability was presented and the "damages" alleged to flow from that disputed liability were also disputed. Dillon does not apply, despite National Grange's effort to undistinguish it by a partial characterization of the Clarks' argument in National Grange's Brief at 19.

F. The order signed by Judge Young in a different case with different evidence and different parties, which was still on appeal, was and is of very little significance.

The order signed by Judge Young in a different case with different evidence and different parties, which was still on appeal, was and is of very little significance. In its Brief at pages 6, 9, 10, 11, 13, 14, 15, 22, 25, 26, 27, 28, and 30, National Grange makes repetitive reference to an order in a different lawsuit. In fact, National Grange pulls much of its recitation of facts from this order, whose draftsman went unstated. However, this order was not binding on the Clarks, on the jury, or the Court in the instant lawsuit. The Clarks were not parties to this other lawsuit in which Judge Young signed an order. That order was appealed, not only by the opposing party, but National Grange itself, and the appeal was not resolved and was still pending at the time of the instant lawsuit.

The appellate papers -- assigning error to Judge Young's ruling in that case -- were not put into evidence. However, other evidence was presented in the instant case which allowed inferences and conclusions different from those in the order signed by Judge Young in the other case.

The order Judge Young signed in the other lawsuit has no more status, factually, or legally, than a record of what one other person thought about some, but not all, the facts of a different case. The order Judge Young signed was not binding on the jury in the instant case, or the parties. Interestingly, that order complimented and found against National Grange on one matter, which National Grange then cross-appealed.

G. Setoff/offset was not charged and provides no basis to blame the jury.

Setoff/offset was not charged by the Trial Judge in the instant case. The Trial Judge did not charge the jury that bad faith was a defense strictly in setoff or offset, and the jury therefore

cannot be faulted for not applying bad faith as a remedy with this exclusive mechanism of action.

In its Brief at 14-16, and again at 20, National Grange mentions or makes argument about “setoff” or “offset” approximately five times. National Grange does so in conjunction with other arguments in which National Grange, approximately 13 times, asserts that the bad faith defense depended upon the Clarks proving their own damages, rather than upon defeating National Grange’s claim that the Clarks were liable. In this vein, National Grange makes approximately 13 references to “the amount of Defendants’ damages,” “evidence of damages,” “specific dollar figures,” “the rule for recovery of damages,” or “proof of Defendants’ damages.”

Here, National Grange implies through repetition, but no authority, that bad faith operates strictly as an offset, in which specific damages must be demonstrated to have flowed from discrete granular instances of bad faith and are then offset against some static presumptive liability under the remainder of a contract. The judge did not so charge the jury. It would have been error to do so, particularly in light of the South Carolina Supreme Court’s statement that bad faith can only be used as a shield, and not a sword.¹

As explained in more detail in the Clark’s Appellants’ Brief, any questions about the mechanism of action of the bad faith defense are interesting, but not necessary to the disposition of this appeal in favor of the Clarks. Further discussion of the nature and mechanism of the

¹ The following authorities, for example, support the availability of the defense of bad faith as a total bar to recovery: Hawthorne’s, Inc. v. Warrenton Realty, Inc., 414 Mass. 200 (1993)(bad faith as total bar if materially related to relief sought); Associated Indemnity Corporation v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1997) (good faith as condition precedent, absence of which bars all relief); Hartford v. Tanner, 910 P.2d 872 (Kan. App. 1996) (circumstances of case required conclusion that “nothing was recoverable”); PSE Consulting, Inc. v. Frank Mercede and Sons, Inc., 838 A.2d 135 (Conn. 2004) (affirming jury verdict for nominal damages for surety accompanied by jury finding that principal had not breached indemnity agreement); and Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 376-377 (2001) (implying use as bar and citing Associated Indemnity). However, the trial judge did not charge total bar, and took pains not to, as previously discussed.

defense of bad faith is unnecessary, because the law which applies to this case and to the jury's discharge of its duties is the law that was charged, without exception, to the jury. It is the law of the case. The jury was not charged that bad faith operated as an offset to the extent that specific particularized damages flowed from specific instances of conduct. The jury was charged:

Now, under our law a principal may assert a surety's bad faith refusal to pay as a defense to indemnification. In order to prove this defense, the Defendant must prove the surety company refused to perform its obligations under the bond because of bad faith or unreasonable action, which is a violation of the implied covenant of good faith and fair dealing under the bond.

(Transcript, 4-8-09, R. p. 421, line 1 to p. 422, line 1.) There was considerable haggling over the charges, and National Grange took no exception to the manner in which the jury was charged.

As pointed out in the Clarks Appellants' Brief, the Trial Judge erred in National Grange's favor by declining to charge other language which he perceived might imply the need to apply the defense as a total bar to recovery. It is absurd to allow a party to request and receive a new trial by complaining about an alleged error which was made in that party's favor at trial.

H. There are differences among "no evidence," "no competent evidence," and "no credible evidence."

There are differences among "no evidence," "no competent evidence," and "no credible evidence." In its Brief at 14, and 21-24, among other instances, National Grange vacillates among distinct and often mutually exclusive assertions that there was "no evidence" of bad faith, that there was "no competent evidence" of bad faith, and that there was "no credible evidence" of bad faith.

National Grange's motions were limited to a bald, pro-forma assertion the there was no dispute as to liability or damages. There was no reference to bad faith and no marshaling of evidence. Where the Clarks argue that "insufficiency" (absence) of evidence of bad faith was not preserved by National Grange because not raised in directed verdict and JNOV motions, National

Grange presents an order which asserts, rather, that the evidence was not "credible evidence."

Where the Clarks argue that "credibility" was also not timely raised, National Grange argues there was "no evidence." Where the Clarks argue that the Trial Judge erred in making determinations about the "credibility" of evidence, National Grange argues there was "no evidence." See, e.g., National Grange Brief at 21-22.²

In National Grange's Brief, there are no less than four assertions that there was "no evidence." There are no less than three references to a lack of "competent evidence." There are no less than four references to the lack of "credible evidence."

Evidence comes in, and is therefore evidence to be considered, unless it is excluded at trial. See Rule 103(a)(1), SCRE. "No evidence" means that there is not any. Evidence is not "competent" if it could have been excluded on the basis of a total lack of perception, a total lack of memory, a total lack of ability to communicate, lack of oath or proscribed status on the part of the witness adducing it. Evidence is not "credible" if it is not believable. Believability is ordinarily the province of the finder of fact – here, the jury. Only in an extreme instance might an item of evidence be not believable as a matter of law.

The Clarks have pointed out in their Appellants' Brief, that National Grange did not preserve an argument regarding "absence of evidence" of bad faith, or "insufficiency of evidence" of bad faith, in National Grange's motions for directed verdict and JNOV. These issues were not preserved for a motion for new trial, were not made in the motion for new trial, and were not fair game in an order granting a new trial. It is too late to dress up or explain a challenge to the

² Here, National Grange also fails to rebut the fact that neither absence of evidence of bad faith nor credibility of evidence was raised by National Grange in its directed verdict motions, making these grounds unavailable in later motions. National Grange also contends that it raised the issue of absence of evidence of bad faith in its "Memorandum" and "during the hearing" of post-trial motions, rather than, as required, in a timely filed "motion." This is insufficient to preserve the issue.

sufficiency or existence of evidence by, instead of saying "no evidence," saying "no credible evidence," or "no competent evidence."

There cannot be both no evidence of bad faith, and evidence of bad faith which is not credible. If evidence is not credible, there must be some evidence which has that attribute. So there is not, "no evidence." Yet for a judge to usurp the province of the jury on questions of credibility, at least some identification and discussion of the evidence is required before such an act could even begin to be viewed a proper exercise of discretion. If, on the other hand, there is no evidence of a thing, it is a useless distraction to say that the nonexistent evidence is not "credible." Either way it swings, granting new trial was error.

I. Abbreviated arguments after a full statement of the scope and standard of review and statement of the facts do not constitute an abandonment of the issue argued.

Abbreviated arguments after a full statement of the scope and standard of review and statement of the facts do not constitute an abandonment of the issue argued. In its Brief at 17, 18, and 21, National Grange appears to argue that a half page argument without reiteration of all previously stated facts and unaccompanied by a citation of authority (or repetition of earlier-cited authority), is a per se abandonment of the issue argued. It can be stated without citation of authority that brevity in briefs, where feasible, is actually encouraged. It can also be stated without citation of authority that common sense and logic are likewise encouraged.

In the instant case, the Clarks have set forth in their Appellants' Brief, a comprehensive statement of the scope and standard of review, with copious citation of authority. The Clarks have also set forth not only a short statement of the case, but also a fairly extensive statement of additional facts, with citations to the record. In not repeating everything previously stated in their Brief, the Clarks did not intend to abandon any issue when discussing it. In not citing authority

on matters of logic or common sense, the Clarks also do not abandon their argument.

In its Brief at 17, National Grange contends the Clarks have abandoned one of the central arguments of this appeal, namely, that the Trial Judge erred in granting a new trial based upon the jury only awarding National Grange a partial recovery, when the Trial Judge intended for the jury to be able to only award a partial recovery. National Grange contends that the Clarks' argument was too short and lacked a statement of authority. This was a fact-based argument and the facts are set out at length in the preceding section applicable to all parts of the brief.

In its Brief at 18, National Grange similarly contends that the Clarks have abandoned their assertion that the jury did not fail to follow the court's instructions. Here, the Clarks again pointed out that the jury had been instructed that it could apply bad faith as a defense in the case, and the jury was not instructed to apply the defense on an all-or-nothing basis. The jury returned a general verdict rejecting approximately 99% of National Grange's claim of liability and damages. It is logic and common sense to conclude that a jury is not derelict when it does something it is told it can do and it does not do anything it is told not to do. Further iterations of this principle may do nothing to clarify it, and there may be no case stating a principle so clear and obvious.

In its Brief at 21, National Grange asserts that the Clarks have abandoned their objection to the Trial Judge's failure to discuss the credibility of the evidence. The order signed by the Trial Judge did not state there was no evidence of bad faith. The order signed by the Trial Judge stated there was no "credible evidence." The Trial Judge invaded the jury's province of determining matters of believability. Yet, in so momentous an act, the Trial Judge's order neither identified the evidence which the order alone determined was not credible, nor explained why the unidentified evidence was not believable. National Grange complains that the Clarks' discussion

of this error by the Trial Judge was not "adequate." National Grange also complains that the discussion does not contain a citation of authority. Issues of credibility are not usually assessed by case citation. They are assessed by reference to the facts – to the evidence – and an examination of what other facts might bear upon believability. In the instant case, a discussion of the facts, without citation of authority, would be perfectly proper. However, in this instance, the order signed by the Trial Judge four months after trial did not even state the evidence in question.

J. The evidence described by National Grange as "uncontroverted" or "unchallenged" was in most instances controverted and challenged by the Clarks.

The evidence described by National Grange as "uncontroverted" or "unchallenged" was in most instances controverted and challenged by the Clarks. In its Brief, National Grange makes frequent assertions that certain evidence it produced was "uncontroverted" or "unchallenged." Of the things National Grange contends were uncontroverted, the Clarks "controverted" most of them. The Clarks did not "controvert" that they signed the indemnity agreement and the Clarks did not controvert the fact that after stalling for six or seven years until Phoenix was out of business, National Grange paid or was getting ready to pay, some sums of money to settle litigation it had involved itself in.

The Clarks challenged, as not believable, National Grange's assertion that at any meaningful point it offered to pay over \$120,000 on the payment bond claim relating to Phase I of the building. This assertion was untenable because years later a judge had to order National Grange to do so, and National Grange appealed that portion of the judge's order. Confronted directly with its assertions, National Grange has alluded to conditional offers that it made at some point. See and compare National Grange's accounts in its Brief at 8 and 26, in which National Grange, without stating any of the other accompanying conditions attached to its generally alleged

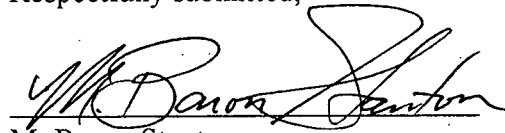
"offers," admits that it determined the claim on Building A to be "valid," but refused to pay it. National Grange refused to pay a valid claim because National Grange conditioned payment on relinquishment of a disputed claim. That is textbook bad faith. For other reasons adduced by the Clarks, failure to pay or forthrightly deal with the disputed claims on Building B was also bad faith.

Chitwood testified that he was unaware of any offers. Virtually every significant factual issue in the case has received a two-sided, inconsistent and equivocal response by National Grange: National Grange did not have a copy of the contract, but National Grange cited the contract in detail, discussed the contract, and incorporated it in its entirety into the bond by specific language; National Grange offered to pay on Phase I of the building, but after years, had to be ordered to do so; National Grange did not repudiate the bond but National Grange told opposing parties that if they persisted in asking for payment relating to Building B, National Grange would not pay on Building A; National Grange claimed as damages, that it "owed" over \$120,000 on the Building A payment bond claim, but National Grange simultaneously denied it owed the money and was appealing the issue at the time of trial; National Grange would not issue a bond with a penal sum over \$1,000,000 or which could ever result in exposure in excess of that sum, but National Grange received a claim from Bovis "on the performance bond for \$11,707,033" (National Grange Brief at 8); National Grange could never let its exposure under a bond exceed \$1,000,000, but National Grange could have payment and performance bonds outstanding on the same project at the same time with a cumulative exposure of \$2,000,000; National Grange could never have exposure under a bond for more than \$1,000,000, but National Grange would refuse to pay \$900,000, or even \$780,000, or even \$120,000; etc.

CONCLUSION

There were no grounds preserved on which National Grange could move for new trial. Even if there had been grounds available, they would have all been untenable. For the reasons stated in the Clarks' Appellants' Brief, none of which are abandoned, the order of the Trial Judge granting a new trial absolute should be reversed, with instruction to enter judgment on the jury's verdict in the case.

Respectfully submitted,



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ATTORNEY FOR APPELLANTS
RONALD AND SUSAN CLARK

Date:

April 1, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
S.C. Ct. App. No. 2010150106

National Grange Insurance Company Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and
Renee L. Graham, ... Defendants,

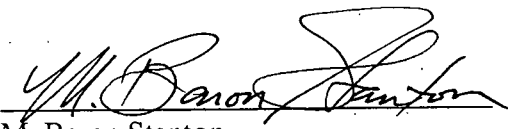
of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and
Susan F. Clark are Appellants.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on April 1, 2011,
served the foregoing Final Appellants' Reply Brief of the Clarks upon the Respondents by causing
copies thereof to be mailed with proper postage to the addresses indicated below:

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Mr. C. Brent Chitwood
Mrs. Linda N. Chitwood
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Irmo, SC 29063


M. Baron Stanton

*and also certify that the brief is identical to the
brief previously served except for correction of typos
and addition of references to the Record.*

APPENDIX DIVIDER

D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
S.C. Ct. App. No. 2010150106

National Grange Mutual Insurance Company, ... Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham Defendants,

Of Whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, and
Susan F. Clark, are Appellants.

RECORD ON APPEAL
(Volume 1 of 2)

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Order dated August 17, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

v.

Phoenix Contract Glass, LLC, C. Brent
Chitwood, Linda N. Chitwood, Ronald L.
Clark, Susan F. Clark, Henry H. Graham,
III, and Renee L. Graham,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) Civil Action No: 2007-CP-40-8435
)

) ORDER
) (POST TRIAL MOTIONS)
)

2009 AUG 17 AM 11:10
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

This matter is before the Court pursuant to Post-trial Motions filed by the Plaintiff, National Grange Mutual Insurance Company. For the reasons set forth below, the Motion for a New Trial Absolute is granted.

Procedural History

The case was tried to a jury beginning on April 6, 2009. The Plaintiff, National Grange Mutual Insurance Company, was represented by Francis M. Mack, Esquire and Emily R. Gifford, Esquire. Henry H. Graham, III had filed bankruptcy and was not present at trial. Renee L. Graham did not respond to the Complaint and default was entered as to her. She was not present at trial. Phoenix Contract Glass, LLC, did not respond to the Complaint and default was entered as to it. Phoenix was not present at trial. C. Brent Chitwood and Linda N. Chitwood appeared *pro se*. Ronald L. Clark and Susan R. Clark were represented by M. Baron Stanton, Esquire.

During the course of the trial, National Grange Mutual Insurance Company presented evidence that Defendants had executed a written Indemnification Agreement in favor of National Grange Mutual Insurance Company. National Grange Mutual Insurance Company presented damages of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) Dollars in the form of settlements of underlying lawsuits and expenses incurred in defending the underlying lawsuits.

At the close of the Plaintiff's case, the Court granted a directed verdict of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) Dollars as to Phoenix Contract Glass, LLC and Renee L. Graham since they failed to appear and presented no evidence in opposition to National Grange Mutual Insurance Company's claims.

The trial concluded on April 8, 2009. The jury returned a verdict of Ten Thousand and no/100 (\$10,000.00) Dollars as to C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and Susan F. Clark.

National Grange Mutual Insurance Company filed various Post-trial Motions in a timely manner pursuant to the Rules. It requested either judgment notwithstanding the verdict, a new trial, a new trial *nisi additur* or judgment pursuant to the Thirteenth Juror Doctrine.

Counsel for National Grange Mutual Insurance Company and the Clarks submitted extensive Memoranda on the legal issues and presented arguments on the Motions at a hearing on July 22, 2009.

Having considered the submissions of counsel and arguments presented, I find that the verdict in this case is irreconcilably inconsistent with the evidence presented at trial. The verdict goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations.

Accordingly, I grant National Grange Mutual Insurance Company's Motion for a New Trial Absolute.

Legal Analysis

National Grange Mutual Insurance Company presented damages of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) Dollars. This included a previous payment of Four Hundred Fifty Thousand and no/100 (\$450,000.00) Dollars to settle a Performance Bond claim, attorney and consultant fees of Three Hundred Seventy-two Thousand, Three Hundred Sixty-six and 41/100 (\$372,366.41) Dollars incurred in investigating and defending Payment and Performance Bond claims and a payment of at least One Hundred Fifty-four Thousand, Nine Hundred Sixty-six and 49/100 (\$154,966.49) Dollars to be paid on a Payment Bond claim.

The Defendants did not contest the amounts of the payments made, nor the reasonableness of the costs incurred. No testimony was offered in opposition to the damages presented.

The Defendants argued that bad faith may be a defense to a Surety's claim, pursuant to Master Clean, Inc., v. Star Insurance Company, 347 S.C. 405, 556 S.E.2nd 371 (2001). The Defendants, however, did not offer any credible evidence as to any bad faith by National Grange Mutual Insurance Company.

The Jury returned a verdict of only Ten Thousand and no/100 (\$10,000.00) Dollars when the undisputed damages were Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) Dollars. The Jury's verdict appeared to be the result of passion, caprice, prejudice or partiality, in that it is unsupported by the evidence. The Jury failed to follow the Court's instructions in returning their verdict.

National Grange Mutual Insurance Company should be granted a New Trial Absolute pursuant to Rule 50(b) and Rule 59 of the South Carolina Rules of Civil Procedure. The Defendants admitted execution of the Indemnity Agreement, and the Jury returned a verdict in favor of the Plaintiff.

The verdict in this case is irreconcilably inconsistent with the evidence presented at trial. The verdict goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations. *Dillon v. Frazer*, -- SC --, 678 S.E.2nd 251 (2009). ("The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this court will grant a new trial absolute.").

IT IS THEREFORE ORDERED that the verdict of the jury returned on April 8, 2009 is set aside and the Plaintiff, National Grange Mutual Insurance Company is entitled to a new trial.

IT IS FURTHERED ORDERED that judgment shall be entered as to Phoenix Contract Glass, LLC, and Renee L. Graham in the amount of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) Dollars.

AND IT IS SO ORDERED.

S/G. Thomas Cooper, Jr.
The Honorable G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

August 17, 2009
Columbia, South Carolina

Order dated November 13, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

National Grange Mutual Insurance Co.,

PLAINTIFF

vs.

Phoenix Contract Glass LLC,

DEFENDANT.

) IN THE COURT OF COMMON PLEAS

)

) FIFTH JUDICIAL CIRCUIT

) CASE NO. 2007-CP-40-8435

)

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)

ORDER

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 NOV 16 PM 2:26

RICHLAND COUNTY
FILED

After careful consideration of the record in this case and the Motion for Reconsideration by the State, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES the State's Motion for Reconsideration. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Presiding Judge, Circuit Court

November 13, 2009

Corrected order dated November 24, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
National Grange Mutual Insurance Co.,	)	CASE NO. 2007-CP-40-8435
	)	
PLAINTIFF	)	
	)	
	)	
vs.	)	
	)	
Phoenix Contract Glass LLC,	)	
	)	
DEFENDANT.	)	

**CORRECTED
ORDER**

RICHLAND COUNTY
FILED
2009 NOV 30 PM 1:51
JEANETTE W. McBRIDE
C.C.P. & G.S.

After careful consideration of the record in this case and the Motion for Reconsideration by Defendants, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES the Defendant's Motion for Reconsideration. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Presiding Judge, Circuit Court

November 24, 2009

Verdict dated April 8, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

NATIONAL GRANGE MUTUAL
INSURANCE COMPANY,

PLAINTIFF,

vs.

C. BRENT CHITWOOD; LINDA N.
CHITWOOD; RONALD L. CLARK;
SUSAN F. CLARK,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2007-CP-40-8435

VERDICT

RICHLAND COUNTY
FILED
09 APR 13 PM 2:20
JEANETTE W. McBRIDE
C.C.P. & G.S.

X We, the Jury, by unanimous consent, find for the Plaintiff against the
Defendants in the amount of \$ 10,000.00 (ten thousand dollars total)

- OR -

 We, the Jury, by unanimous consent, find for the Defendants.

(Check only one)

Wayne Z. Sells
FOREPERSON

4-8-09
DATE

PLEASE SIGN AND DATE THE VERDICT FORM AND INFORM THE BAILIFF.

Complaint dated December 17, 2007

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

v.

Phoenix Contract Glass, LLC, C. Brent
Chitwood, Linda N. Chitwood, Ronald L.
Clark, Susan F. Clark, Henry H. Graham,
III, and Renee L. Graham,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2007-CP-40-_____

COMPLAINT
(NON-JURY)

COPY

BARBARA A. SCOTT
C.C.C. & G.S.

2007 DEC 17 AM 11:15

FILED

Now comes the Plaintiff, National Grange Mutual Insurance Company ("National Grange"), Complaining of the Defendants herein alleges:

I. JURISDICTION AND VENUE

1. That Plaintiff National Grange is a corporation organized and existing under the laws of a State other than the State of South Carolina, with its principal place of business located in Keene, New Hampshire, and is authorized to conduct business in this State;

2. That Defendant Phoenix Contract Glass, LLC was at all times relevant hereto a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina;

3. That Defendant C. Brent Chitwood is a citizen and resident of Lexington County, South Carolina;

4. That Defendant Linda N. Chitwood is a citizen and resident of Lexington County, South Carolina;

5. That Defendant Ronald L. Clark is a citizen and resident of Lexington County, South Carolina;

6. That Defendant Susan F. Clark is a citizen and resident of Lexington County, South Carolina;

7. That Defendant Henry H. Graham is a citizen and resident of Richland County, South Carolina;

8. That Defendant Renee L. Graham is a citizen and resident of Richland County, South Carolina;

9. That Venue is proper in Richland County, South Carolina pursuant to South Carolina Code §15-7-30 because at least one Defendant resides in Richland County, South Carolina;

II. FACTUAL BACKGROUND

10. That the Plaintiff is in the business of (among other things) issuing surety bonds, known as payment and performance bonds for general contractors and subcontractors on construction projects;

11. That the Plaintiff requires construction companies and subcontractors and the principal officers and owners of such companies to execute an "Agreement of Indemnity" as a condition of issuing payment and performance bonds on behalf of the construction company;

12. That Brent Chitwood was a principal and owner of Phoenix Contract Class, LLC.;

13. That Ronald Clark was a principal and owner of Phoenix Contract Class, LLC;

14. That Henry Graham was a principal and owner of Phoenix Contract Class, LLC;

15. That the Plaintiff issued a Subcontract Performance Bond and a Subcontract Labor and Material Payment Bond at the request of the Defendant Phoenix Contract Glass, LLC for a sum of Nine Hundred Fourteen Thousand, Eight Hundred Thirty-Five and No/100 (\$914, 835.00) for

glass work to be performed at the Renaissance on Charleston Harbor condominium project located in Mt. Pleasant, SC;

16. That on or about February 16, 2000 Plaintiff entered into an Agreement of Indemnity with Defendant Phoenix Contract Glass, LLC. as Principal and Defendants C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham as Indemnitors and that the indemnity agreement was executed as an inducement to the Plaintiff to issue the aforementioned Bond.

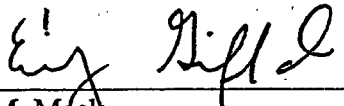
17. That under the Agreement of Indemnity the Defendants agreed to exonerate, hold harmless, indemnify and keep indemnified the Plaintiff from and against any and all claims, demands and liability for losses, costs and expenses of whatsoever kind of nature, including court costs, counsel fees, investigative costs, and from and against any all other such losses and expenses which the Plaintiff may sustain or incur:

- a. By reason of having executed or procured the execution of Bonds;
- b. By reason of the failure of the Defendants to perform or comply with any of the covenants or conditions of the Agreement of Indemnity;
- c. In enforcing any of the covenants or conditions of the Agreement of Indemnity;
- d. In making any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid bond premium in connection with any Bond;
- e. In prosecuting or defending any action or claim in connection with any Bond, whether Plaintiff at its sole option elects to employ its own counsel, or permits or requires Defendants to make arrangements for the Plaintiff's legal representation;

25. That the Plaintiff is entitled to contractual and/or equitable indemnification from the Defendants.

WHEREFORE, the Plaintiff prays that the court enter judgment on the Complaint for actual damages in an amount to be proven at trial, for prejudgment and post judgment interest on the Plaintiff's damages, for attorney's fees and costs and for such other and further relief as the Court deems just and proper.

Respectfully submitted,



Francis M. Mack
Emily R. Gifford
RICHARDSON PLOWDEN & ROBINSON, P.A.
S.C. Bar No. 3505
S.C. Bar No. 72785
1900 Barnwell Street
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEY FOR THE PLAINTIFF,
NATIONAL GRANGE MUTUAL INSURANCE
COMPANY

Columbia, South Carolina
Dated: December 17, 2007

Answer of the Chitwoods, dated January 15, 2008

RECEIVED

January 15, 2008

JAN 16 2008

Francis M. Mack
Richardson Plowden & Robinson
P.O. Drawer 7788
Columbia, SC 29202

Re: National Grange vs. Phoenix Contract Glass, LLC
Et Al 2007-CP-40-8435

FILED
08 JAN 24 AM 11:05
BARBARA A. SCOTT
C.C.C. & G.S.

Mr. Mack:

As an answer to the above named complaint by:

Phoenix Contract Glass, LLC
C. Brent Chitwood
Linda N. Chitwood

For any and all items where we claim no knowledge or do not specifically deny the item we do deny that item.

For each item number listed we answer:

1. We claim no knowledge.
2. Phoenix has not been an operating company since November, 2004.
3. Brent Chitwood is a resident of Richland County, SC
4. Linda Chitwood is a resident of Richland County, SC
5. We agree.
6. We agree.
7. We claim no knowledge.
8. We claim no knowledge.
9. We agree.
10. We agree.
11. We claim no knowledge.
12. We agree.
13. We agree.
14. We agree.
15. We deny this claim. We are not in possession of a copy of the Bond. We contend that the amount is incorrect.
16. We claim no knowledge and are not in possession of this document.
17. We claim no understanding of this document and are not in possession of this document.
18. We are not aware of such a requirement.
19. We claim no knowledge.

20. We claim no knowledge.
- 21.
22. We claim no understanding of this and are not in possession of this document.
23. We claim no knowledge. However, if payment was made, it was not with the approval, authorization or concurrence of the defendants completing this answer.
24. We claim no knowledge.
25. We claim no knowledge.

As a defense to the claim of Breach of Contract, we (Phoenix Contract Glass, LLC, C. Brent Chitwood and Linda N. Chitwood hereafter referred to as Phoenix) contend that National Grange defaulted on its obligations under the bond to pay Efco Corporation and by doing so prohibited the collection of the approximately \$1,100,000.00 account receivable from Bovis Lend Lease. That receivable would have then been assigned to National Grange, repaying them and relieving them of their payment bond obligations. Bovis repeatedly indicated in writing their willingness to make payment if the Lien from Efco was removed. This default by National Grange was a Breach of Contract and did irreparable harm to Phoenix Glass.

Furthermore, National Grange had an obligation to complete the work under the bond and hired a consultant to review the quality and percentage completion of Phoenix's work. National Grange determined in writing that Phoenix's work was installed in accordance with the plans and specs and that Phoenix was capable of completing all work according to the schedule provided by Bovis. National Grange defaulted on its' Completion Bond agreement. This default was a Breach of Contract and did irreparable harm to Phoenix Glass.

Furthermore, the bond described in this complaint only covers Building A. National Grange repeatedly and vigorously denied in court records the existence of any bond obligations for Building B. Any settlement for non-payment or non-performance under the bond described in this complaint for Building B were therefore not covered under the bond or any indemnity agreement. Efco records indicate that all materials for Building A were paid in full.

Phoenix denies any responsibility for non-performance on the project covered by this bond. All liability for materials determined to not be in accordance with the plans and specs were resolved by Efco corporation and were not the responsibility of Phoenix. All installation methods were in accordance with plans and specs with the exception of the work altered or directed by Bovis, where we contend they have accepted liability. The improper installation of the head attachment surfaces of the fixed window units (the lintels) were determined to be the primary cause of the leaks and damage to the building. It was determined that the leaks would have occurred regardless of the actions of Phoenix.

Phoenix contends that any payments that National Grange may have made were made without justification, authorization, concurrence or proper defense. The payments

were made solely to limit the perceived liability of National Grange and were not made under the terms and conditions of the Bond Agreement. We therefore deny any responsibility for these payments.

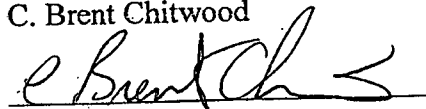
Sincerely,

Phoenix Contract Glass, LLC


By C. Brent Chitwood, Member

1-15-08
Date

C. Brent Chitwood



1-15-08
Date

Linda N. Chitwood



1-15-08
Date

Answer of the Clarks, dated February 14, 2008

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

v.

Phoenix Contract Glass, LLC, C. Brent
Chitwood, Linda N. Chitwood, Ronald L.
Clark, Susan F. Clark, Henry H. Graham, III,
and Renee L. Graham,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2007-CP-40-8435

**ANSWER OF DEFENDANTS
RONALD L. CLARK AND
SUSAN F. CLARK
(JURY TRIAL DEMANDED)**

Defendants Ronald L. Clark and Susan F. Clark answer the complaint as follows:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation not specifically admitted.
2. Defendants, upon information and belief, admit the allegations in Paragraphs 9, 10, 12, 13, 14, and 15 .
3. Defendants deny the allegations in Paragraphs 2 (in the respect that Phoenix is out of business), 3-6, 18, and 23-25.
4. Defendants lack knowledge sufficient to form a belief as the truth or falsity of, and so deny, Paragraphs 1, 7, 8, 11, 16, 17, 19, 20, and 22.

FOR A SECOND DEFENSE

5. Upon information and belief, Plaintiff breached its obligations under the relationship, in that it failed to timely pay on the payment bond, and caused Phoenix to fail to collect a draw, and consequently go out of business. This cost defendant Ronald Clark his entire

investment in Phoenix and his livelihood.

6. Upon information and belief, Plaintiff further breached its obligations under the relationship, in that it failed to timely pay on the payment bond, and consequently failed and continues to fail to prosecute in its own right, the contractual claim of Phoenix against Bovis for payment of a substantial draw due under Phoenix's subcontract with Bovis. This draw was payable upon payment of EFCO. This claim is for more money than Plaintiff is seeking in this action.

7. Upon information and belief, Plaintiff failed to perform under the performance bond or failed to timely so perform, causing its own damages to the unfair prejudice of defendants, or else paid a settlement Plaintiff should not have paid.

8. Upon information and belief, in the alternative to some of the foregoing allegations, Plaintiff has no valid indemnity claim as a result of not having issued any bond coverage for the matters complained of.

9. Upon information and belief, the settlements reached in related litigation and the payments made and costs incurred were without the concurrence of Phoenix or these defendants, and in dereliction of duties to same, or in the alternative, were a full resolution and extinguishment of all claims made by Plaintiff herein.

FOR A THIRD DEFENSE

10. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

11 Plaintiff is barred by its own breach, and by setoff, recoupment, and damages sustained by Phoenix and these defendants.

FOR A FOURTH DEFENSE

12. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

13. Plaintiff is barred by its failure to mitigate its own damages.

FOR A FIFTH DEFENSE

14. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

15. Plaintiff is barred by laches, waiver, estoppel, and unclean hands.

FOR A SIXTH DEFENSE

16. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

17. Plaintiff is bared by its failure to do equity to Phoenix and these defendants.

FOR A SEVENTH DEFENSE

18. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

19. Plaintiff is barred by res judicata, issue preclusion, and claim preclusion.

FOR AN EIGHTH DEFENSE

20. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

21. Plaintiff is barred by the applicable statute of limitations.

FOR A NINTH DEFENSE

22. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

23. Plaintiff is barred, unless it produces authentic signed writings, by the statute of frauds.

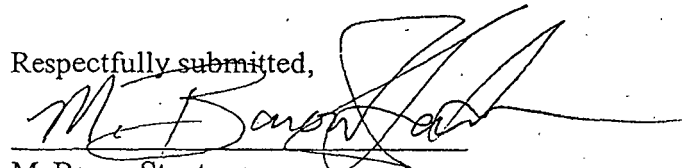
FOR A TENTH DEFENSE

24. The allegations of Paragraphs 5, et seq., to the extent not inconsistent with the following, are incorporated herein by reference.

25. The defendants preserve any other defenses which may become apparent as this matter is investigated.

WHEREFORE, these defendants pray that the action as against them be dismissed with prejudice and that they be allowed their costs and any other and further relief, including damages, as may be just and proper.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
P. O. Box 245
Columbia, SC 29202
803-929-1484

Attorney For Defendants
SUSAN F. CLARK and
RONALD L. CLARK

Date: 2/14/08
Columbia, South Carolina

Transcript of trial for April 6 and 7, 2009: Title page, 32-208, and 212-285.

State of South Carolina)
)
County of Richland)
)

National Grange,
Plaintiffis

vs.

Common Pleas
07-CP-40-8435

Phoenix Glass,
Defendants

April 6th & 7th, 2009
Columbia, S.C.

Before The Honorable G. Thomas Cooper, Judge.

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

Mr. Francis M. Mack, Esquire
Ms. Emily R. Gifford, Esquire
Mr. M. Baron Stanton, Esquire
Mr. Brent Chitwood, pro se

Margaret T. Sullivan,
Court Reporter

1 THE COURT: Well you disagree with me that
2 Mr. Chitwood may be able to use that for
3 impeachment purposes?

4 MR. MACK: That would be appropriate, Your
5 Honor. But not introduced as an exhibit.

6 THE COURT: All right.

7 MR. MACK: As evidence. If we could get
8 another copy so that I would have something to
9 look at.

10 THE COURT: Well maybe by tomorrow you may
11 be able to figure out. We will run a copy and
12 make available to you.

13 MR. MACK: Thank you, Your Honor.

14 THE COURT: Counsel, are you ready?

15 MR. MACK: Yes, Your Honor.

16 MR. STANTON: Yes.

17 THE COURT: Mr. Chitwood, do you
18 understand you have the right to make an opening
19 statement to the jury if you wish to do so?

20 MR. CHITWOOD: Yes, sir.

21 THE COURT: Bring the jury please. You
22 may swear the jury.

23 (Whereupon, the jury is sworn.)

24 THE COURT: Let me take just a few minutes
25 to talk to you and explain a little bit about the

1 procedure. What I want to talk to you about is
2 sort of introducing of the case. This is not a
3 charge or explanation of the law as it applies to
4 this case. I will to talk to you about that at
5 the end of the trial before you retire to your
6 jury room to decide the case. But I do want to
7 talk about -- a little bit about the procedure we
8 will follow so you will have a better
9 understanding of what is happening from time to
10 time during the course of the trial. Now you have
11 been selected as fair and impartial jurors whose
12 purpose it is to find and the determine the facts.
13 You are the sole judges of the facts in this case.
14 If at any time I make any comment regarding the
15 facts you must disregard those comments. You are
16 to determine the facts from the testimony you hear
17 and any other evidence that's presented during the
18 course of the trial. It's especially important
19 that you perform your duty diligently and
20 conscientiously, because ordinarily there is no
21 way to correct an erroneous determination of the
22 facts by a jury. When you comply with your oath
23 to impartially determine the facts in the case you
24 will have fulfilled your duty as jurors and no one
25 will have the right to criticize your verdict. On

1 the other hand and with equal emphasis, the same
2 law that makes you the judges of the facts makes
3 me the judge of the law. The law as I explain it
4 to you, is the only law you may consider. You
5 must accept it and follow it even though you may
6 disagree with it. I cannot you tell what the
7 facts are. You should not disagree with me about
8 the law is, or what the law ought to be.

9 Your job is to take the law as I explain
10 it to you, and apply it to the facts as you find
11 it from the testimony of the witnesses and any
12 other evidence that is presented during the course
13 of the trial. And after doing that, you will
14 render your verdict a true and just verdict under
15 the solemn oath you just took as jurors.

16 The procedure that we will follow is
17 basically that the Plaintiff will present its
18 evidence first to you in the form of witnesses,
19 testimony and or exhibits that will be made a part
20 of the record. When I say a part of the record,
21 it's a record that you will have with you when you
22 go to the jury room. A permanent record is made
23 of everything we say and do during the course of
24 the trial.

25 The Defendant will then have the

1 opportunity to present its defense as to her
2 defense, his or her defense as the case may be.
3 And following that, the attorneys will be allowed
4 to sum up their case, and I will instruct you on
5 the law of the State of South Carolina as it
6 applies to this case. After that, the case will
7 be turned over to you for a decision. And until I
8 advise you to begin your deliberations, I am going
9 to ask you again, you must not discuss this case
10 with anyone. Including your fellow jurors,
11 friends, family members or anyone involved in the
12 case. After the case is submitted to you, you
13 must discuss it only in the jury room with your
14 fellow jurors. It is important that you keep an
15 open mind and not decide any issued in this case
16 until all the evidence has been presented, the
17 parties have made their closing arguments, and I
18 have instructed you on the law as it applies to
19 this case.

20 Now from time to time during the course of
21 the trial, you may hear one of the attorneys
22 say something like, "I object." I am sure you
23 have seen that sort of thing if you watch any
24 courtroom shows on television that sort of
25 thing. I always tell jurors the attorneys are

1 not trying to hide anything from you. They are
2 merely following the rules of the road. What
3 we call rules of evidence that govern all
4 trials and all courtrooms in this State.
5 Basically what is happening is that one side or
6 the other is asking the court to rule on
7 whether if not one -- the other party may have
8 violated one of these rules either
9 intentionally or inadvertently.

10 Also from time to time during the trial,
11 you may hear one of the lawyers say something
12 like, "Your Honor, I believe we have a question
13 of law or a matter of law to discuss with you.
14 Or may we approach the bench." Or sometimes I
15 myself might find it necessary to ask you to
16 leave the courtroom while I discuss these
17 matters with the attorneys. The reason for
18 this is because you are judges of facts in this
19 case. Sometimes when I am discussing matters
20 of law with the attorneys, it may be necessary
21 for me to make some comment about the facts in
22 the case in connection with the ruling. And
23 whether a particular law applies or doesn't
24 apply. I am not supposed to tell you what the
25 facts are. So the practice is to excuse you

1 from the courtroom while these discussions take
2 place so that you will not be influenced by
3 anything that I say or do in connection with
4 the facts of the case.

5 In determining what the true facts are,
6 you must decide whether or not the testimony of
7 these witnesses is believable. It is not -- it
8 will be my responsibility to rule as a matter
9 of law whether they are admissible; that is,
10 whether it comes in to court. But once the
11 testimony is admitted whether you believe it is
12 entirely up to you. In deciding whether to
13 believe a witness, you have the right to
14 consider whether the witness has an interest in
15 the outcome or the result of the trial.
16 Whether the witness is prejudice towards either
17 the plaintiff or defendant, the opportunity for
18 the witness to have seen the matters and things
19 about which they testified. And the way the
20 witness acts on the witness stand. You have a
21 right to consider anything that will be in this
22 record that will help you evaluate the
23 testimony of these witnesses. That means that
24 it is your duty to pay close attention to the
25 witnesses, observe the witnesses and the

1 attorneys. Don't let your thoughts wander, but
2 pay strict attention to the testimony so at the
3 end of the trial you will be able to determine
4 what the true facts are and to apply the law to
5 those facts and render a true and just verdict.

6 Now, Mr. Foreperson, it will be your duty
7 to preside here in the courtroom; to be the jury
8 spokesperson here in Court and write the verdict
9 if that becomes necessary. Ladies and gentlemen,
10 thank you for your kind attention. I trust you
11 will give you the same kind of attention to the
12 attorneys and the parties in this case. We will
13 now begin with opening statements.

14 MR. MACK: Thank you, Your Honor. May it
15 Please the Court, Ladies and gentlemen of the
16 jury, first of all, I want to thank you for taking
17 the time to be on jury duty today and this week.
18 What you are doing as you've heard Madam Clerk
19 earlier this morning say, it's one of the most
20 important things you can do as citizens. You are
21 here to help us resolve disputes and this is the
22 one of the great things of the American Justice
23 System that you take time out from your every day
24 ordinary lives away from your jobs, away from your
25 families, and come here and participate. You are

1 the most important people in the courtroom during
2 this trial. And I just want to thank you on
3 behalf of my client for your being here.

4 First, by way of introduction, we met
5 earlier. I am Frank Mack. I practice law here
6 in Columbia. And with me is Emily Gifford.
7 She is an attorney in my office. She will be
8 helping some during the trial. Mr. Cinq-Mars
9 is down from New Hampshire, where National
10 Grange Mutual is located. Now this case is
11 going to sound pretty complicated. First of
12 all, my client is National Grange Mutual
13 Insurance Company, but it is not about
14 insurance. Insurance has nothing to do with
15 this case. It's about construction bonds.
16 We'll hear about a project known as Renaissance
17 on Charleston Harbor. It's located obviously
18 down in Charleston.

19 It's a very nice project. High rise.
20 There are two buildings involved. There are 50
21 condominiums in each building. What we will be
22 talking about during the trial is the windows.
23 And there are different types of windows.
24 There are bay windows. There are sliders.
25 There are sliding glass doors with transoms

1 above them. You will probably hear some talk
2 about that. It will all seem fairly
3 complicated. Just to help you through, as you
4 may be thinking about these things, these bay
5 windows are the ones that kind of stick out
6 from the building. Kind of a triangular shape
7 more or less.

8 There are sliding glass doors that are on
9 the porches with transoms above them. And one
10 of what is called sliders or punch windows are
11 these small windows that are just stuck in the
12 wall. So you will hear talk about this project
13 which again will sound complicated. You will
14 hear about the work at Phoenix Construction
15 Company, a blazon or glass subcontractor did on
16 the property. You will hear about some other
17 lawsuits. This is one of a number of -- this
18 is the only one of this particular type. But
19 there were problems with the construction
20 company, with payments, with getting the job
21 done, getting it done right. You will hear a
22 lot about that. You will hear some terms that
23 you are probably not familiar with. Some terms
24 like payment bonds, performance bonds,
25 Indemnity Agreements, shop drawings, a lot of

1 things relating to construction.

2 All of this will sound complicated. But
3 this case is really a simple case. At the end
4 of the trial you will need to answer basically
5 one question. The question you will need to
6 answer is, when you're in a business involving
7 hundreds of thousands of dollars and you agree
8 to do so something, should you be required to
9 do it. It's a pretty simple question, and it
10 will be up to you to decide what the answer to
11 that question is.

12 Now some background in this case.

13 Phoenix, you've heard that name. Phoenix
14 Contracting is not here at present. They are in
15 what's called default. But they are still a party
16 to the case, and some of the owners are here or for
17 some reasons you will come to understand.

18 But Phoenix was a company involved in
19 installing glass, glazing, putting in sliding glass
20 doors. On large commercial projects; such as, The
21 Renaissance. The general contractor for that
22 project was a company known as Bovis Lend Lease.
23 Bovis is an international construction company.
24 They have offices in the Southeast. All over the
25 U.S. In fact, their home office is in Australia.

1 They have been bought and sold around. So this was
2 a major construction project.

3 Phoenix entered into a subcontract with
4 Bovis to install the glass on the building. The
5 bay windows. The punch windows, the sliding glass
6 doors, transom. Any of the glass that you see when
7 you look at these photos, that would have been
8 installed by Phoenix. And you can see there is a
9 lot of glass. This is on the harbor down in
10 Charleston. They wanted to have a project that you
11 could enjoy with views out across the marshes and
12 the harbor.

13 So Phoenix were the subcontractors of the
14 glass on the project. Their contract, original
15 contract, was for one of the two buildings. That
16 was \$915,000. So you can get a sense of how large
17 this project was with just the glass. Just the
18 windows was almost a million dollars. A little less
19 than a million dollars, and that may come in to play
20 at some point.

21 Now under the contract, Bovis had the
22 right to add a second building to Phoenix Contract
23 Building B provided that it was done by a certain
24 day. There was a deadline for that to happen. Now
25 in order for Phoenix to get the subcontract, to be

1 awarded the subcontract, they have to provide what
2 are known as payment and performance bonds. Now
3 these payment bonds or contract bonds, they are
4 provided by bonding companies; such as, National
5 Grange.

6 The bonds are to give the owners or give
7 the general contractors in this case some assurance
8 that things will go smoother on the job. If you
9 have been around construction, you know that most
10 construction projects, especially the ones like
11 this, everybody doesn't prefer to it, but the bonds
12 are to give some assurance that there will be fewer
13 problems. There are two types of bonds. The first
14 is a payment bond. The payment bond simply says if
15 Phoenix does not pay its suppliers then the third
16 party, the bonding company, National Grange will
17 step in and pay those suppliers. The second type
18 of bond is a performance bond. And as the name
19 implies, it is to help ensure the performance of
20 Phoenix of the subcontracting on the property. So
21 if Phoenix doesn't perform its contract according to
22 its terms, then National Grange as the bonding
23 company, can be called on to come in and complete
24 the work or do what is necessary to fulfill the
25 contract.

1 Now in order for the company such as
2 Phoenix to get these payment and performance bonds,
3 since National Grange the bonding company, to
4 guarantee or insuring or helping to assure that
5 certain things will be done, the bonding company
6 requires the contractor or Phoenix to sign what is
7 called an Indemnity Agreement. And you heard that
8 term in the voir dire. The Indemnity Agreement is
9 pretty straight forward. That's what this case is
10 about. About the Indemnity Agreement.

11 The Indemnity Agreement says that if the
12 bonding company has to step in and make any payments
13 whether it is under the payment bond or the
14 performance bond then the subcontractor Phoenix,
15 will reimburse National Grange for any payments that
16 it may have to make.

17 In addition to having the company sign the
18 Indemnity Agreement, the bonding company also gets
19 the owners of the company and their wives to sign
20 the agreement. That if the bonding company has to
21 pay anything on behalf of Phoenix and on behalf of
22 the construction company then the owners and their
23 families will reimburse National Grange. The reason
24 for this is to discourage the owners of the company
25 if they see problems are coming from shifting money

1 around or moving it somewhere to try to avoid paying
2 what they should be paying.

3 So this case is about an Indemnity
4 Agreement that was signed by Phoenix and by the
5 three owners of Phoenix and by their wives. The
6 three owners of Phoenix, Brent Chitwood is here
7 today. Mr. Clark you met earlier. Henry H. Skip
8 Graham. Mr. Graham is not here. They were -- the
9 Indemnity Agreement was signed by their wives. And
10 Mr. Chitwood is here. Mr. Clark is here. Again
11 Renee Graham, the wife of Skip Graham is not here.

12 So the indemnification agreement was
13 signed by all the appropriate people. This was
14 somewhat in advance of National Grange actually
15 issuing the bonds for this particular project. But
16 it issued some bonds for other projects. And you
17 will see this Indemnification Agreement. It's
18 marked as an exhibit. You have a chance to take a
19 look at it and see what the terms are. And now
20 going to the project itself, it got started back
21 around the 99, 2000, 2001, time frame. And It got
22 off to kind of a rocky start. The developers were
23 slow getting all the plans from the architect.
24 Really getting everything in apple pie order. There
25 were a number of plans. And again you can imagine a

1 project this big, the design that goes in to it.
2 And this building itself is cast in place in
3 concrete. So we got a concrete frame. All the
4 systems that you normally see..

5 So there was some confusion regarding the
6 set of plans that should be used for the windows.
7 It started off with one set of plans. And then
8 there was some changes in the windows, and getting
9 all that taken care of. Everything kind of got
10 behind the curve, so to speak. In addition, Bovis,
11 the general contractor, missed the deadline for
12 adding Building B to the contract. There is a
13 dispute over that. This project needless to say,
14 got off to a rocky start, and it never got much
15 better as time went along.

16 During the course of the project, Phoenix
17 disagreed with Bovis about how much it should be
18 paid. From a construction project you typically
19 have monthly draws so that each month when the
20 contractor does some work, they are paid for that
21 work. The work progressed but not smoothly. And
22 because of the variety of reasons, Phoenix failed to
23 pay its main supplier a company by the name of Efco.
24 And that's just apparently an abbreviation for
25 something. It's Efco. It's pronounced Efco. Efco

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1 notified Bovis that they weren't being paid, and it
2 was a fairly significant amount of money. About 700
3 and something thousand dollars for the glass parts.
4 The actual glass. And the way these windows are put
5 together, the window frame is made of aluminum. And
6 it's put together in a couple different ways. Some
7 of the units come and you just stick them. Others
8 are actually built on the site. Pieces cut up to
9 fit. And then the glass stuck in there.

10 So Efco notified Bovis and ultimately
11 notified, of course, Phoenix knew about it. But
12 notified National Grange that it wasn't being paid.
13 At the point when things really heated up, so to
14 speak, Efco was owed about \$120,000 on Building A.
15 Then about \$650,000 on Building B. And then
16 \$700,070 on the two buildings. Again, it is
17 important to remember Building A. Much less is owed
18 on it. The work was further along.

19 This is the point that National Grange got
20 involved. Efco had sent a letter to National Grange
21 demanding payment of the full \$772,000 for both
22 buildings. Also at this point because of the
23 financial concerns, Bovis became concerned that
24 Phoenix may not be able to complete its work.
25 Complete it's contract on the building. So at this

1 point their concerns had become under the payment
2 bond because Efco wasn't being paid. And concerns
3 that it fall under the performance bond because
4 Bovis was concerned that Phoenix may not be able to
5 finish or complete its work.

6 One of the issues that have been flowing
7 through this whole dispute for a number of years
8 actually going back to around 2003, is whether the
9 bonds issued by National Grange covered just
10 Building A, just the original contract or did it
11 cover Building A and Building B. In any event, once
12 National Grange was advised that there might be
13 concerns both about the performance bonds and the
14 payment bond, they hired a consultant to come in.
15 There was no question that Efco hadn't been paid.
16 The information was slow coming. The documentation
17 was slow coming. But it was pretty apparent that
18 they hadn't been paid everything.

19 But the consultant determined, and this is
20 the consultant hired by National Grange determined
21 that Phoenix should be able to complete the work.
22 National Grange reviewed the payment claim and
23 determined that bonds issued only covered Building
24 A. They offered to pay Efco. National Grange
25 offered to pay Efco. We issued bond on building A

1 to pay the amounts due on Building A, which is
2 \$120,000. Efco refused. They wanted the full
3 \$700,700 or so that they were owed for materials.
4 So that was in dispute.

5 National Grange offered to pay. Efco
6 wouldn't accept it. Efco filed suit against
7 National Grange. And against Phoenix. This was in
8 2003. The case was finally tried down in Charleston
9 in 2008. A case was sort of like this. It was
10 nonjury. Just had a judge rather than a judge and a
11 jury. But the judge heard all of the evidence just
12 the way you would do. Listen to witnesses, review
13 documents. And after he did all that, he made the
14 decision and determined that bonds only covered
15 Building A. National Grange's position back in
16 2003, was correct. They owned money on Building A,
17 but not on Building B.

18 The Judge ruled that Efco was entitled to
19 the \$120,000 which again National Grange had offered
20 to pay some time earlier. Plus interest from the
21 time it first came up, so the Judge ordered that.
22 He also ruled, and you have will have copy of the
23 order when you go back as an exhibit after the
24 trial. He also ruled that Phoenix owed Efco the
25 full amount on both buildings. So that case was

1 tried. After the trial once again National Grange
2 offered to pay the full amount that the judge said
3 they should pay which was the amount on Building A.

4 Efco refused and filed an appeal. And
5 that appeal is still standing. But it's still
6 proceeding up to the Supreme Court. Efco is still
7 contending they should -- that National Grange
8 should pay on both buildings not just on Building A.
9 So that's one of the things you are going to hear
10 more about as we go through the trial today.

11 Now jumping back a bit, that takes care of
12 the payment bond issues. Jumping back a bit, the
13 buildings were completed, I think in 2002. Sometime
14 in the early 2000. Shortly after the owners moved,
15 there were complaints about the windows. These
16 windows are what are called thermal windows that
17 have double panes. Two pieces of glass in each
18 window. And then in between those two pieces of
19 glass, there is a film, a reflective film, to keep
20 out ultra violet rays. Cut down on the sun and what
21 not, that come in through the windows. There were
22 spots. There were a number of problems with the
23 glass that Phoenix had supplied on the building.

24 In addition, there were concerns about
25 condensation on the metal parts. At certain times

1 and under certain conditions on the inside of the
2 windows, you get water droplets or condensation
3 forming like a fog or something. And some times
4 it's pretty severe. Efforts were made to try to
5 figure out what was going on, but nothing really
6 much happened until around 2004, when tropical storm
7 Gaston came through. This wasn't hurricane
8 strength, but it was pretty strong, and pretty high
9 winds. There were lots of leaks on the building. A
10 fair number of them around the windows. So
11 obviously the homeowners were upset getting water in
12 to their units; in to their homes.

13 As a result of that, and some of the
14 earlier problems had come up. The homeowners had
15 sued the general contractor Bovis. And actually
16 there were four separate lawsuits filed by
17 individual homeowners. There was a Class action.
18 It had gotten pretty heated, pretty procedurally.
19 Again, complicated because of all the problems on
20 the building.

21 Bovis being a very large, well financed
22 company, they realized they had some serious
23 problems. They settled with the homeowners and
24 basically said, we will repair the building. What
25 repair involved again, this is, the way these

1 buildings are built, what repair involved, again
2 just looking, the way the buildings are built, the
3 one that have concrete frame, which you can't see.
4 But there is some stucco down on the lower levels
5 that is brick. These darker areas, all that is
6 brick.

7 And, of course, the windows in it, you
8 can see on this side of the building, there is a
9 little more brick than on the front side. What
10 Bovis did was go in and completely take the complete
11 skin off the building. All the stucco, all the
12 bricks, all the stuff under it. It was a major,
13 major undertaking. And also while doing this, they
14 discovered or confirmed, or whatever term you might
15 want to use, that the bay windows, and I pointed
16 these out earlier, are the ones that kind of stick
17 out. Many of those were simply built with the wrong
18 material.

19 These metal pieces are supposed to have
20 kind of like a little insulated between the inside
21 metal and the outside metal, so that you don't get
22 the cold moving in and out. And this is part of
23 what was causing the condensation; as well as the
24 other problems. So the bay windows had to be
25 completely replaced. The sliders and the transoms

1 over the sliding glass door. Some work had to be
2 done on that. As well as some brick work.

3 There was a lot, a lot of work that was
4 done. So Bovis sued all the subcontractors on the
5 project. Brought everybody in to a lawsuit. Bovis
6 said we are going to spend a lot of money to correct
7 this problem. A lot of it is due to subcontractors.
8 We are using you to collect that. They sued the
9 subcontractors including Phoenix, and sued the
10 subcontracting bonding companies including National
11 Grange. Bovis spent over 13 million dollars on the
12 repairs. So it was a pretty significant repair
13 process for them.

14 Now focusing more on the windows at this
15 point, realizing there was a lot of other work, not
16 just the windows. But they claimed direct cost
17 related to replacing the bay windows, repairing all
18 the other windows, taking care of all the problems.
19 To some 5.8 million dollars. In addition to those
20 direct costs, they were claiming additional costs
21 for the project superintendents, for the scaffolding
22 you would have to use to get up to work on the
23 exterior skin of the building. The job site costs.
24 They pretty much threw in everything they could
25 think of in to that lawsuit.

1 Bovis' lawsuit, they were -- you can
2 imagine the number of subcontractors involved, which
3 meant a number of lawyers involved. In any event,
4 it was finally settled. As part of that settlement,
5 first of all, Bovis' claim for repairs covered both
6 buildings. They didn't really keep Building A
7 separated from Building B. The nature of the
8 repairs were the same on both of them. Some
9 differences, but nothing really significant. Bovis'
10 claims covered both buildings since National Grange
11 was sued as a Defendant in that case.

12 It ultimately settled and with Bovis under
13 the performance bond claim for \$450,000. This was
14 to resolve claims as to Building A as to National
15 Grange. Phoenix had its own attorney during that
16 whole process, and it settled separately, a fairly
17 significant sum of money.

18 Now going to the core of this case, is the
19 Agreement of Indemnity. You will see when you have
20 a chance to look at the documents, one of the terms
21 of the agreement; is that, the defendants agreed to
22 pay National Grange, reimburse them for any monies
23 that it spent in connection with issuing any bonds.

24 So just to give you the overview on that,
25 to settle the Bovis case, National Grange paid

1 \$450,000. As to the Efco claim under the payment
2 bond, the judge has ruled that National Grange
3 should pay \$154,000 which it has offered to do, but
4 Efco would not agree to it until the appeal is
5 finalized. In addition to paying these amounts and
6 being required to pay these amounts, it spent money
7 on consultants to go down to investigate, to
8 determine when the building would be complete. And
9 then once the problems after Hurricane Gaston came
10 through, to determine what those problems were. So
11 It spent money on that.

12 It spent money defending the lawsuit, the
13 Efco lawsuit. And the Bovis lawsuit. Under the
14 Agreement of Indemnity, the defendants once again
15 agreed to reimburse National Grange for any
16 expenses; such as, consultants and attorneys and the
17 expenses that it incurred.

18 And so all of this is very complicated.
19 And during the trial, there are going to be a lot of
20 things that you will hear. It will sound very
21 complicated, but it's really a simple case. And the
22 question that you will need to answer "When you are
23 in business involving hundreds of thousands of
24 dollars and sign an agreement to do something,
25 should you be held accountable for what you agreed

1 to do?" So it sounds complicated, but it really is
2 very simple. Thank you very much.

3 THE COURT: Mr. Stanton.

4 MR. STANTON: Ladies and gentlemen, I am
5 Barry Stanton. I live and practice here in
6 Columbia. And I am the representing Mr. and Ms.
7 Clark. Ms. Clark is the lady with me. Mr. Clark,
8 Mr. Ronnie Clark, is one of the owners of Phoenix
9 Contract Glass. And Ms. Clark is the wife. And
10 that is the nature of her involvement in this
11 matter. And I too would like to thank you briefly
12 for being here. I personally think that the space
13 of life and the details we all have, it is picking
14 up to the point where it's harder and harder on
15 people to be here. But it's the best system in
16 the world. And it is not perfect. We appreciate
17 your being here to help us resolve it.

18 Without further ado, let me tell you about
19 the other side of the story. Essentially now
20 that you have a pretty good understanding of
21 the mechanics of the surety, and Phoenix will
22 be called the principal of the surety
23 arrangement. You heard about a payment bond,
24 and a performance bond. It is kind of a
25 three-part agreement. You have to -- you may

1 hear people referred to by different names.

2 But here are some that are sometimes used. One
3 person goes to the surety. In this case, a for
4 profit surety. They are in this as in any
5 business to make money.

6 They go to the surety and they tell the
7 surety, I need a bond. The surety issues a
8 bond to a third person giving them an
9 assurance, a bond, a promise to stand for
10 something, or to do something. To be
11 accountable for something. And the parties are
12 sometimes described as the principal, which in
13 this case would be Phoenix who goes to the
14 surety which would be National Grange. And the
15 surety National Grange, issues the bond in
16 favor of a third party, sometimes called a
17 beneficiary. In this case, the general
18 contractor, Bovis Lend Lease, was the
19 beneficiary of those bonds. And in kind of a
20 strange sort of way with the payment bond.
21 Although issue Bovis is actually nearer to the
22 benefit of suppliers and people like that if
23 they ever claim they haven't been paid on the
24 job. Because if somebody doesn't get paid, it
25 causes a problem all around and that's what

1 everybody is trying to avoid.

2 So what we have is Phoenix the principal,
3 goes to National Grange the surety, and asks
4 National Grange to insure the bond. National
5 Grange Mutual Insurance Company in this
6 instance, is ^{n't} an issuing insurance per se. We
7 are talking about a bond, surety work. So they
8 do charge a premium for that. So they are in
9 this to make money. And they so in return for
10 the money and the other things they issue the
11 bond. In order to get them to issue the bond,
12 Phoenix signs an agreement that says: "What
13 you spent under this bond, what you've already
14 spend under this bond, we will pay you back for
15 it if and when you are ever called upon." And
16 of course everybody hopes from the beginning
17 there will never be any cause to go to National
18 Grange and ask them to do anything.

19 So National Grange makes its money by
20 collecting premiums and looking at the risk.
21 And then, you know, you hope there are a lot of
22 jobs that go well where they're never called
23 upon to do a darn thing. But every now and
24 then, something happens where the surety is
25 called upon and that's the purpose of the bond.

1 Phoenix signs an Indemnity Agreement that says
2 if you it will issue this bond, we will pay you back.
3 And you will probably see the Indemnity
4 Agreement. It's long. It's written by an
5 insurance company not only with a bunch of
6 lawyers, but they have had a bunch of lawyers
7 for decades, if not centuries.
8 This broad agreement that has a lot of
9 latitude. It says, we can do this. We don't
10 have to do that. We can do this. We don't
11 have to do this, but you have to pay us back.
12 And in this case, the judge will instruct you
13 on some of the law applicable to that. We
14 don't know until the case develops kind of,
15 what sort of charge or instruction you will get
16 about the law. But it may include something
17 along the lines of, you know, when you enter in
18 an agreement with somebody who is much more
19 powerful than you, who has written an agreement
20 that you are not at liberty to change or
21 negotiate. It gives you an extremely broad
22 latitude. And puts you in an extremely
23 vulnerable situation that if and when something
24 happens, to do the right thing. That that
25 agreement whether it is written in there or

1 not, that as a matter of law, that imposes upon
2 you, is a duty of what we call good faith and
3 fair dealing. And you may also be instructed
4 that in a principal surety relationship, the
5 surety is fiduciary in the principal.

6 Fiduciary is kind of a word that derives
7 from the Latin. At it's root is the word
8 trust. You are putting the trust and
9 confidence in somebody else. And if you put
10 your trust and confidence in someone else's
11 special relationship, the law and equity puts a
12 duty on that person to act with utmost loyalty
13 and concern and reasonableness and scrupulous
14 with regard to such ^{manner} matter of relationship.

15 Well I have gone on longer than I meant
16 to. In a nutshell, what we have is, Phoenix
17 goes to National Grange and says I'll sign the
18 Indemnity Agreement and I will pay you money,
19 a premium if you will issue this bond. Then
20 National Grange issues the bond, and over a
21 year goes by, and the very first time that any
22 claim is made by anybody. In this case you
23 heard Efco, which was the supplier of some of
24 the glass and window products used by Phoenix.

25 The very first time someone makes a claim

1 under the bond, National Grange's response,
2 through its lawyer, through its in house people
3 is, there is no bond. There is no bond. We
4 didn't bargain for Building A and Building B,
5 so we are not going to pay you for anything
6 even for Building A. Then you heard very
7 complicated stuff happens. It goes on for
8 years. And we can talk all afternoon. It's
9 kind of interesting. If you're a lawyer or a
10 construction person just the mechanics of all
11 the different things that happened. But it was
12 an unfortunate situation. And you may hear
13 some people saying, you know, that a lot of it
14 was the general contractor to blame for a lot
15 of it going bad.

16 But National Grange then continued in this
17 litigation for not months but years. Year
18 after year. And from the beginning, never
19 acknowledged that they owed under the bond at
20 all. They spent, you may hear some evidence,
21 or some claim as to money they want now.
22 \$300,000 in attorney's fees. And at the end of
23 a day, a judge told them on the payment bond
24 claim to pay it. At least on Building A. And
25 on the performance bond side, at the end of the

1 line, after years of litigation on multiple
2 cases, all of in Charleston not in Richland
3 County. Or I can take that back. They may
4 have some. At the end of the line, they paid
5 \$450,000 on the performance bond claim without
6 admitting that the performance bond covered
7 what they were paying them.

8 So when we talk about, is a deal a deal,
9 if you agree to do something should you do it.
10 Should you be held accountable for what you
11 agreed to do, ask yourself that question. If
12 somebody comes to you and says, "I'll do this
13 if you do that." Then you say "Fine, I will
14 take your money, sign the agreements. Then I
15 will do what I darn please. I'll paddle my own
16 canoe. I won't consult with you. I won't come
17 in and help. I won't advance money to help you
18 finish this job. I am going to litigate for
19 how many years." And now, "Oh, pay me for
20 that." That's what the case is about.

21 And in the end, I am going to ask you on
22 behalf of the Clarks to deny that repayment.
23 And in a nutshell, National Grange repudiated
24 to the bond, but wants to be paid back under
25 something that was a part of that arrangement.

1 And that's pretty much it.

2 THE COURT: Mr. Chitwood.

3 MR. CHITWOOD: Good morning, everybody.

4 Mr. General Foreman. My name is Brent Chitwood.

5 I put this in the right place.

6 THE COURT: Move it up a little closer. I
7 had a hard time seeing it.

8 MR. CHITWOOD: Thank you, Your Honor. I
9 am representing myself, pro se. My wife is
10 also representing herself pro se. I appreciate
11 you being here. And I appreciate the court's
12 indulgence. Me not knowledge exactly all the
13 procedures about how to go about doing this.

14 When I look at this case I said, how could
15 you ever understand something as complicated as
16 this. This nightmare I have been living
17 through the last 10 years. So I thought I
18 would draw you a picture. This will be the
19 third time you have heard it. But hopefully
20 you can begin to grab the details of how
21 complicated the legal structure is between all
22 of these parties.

23 The owner was a local company here in
24 Columbia who decided they wanted to build a
25 building. They hired through a construction

1 contract, a general contractor, known as Bovis
2 Lend Lease. A very large company. So there is
3 a master contract here that specifies certain
4 things. They issued a set of plans and
5 specifications as Mr. Mack says. We're talking
6 about a stack this high of specifications.
7 Page after page of details.

8 Bovis hires many companies to do all the
9 facets of the building. Phoenix Glass is one.
10 And there is a separate contract here called a
11 subcontract. It specifies what they are
12 supposed to do. They, Bovis, and an agreement
13 with the owner that said we are going to build
14 Building A. And we are going to build a
15 connecting part of the building definitely.
16 But we want to have the option of building
17 Building B, the second building. And if sales
18 go real well on Building A, we are going to
19 build the second building. And we want to lock
20 in the price.

21 So they did that by writing in the
22 contract an option change order, which they
23 could execute so that they could lock in their
24 price. This subcontract required us to obtain
25 the payment and performance bond. There's

1 actually two different bonds. Two completely.
2 You will see both of those documents later on.
3 And as he mentioned, Mr. Stanton mentioned,
4 It's tri-party agreement. It says here that
5 the obligee here is being guaranteed through
6 the performance, the detail by the surety with
7 Phoenix being the principal.

8 I am putting all these up here, because
9 when you read this agreement, it is very
10 confusing and very difficult to follow the
11 legal leads about who was supposed to do what.
12 And it's very, very confusing. So we're trying
13 to get through. Here it shows Efco the
14 supplier, that through a purchase order
15 agreement, Phoenix agreed to buy the material
16 from Efco.

17 Now I will also not go into the hundreds
18 of stories of the details about what happened.
19 But I am going to tell you the first two
20 problems that happened. And this contract that
21 we signed, here let me finish down here. Down
22 here, the defendants, the Clarks and the
23 Chitwoods, the Grahams, we're the owners of
24 this corporation here. So we're the defendants
25 here. Here is the Indemnification Agreement

1 that we personally signed here back to National
2 Grange, the bonding company.

3 So this is a document. This is a
4 document. This is a document. And this is a
5 document here that shows our ownership in this
6 company. The original contract, the
7 subcontract says for 900 and something thousand
8 dollars, you will provide all of the glass
9 glazing and installation and warranty for
10 Building A and the breezeway section according
11 to the plans dated May 20th 2000. I don't
12 remember the exact date, but if that's an
13 example which specified these plans.

14 So we said we take these plans and we take
15 these plans, and we give them to Efco. And
16 Efco comes back and says: "Oh, we'll provide
17 that to you for X hundreds of thousands of
18 dollars. We said well, great. We can figure
19 out how much our bid is going to be." So we
20 bid here back to Bovis and we agree. We come
21 to an agreement. And we sign the contract. It
22 has in there that we are going to later on get
23 B. They want to know how much that is going
24 to be. So we now found out from there.

25 So now know what our material cost is

1 going to be, and we have to contract a material
2 supplier for that exact amount of money. So we
3 go in and we get the shop drawings. And that's
4 a detailed drawing of exactly every window and
5 door and slider and every piece that's in our
6 contract. We'll make a fine detailed drawing,
7 and say this is what we agreed to correct. And
8 they said, "No." You've got the wrong set of
9 plans. We're sorry. We gave you the wrong
10 set" How bad.

11 So we said, okay. So we take a new set
12 and we go to Efco and we find out that They
13 want a lot more money for this extra set of
14 plans. So we go back to the contractor and
15 say, "It's going to be more money. And they
16 said, "No, you have to proceed. We will worry
17 about the price later. But wait. We got to
18 pay these people now. No, it's not our
19 problem. You have put the glass in. That's
20 what the contract says."

21 So at some point after the material
22 arrives for Building B, we can no longer,
23 because we can only bill the contractor for a
24 lesser amount. That is not enough money
25 anymore. Plus as Mr. Mack mentioned, there

1 were lots of other problems we were having to
2 overcome. The building wasn't square. The
3 openings weren't rectangular. We're trying to
4 make a square peg fit in a round hole. It's
5 costing us a lot of money, but we're staying
6 with it.

7 So a lien comes along. Because we
8 weren't paying it. We couldn't get any more
9 money. Because that's what the contract said.
10 We have to live with it. Well I mean, there
11 was nothing we could do. We had to live with
12 the contract. We couldn't win. So a lien is
13 placed. Bovis says, "We are not going to pay
14 you until you remove the lien. That's what our
15 contract says. "Well we can't." But that's
16 okay. We got a bond. We signed a contract
17 with National Grange that says if we can't pay,
18 you will pay. Well that is great, pay. If you
19 pay Efco, the lien goes away. Bovis then can
20 release the money. We get the money back, and
21 we pay back National Grange. Not a problem.
22 Nope, sorry. You don't have a bond. But we
23 didn't do this. You don't have a bond. We're
24 not paying."

25 That's the beginning of the problems.

1 We're stuck in the middle. We made a contract
2 and they didn't live up to it. They left us
3 hanging.

4 Mr. Mack asked the question: "Should you
5 be held accountable for what you agreed to do."
6 That's what I want to know. I want you to look
7 for what National Grange agreed to do when you
8 hear the evidence. You look at what they
9 agreed to do. If you look at what they did,
10 and then look for the consequences. What
11 happened to the parties involved based on their
12 actions. Because of those consequences, we
13 don't think we should have to pay back the
14 Indemnification Agreement. They created their
15 own problem. Their first response was, no,
16 it's your problem. We say you violated the
17 contract. You breached the contract, we don't
18 have to pay. Thank you.

19 THE COURT: Ladies and Gentlemen, that's
20 it. It's time for a break. How about that?
21 would that be better? What I am going to do
22 after the break, I am going to ask that you
23 don't discuss the case among yourselves while
24 you are in the jury room. If anybody has any
25 child care problems or something like that,

1 that they need to be at a certain time after
2 work that sort of thing, you need to pick up
3 children in child care, or something, please
4 let the bailiff know so we'll know what your
5 schedules so we can accommodate your schedule.

6 I am going to give you, when we start the
7 evidence, pads and pencils to take notes if you
8 wish to take notes. You don't have to take
9 notes. What the attorneys have just told you
10 was an outline of the case. It's not evidence
11 in the case. The evidence will begin when the
12 witnesses take the witness stand and start
13 presenting the evidence. But if you want to
14 use a pad and pencil to keep your parties
15 straight, since there are some complicated
16 parties and who is responsible for what, you
17 may want to use a pencil and paper to do that.

18 I would remind you that if you do that,
19 those notes are only for your benefit and not
20 for anybody else's benefit, but just your own
21 personal memory when we go through the trial.
22 So let's take about a 10-minute break at this
23 time. Mr. Whittle, the pads and pencils should
24 be outside the door. Thank you very much.
25 Stand at ease for about 10 minutes.

1 (Whereupon, the court takes a short
2 break.)

3 (Diagram marked Court's Exhibit No. 1 for
4 ID.)

5 THE COURT: Is the Plaintiff ready for the
6 jury?

7 MR. MACK: Yes.

8 THE COURT: Is the Defense ready?

9 MR. STANTON: Yes, Your Honor.

10 THE COURT: Bring the jury, please.

11 (Whereupon, the following takes place
12 within the presence of the jury.)

13 THE COURT: Mr. Mack, call your first
14 witness.

15 MR. MACK: Thank you, Your Honor. I would
16 call Eli Cinq-Mars.

17 Eli Cinq -Mars, after being duly
18 sworn, testified as follows:

19 Direct Examination By Mr. Mack:

20 Q Eli, would you tell the jury a little bit
21 about your personal background?

22 A Well I assume you mean my work background.
23 I graduated from the University of New Hampshire. I
24 have worked in construction and residential
25 construction, as well as, commercial construction.

1 I subsequently went to law school in New Hampshire.
2 I was a city prosecutor for a short period of time.
3 And then I worked for Peerless Insurance Company as
4 a bonds claim examiner for the same thing I am doing
5 today. And around 2001, I changed jobs and I worked
6 for National Grange Mutual Insurance Company as a
7 bonds claims attorney for that organization.

8 Q Do you have any college degrees?

9 A Yes, I do.

10 Q What are those?

11 A Environmental Conservation.

12 Q Do you have a law degree?

13 A Yes, I do.

14 Q Are you admitted to the bar in any state?

15 A I am admitted in the State of New
16 Hampshire.

17 Q Now tell the jury just a little bit about
18 your work history. Explain what you do at National
19 Grange.

20 A At National Grange, we have what is
21 probably a small surety department relative to other
22 major companies. There are two individuals handling
23 claims or surety claims for Grange. And all of us
24 handle essentially all the claims that come in
25 through the territories that we write. We write

1 basically from the Maine to Florida. And then in
2 about one state. So roughly anything that blows in
3 the Atlantic ocean. And then two of us handle those
4 claims that come in to that territory.

5 Q Now tell the jury a little bit about
6 National Grange. Is it an insurance company as well
7 as a surety company?

8 A National Grange is a mutual insurance
9 company. They basically have gone through some
10 transgressions recently in the State of Florida.
11 But basically like property and casualty. A
12 smaller group of that entity writes what are called
13 surety bonds. I believe surety writings are about
14 20 million in premiums. Whereas, the insurance side
15 writes, I think they are up to 800 million or
16 something like. Sort of a smaller subset of the
17 organization.

18 Q Is there a difference between the surety
19 bonds and the insurance that National Grange writes?

20 A There is. And probably it's a good time
21 to explain the difference between surety and
22 insurance. Insurance everybody is probably familiar
23 with. The car insurance, homeowners insurance. A
24 surety bond is more of a guarantee that the person
25 that we have a bond or a principal is going to

Eli Cinq-Mars-direct by Mack

1 perform according to their obligations. So an
2 example of that might be, the probate bond. An
3 executor of a will gets a probate bond to an estate,
4 or to the court, a Probate Court. And it guarantees
5 that they will disseminate the funds in that estate
6 according to what their obligations are. They will
7 pay the bills according to the way they are supposed
8 to. And they distribute the money according to what
9 their obligations are.

10 We write a variety of bonds. They are
11 miscellaneous bonds. A notary bond for example, is
12 a small bond that guarantees whatever the notary
13 signs, that she has done what she is supposed to do;
14 he is supposed to do as a notary.

15 There are executive bonds. There are
16 finality bonds that are issued which guarantee that
17 dishonest employees will be covered. And then there
18 are what are called contract bonds. The most
19 typical of the contract bonds are performance and
20 payment bonds. They are usually on a public
21 project, so a contractor would be -- will be
22 required to have one. Say on a municipal building,
23 a school, or a road project that the guarantees that
24 the substance supplies are paid. And it guarantees
25 that the work is performed in compliance with the

1 contract.

2 A stark difference between the insurance
3 and surety bonds are that the insurance, they
4 actually make some calculations. They know how many
5 accidents there are within such a volume. They know
6 how many accidents there are per year. How many
7 fires there are on houses. Then they have
8 individuals within the organizations that actually
9 can make some calculations as to what might cost the
10 company in the next year. And so based within the
11 premium that everyone pays, there is a calculation
12 or coverage to pay for those losses.

13 A surety on the other hand, everybody is
14 expected to perform according to their obligations.
15 No one is expected to steal from the estate. No one
16 is expected to not notarize their property. No one
17 is expected to not pay their substance suppliers.
18 So the calculations for loss are not incorporated in
19 to anything that is incorporated in the estate. And
20 as a result, one of things that the surety
21 department asks for is an Indemnity Agreement or an
22 agreement of indemnity from individuals that we
23 would ask -- excuse me, for individuals who ask for
24 bonds from us.

25 Q So for a bond you get an Indemnity

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1 Agreement.. But for insurance there is no Indemnity
2 Agreement involved. Is that a fair statement?

3 A Not to my knowledge, no.

4 Q What I would like for you to do is look in
5 this book of exhibits that we have marked. And look
6 at Plaintiff's Exhibit 2. Excuse me.

7 A Yes, sir.

8 Q Are those the type bonds that National
9 Grange issues for construction projects?

10 A Yes, it is.

11 MR. MACK: Your Honor, we would move to
12 admit Exhibit 2.

13 MR. STANTON: Without objection.

14 MR. CHITWOOD: No objection.

15 (Payment and performance bonds marked
16 Plaintiff's Exhibit No. 2 into evidence.)

17 A If I could clarify, a number of bonds are
18 actually provided by what is called obligee or the
19 persons whose has benefit this bond is for, and the
20 owner so to speak. And in this case, Bovis Lend
21 Lease.

22 Q So It may not be a matter that we issue
23 the bonds, as much as we approve the bond that has
24 been requested by an obligee. Or that may be one of
25 our documents.

1 A It depends.

2 Q As far as the particular form that the
3 bonds in Exhibit 2 are on, was this the form that
4 National Grange would provide? Or is this the form
5 that Bovis provides?

6 A It is my recollection that this was a
7 Bovis Lend Lease form.

8 Q Now explain for the jury, before we get to
9 that, now the back page of Exhibit No. 2, is
10 something called a Power of Attorney. Do you see
11 that?

12 A That is correct.

13 Q What is the purpose of the Power of
14 Attorney?

15 A The purpose of a Power of Attorney is to,
16 I guess I will have to back up a little bit. NGM,
17 National Grange is a -- not a direct writer. They
18 write through agents. They write for an independent
19 agency. And one would not come directly to us.
20 They have to go to an agent to request a bond,
21 because they are an independent agent. The company
22 provides what is called a Power of Attorney to that
23 agent that allows to sign on our behalf. They are
24 not employees. They are independent agents; such
25 as, I am sure not everyone is familiar with us.

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1 Q And on the Power of Attorney is John
2 Brownlee identified?

3 A Yes, he is.

4 Q And what is the limitation on that Power
5 of Attorney?

6 A Limitation is that he is not allowed to
7 execute a bond in excess of one million dollars.

8 Q Now if you would, would you explain to the
9 jury what a payment bond is, and what its purpose
10 is?

11 A In general, a payment bond is issued in
12 conjunction with a project that guarantees that the
13 substance suppliers are paid and if they are owed
14 money under a particular project. They are some
15 limitations based on the state. Based on how far
16 down if you have a substance, that there are
17 different states that have different allowances as
18 to who can be a legitimate payment bond claimant.
19 And also in general, the materials have to be
20 incorporated into the project. The mere fact that
21 materials were purchased by a contractor does not
22 necessarily mean we have an obligation to pay. And
23 so the general thesis is, it's incorporated in the
24 project.

25 Q Then also under Exhibit No. 2, there is a

1 performance. A performance bond. Would you explain
2 to the jury what the purpose of a performance bond
3 is?

4 A The general purpose because performance
5 bonds vary depending on who wrote them and what
6 their obligations are. But the general purpose is
7 to guarantee the performance of a principal, the
8 contractor. And performing work according to plans
9 and specifications. If they fail to complete the
10 project, if there are latent defects, if there are a
11 number of situations where they fail, then request
12 is made by an obligee, by a bond holder, who would
13 come to us and make a claim under the performance
14 bond.

15 Q Now did National Grange issue payment and
16 performance bonds in favor of Bovis on the
17 Renaissance project Building A?

18 A Yes, we did. Actually we issued a
19 performance and payment bond in the amount of
20 \$914,835 on the renaissance project. And Building A
21 is \$914,835.

22 Q \$914,000. That was the amount of Phoenix'
23 contract with Bovis?

24 A That is correct.

25 Q And that is for Building A?

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1 A That is correct.

2 Q Now how did you first get involved in the
3 Phoenix/Renaissance issues?

4 A If you will pardon me if my memory is a
5 little off, but this was 2000, 2001. There were, I
6 think around the same time, they were notified by
7 Bovis that there were some issues regarding
8 performance. That the glass was not being installed
9 in a manner that was acceptable to Bovis. As well
10 as, there was a lien that was filed by Efco, which
11 is a glass manufacturer. And they make a fancy
12 glass that's on the Renaissance building.

13 Q Would you look at 2 photographs that we
14 have marked as Exhibits 10 and 11? First of all,
15 you have visited the Renaissance project?

16 A Yes, I have.

17 Q And do you recognize those as being
18 photographs of the project?

19 A Yes, sir.

20 MR. MACK: We would admit 10 and 11.

21 THE COURT: Any objection?

22 MR. STANTON: Two photographs? No
23 objection.

24 THE COURT: Without objection.

25 (Photographs marked Plaintiff's Exhibit

1 Nos. 10 and 11 into evidence.)

2 Q Now it's fairly apparent from the
3 photographs, but could you just explain to the jury,
4 kind of describe the project a little bit from what
5 you recall seeing down there.

6 A Directly behind the buildings is the bay.
7 And there is a new bridge that crosses over from I
8 don't recall the location.

9 Q Mount Pleasant in Charleston?

10 A Mount Pleasant in Charleston. Thank you.
11 very much. It's really very scenic. And so
12 visibility is built on the bay. And right next to
13 it is a parking garage connecting with some glass.
14 And there is another building right next to it also
15 directly on the bay. It's, as I recall, 9 stories.
16 I guess 7. It looks like a 7-story building. 50
17 units. High end units. I don't recall, as I
18 recall, they were in the \$500,000 range.

19 Q And that's 50 units in each building?

20 A That's correct.

21 Q What is your understanding of the scope of
22 Phoenix' work on that contract?

23 A As I understood, Phoenix was to go install
24 the glass as well as the metal framing to hold the
25 glass in for the sliding glass doors. Bay windows

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1 that protrude from the base. As well as some
2 sliding windows or punch windows. Essentially all
3 the glass that was on the building.

4 Q Now at some point, did the general
5 contractor Bovis, express concerns of whether or not
6 Phoenix would be able to complete its work?

7 A They did. We got a notification from
8 Bovis; that there was some issues regarding
9 performance. I subsequently hired a consultant to
10 go and actually and look at the project to determine
11 what the status of the project was. And get an
12 evaluation as to whether our principal could perform
13 and install the rest of the windows. Sort of eyes
14 and ears as to what was going on.

15 Q And do you know whether or not Phoenix
16 completed its work, and was the building occupied
17 after Phoenix completed its work?

18 A It's my recollection that at the time the
19 consulting went down, Building A, or phase one, was
20 in fact was completed. Mostly completed. The
21 exception which was some glass in the breeze -- sort
22 of a walkway area connecting the building to a
23 garage. Some of that had not been completed. And
24 at the time they were in the process of putting
25 glass up on Building B or phase two, they did in

1 fact complete all the glass to the best of my
2 knowledge on both buildings as well as the garage.

3 Q Let's focus a little bit on the Efco
4 claim. Describe for the jury what was involved in
5 the Efco claim.

6 A Again based on my recollection, we had a
7 copy of a lien that Efco had filed against Bovis.

8 Q When you say the lien, what are you
9 talking about there?

10 A In various states an unpaid service
11 supplier is allowed to file what is called a lien,
12 in notifying the owner that they are unpaid for the
13 work that they performed or submitted; whereas, they
14 incorporated in the project. A lien would usually
15 prevent future sales on a piece of land. And as
16 notice to anybody else, and may give priority in a
17 bank, and may occur subsequently.

18 Q And do you recall how much the Efco lien
19 was? How much they were asking for?

20 A It is my recollection, they were asking
21 around 770 million dollars.

22 Q You said 770 million?

23 A I am sorry, \$770,000 dollars. Three extra
24 zeroes.

25 Q Now do you recall how that was broken down

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1 between the two buildings?

2 A We were notified initially that the work
3 was for two buildings. One of the things that I
4 requested was the break out between phase one, or
5 Building A and Building B.

6 Q Why did you request that?

7 A Well surety would not be responsible for
8 materials that were essentially not incorporated in
9 the project. And if it is another building, whether
10 it was next door or down the street, we would be
11 responsible for that. So I was trying to determine
12 what in fact was incorporated in phase one. We
13 subsequently learned, it took a little while to get
14 the information based on Efco's records, that the
15 break out was 120,000 on phase one. And about
16 650,000, \$640,000 on phase two.

17 Q And when you say phase one, what building
18 is in phase one?

19 A Building A, and a little bit of the
20 parking garage.

21 Q And once you received notice of the lien
22 of the claim by Efco, what did National Grange do?

23 A Again, I had requested that information
24 from Efco in terms of a break down. It's my
25 recollection I talked to Mr. Chitwood. And also

1 spoke with Mr. Scott, the consultant, regarding the
2 work that was going on.

3 Q So in the investigation of the Efco claim,
4 what was the result of that investigation?

5 A We did not get a finalized result for a
6 while because we did not receive all the information
7 from Efco. In addition, I was notified by Mr.
8 Chitwood that the reason for the lien was trying to
9 prod Bovis on the release, to release some of the
10 contract funds on phase two to either Efco directly
11 or to Phoenix Contract Glass.

12 Q At some point did you determine that the
13 Efco claim on Building A was a valid claim?

14 A To the extent of \$120,000. And that's a
15 rough number, yes, we did. And we offered to pay
16 Efco \$120,000.

17 Q What was Efco's response when you offered
18 to pay them that?

19 A They refused the money that they wanted
20 the \$770,000. And litigation ensued. Ultimately
21 the judge determined that we were only owed, excuse
22 me, we were only obligated to pay \$120,000. Plus
23 interest. Based on the time, there was quite a bit
24 of interest. I think the number now is, 150 or
25 \$164,000 something like that.

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1 Q I would like for you to look at Exhibit 6
2 please.

3 A Yes.

4 Q Was this the order entered by Judge Young?

5 A Yes, it is.

6 Q And is this on file in the Charleston
7 County Courthouse?

8 A Yes, it is.

9 MR. MACK: I would move to enter Exhibit
10 6.

11 A And If I---

12 MR. STANTON: Your Honor.

13 THE COURT: Just wait a minute.

14 MR. STANTON: I would object to that
15 admission of that document. It is an Order that is
16 on appeal. And it contains a lot of lengthy legal
17 discussion. It is not conclusive. And I don't know
18 really the relevance of it other than to place, you
19 know, place a lot of confusion on it. There is no
20 way to approach it. I think it would introduce
21 confusion and waste time putting in something that
22 really is not the final word.

23 MR. MACK: Your Honor, it's the public
24 record. It's to show that National Grange's
25 position throughout was reasonable. The judge

1 agreed with the position that only Building A was
2 covered. And that National Grange's tender of
3 payment early on was the appropriate thing. Its
4 just simply that Efco refutes. But it is a public
5 document.

6 THE COURT: Objection is overruled. Go
7 ahead.

8 (Efco Final Order marked Plaintiff's
9 Exhibit No. 6 into evidence.)

10 Q Mr. Cinq-Mars, look on the first page, if
11 would you just read the one sentence that has the
12 number one.

13 A The first sentence reads: "The payment
14 bond in issue in this case covers only phase one."
15 And in parenthesis, Building A, and associated work.
16 And if I could clarify one thing I made earlier.
17 The judgment is for \$154,966.

18 Q That's 120,000 plus interest.

19 A Plus interest. That's correct.

20 Q And once this order was entered, did
21 National Grange offer to pay Efco the amount the
22 judge said that National Grange should pay?

23 A Yes, we did.

24 Q Did you offer to pay the full 154,966.49?

25 A Yes, we did.

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1 Q And what was Efco's response?

2 A They refused the money, and they
3 appealed.

4 Q Now also as part of that order, If you
5 would look on the last page.

6 A Yes.

7 Q And the last sentence, would you read
8 that, please?

9 A "Efco," is entitled? Is that the
10 sentence?

11 Q That's correct.

12 A "Efco is entitled to recover
13 \$1,175,283.80. from Phoenix. And it is so ordered."

14 Q So the Judge found that Phoenix owned on
15 both buildings but National Grange owed on one?

16 A That is correct.

17 Q Now....

18 A Now if I could clarify for the jury. That
19 it would be like the 770,000 plus interest from the
20 time of the judge's order.

21 Q So that's resolved the Efco issue subject
22 to the appeal. Is that correct?

23 A That is correct.

24 Q Now let's switch over to the performance
25 bond issues. What I will call the Bovis case. Do

1 you recall suits involved in the Bovis case?

2 A Yes, I do. And there were more than one
3 unfortunately. They were homeowner's associations
4 that filed suit against Bovis. And then Bovis
5 incorporated us. There were different homeowners
6 that filed suit. And then there was a class action
7 on behalf of some of the unnamed homeowners. There
8 were a variety of different litigations, but they
9 were all incorporated in one case handled through
10 one judge in Charleston, South Carolina.

11 Q Now was Phoenix and National Grange the
12 only parties, the only defendants in those cases?

13 A No, I don't recall the exact number, but
14 there are at least 10 defendants and another 10
15 surety. So Mason was involved. Glass -- Phoenix
16 was involved. I think the roofer was part of the
17 litigation. There are a number of subs as well as
18 the sureties that were involved.

19 Q Now as far as Phoenix as far as the glass
20 is concerned, could you tell the jury a little bit
21 about what that case involved?

22 A Bovis alleged a number of different things
23 relative to the glass. Prior to and as time was
24 going on, there were claims that there was
25 condensation on the inside the glass. That

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1 condensation resulted in damage to the wood below
2 the window and other damages. There were also
3 claims, and I don't recall exactly which claim
4 first. But some of the film in the glass was a
5 little cloudy, or you could actually see something
6 in the glass. You couldn't clean it from inside.
7 You couldn't clean it from the outside. Because it
8 was actually something going on between the two
9 panes of glass. But probably the largest bulk of
10 the claim was as a result of a tropical storm that
11 came through, Gaston, which pushed water up
12 underneath the sliding glass doors and in to the
13 apartments. Pushed water around windows. And water
14 coming in to the walls. And a number of the
15 contractors were blamed for the water intrusion.

16 Q Now what did you do, or what did National
17 Grange do once the Bovis claims were made for
18 construction, the lawsuits filed and so forth?

19 A In this case, I hired a separate
20 individual. He's an engineer, to take a look that
21 Bovis made relative to the windows. So we took a
22 look at the window systems and the door systems. As
23 well as what went on. Bovis pretty much moved
24 forward on their own, and chose how to correct what
25 they believed were the problems. And that they

1 removed the brick all this way up 7 stories. And
2 then refaced it. And reflashed it. And they did
3 both buildings.

4 Q During the investigation, did you
5 determine that there were actually some problems
6 with the windows?

7 A They were actually -- there were some
8 problems with the windows. Phoenix had acquired
9 some metal stock from this different location that
10 did not have a thermal break in it. And the purpose
11 of the thermal break that holds the glass together.
12 If I could explain properly. What holds the glass
13 in is a metal frame. And the metal frame is to the
14 outside as well as to the inside. And so they put a
15 thermal break in between so that the cold can't
16 transmit across or warmth can't transmit across.
17 Depending if you are warmth and outside, would
18 depend on which you want to prevent. But that's
19 called a Thermal break. And some of the framing
20 members that were installed, especially in the bays
21 in my recollection, did not have a thermal break.
22 And so they had to remove the windows. Put in the
23 correct windows. There were also allegations that
24 they were placed upside down. So if you had a
25 window frame that was about that wide and the

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1 thermal break was maybe a little ways in, if you
2 flip it around, now it's on the wrong side, it's not
3 really performing a thermal break. They were also
4 alleging that some of the windows, I believe the
5 front windows, and maybe even the sliders, were put
6 too far out of the interior space so that the
7 thermal break was in effect.

8 Q Now did in the Bovis settlement of
9 lawsuits, did Bovis provide any documentation on
10 damages?

11 A Yes, they did. They provided a number of
12 different items. Especially the summary. That the
13 outlines what they believed their allocation was of
14 different parties that were involved in the
15 litigation.

16 Q And would you look at Exhibit No. 3,
17 please?

18 A Does she want to make this first?

19 Q Now Exhibit No. 3, is this something that
20 Bovis prepared?

21 A Yes, it is.

22 Q And did you have access to all the backup
23 documentation; such as, invoices and things that
24 went in to this summary?

25 A The back up documentation was voluminous.

1 I don't recall every piece of payment being
2 available. But Bovis was and did provide back up
3 documentation for summation.

4 Q Now did National Grange agree with Bovis's
5 compilation of damages?

6 A No, It did not.

7 Q Did National Grange dispute the numbers
8 that they come up with?

9 A Yes, we did.

10 Q But in your evaluation of the claims being
11 presented by Bovis is the type of information that
12 you take into account?

13 A We certainly take into account information
14 that is provided by owner or the obligee. We had to
15 internally sort of separate between the buildings.
16 It continued to be our contention that we're only
17 obligated for Building A. So, you know, it was the
18 work that's on the list of both buildings. And if
19 so, was it equal, so divide it in half. Then taking
20 a look at their calculations and allocations, they
21 allocated overhead. Superintendents, and, you know,
22 the kitchen sink I think they threw in. We do take
23 all that into consideration. Because the claim that
24 is attributed to Phoenix ultimately they listed as
25 \$110,770,000.

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1 Q Out of 13 million, would you look over to
2 the left under repair cost?

3 A Yes. Under 13 million. They believed
4 that Phoenix Contract Glass was responsible for 83
5 percent to the cost. The cost of the lift. The
6 cost of have fencing up. The cost of everything.

7 Q And did they duplicate, show some of the
8 same cost under more than one subcontractor?

9 A Oh, absolutely.

10 Q Now is this the type of information as a
11 bonding company when you are evaluating what the
12 claim may be worth, that you take into
13 consideration?

14 A We certainly took into consideration
15 obviously if one went to a jury trial, and the jury
16 agreed with Bovis, we could hit for a judgment for
17 11 million dollars plus interest.

18 MR. MACK: I would move to admit Exhibit
19 No. 3.

20 MR. STANTON: No objection.

21 THE COURT: Without objection.

22 (Damages by general contractor marked
23 Plaintiff's Exhibit No. 3 into evidence.)

24 Q Looking at Exhibit No. 3, how much does
25 Bovis claim that they spent to replace the bay

1 windows?

2 A If I could find it.

3 Q It's Item 2.

4 A Yes, replacement of bay windows was
5 100,132,640.

6 Q And did they also spend money on the
7 repair of punch windows?

8 A Yes.

9 Q And the various categories under that?

10 A They foam the brick cavity around the
11 window jams and frames. They didn't take the window
12 off. But they put foam in around the frame the
13 thermal coating. That was about \$86,390. They
14 added anchor, clips and shins to the windows. There
15 was an allegation that they were not -- the windows
16 were not properly anchored. In some instances they
17 were anchored straight up, and went through the
18 flashing that was above the windows. And the water
19 hit the brick, hit the flashing. And Bovis claimed
20 that the water came straight in through the screw
21 and then was going straight up. There is a clip
22 system. They redid all the clips. That was
23 \$21,086. The triple window attachment was \$1,644.
24 Window support angle \$248,184. That was another
25 large number.

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1 Yes, there were a number of items.

2 Q Then how about, was there any work done on
3 the patio doors?

4 A Yes, Bovis repaired the patio doors and
5 they claimed the cost was \$545 -- \$5,517.

6 Q Now ultimately what happened in the Bovis
7 suit, as far as National Grange is concerned?

8 A Ultimately we settled with Bovis for
9 \$450,000.

10 Q If you had gone to trial with Bovis, what
11 if things went really bad and went really south,
12 what was the potential verdict against National
13 Grange?

14 A Well if a verdict was given to according
15 to their damage model, it would have been
16 \$110,770,000. Plus interest probably from 2003,
17 2004, so that's half million dollars worth of. Plus
18 attorney's fees would have been. Now if it was only
19 as to one building, Building A, which the bond
20 covered, what was exposure? You can just give round
21 numbers.

22 A It would have probably been close to 6
23 million dollars.

24 Q So you had a 6 million dollar exposure.
25 And how much did you settle it for?

1 A \$450,000.

2 Q If you would look at Exhibit No. 4.

3 A Yes.

4 Q Is this the settlement agreement that was
5 reached between National Grange and Bovis?

6 A Yes, it is.

7 Q Now do you know if the other parties in
8 that suit settled their cases?

9 A Almost all of them did. Efco did not
10 settle their suit with us. And Phoenix had not
11 finally settled its suit with Bovis at the time that
12 we settled.

13 Q Did you learn later on that Phoenix did
14 actually settle up with Bovis?

15 A Yes, Phoenix did settle up with Bovis
16 subsequently.

17 MR. MACK: I would move to admit Exhibit
18 No. 4.

19 THE COURT: Without objection.

20 (Bovis Settlement Agreement marked as
21 Plaintiff's Exhibit No. 4.)

22 Q If you would turn to page 6. Exhibit No.
23 4. Is that under the first numbered paragraph does
24 that confirm the amount of the settlement that was
25 agreed on?

Eli Cinq-Mars-direct by Mack

1 A Yes, it does.

2 Q And if you would turn to Exhibit 5,
3 please.

4 A Yes.

5 Q And what does Exhibit No. 5 represent?

6 A The check that we issued in the amount of
7 \$450,000. Made payable to Bovis Lend Lease.

8 MR. MACK: Move to admit No. 5.

9 MR. STANTON: No objection.

10 (Check to Bovis marked Plaintiff's Exhibit
11 No. 5 into evidence.)

12 Q So the Bovis claims are completely
13 resolved at this point as to National Grange, is
14 that correct?

15 A That is correct.

16 Q Now during the course of the lawsuit,
17 there was some discussion about a contract balance
18 that Bovis owed to Phoenix. You mentioned early on
19 that Mr. Chitwood said the lien was to try to get
20 Bovis to make some payments? What were you talking
21 about there?

22 A Well in more general terms on any
23 contract, whether it be a homeowner hiring a
24 subcontractor or a contractor on a large project, as
25 there are payments being made, there is what is

1 called contract balances the unpaid portion the
2 owner has not paid to the contractor for work that
3 has been completed. In some instances, the work may
4 have been performed. Or in other instances the work
5 hasn't been done yet.

6 Q Okay.

7 A In a particular, I guess, I will get back
8 to your question. In particular, there was a
9 question as to what the contract balance was on
10 Building A phase one of the Renaissance project.

11 Q Now do you recall the approximate amount
12 of the contract balances? Just round numbers.

13 A As I recall it was about 120,000 on phase
14 one of the project.

15 Q Phrase one, Building A, do you how much?
16 About how much was owed on Building B?

17 A I don't recall off hand. 6 or \$700,000
18 somewhere in that vicinity.

19 Q Did National Grange get involved in?

20 A Actually, I don't think it could have been
21 that large, because the contract was not that large.
22 I just don't recall the second phase.

23 Q Now did National Grange get involved
24 trying to collect that contract balance for Phoenix?

25 A Well collect is probably a difficult term

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1 because it was Phoenix' position, excuse me, it was
2 Bovis' position that those funds were used to
3 complete the project. So we didn't attempt to
4 collect as much as we wanted an accounting for what
5 happened with the \$120,000. And Bovis' answer was,
6 we have a loss in excess of 12 million dollars. We
7 used a 120,000 of that to pay for some of the work
8 we had to do. And we were expecting more from the
9 surety to cover our shortfall. It would be no
10 different than if a homeowner hired somebody to put
11 a roof on, and the roof leaked. And you had damage
12 to the inside. And that roof hasn't been solved
13 correctly, and you have to pay for the roof and
14 everything. And you have to buy -- you have to fix
15 the inside as well as put a new roof on. The
16 homeowner would have the right to say no, I am using
17 the money to fix what the problem. And by the way,
18 I still don't have enough money. And that was sort
19 of the Bovis' position on National Grange.

20 Q If you would look back on Exhibit No. 3
21 please?

22 A Yes.

23 Q In replacing the bay windows, the direct
24 cost of replacing the bay windows, how much did
25 Bovis spend?

Eli Cinq-Mars-direct by Mack

1 A Bovis spend \$1,132,620.

2 Q And when you were or anybody at National
3 Grange asked about the contract balance, did Bovis
4 bring that up?

5 A Yes, they brought up 12 million dollars as
6 their claim. But yes, they brought up essentially
7 that they got paid much, much more than the contract
8 balance was on this particular project.

9 Q Now before we start talking about the
10 Indemnity Agreement, has National Grange ever said
11 that it never issued a bond on Building A.

12 A No, we have not.

13 Q Did you offer to pay Efco on Building A?

14 A Yes, we have. On more than one occasion.

15 Q Did you settle up with Bovis on the basis
16 of Building A and paying \$450,000?

17 A Yes, we did under the performance bond,
18 which is we wrote Building A.

19 Q Let's talk about the Indemnity Agreement.
20 First of all, if you would look at Exhibit 1.

21 A Yes, sir.

22 Q Is this the agreement of indemnity that
23 was issued prior to the bond on the Renaissance
24 project?

25 A Yes, it was.

Eli Cinq-Mars-direct by Mack

1 MR. MACK: Move to admit Exhibit 1.

2 MR. STANTON: No objection.

3 A Well if I could clarify. It was written
4 in conjunction. I don't -- I'd have to check and
5 see if it was written.

6 MR. MACK: Mark Exhibit No. 1.

7 (Agreement marked Plaintiff's Exhibit No.
8 1 marked into evidence.)

9 Q If would you look at the date on Exhibit
10 1, what is that date? The first page.

11 A I was also checking the signature.
12 February 16th 2000.

13 Q And if you will look at the date on
14 Exhibit No. 2, which is the bonds, what is the date
15 on that?

16 A December 1, 2000.

17 Q So the Indemnity Agreement was executed in
18 February of 2000. And then about 10 months later
19 the bonds were issued.

20 A That is correct.

21 Q Now explain to the jury what the agreement
22 of indemnity is.

23 A Okay. I'll back up a little bit. As I
24 explained earlier, there is an expectation of our
25 principal of surety bond to perform their

1 obligations. In the event that they do not, we also
2 ask that they execute an agreement of indemnity by
3 which we ask them to indemnify us for any loss,
4 cost, claims, attorney's fees, expenses, as a result
5 of us having executed those bonds. Because usually
6 a trigger within the agreement of indemnity, they
7 have to be in default. And there are some
8 conditions of default. If they fail to pay
9 substance suppliers that will be a condition of
10 default. If they are in default of the contract or
11 notify -- were notified by the owner that they were
12 in default in the general contractor.

13 There are a variety of conditions of
14 default before the surety. Really we act on the
15 Indemnity Agreement.

16 Q Now who typically signs the Indemnity
17 Agreement?

18 A An Indemnity Agreement is usually executed
19 first by a contractor themselves, and results as a
20 contractor. The corporation that holds the
21 sub-chapter or whatever it is. And also the owners
22 of the corporations and their spouses.

23 Q Why do you have the spouses sign it? Why
24 do you have the owners and the spouses sign it?

25 A Actually for a number of reasons.

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1 Probably the one that is maybe foremost in
2 everybody's mind right now with Mr. Madoff and Ms.
3 Madoff having a lot of money in her possession, even
4 in jail, people can shift funds from one individual
5 to another preventing collection of that debt. But
6 in addition to that, underwriting is based on the
7 financial strength of the unit, and it could be
8 family unit. So it maybe the combined assets of
9 both parties and the surety agreeing to underwrite
10 that particular bond.

11 Underwriting is sort of a financial,
12 equivalent to banking in some instances. Some
13 people get mortgages. Some people don't. And it's
14 based on their financial strength. Their ability to
15 repay. Whether they had a good credit rating. How
16 much money they have in the bank. How many liquid
17 assets. There are a number of factors that go in to
18 it. And so to with writing surety bonds. And
19 depending on how strong individuals are, or whether
20 the couple, how strong the couple are. There are
21 instances where we might request the execution of an
22 agreement of indemnity by a son and a father;
23 whereas if the son is running the company, but it's
24 the father's financial wherewithal that is really
25 behind the son. And you say, that's fine, the son

1 is going to take over the company. But you have the
2 guarantee that he is going to do what he is going to
3 do. And likewise daughter/mother which are no
4 longer together.

5 So it's not uncommon and it is certainly
6 usual for a spouse to be behind a premium of
7 indemnity. Because they benefit from a flourishing
8 corporation as well.

9 Q What I would like to do is go through the
10 agreement of indemnity and some of the paragraphs on
11 it. And you don't want me to read everything. But
12 I just would like for you to explain to the jury the
13 general tone or tenor or what is included in some of
14 these paragraphs.

15 A Sure.

16 Q So if you look at page 1 under
17 definitions.

18 A Yes, sir.

19 Q Event of default. Why is that important?

20 A In event of default, starts to define at
21 what point the surety is allowed to take some sort
22 of action against the individual. There is no event
23 of default. We could not attach contract balances
24 or demand repayment or anything because they are not
25 in default. Under the principal of surety shift,

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1 the principal, the contractor has got the first
2 obligation to do everything they are supposed to do.
3 And so there is a definition of an event of default.
4 And generally if they are not paying their substance
5 suppliers, if we have notification of that. If they
6 failed to perform the terms of the contract, the
7 contractor, or general contractor or an owner is
8 complaining to us that it is not going up the way it
9 is supposed to. It is not going up in a workman
10 like fashion. It's not on time. It's not
11 according to the plans and specifications, that
12 would be an event of default. And there are other,
13 family to discharge the debt that it owes. There
14 are a number of conditions of default.

15 Q Going one step, is National Grange the
16 only bonding company that requires Indemnity
17 Agreements?

18 A Most sureties that I am aware of in
19 construction, requiring an agreement of indemnity.
20 In addition to that some sureties actually ask for
21 collateral. You have to actually put up a letter of
22 credit or cash in the bank before they will issue a
23 performance and payment bond form. So we are not
24 the only company.

25 Q So in order for a contractor or a

1 subcontractor to get bonds from a large commercial
2 project or a public body, it's generally accepted
3 that you are going to sign an Indemnity Agreement?

4 A That's correct.

5 Q So this isn't anything unique to Phoenix?

6 A No.

7 Q And it's nothing unique to this particular
8 project.

9 A Nothing unique to the industry.

10 Q If you would turn over to page 2, please.

11 A Yes.

12 Q Of a paragraph, third, indemnity, and
13 "Hold harmless." Just in general terms what did the
14 Phoenix people agree to do once they signed the
15 agreement?

16 A In general terms, and I alluded to a
17 number of them earlier; that they agreed to hold
18 harmless for any claims, demands, expenses, what
19 sort of a crime. Somebody would say that that's a
20 long laundry list and written by an attorney
21 somewhere. And it's really meant to cover
22 everything in general terms. You're obligated to
23 pay a surety for any loss that it incurs by whatever
24 nature it is. Again, the general premises on the
25 surety ship; that our principal has the primary

Eli Cinq-Mars-direct by Mack

1 obligation to fulfill their obligation.

2 There is a expectation that they are to do
3 everything as they are supposed to do it.

4 Q And you use the term, "Hold harmless."
5 What does that mean?

6 A To either repay, or in some instances a
7 surety company will put up what is called a reserve.
8 And based on what's required by the different states
9 we actually set aside money, and we make demands
10 from an individual to compensate us for the fact we
11 are holding beside the money. For example, the Efco
12 claim, we have set aside sufficient money in order
13 to pay Efco even though they have not accepted it.

14 Q And if you turn over to page 3, the 5th
15 paragraph, the settlement.

16 A Yes.

17 Q What did the Phoenix people agree to under
18 that paragraph?

19 A When they executed the agreement they
20 acknowledged that we would have the exclusive right
21 to settle, adjust and compromise, any claim or
22 demand or ligation that is going on. As we deemed
23 necessary and appropriate.

24 Q Now still on this page 3 under the 6th
25 paragraph, "Prosecution of claims." What did the

1 Phoenix people agree to when they signed the
2 agreement including that provision?

3 A They acknowledged that we had the right to
4 pursue claims, but not the obligation to prosecute
5 them. We don't have an affirmative duty to go after
6 change orders, or some additional amounts that they
7 believe they are owed money; that surety has the
8 right to basically settle with an owner. Again once
9 they are in default, they fail to pay their bills.
10 They fail to perform the project. Or any event that
11 would precipitate utilizing an agreement of
12 indemnity. The surety has the right to, but not the
13 obligation to go after any contract balances that it
14 would deem appropriate on that bond or project, or
15 to waive. Or make its own determination as to the
16 validity of that amount of claim.

17 Q Now under that paragraph, could National
18 Grange have gone to try to collect any contract
19 balances on Building B, on phase two of the
20 Renaissance project?

21 A I am not sure how we could, because we
22 didn't bond Building 2. So we wouldn't have rights
23 to collect money that didn't come under a bonded
24 project.

25 Q And if you turn over to page 4, under 16

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1 paragraph suits. Just the last subparagraph of
2 that. What does that, what did the Phoenix people
3 agree to under that paragraph?

4 A Well in addition to, under an earlier
5 provision, there was a litany of, you know,
6 reimbursements for claims, losses, attorney's fees
7 and expenses. But in addition to that, if they
8 failed to reimburse us under 6, they also agreed to
9 reimburse us for the attorney's fees in conjunction
10 with the litigation to recover the money.

11 Q Now what I would like to do is just
12 summarize the money, the amounts that National
13 Grange paid out. First of all, how much did
14 National Grange pay to Bovis?

15 A \$450,000.

16 Q Now under the Efco claim, how much is
17 National Grange obligated to pay at the minimum?

18 A At a minimum, \$154,966.49.

19 Q Now all of this started with the lawsuits
20 that Efco brought in 2003 to get paid. They have
21 asked for both buildings that you all are involved
22 in under one. Have you incurred legal fees?

23 A Yes, we have.

24 Q And you have talked about hiring some
25 consultants to go down and look at the buildings.

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1 You have incurred consulting fees?

2 A Yes, we have.

3 Q If you look at Exhibit 7, please.

4 A Yes.

5 Q And what is the document?

6 A This is spreadsheet compiled by our
7 office outlining all the different expenses,
8 payments, as well as, check numbers, excuse me,
9 associated with each payment, to the different
10 entities that we pay. Including the two consultants
11 as well as attorney's fees.

12 MR. MACK: Move to admit Exhibit No. 7.

13 MR. STANTON: No objection.

14 THE COURT: Without objection.

15 (Spreadsheet marked as Plaintiff's Exhibit
16 No. 7 into evidence.)

17 Q Just to go down a couple of them.

18 Richardson, Plowden and Robinson. What kind of fees
19 were those?

20 A Attorney's fees.

21 Q Cary E. Scott?

22 A He was consultant.

23 Q Meridian consulting?

24 A Also a consultant.

25 Q Now looking on the second page, there is a

Eli Cinq-Mars-direct by Mack

1 couple of checks to MDM Insurance. What does that
2 represent?

3 A That's actually reimbursement for expenses
4 that in all likelihood I incurred as a result of
5 attending and or going to Charleston. They don't
6 want us cutting checks to ourselves. So this is an
7 internal process where we submit a check for
8 reimbursement. And then we also submit a check off
9 the file. So we pay the company and the company
10 pays us back.

11 Q There are some invoices for Clark and
12 Associates. Do you recall what those were for?

13 A I think those were for expenses. Those
14 might have been---

15 Q Court Reporter fees.

16 A Court Reporter, yes.

17 Q And HOV Services/Meridian Consulting.

18 A Yes, Meridian was purchased by HOV
19 Services. So actually subsequent to that would be
20 payments made to HOV Services.

21 Q There is one check to Cindy Day. That's
22 \$185. Do you recall what that was for?

23 A Yes. That was reimbursement to Ms. Day.
24 And I think it was for the Efco trial in Charleston.

25 Q And do you know what the total of legal

1 fees, and strike that. If you look at Exhibit No.
2 8, please.

3 A Yes.

4 Q Is this a summary of everything being
5 claimed by National Grange?

6 A Yes, it is.

7 Q And how much are the legal fees and
8 expenses for the Efco suit, four Bovis suits,
9 everything over the last 6 years or so?

10 A \$312,558.60.

11 Q How much were the consulting fees?

12 A \$50,807.74.

13 Q And what is the total amounts being
14 claimed?

15 A \$968,332.29.

16 MR. MACK: Your Honor, we would move to
17 admit this as a compilation of the prior schedules.
18 It's a summary compilation.

19 MR. STANTON: Without objection.

20 (Compilation of Damages marked Plaintiff's
21 Exhibit No. 8 into evidence.)

22 MR. MACK: That's all I have. Answer any
23 questions the others may have.

24 THE COURT: I think this would be a good
25 time to conclude the testimony for the day,

Eli Cinq-Mars-direct by Mack

1 Ladies and gentlemen. I'll ask you to be back in
2 the jury room tomorrow morning at 9:30. At which
3 time we will continue the trial. Have a pleasant
4 evening. And again, do not discuss the case when
5 we return to the jury room among yourselves or
6 anyone else over the evening hours. Thank you
7 very much.

8 (Whereupon, At 5:15 p.m. the jury is
9 dismissed.)

10 THE COURT: Mr. Cinq- Mars, I caution you,
11 and your attorney knows this, but you are not to
12 speak with anyone else about this case over the
13 evening hours. Just relax. Go down to Ruth Chris
14 and get yourself a nice steak. And watch the
15 basketball game. You are not to talk to your
16 attorneys or anybody else about this case over the
17 evening hours. Do you understand?

18 MR. CINQ-MARS: Yes.

19 THE COURT: Thank you very much. See you at
20 9:30.

21 (Whereupon, the trial commences at 9:30
22 a.m. on Tuesday, April 7, 2009.)

23 THE COURT: The last juror just arrived.
24 Counsel, are you ready to proceed?

25 MR. MACK: The plaintiff is, Your Honor.

1 THE COURT: The defense ready?

2 MR. STANTON: Yes, Your Honor, before the
3 jury is brought in one potential thing in
4 advance. There was some discussion yesterday
5 about a letter that there may have some
6 objection. That's the first time I have had
7 the letter. I didn't fail to produce the
8 letter. I didn't have it. I have it now.
9 They've had it overnight. Written by
10 Mr. Cinq-Mars. And I would like to have the
11 ability to introduce it. I can certainly we
12 can take that up at the time, I try it. But I
13 thought I would mention it in advance.

14 THE COURT: I think I ruled yesterday that
15 the letter could be used to impeach,
16 Mr. Cinq-Mars, if he denied he said it, or wrote
17 it or something like that. But It could not be
18 used as primary evidence. "Mr. Mack, what's your
19 position on that?

20 MR. MACK: We would have the same
21 objection, Your Honor. This letter is from
22 2002. And I know there was a string of
23 correspondence about this time. We have not --
24 by not having it in advance of the trial, we
25 have not had the opportunity to go back, pull

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1 out other documents that may relate to this
2 string of correspondence. In addition, a
3 portion of that letter has been highlighted.
4 Obviously the original would not have been.
5 And we would still object---

6 THE COURT: Of course, everything it looks
7 like went on in 2002, anyway. Not that 2002,
8 would be a reason to keep it out. But from what I
9 understand, a lot of activity was going on in
10 2002, anyway.

11 MR. MACK: Certainly.

12 THE COURT: How this letter relates to
13 this case is, and I have no idea.

14 MR. MACK: And it's the element of
15 surprise. We haven't -- didn't have a chance to
16 go back in the files to get additional documents
17 that may relate to this same topic. You know,
18 coming in at the last minute, so to speak---

19 THE COURT: Well that's true.

20 MR. MACK: ---when a document enhances the
21 case.

22 MR. STANTON: And then my point is, I am
23 Baron Stanton here representing the Clarks.
24 And to the extent that we didn't respond to a
25 Request for Production or an interrogatory

1 about this letter, I didn't have it. I've
2 never seen it. I got it yesterday. They had
3 it overnight written by their witness at the
4 time of all this stuff.

5 THE COURT: Wait, for all I know, it deals
6 with the problems in Iraq. But how does it relate
7 to this case? This case is a contract case based
8 on Indemnity Agreements.

9 MR. STANTON: It is a letter, first letter
10 or an early letter from National Grange responding
11 to the first claim that was made on the bond,
12 stating what their reasons are.

13 THE COURT: What was the first claim?

14 MR. STANTON: The first time a claim was
15 made on the bond was a claim by Efco and the
16 payment bond. And this is their response
17 saying, "Here is how you respond to this
18 payment bond. Here is the way we see it. Here
19 is what we are looking in to. Here is where we
20 denied there is anything on Building B." Now
21 over my objection they have admitted into
22 evidence, an order as there Exhibit No. 6, that
23 is numerous pages of legal discussion about
24 their liability under the bond. And this is
25 the letter.

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1 THE COURT: Let me see the letter.

2 MR. MACK: There is one additional
3 matter, Your Honor. We had not had the chance to
4 talk to Mr. Cinq-Mars about the letter since he
5 was still under examination. We did not talk to
6 him about it overnight. Which is an additional
7 element.

8 THE COURT: Who is Linsey?

9 MR. MACK: He was the project manager.
10 Project manager for Bovis Land Lease.

11 THE COURT: I have seen the letter. Most
12 of the contents of this letter are already in
13 evidence of the testimony of Mr. Cinq-Mars.
14 Not all of it is. I think my ruling stands.
15 Mr. Stanton, you can ask him anything you want
16 to about it. You can use that as a format for
17 cross examination. If he denies he wrote it,
18 then you can offer it. If he says he wrote it,
19 it's just not going to go to the jury as
20 evidence.

21 MR. STANTON: Thank you.

22 MR. MACK: Thank you.

23 THE COURT: Are you ready for the jury?

24 MR. MACK: Ready, Your Honor.

25 MR. STANTON: We're ready, Your Honor.

1 THE COURT: You may bring the jury.

2 (Whereupon, the following takes place
3 within the presence of the jury.)

4 THE COURT: Good morning, Ladies and
5 gentlemen.

6 THE JURY: Good morning.

7 THE COURT: I hope you had a pleasant
8 evening. We are now ready to continue with the
9 trial. Mr. Stanton you may begin your Cross
10 Examination. Mr. Cinq-Mars would you retake
11 the witness stand.

12 Eli Cinq-Mars, after being
13 previously sworn, retakes the witness stand and testified
14 as follows:

15 Cross Examination by Mr. Stanton:

16 Q Good morning, Mr. Cinq-Mars. I don't
17 believe I've had the pleasure. I am Baron Stanton.
18 You were here yesterday in the courtroom, correct?

19 A Correct.

20 Q And you heard your lawyer Mr. Mack's
21 opening statement.

22 A Correct.

23 Q You agree, don't you, that if you agree to
24 do something, you should do it, as a general
25 proposition?

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1 A General proposition.

2 Q Isn't it true, from the beginning of the
3 seven or more year history of this contract,
4 National Grange has looked for ways to deny that it
5 has any obligations under the bonds it issued?

6 A That is not true.

7 Q Isn't it true that for the 6 years from
8 the time of the first claim against the bond,
9 National Grange in fact did not pay one dime in
10 claims?

11 A We have offered to pay what we have been
12 ordered to pay, which is approximately the same
13 amount that we offered to pay prior to trial. The
14 claimant has refused the money.

15 Q The question is though, in the 6 years
16 from the time of the first claim, the first claim,
17 National Grange did not pay one dime in claims in
18 the 6 years from the first time that there was a
19 claim on either bond?

20 A The monies were reserved, we have not
21 issued the check yet.

22 Q Is it your testimony that they have not
23 offered to pay money under the bond before a judge
24 ordered National Grange to do so only in March of
25 2008?

1 A Yes, we did.

2 Q Is that in one of the exhibits?

3 A I don't recall.

4 Q Now you heard your lawyer say in opening
5 statements that under the contract between Bovis and
6 Phoenix, Bovis had the option to add Building B to
7 the contract. But had to do so by a certain date,
8 is that correct?

9 A If you are repeating what Mr. Mack said, I
10 assume you are repeating, correct?

11 Q So you heard him say that?

12 A I heard him say approximately. I don't
13 recall his exact words.

14 Q Now is that proposition true under the
15 contract between Bovis and Phoenix, Bovis had the
16 option to add building B to the contract, but had to
17 do so by a certain date?

18 A I think you would have to review the
19 contract to get what the literal translations of
20 Bovis were. There was a date earmarked for the
21 change order to add Building B. It was actually
22 signed by Phoenix under protest, because it was
23 passed for, well actually for a lot of reasons.

24 Q But my question is, did the contract
25 between Bovis and Phoenix have some sort of option

Eli Cinq-Mars-cross by Stanton

1 in there for Bovis to expand the contract to include
2 Building B?

3 A I believe it did, yes.

4 Q You didn't have a copy of that contract,
5 did you, when you wrote the bond?

6 A Normally a contract you would understand,
7 it was relayed earlier, the contract is voluminous.
8 And we had it's my understanding, we had in the
9 beginning pages of the contract, the first page for
10 example, references a contract for \$918,000 for the
11 Renaissance. It was not until well into the
12 contract that the change order was enumerated.

13 Q Okay well my question is not about the
14 change order, my question is about the contract.
15 Are you telling this jury that you did not have a
16 copy of -- that you only viewed a portion of the
17 contract when you issued the bond?

18 A I don't issue the bonds. If I could
19 clarify that.

20 Q I'm sorry. I was referring, when National
21 Grange issued the bond.

22 A Yeah, I don't know for sure how much of
23 the contract they had.

24 Q Is that the exhibit book there that we
25 were looking at the other day?

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1 A I believe it is.

2 Q For convenience, would you turn to Exhibit
3 No. 2 that your lawyer put in to evidence?

4 A Yes.

5 Q And you remember yesterday you testified
6 that that Exhibit No. 2 that that was the bond that
7 National Grange issued at the behest of Phoenix to
8 Bovis, correct?

9 A That is correct.

10 Q And when we say the bond, I guess
11 sometimes we go back and forth, we say the bond.
12 But there is a payment bond and a performance bond,
13 which is sometimes called collectively the bond.

14 A That is correct.

15 Q And that Exhibit 2 has both of those
16 components. This first one is the performance bond,
17 and the next one is the payment bond, I think?

18 A That is correct.

19 Q Okay. Let's look at the first page, the
20 very front page of the performance bond that is
21 marked as Exhibit No. 2. Does that not say, and
22 directing your attention to right in the middle of
23 the first part, beginning with the word, in all
24 caps, "WHEREAS." WHEREAS the principal entered into
25 a certain contract dated September 30th 2000, for

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1 Bovis Lend Lease, Inc. for project No. 23902600
2 named the Renaissance on Charleston Harbor, at Mount
3 Pleasant, South Carolina. Does it not say, which is
4 hereby referred to and made a part hereof, as if
5 fully set forth herein? Is that, that's what it
6 says?

7 A That's exactly what it says.

8 Q Okay. Now you're a college graduate in
9 environmental----

10 A Conservation.

11 Q Conservation. And a lawyer from New
12 Hampshire.

13 A Correct.

14 Q Does that mean to you that the contract is
15 part of the bond?

16 A In general terms, yes, there are, as you
17 may well, there are always exceptions depending on
18 what the circumstances are.

19 Q Let's look still Exhibit No. 2. If you
20 will flip back 3 pages to the face page of the
21 payment bond. Middle of the page. Does it not have
22 an exact same language about the bond being
23 incorporated in its entirety into the bond?

24 A It has the same language.

25 Q Now we just covered that that contract has

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1 an option in it for Bovis to add Building B. Some
2 sort of an option for Bovis to add Building B.

3 A It has some sort of an option, correct.

4 Q So National Grange did issue these bonds,
5 correct?

6 A Correct.

7 Q Okay. Now let's look at what Phoenix did.
8 To your knowledge, Phoenix did enter a contract with
9 Bovis to do glass and glazing work on the project.
10 Correct?

11 A That's correct.

12 Q And you've testified that the first time
13 National Grange sent a consultant to inspect the
14 job, Phoenix had completed all it's work on Building
15 A except some glass in a breezeway or connector?

16 A Correct. I think there was a garage and a
17 connector to the garage. I don't recall specifics.

18 Q And you testified yesterday that Phoenix
19 did go on to complete both Building A and Building
20 B.

21 A It is my understanding they did, correct.

22 Q And you heard your lawyer say in opening
23 that the buildings were completed maybe in the early
24 2000. Around 2002, or thereabouts.

25 A I don't recall exactly, but they were

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1 completed.

2 Q Now Phoenix did this to your knowledge
3 without Bovis paying Phoenix the 7 to \$800,000 draw
4 that was held up that you described yesterday.
5 Right?

6 A To my knowledge, Bovis did not pay that
7 draw.

8 Q And Phoenix completed those Building A and
9 Building B without getting that money, correct?

10 A My understanding they did not get that
11 money from Bovis.

12 Q And National Grange did not advance any
13 money to Phoenix or to Bovis or to anyone else to
14 get the project to that stage, correct?

15 A Correct. We did not advance any money.

16 Q Now you heard your lawyer say in his
17 opening statement that the essence of a payment bond
18 is a promise of a surety that if Phoenix does not
19 pay its supplier National Grange will do so.
20 Correct?

21 A That's the essence of it. And I think I
22 also testified there are some additional information
23 one would need. Specifically it would need to be
24 materials that were incorporated in a project. The
25 mere fact that a subcontractor or a contractor

1 purchased something, does not necessarily obligate
2 us to make payment. So if they went to Staples and
3 got staplers and pads and pens, that is not
4 incorporated in the project.

5 Q Right. And have you given any evidence
6 that you found Phoenix was out buying staplers and
7 paper and pens?

8 A Not at all, I was trying to use that as an
9 example.

10 Q Okay. And other examples you've used is I
11 think was shifting money around. Have you given any
12 evidence that anybody was shifting money around?

13 A Have I given any? Excuse me?

14 Q You mentioned as an example the other day,
15 you get the husbands and wives to sign the Indemnity
16 Agreements, because there is a possibility that the
17 company might shift money around.

18 A I think the question was why would the
19 wives be on the Indemnity Agreement.

20 Q Right. And the answer was there are many
21 reasons, but one might be, to make sure the company
22 is not shifting money around?

23 A That is correct.

24 Q And you have not given any evidence about
25 Phoenix shifting any money around.

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1 A No, I haven't.

2 Q Other than shifting money to get the
3 project finished.

4 A They completed the project.

5 Q So on the issue of the payment bond from
6 the 6 years from the receiving Efco's claim in
7 February 2002, National Grange did not pay Efco,
8 correct?

9 A Again, you asked it before. I'll say it
10 again. We currently have it reserved. We offered
11 it before trial. And we were told by a judge to
12 pay. We offered to pay Efco. They refused the
13 money, we have the money set aside.

14 Q But in fact even as late in that trial in
15 2008, or thereabouts.

16 A Yes.

17 Q As late as that trial, National Grange
18 took the position that it didn't own Efco anything.
19 And that the bond didn't cover Building A or
20 Building B, isn't that correct?

21 A We took the position they if they wish the
22 claim that Building B is part of the bond then that
23 is a material alteration to the contract. And there
24 is case law out there that says that significant a
25 change would not be held accountable. The surety

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1 should not be held accountable for such a material
2 change. But in general, we have offered to pay, and
3 to pay it today. The amount of the judgment at this
4 time. And we have it currently on reserve.

5 Q So you offered to pay less than they
6 wanted.

7 A Well that's because they want money for
8 glass provided and put into Building B, which we did
9 not bond.

10 Q And if I understand you correctly, you
11 basically told them if you are going to ask for
12 Building B, we are not going to give -- we're going
13 to claim that it doesn't even cover Building A.

14 A No, I think we told them that we believe
15 it covers Building A.

16 Q Let's look at the other exhibit that your
17 lawyer put into evidence. And let's see, I think it
18 is Exhibit No. 6. Says on the first page.

19 A Yes.

20 Q This is 14 pages long.

21 A Yes.

22 Q This is the order in 2008, that the judge
23 in Charleston issued when Efco sued National Grange
24 to be paid, right?

25 A That is correct.

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1 Q Excuse me. I lost my place. Sir, we are
2 on page 13 out of 14 on Exhibit No. 6. It is the
3 middle paragraph on that page. That says National
4 Grange raised the issue of discharging a surety due
5 to a material change in the contract. In its
6 pretrial brief and in its memorandum in support of
7 its Motion to Dismiss pursuant to Rule 41(b) of the
8 South Carolina Rules. "While these arguments are
9 persuasive and would result in denying Efcos claims
10 in their entirety, the court finds that the more
11 equitable approach is to hold that the payment bond
12 covers Building A." That's what that says, right?

13 A That is correct.

14 Q And are you telling me then National
15 Grange did not take the position as late as 2008, in
16 a trial in Charleston, that it owed neither for
17 Building B nor for Building A?

18 A Again, I think I will repeat what I just
19 said. We took the position in trial that if the
20 argument that Building B is incorporated in to the
21 bond, then that's a material change to the contract.
22 That's doubling the size of the bond. And based on
23 case law, that would be a material change and the
24 surety should not be held accountable.

25 Q And you took that position not just in

1 2008, you took that position, the very first
2 response to the very first claim that was made under
3 a payment bond in February of 2002. Do you remember
4 that?

5 A It is my recollection that I take that
6 position with the obligee with Bovis under the
7 performance bond. Bovis was attempting to say,
8 Bovis being the general contractor, was attempting
9 to take the position that not only were we
10 responsible for Building A, but Building B. And my
11 initial response was, if you contend, if you contend
12 that we are responsible for Building b, then that's
13 a material change. We bonded one building. We
14 didn't bond two buildings.

15 Q And so do you remember writing them -- in
16 general, do you remember writing them a letter back
17 explaining your positions on that?

18 A Yes, I did.

19 Q And you remember you told -- what did you
20 tell them about Building A? Did you say, "Oh, we
21 are going to Building A, or did you say we'll look
22 in to that?"

23 A Part of my obligation is to do an
24 investigation. And I believe I told them that we
25 were going to proceed with an investigation as to

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1 both claims of nonperformance, as well as the
2 payment bond. Correct.

3 Q And you didn't pay them anything on this
4 Building A in 2002, did you?

5 A In 2002, we did not. But ultimately we
6 did.

7 Q Was it your recollection you were writing
8 to Bovis in response to a performance bond issue o
9 or a payment bond issue?

10 A It's my recollection it was a performance
11 bond issue, because we had Mr. Scott on the project
12 to take a look at what was completed on the project
13 so we could notify them of that. In addition to
14 that, under the performance bond, Bovis had provided
15 us with a copy of lien by Efco. But obviously Bovis
16 could not make the payment bond because they're not
17 a third party.

18 Q They're not a third party, but the payment
19 bond is actually issued to Bovis, is it not?

20 A Correct.

21 Q Basically saying Bovis, again, in general,
22 it's directed to Bovis. It's addressed to Bovis.
23 Bovis were issuing you this payment bond. The
24 purpose of the payment bond, is to assure third
25 parties they will get paid. Is that what you are

1 explaining?

2 A A payment bond is actually for the benefit
3 of third parties.

4 Q Right.

5 A It was not -- Bovis would not make a claim
6 under the payment bond.

7 Q They wouldn't call you up and say, a
8 third party has a lien on a project, and I think you
9 need to get them.

10 A They would do that under the performance
11 bond.

12 Q Under the performance bond. It's your
13 responsibility in performing, to make sure the
14 liens are on. I understand. So when you were
15 writing to Bovis in 2002, you were saying that the
16 Building B wasn't covered under the performance
17 bond.

18 A That was -- I'll rephrase that. I don't
19 think that's exactly what I said. I indicated to
20 them that if they contend, if they contend that it's
21 under the performance bond, that that would be a
22 material change. We believe and it appeared that
23 the contract amount and the bond amount was exactly
24 the same, which covered Building A.

25 Q Well let's not mix words. Did you give

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1 them any indication whatsoever that Building B would
2 be covered under the performance bond under any
3 circumstance?

4 A I did not tell them that we were covering
5 Building B.

6 Q You told them you were not covering
7 Building B. The only question you had was about
8 Building A.

9 A That's correct.

10 Q And then you essentially told them if they
11 want to persist with Building B, you would take
12 Building A off the table.

13 A I give them some case law as to why
14 Building A would come off the table using your
15 words.

16 Q That order that your lawyer put in as
17 Exhibit No. 6 the one we were just looking at.

18 A Yes.

19 Q It's your understanding that the lawyer
20 that, that that Order was issued by a trial level
21 judge, right?

22 A Correct.

23 Q And that Efco essentially under that
24 order, was awarded some of what they were looking
25 for but not all of it.