

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge AUG 29 2012

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 2 of 3)

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1 A That is correct.

2 Q But it's also your understanding that Efco
3 has appealed that order saying that was not the
4 correct result.

5 A They have appealed that order.

6 Q And they have gone as they say, to a
7 higher court with that.

8 A That is correct.

9 Q That appeal is still pending?

10 A To my knowledge it is.

11 Q So this Exhibit No. 6 is not the last word
12 on what the law of this case is or what the law of
13 South Carolina is, correct?

14 A It could be.

15 Q But we don't know. It's not the last word
16 yet.

17 A Not yet.

18 Q All right. Now also in his opening
19 statement, you heard your lawyer say that essence of
20 the performance bond was that National Grange would
21 help insure the performance of Phoenix. Is that
22 sort of it in a nutshell?

23 A I don't recall that that's what he said or
24 not.

25 Q Well we've covered how National Grange has

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1 helped Phoenix. You sent a consultant to see what
2 the job looked like, right?

3 A I am a little hesitant because you used
4 the word help. I don't know that there is any
5 obligation to help. We have an obligation to
6 provide assurances to the obligee that Phoenix will
7 perform as it is supposed to under the bond.

8 Q So you don't know that that is any
9 obligation to help Phoenix at all?

10 A I am not sure what mean by the word:
11 "Help."

12 Q Under the performance bond and the
13 Indemnity Agreement, do you think that National
14 Grange has any duties at all to Phoenix? To do
15 anything for them at all?

16 A We certainly do have a duty to Phoenix.
17 We have a duty to have -- ask for an accounting. We
18 have a duty to investigate. We have a lot of duties
19 we have relative to Phoenix. But our obligation is
20 for the obligee, to the general contractor. In this
21 case, Bovis. And really under the principal of
22 surety ship, the principal has primary obligation to
23 perform under the bond.

24 Q Now I am not asking you if you have any
25 obligation relative to Phoenix. I am asking you if

1 you have any obligations at all to Phoenix. Do you
2 know of any obligation at all that you have to
3 Phoenix?

4 A I just named them.

5 Q To investigate Phoenix?

6 A No, no. To investigate claims that have
7 been presented.

8 Q Investigate a claim. And you investigated
9 these claims for how many years?

10 A Well investigation was ongoing. And
11 litigation for a number of years.

12 Q Now I believe your lawyer said in his
13 opening statement, that when performance issues were
14 first raised, that National Grange hired a
15 consultant to come in.

16 A That is correct.

17 Q In fact, you testified when Bovis
18 expressed concerns about Phoenix' ability to
19 complete, National Grange hired a consultant.

20 A That is correct.

21 Q And I believe your lawyer, you heard your
22 lawyer say in opening statement, that the consultant
23 determined that Phoenix should be able to complete
24 the job at that stage.

25 A At that stage, it's my understanding glass

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1 goes up pretty quick. When he was over there,
2 Phoenix was installing the balance of the glass.
3 And the initial performance bond claim by Bovis that
4 the glass would not be installed was -- our
5 consultant told us that Phoenix was going to be able
6 to install the glass.

7 Q Did that consultant do anything else other
8 than tell you that he thought Phoenix would be able
9 to complete the part that Bovis was concerned about?

10 A I don't recall at this point. I am sure
11 he did. I am sure he communicated with Mr. Chitwood
12 and probably the superintendent that is there for
13 Phoenix. I am sure he did a lot of other things
14 that I specifically don't recall.

15 Q Excuse me a second. Now the last page is
16 called the Power of Attorney.

17 A Correct.

18 Q That's the bond that incorporates the
19 contract between Bovis and Phoenix by reference,
20 correct?

21 A Again, that is subject to some
22 interpretation based on the case law. And you read
23 the language, and that language was accurate.

24 Q What is it that needs interpreting in the
25 words, "It's hereby referred to and made a part

1 hereof as if fully set forth herein." Is there
2 something ambiguous about that?

3 A I think there's a judge in the 9th
4 Judicial Circuit that found that we were obligated
5 for the incorporation of Building B into the bond,
6 even though that language was in there. So that's
7 why I said it is subject to some interpretation.

8 Q Okay. But now here we are today, and
9 you're not telling this jury that you didn't get a
10 copy of the contract, are you?

11 A Again, I don't underwrite the bond.

12 Q You're not telling this jury that National
13 Grange didn't get a copy of the contract.

14 A To the extent that Grange got a copy of
15 the contract or how much of the contract, and you
16 would have to see the contract to fully appreciate
17 it. I don't know what was received by National
18 Grange. I can't testify to that, I am sorry.

19 Q Do you think that a party has a duty to
20 read something that they're about to sign before
21 they sign it?

22 A Certainly.

23 Q And National Grange is an experienced
24 insurance company with lawyers as employees,
25 correct?

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1 A I think there is only four employees that
2 are lawyers there.

3 Q And this bond here says that the contract
4 is incorporated as if it were set forth as part of
5 the pages.

6 A Again, you have read that before. That is
7 what the bond says.

8 Q National Grange signed it. Had someone by
9 Power of Attorney signed this bond for National
10 Grange? Right?

11 A If I can answer that. I just want to look
12 at it. National Grange authorized an independent
13 agent through the Power of Attorney to sign on its
14 behalf.

15 Q Okay. Let's talk about the independent
16 agent. You said they used an independent agent to
17 sell these bonds, right?

18 A And National Grange uses an agency system,
19 independent agency to sell bonds.

20 Q And you said that National Grange gave
21 that agent a Power of Attorney, and that that means
22 the agent can sign on National Grange's behalf,
23 right?

24 A That's correct. Otherwise they would have
25 no authority to sign on our behalf.

1 Q Right. And as a lawyer, you understand
2 that a Power of Attorney is something that makes
3 another person your agent to the extent that it is
4 stated in the Power of Attorney.

5 A Well you would have to read the language
6 of the Power of Attorney in terms of what their
7 obligations are.

8 Q Right. But if you were talking to
9 somebody at the back fence or a barbecue, and they
10 said what's a Power of Attorney, Mr. Cinq-Mars, in
11 general it's something that authorizes someone else
12 to act as your agent with respect to that document,
13 correct?

14 A Not entirety. In this case it authorizes
15 him to sign on our behalf, the bond. Performance
16 bond and payment bonds.

17 Q Right.

18 A So it does not authorize the full panoply
19 of responsibilities as an agent. The document
20 speaks for itself.

21 Q You're saying a man can sign a legal
22 document binding him in some respect, if he is not
23 in any respect your agent? Is that what you're
24 saying?

25 A He does not have the full obligations and

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1 rights as an agent. He is not a claim's agent. He
2 is not, there is a lot of---

3 Q Is he any kind of agent at all?

4 A Yes, he is an agent for the purposes of
5 signing the bonds on our behalf. That's what I said
6 earlier.

7 Q Are you familiar with the restatement of
8 second agency, the definition of agency and so
9 forth, right?

10 A I am familiar with it.

11 Q ^{A consensual fiduciary} Central to this your relationship in which
12 the agent has the power to effect legal relations
13 ^{of the} and principal, something along those lines. Does
14 that ring a bell?

15 A It rings a bell.

16 Q Now, that person who acted on the Power of
17 Attorney, that person, I am going to call him an
18 agent, was Mr. John Brownlee, correct?

19 A Yes, that is Mr. Brownlee, that is
20 correct.

21 Q Now the name on Exhibit 2 is John
22 Brownlee.

23 A That is correct.

24 Q On both of the bonds.

25 A That is correct.

1 Q And on the Power of Attorney.

2 A I don't believe he signed----

3 Q I may have jumped the gun here. Let's see
4 if he is on the Power of Attorney.

5 A I wanted to clarify. I don't think he
6 signs the Power of Attorney.

7 Q Does it name him?

8 A It names him.

9 Q A few other little things I wanted to go
10 over with you about the progress of the job and so
11 forth. In your direct testimony you stated that
12 after -- was Gaston a tropical storm or a hurricane?

13 A I believe a hurricane. That's where the
14 tropical storm came from.

15 Q Downgraded by the time it got here.

16 A I believe so.

17 Q We had a rain event to say the least, with
18 tropical storm Gaston.

19 A In South Carolina it did, yes.

20 Q And after that, which when you became
21 aware of some significant water intrusion claims
22 that were going on in the project, correct?

23 A I think there were some issues relative to
24 performance before then. But certainly once Gaston
25 hit, there was some larger issues that went on.

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1 Q Right. And then National Grange hired a
2 consultant to go down and look at the windows and
3 doors?

4 A We did. They went down there several
5 times, so they may have in fact went down before the
6 hurricane and then after the hurricane.

7 Q And National Grange knew that Phoenix had
8 had the same issues with Bovis concerning being in
9 essence required to do things out of spec., and to
10 fit things to openings that were not quite right.
11 Were you aware of some of that?

12 A I was aware that some of Phoenix, the
13 fences were the -- the openings were not as they
14 should have been.

15 Q Like where the sliding glass doors go in.
16 The opening not being square, require them in some
17 instances, to shim the door up on one side, and
18 actually grout out the concrete on the other and
19 sink it below the level of the concrete.

20 A I believe that Bovis had to actually grout
21 out some of the concrete, because they were general
22 contractors.

23 Q So Phoenix actually had to go its product,
24 in, in a way that really wasn't what they were
25 expecting to have to do in the contract? In that

1 respect.

2 A I think there were some issues between
3 Phoenix and Bovis in terms of how well the openings
4 were repaired for Phoenix.

5 Q Did you ever see the doors yourself?

6 A Not until after they installed.

7 Q And then after they did that, then when
8 they came in with the caulk, they actually -- the
9 caulk or sealant or whatever you want to call it
10 around the doors, in essence it is because of the
11 way the doors had to be installed, the sealant
12 actually clogged some of the weep holes.

13 A That's what Phoenix mentioned.

14 Q And then in your testimony yesterday, you
15 mentioned there were, among other issues there were
16 various problems with the facade of the building to
17 say the least, right?

18 A They appeared to have been.

19 Q And were you aware of the fact that Bovis
20 had built the infrastructure of the building,
21 right? The cast concrete of the infrastructure,
22 right?

23 A Actually I think that was another
24 subcontractor.

25 Q But that contractor, whoever did that,

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1 were you aware that in instances, the building
2 wasn't flung inlay. It wasn't in a straight
3 vertical line up and down.

4 A I was aware that that was an issue that
5 Phoenix alleged.

6 Q So that when they -- when they have a
7 building that's out of line, when the masonry
8 contractor came up with the veneer brick, there
9 would be an uneven space between the brick outside
10 the building. Excuse me, an uneven space between
11 the brick veneer and the infrastructure of the
12 building, if you would, going up in some instances.

13 A Yes. Phoenix had rebricked the whole
14 facade. So I am not sure if they rebricked it in
15 the same fashion. I don't know how they corrected
16 what you're indicating was the problem.

17 Q But yesterday you mentioned one of the
18 complaints of Bovis, again, we're not dignifying all
19 those complaints as true, but you were acting by
20 looking at, well what are people complaining about.
21 One of the complaints of Bovis was that the -- some
22 of the windows were installed in a way that was too
23 far out from the building. And that that resulted
24 in a either some thermal problems or perhaps some
25 maybe even some leaking problems. Do you remember

1 that?

2 A Yeah, I can remember that. Correct.

3 Q And you don't -- do you know whether that
4 was Phoenix' fault or the fault of the contractor?
5 The fault of the person that built the building? It
6 was not straight?

7 A That was the subject of the litigation in
8 Charleston whose fault it was.

9 Q So it was a mess?

10 A Absolutely.

11 Q On the bay windows, on that sheet we went
12 over some of the notable---

13 A Yes.

14 Q ---expenses that Bovis claimed.

15 A Yes.

16 Q Do you remember that sheet? It was
17 Exhibit No. 3.

18 A Yes.

19 Q And I think on your testimony yesterday,
20 you, it was made pretty clear that is what you were
21 looking at in terms of what Bovis was putting out
22 there or claiming; that you all aren't claiming that
23 this is, all of this is correct, right? We're
24 indicating that that was what Bovis put up there?

25 A Right.

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1 Q And then Bovis has all these columns on
2 here saying, here is how much is the fault of the
3 glass contractor, and here is how much of this here
4 is the fault of the masonry contractor, and here is
5 how much of the fault. They have got about a whole
6 pantheon of people there that they want to allocate
7 the blame to, right?

8 A I believe 10 people, yes.

9 Q Did they take any of the blame? Is there
10 a Bovis call that says, "Here is the amount that
11 Bovis is going to eat because they screwed up?"

12 A I believe they accepted settlement for
13 less than the full amount that they claimed. So I
14 suppose that in some regards that is accepting some
15 of the blame.

16 Q On this sheet did they put out here on the
17 sheet, "Here is how much is our fault?"

18 A I don't recall reviewing the sheet for
19 that, but it probably is not there.

20 Q Okay. But backing up, I was actually
21 going to one thing. One of the big figures you said
22 was, had to do with the bay windows.

23 A That's correct.

24 Q And there is a thermal break problem with
25 the bay windows.

1 A That's what I understand.

2 Q And you said there was some of the
3 windows, not all of the windows. But some of them
4 that were not installed to spec.

5 A I clarified, it's my understanding, that
6 material that was not under the contract was utilized
7 to build those bay windows. So therefore some of
8 those windows were not proper.

9 Q And were you aware of whether Bovis
10 actually directed Phoenix to do it in a way that it
11 wasn't under the contract because of the other
12 nonconformities of the building?

13 A It is my understanding Phoenix admitted
14 that they actually went to another supplier for the
15 aluminum extrusions, and got the wrong extrusion and
16 cut that up in to pieces.

17 Q And there were issues about whether that
18 could be repaired?

19 A Correct.

20 Q And in fact, that was one of the things
21 that your consultant went down there to look at it
22 was, "Can we fix this?"

23 A Correct.

24 Q Well what did he say? Did he say, "We can
25 fix it?"

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1 A Well part of Bovis's contention was, if
2 they needed to remove the windows in order to fix
3 it. And once you remove the windows, you now have
4 to follow the local ordinances regarding the, and I
5 am going to do this in laymen's terms, but I am not
6 a glass guy. But the -- because it's coastal the
7 amount of winds that the window needs to sustain
8 before this building was built was somewhere around
9 80 miles an hour. But then Gaston came along and so
10 they upped the requirement, that they now had to
11 have 100 mile an hour windows.

12 And I may be off. Basically they changed
13 the requirements. But phoenix indicated as soon as
14 they remove the windows, they now have to put higher
15 grade window because of the local ordinance.

16 Q So did you have any discussion about
17 whether if they had gotten moving earlier with the
18 determination of these issues, and perhaps less than
19 conspicuous repair of them that they might go a
20 little more cheaply and more efficiently?

21 A I am not sure what your question is. Are
22 you asking if they had repaired it in the middle of
23 the night, that it might have been cheaper?

24 Q Not in the middle of the night, but
25 earlier in the project.

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1 A Once a hurricane or a tropical storm came
2 through then that changed what was obligated to put
3 in.

4 Q And there were none of these issues before
5 the tropical storm came through.

6 A I think they were still trying to evaluate
7 where the condensations were coming up from.

8 Q And National Grange was still looking in
9 to the bond claims that Bovis had expressed on the
10 performance side?

11 A Correct. We were going to a -- the
12 consultant was going to look at the project. It did
13 an evaluation.

14 Q And so what it ended up doing on those
15 windows was going back with a much more expensive
16 product that was not the product that was in the
17 original project, correct?

18 A It's my understanding they had to put in a
19 100-mile an hour windows or some grade higher
20 because of the local ordinances.

21 Q And they had to do that on a wholesale
22 basis. And they did most or all of them that way,
23 right?

24 A I think they only did the bays. The
25 punch -- I don't believe the punch windows came out.

Eli Cinq-Mars-cross by Stanton

1 Q I meant the bays. They did---

2 A Right, the bays.

3 Q Rather than fixing the ones that were a
4 problem, they ended up replacing all of them.

5 A Well you would have two different, I think
6 you would have two different visual glass.

7 Q Correct.

8 A ---on the building. So it was their
9 contention they were obligated to change all the
10 windows. But they didn't---

11 Q And because of the other problems with the
12 building, Bovis went ahead and stripped the entire
13 skin off the building. I mean they took the masonry
14 off and everything.

15 A There were a number of problems with the
16 building and they obviously named a number of
17 people. They took the skin off the building. They
18 kept punch windows in place, so they wouldn't have
19 to replace them. And I think they put some clips
20 in. The clips were improperly installed. And I
21 believe they kept the sliding glass doors in place
22 so that they were not obligated to replace those.

23 Q When Bovis went ahead and did that, took
24 the whole skin of the building off, the bricks, and
25 a lot of the windows. Peeled the whole facade. By

1 then National Grange had already taken the position
2 in writing with Bovis, that any obligation under
3 Building B was repudiated, correct?

4 A No, we took the position that we were not
5 responsible for -- we were not responsible for
6 performance issues, correct.

7 Q Right. And in fact, you had already taken
8 the position that if Bovis would have pushed
9 Building B as a responsibility, you might not cover
10 Building A.

11 A We took the position that we would move
12 the argument forward. But that's a material
13 alteration to the bond, and the surety is not
14 responsible.

15 Q That's what it says on the building B.
16 Looking at that order that was Exhibit No. 6. If
17 you would look at page 6, I believe. On page --
18 Exhibit No. 6, page 8, paragraph No. 52. Clearly as
19 late as 2008, National Grange was denied that
20 performance bond covered Building B, correct?

21 A I don't think that's what that says.

22 Q Paragraph 52 says: "National Grange
23 denied that the performance bond covered Building B,
24 and asserted the penal sum of the performance bond
25 was limited to \$914,835 which was the contract

Eli Cinq-Mars-cross by Stanton

1 amount for Building A, correct?

2 A That's correct.

3 Q You mentioned on your direct testimony,
4 well we're looking -- already looked at Exhibit 1.

5 A Yes.

6 Q Exhibit No. 3 on your direct testimony you
7 said that Bovis was sending you this, they were
8 sending you the message that they were claiming you
9 might be liable for the 11 million dollars or
10 something in that neighborhood?

11 A I think the very bottom below line 24,
12 under the column: "Amount attributed to Phoenix,"
13 National Grange Mutual insurance it says,
14 11,707,000.

15 Q Your bottom line total on the Phoenix
16 column, over 11 million dollars, correct? That is
17 something that Bovis had decided to allocate.

18 A That is correct.

19 Q And you're saying the significance of this
20 is if you are looking at least at what they are
21 claiming. You're not necessarily agreeing with it.
22 But you are taking that into account in determining
23 the course of action.

24 A That is correct.

25 Q If your bond is only for \$914,000 whether

1 it's Building A or Building B, on what basis was
2 Bovis going to be claiming that you were only hooked
3 for 11 million dollars or more?

4 A I couldn't go through all the legal
5 arguments they presented but---

6 Q Was it bad faith?

7 A I don't believe there was any bad faith
8 alleged in the claim. But there may have been an
9 amount in excess of the bond penal sum alleged
10 against us.

11 Q Now did you have any case law for them on
12 that, that you couldn't be liable for more than the
13 penal sum of the bond?

14 A I don't recall what. It's a rather
15 lengthy case. I don't recall all the little
16 details.

17 Q Well just the big detail. On what basis
18 was Bovis going to hold National Grange liable for
19 11 million if the bond was only for \$914,000?

20 A That's not what I said. I didn't say that
21 they were going to hold us liable for 11 million. I
22 indicated that that's the amount of their claim.

23 Q Right. Now yesterday when your lawyer was
24 asking you questions, you told this jury, "National
25 Grange has never said it did not issue a bond on

Eli Cinq-Mars-cross by Stanton

1 Building A." Do you remember that?

2 A Roughly, yes.

3 Q Is that true?

4 A We've never said that we didn't issue a
5 bond. We have said that if Bovis contends that
6 Building B is part of the bond, then based on case
7 law that is material change, and we would assert
8 that we are not obligated under Building A. That's
9 different than to say we didn't issue a bond.

10 Q Okay. So you're not saying you never said
11 you didn't issue it. You're saying that -- you're
12 saying you never said you didn't -- you're saying
13 you never said you didn't issue it. But you're not
14 denying that you---

15 A I'll repeat it again to the jury just if
16 you want me to clarify it.

17 Q Okay.

18 A It was our position that if Bovis says you
19 are responsible for Building B, our response was
20 going to be that that's a material change to the
21 contract. That's doubling the size of the bond.
22 That's not what we got premiums for. We gave them
23 premium for Building B. We didn't know about
24 Building B. We issued a bond on Building A. And
25 based on some case law that we as a surety are able

1 to say that material change, they are not obligated
2 under Building A or B. But they never actually
3 formally said strike that.. They may have some of
4 that in the...

5 Q But you are just explaining to the jury
6 again, I think, in your explanation, we didn't know
7 about Building B.

8 A It's my recollection that we didn't know
9 about Building B.

10 Q Even though the contract has Building B
11 mentioned in it. The contract is appropriate and
12 the bond is issued?

13 A Again, my understanding of the
14 underwriting that we didn't.

15 Q Now---

16 A And while you are paused, if I can add a
17 little bit. Let me explain. When I say we didn't
18 know about Building B, we weren't covering Building
19 B under that bond.

20 Q You knew about it, you just weren't
21 covering it.

22 A Well I am not sure we know about it. I
23 really, I don't know for sure. You would have to
24 ask.

25 Q And then on that Exhibit 1 that Indemnity

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1 Agreement, you can look at it if you want to, but
2 it's going to be a general question. When you were
3 asked about that yesterday, I think you said in
4 various iterations that it gives National Grange the
5 right but not the obligation to do certain things
6 with respect to Phoenix and receivables as assets as
7 performance, is that correct?

8 A I am not -- you have asked such a broad
9 question, I would have to refer back to the
10 documents in terms of....

11 Q I mean that appears in there several times
12 that National Grange has the right but not the
13 obligation to do certain things.

14 A That part is correct.

15 Q What duties do you have to Phoenix, and
16 the husbands and wives who sign that Indemnity
17 Agreement? What duties does National Grange have?

18 A Well as I indicated to you earlier, that
19 certainly a duty to investigate is one. A duty to
20 settle the claims presented was another. And I am
21 sure that are many.

22 Q National Grange issued the bonds, and for
23 over 6 years didn't pay a dime in claims. And now
24 you want to get paid back for over \$300,000 in
25 litigation expense. And what you are finally either

1 forced to pay or elected to pay. Isn't that
2 correct?

3 A You have provided a sort of a simplified
4 version.

5 Q Yes.

6 A A litigation because of the nature of the
7 litigation, we were brought in to cost National
8 Grange a lot of money. There were a number of
9 defendants. The litigation itself lasted a very
10 long time. And yes, we did incur \$300,000 in legal
11 fees as a result of that. A number of other
12 entities incurred a substantial amount of legal fees
13 in that same -- very same litigation. The only way
14 out of the litigation in cutting down legal fees
15 would have been to pay the bond penal sum probably
16 plus some. We only paid \$450,000. And the legal
17 fees were still below the bond limit under Building
18 A. So, yes, we did incur a number of legal fees,
19 but that was the very nature of the project and how
20 we were incorporated in to this claim.

21 MR. STANTON: Thank you. I don't know if
22 Mr. Chitwood has any.

23 Cross Examination by Mr. Chitwood:

24 Q Good afternoon. There was a period of
25 time, a long period of time, between the completion

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1 of the building, and the units that were being
2 occupied, and before the repairs were begun Bovis,
3 the general contractor.

4 A That's my understanding, yes. It was
5 sometime it occurred.

6 Q It was sometime. And during that time,
7 there were earlier problems. And then that was the
8 condensation issues that came up. I personally went
9 down. You sent your team -- did you send your
10 investigators to investigate the condensations
11 issues?

12 A I believe Mr. Bowden from Meridan was down
13 there. And took a look at the condensation issues.

14 Q And were the bay windows part of the
15 condensation issue?

16 A I just don't recall offhand. I believe
17 they were.

18 Q When the portion of the member, the
19 aluminum framing of a bay window did not include the
20 thermal break, as you testified. A portion of them
21 did not.

22 A That is correct.

23 Q Then the lack of the thermal break would
24 cause the condensation issue.

25 A One would -- that was what was alleged by

1 Bovis, yes.

2 Q Well what did your investigator find?

3 A That the lack of a thermal break would
4 cause condensation in general.

5 Q And that is part of the claim that was
6 being made by Bovis?

7 A That is correct.

8 Q Did the bond require you then, in your
9 obligation to Bovis to repair if Phoenix was unable
10 to do so?

11 A Well at that point, Phoenix was still
12 there trying to resolve the claims. And Phoenix has
13 the primary obligation to resolve claims. So we
14 would not push Phoenix out of the way.

15 Q You indicated that you were there looking
16 at the issue of the windows. So, and it's a little
17 difficult for me, because he is pro se, Your Honor.
18 But you indicated to me, or to the consultant, that
19 you were taking care of things. Is it your
20 testimony that I spoke with your consultant?

21 A It's my understanding you have spoken with
22 our consultants, yes.

23 Q On the issue of condensation on the bay
24 windows?

25 A On a number of the issues.

Eli Cinq-Mars-cross by Chitwood

1 Q I am referring to the condensation on the
2 bay windows.

3 A I don't recall specifically as to each
4 issue.

5 Q And is it your testimony that Phoenix was
6 still involved with the process at that point and
7 time? That's why you weren't stepping in to perform
8 your duties under the bond?

9 A It's my understanding that Phoenix was
10 there relative to the issues of the condensation
11 prior to the hurricane. And when you have an active
12 principal, there is an expectation that they will
13 resolved whatever claims there are.

14 Q Did you receive notification from Bovis
15 that Phoenix was unable to effect those repairs?

16 A I don't recall exactly which. We received
17 a number of things from Bovis.

18 Q Do you remember why Phoenix didn't enact
19 those repairs?

20 A I think Phoenix at that point was alleging
21 that they weren't paid a substantial amount of money
22 on Building B. But I may be off.

23 Q And these windows there that were
24 incorrect were both A and B?

25 A That is correct.

1 Q You testified it was your understanding
2 that Phoenix went to another supplier to obtain this
3 material?

4 A The supplier of material. It may have
5 been another warehouse for the same Efco product.

6 Q The same product.

7 A I believe it was. But not the same
8 extrusion as was required.

9 Q Right. But you were not inferring that
10 Phoenix attempted to go outside of the spec. On
11 purpose?

12 A Oh, I -- no. No. They had just gone to a
13 different location to pick up the material.

14 Q You indicated in your testimony that after
15 the hurricane, tropical storm, that there were a lot
16 of issues concerning leaking under the sliding glass
17 doors.

18 A That was one of the issues that Bovis
19 alleged, and the homeowners, that water came in
20 causing damage.

21 Q Were you aware of an agreement between
22 Phoenix and Bovis that Bovis was installing the
23 sealant underneath those doors?

24 A Off hand I don't recall if there was.

25 Q Why would you have not been in

Eli Cinq-Mars-cross by Chitwood

1 communication with Phoenix concerning all of these
2 claims by Bovis?

3 A My recollection, we were in communication
4 with you. I personally had phone calls with you.
5 And a consultant I am sure had conversations with
6 you. And or an on site supervisor or staff or
7 whatever.

8 Q And you don't remember during these
9 conversations being told that these leaks were not
10 our responsibility because we didn't install the
11 project.

12 A I do recall that that was alleged by
13 Phoenix that it wasn't our responsibility because of
14 how much they had to cut out. Bovis countered with
15 the shims that were used under the glass door were
16 not the proper shims. The sealant was not properly
17 installed. So it was---

18 Q So you were not made aware at any time or
19 don't remember that the sealant that they're
20 claiming was improper or wasn't even installed or
21 purchased or touched by Phoenix?

22 A I don't remember. Normally sealants are
23 done or on this large a buliding is usually done by
24 a separate subcontractor.

25 Q Would it surprise you to find out that

1 Phoenix refused to install the doors, and refused
2 to take the responsibility of issuing that because
3 of their concern of exactly what was happening; that
4 it was going to leak?

5 A But I think Phoenix did install the door
6 and windows.

7 Q I asked you would you be surprised to
8 learn that?

9 A I would surprised. I've never seen it
10 documented.

11 Q Now during these extensive, well I am
12 sorry. I don't want to characterize them extensive.
13 These conversations that you had with Phoenix, did
14 you ever review line by line, the contentions by
15 Bovis of what Phoenix' responsibilities were? And
16 what ultimately you were asked under the bond?

17 A Yeah, I am not an engineer. So that's one
18 of the things I asked an engineer to take a look.

19 Q Did the engineer consult with Phoenix on
20 this list of contingents by Bovis?

21 A It is my understanding they did. And they
22 took a look at what was installed as well.

23 Q Do you have any recollection of whom in
24 the Phoenix organization this inspector or engineer
25 or any representative of National Grange spoke with?

Eli Cinq-Mars-cross by Chitwood

1 A Yeah, I think he talked to you for one.

2 And I think Terry Scott talked to you. And I think
3 Jay talked to you.

4 Q Mr. Scott's visit there was during the
5 evaluation of the performance bond on Building A and
6 B, which was the very first claim.

7 A That's correct.

8 Q That was -- that would be, would that be
9 before the condensation issues came up?

10 A Yes.

11 Q So we didn't talk to Mr. Scott about the
12 condensation issues or about the leaks under the
13 doors. Is that correct?

14 A But I understand you did talk to
15 Mr. Scott. But probably not about condensation.

16 Q Probably about not those issues. But the
17 issues that you testified that you talked --
18 Mr. Scott came down to evaluate our building and
19 finished project.

20 A That's correct.

21 Q Not about any issues about leaks or
22 condensation.

23 A I don't believe those issues had arisen at
24 that point and time.

25 Q So the conversations that I am trying to

1 get a handle on have to do with, Bovis has this
2 extensive list of claims. 11 million dollars worth.
3 And it incurred not just at one time during the
4 trial, and the preliminary parts of the trial, it
5 occurred all during the past. And you were being
6 involved. Your company was being involved with the
7 process. You're sending people down. At what time
8 did you say, "Phoenix we are in this together. Go
9 over with me and show me what we don't know. We're
10 not a glass installer." Did you ever sit down with
11 Phoenix and say: "Show us where Bovis is wrong.
12 Show us where our liability really is. Help us
13 understand this extremely complicated," -- did you
14 do that?

15 A In general I think we did. Phoenix hired
16 counsel when litigation ensued. I am sure there was
17 communication between counsel in terms of what the
18 responsibilities are. As to the issue of the
19 caulking, which would prevent the leakage, any
20 damage as a result of the leakage really would come
21 under the CGL carrier or the insurance carrier for
22 Phoenix as opposed to a surety bond. If doors don't
23 have to be replaced, the cost of the damages as a
24 result of the water leak is usually under insurance,
25 as opposed to under the surety bond.

Eli Cinq-Mars-cross by Chitwood

1 Q Your responsibility under the bond would
2 be to complete the project if Phoenix was unable to
3 do so.

4 A That's correct. But...

5 Q And so my understanding from a review of
6 the documentation is that Bovis contends that it was
7 not done at all. So would we not have need to ask
8 them to complete it? I'm not talking about damages.
9 I am talking about completing.

10 A I am sorry, there's a couple of knots in
11 there. Can you rephrase the question?

12 Q Let's try something else. We're talking
13 about one particular issue to the jury. There are
14 many issues we could be talking about. We're just
15 talking -- this one was brought up. And we're
16 exploring this in detail. So the issue I am asking
17 about is why you didn't involve Phoenix to help you
18 understand what your liability was. Not the part
19 about what was the insurance company's liability,
20 but what your liability was.

21 A Well I think we did. I think I recall
22 that one of the actions Bovis took was, we are
23 fixing the buliding. We are doing this on our own.
24 And we are going to send you the bill. And they
25 striped the whole face of the building and rebricked

1 it. And put new windows in the bays. Reclipped
2 where the clips were incorrect. So in some degree,
3 some of our investigation was done after the fact.
4 But we were in communication with your counsel. And
5 Phoenix had counsel. As well as we hired an
6 independent investigator or engineer to take a look
7 at the issues that Phoenix presented.

8 Q My counsel, our counsel, being an attorney
9 who practices in construction law.

10 A That's fine.

11 Q I'm asking---

12 A I mean, I assume so.

13 Q I am asking if that's who that was.

14 A Chad Poteat I think---

15 Q Chad Poteat.

16 A ---was his name.

17 Q And so your testimony is that Chad Poteat
18 was who you went to, to determine for help, on
19 determining the reality of what was going on in the
20 building and the claims?

21 A I am sure there are communications with
22 Mr. Poteat both oral as well a, probably some
23 written requesting information regarding the
24 defenses.

25 Q Let me ask one more specific, and I think

Eli Cinq-Mars-cross by Chitwood

1 we will be done. Could you explain to me the
2 process of the bond in relation to the fees and fees
3 for change orders.

4 A I am not sure what you are asking.

5 Q There -- when a company, when a
6 contractor, subcontractor applies for the bond, we
7 in effect purchase the bond.

8 A Correct.

9 Q And we give the bonding company two things
10 in exchange for that. We give them money and an
11 indemnification agreement?

12 A Give probably give them more than two
13 things.

14 Q No, in consideration.

15 A You probably give them more than two
16 things in consideration. You probably have given
17 them personal financial information. Financial
18 information regarding the company. Audits of your
19 company for how ever many years back they request.
20 Information regarding substance suppliers, who they
21 are. There is a lot of information that is
22 requested of a contractor between when we write a
23 bond.

24 Q And there is a -- and that's the normal
25 general procedural that you describe. If there is a

1 change order on the project, what is the procedure
2 at that point? And I am not referring to a material
3 change that you referred to before. We are not
4 talking about Building B. We are talking about if
5 there is a change order which would change the
6 amount of that contact. What is the procedure?

7 A The normal procedure might be to notify an
8 underwriter. I am not in the underwriting side of
9 the house to know what exactly what the procedure
10 is. I handle claims. I don't handle underwriting.

11 Q All right.

12 A They don't want me writing bonds. We
13 don't want them handing claims.

14 MR. CHITWOOD: Thank you.

15 THE COURT: Redirect?

16 MR. MACK: Thank you, Your Honor. Just
17 relatively briefly.

18 Redirect Examination by Mr. Mack:

19 Q I'm going to be jumping around just a
20 little bit so if you and the jury have a little
21 trouble keeping up with me, just to address a couple
22 of points that have been brought up. First of all,
23 the question of premiums and what not, and this may
24 be kind of reverse order. If you look at exhibit---

25 THE COURT: Is the jury okay?

Eli Cinq-Mars-cross by Chitwood

1 THE FORELADY: Is there any way...

2 THE COURT: Yes. It's 11 o'clock. Let's
3 take a short break before Mr. Mack gets in to his
4 redirect examination. Ladies and gentlemen, we
5 will take a break for about 10 minutes. Just go to
6 the jury room and I will call you when we are ready.
7 Again, don't discuss the case among yourselves while
8 you are in the jury room. Thank you.

9 (Whereupon, the Court takes a short
10 break.)

11 THE COURT: You may bring the jury,
12 please.

13 (Whereupon, the following takes place
14 within the presence of the jury.)

15 THE COURT: You may proceed.

16 MR. MACK: Thank you, Your Honor.

17 Redirect Examination by Mr. Mack:

18 Q Just again very briefly, and we'll try --
19 we'll be jumping around a little bit. I would like
20 you to look at Exhibit 2, which is the bond. You
21 were asked a little bit about premiums. And how
22 they were calculated and so forth. Would you look
23 in the upper right hand corner of the bond, Exhibit
24 No. 2?

25 A Yes.

1 Q And what is the premium shown for that?

2 A \$8,188.

3 Q And would National Grange have been paid
4 that amount, or would the agency have gotten some of
5 that?

6 A The agency would have gotten a portion of
7 that.

8 Q And National Grange is paid out \$450,000,
9 and they will pay another or will pay another \$150
10 or so on the Efco claim?

11 A That's correct.

12 Q National Grange hasn't made a whole lot of
13 money on this bond?

14 A Not at all.

15 Q Now there were a good many questions about
16 the investigation that National Grange did, and the
17 consultants did. Once Bovis filed suit, was
18 National Grange really in a position to work
19 directly with Phoenix on things?

20 A Well once Bovis filed suit, Phoenix was
21 not going to be allowed back on the project to
22 complete, or we were not going to be allowed to
23 complete the project.

24 Q Did Phoenix have an attorney in the Bovis
25 litigation?

Eli Cinq-Mars-redirect by Mack

1 A Yes, they did.

2 Q So it is normal when there is litigation
3 and attorneys are involved, that most of the
4 dealings are things between the attorneys?

5 A Yes, it is.

6 Q And is this discovery process part of your
7 investigation once a lawsuit is filed?

8 A Absolutely. Sometimes we don't get
9 information when we ask for it before the lawsuit.
10 Or just we ask for information and we don't get it.
11 We file suit. So then we force the claimant to
12 provide the information through discovery.

13 Q When you talk about discovery, what are
14 some of the ways of getting information during the
15 process of the lawsuit?

16 A There are interrogatories, as well as,
17 production of documents. There may be questions
18 asked from the other side. Or, please let me see
19 these documents, these invoices, those kinds of
20 things.

21 Q Switching gears to the tenor of some of
22 the questions you were asked by Mr. Chitwood, and by
23 and Mr. Stanton, it seems to me National Grange
24 could have gone ahead and paid the claim when they
25 came in as they presented it. What I would like to

1 do, first of all, if National Grange had paid Efco
2 \$770,000 that it was asking on both Building A and
3 Building B would National Grange be looking to
4 Phoenix and the owners to be reimbursed the full
5 \$770,000?

6 A Yes, we would.

7 Q Is it Phoenix and the owners advantage
8 that instead of paying Efco 770,000 they only pay
9 \$150,000?

10 A Definitely to their advantage and their
11 decision once they were obligated to pay \$150,000.

12 Q Bovis was claiming both building A and
13 Building B, is that correct?

14 A That's correct.

15 Q Did you ever deny National Grange issued a
16 bond on Building A?

17 A No, we did not.

18 Q Now if Bovis had prevailed or if they had
19 really pushed or did push to sue you, but the issue
20 over Building B would affect, would that have simply
21 invalidated the bond rather than denying it ever
22 existed?

23 A One of the arguments would be that it was
24 a material change in the contract. And our position
25 would have been that it materially changes the

Eli Cinq-Mars-redirect by Mack

1 contract. To explain to the jury, one doesn't write
2 a bond and say there is a subdivision that goes in.
3 One would write a bond for one buliding. And if a
4 contractor has a change order for the next buliding
5 and the next building and the next building. You
6 would want to know the totality of both your
7 exposure as well to your liability before you write
8 a bond.

9 Q I just want to do a little math. And I
10 did this in a hurry. But there were questions about
11 the amount spent in investigation and whether it is
12 reasonable or not. So the Efco claim was 772,674.
13 That's Building A and Building B.

14 A That's right.

15 Q Do you recall that?

16 A Yes.

17 Q And then Bovis the bond on Building A,
18 was \$914 -- 835,000.

19 A That is correct.

20 Q And you settled that part or that claim
21 for \$450,000?

22 A That is correct.

23 Q Building B, the change order was \$719,920.
24 So A plus B. Now is the million six what Bovis was
25 asking National Grange to pay?

1 A A million six. Well they were asking to
2 pay more than that. But they indicated we had
3 responsibility for 1,630,000. Plus that figure.

4 Q So the total, the full amount claimed by
5 Efco A and B, if all the bonds and everything had
6 included Building B, roughly 2.4 million dollars?

7 A That is correct.

8 Q And if you had simply not incurred
9 attorney's fee and not incurred consulting fees and
10 just simply paid what they asked when it came in,
11 would that be the 2.4 million dollars?

12 A Yes.

13 Q And under the agreement is that what
14 Phoenix and the owners of Phoenix would be
15 responsible for?

16 A Yes, it would be.

17 Q So if Phoenix benefited -- Phoenix was
18 benefited by the investigative process of National
19 Grange? The settlement process?

20 A Yes. Yes, they are. We paid less on
21 Bovis. Hopefully ultimately on the Efco claims.
22 And definitely on the Bovis case as well.

23 Q And in the Efco case, if the judge had
24 ordered National Grange to pay 770 plus interest,
25 would National Grange be looking to Phoenix and the

Eli Cinq-Mars-redirect by Mack

1 owners to be reimbursed the roughly 1 million
2 dollars or so?

3 A I am sorry. If they had already?

4 Q If the judge rather than saying it only
5 covered Building A, if the judge had said It covered
6 A and B the judgment would be one million dollars.
7 A little over a million dollars.

8 A I think the judgment, the total judgment
9 is not exactly one. I think the difference is a
10 100,100,000. But yeah, we would have asked for that
11 in addition to that.

12 Q So the indemnitors have benefited by the
13 National Grange defense that they have paid the bond
14 claim, haven't they?

15 A Yes, they are.

16 Q Now just talking about whether it covers
17 Building A and Building B, if you would look at the
18 Power of Attorney which is attached to the bond.

19 A Yes, sir.

20 Q And what is the limit on that Power of
21 Attorney?

22 A It states that no bond to exceed 1 million
23 dollars.

24 Q And the Building A, was 914,000 which is
25 under B. So Building A falls within the Power of

1 Attorney.

2 A That is correct.

3 Q Based on your understanding of this claim
4 process, if Building B was excluded making the
5 total a one million six, would the Power of Attorney
6 have been valid for a bond for a one million six?

7 A Our position with Bovis was there was not
8 a valid Power of Attorney. That it was in excess of
9 \$1,000,000.

10 Q Let's talk about National Grange not
11 paying the claims. First of all, let's just go
12 over the claims that were originally involved in
13 this. First was the Efco claim for payment, is that
14 right?

15 A That's correct.

16 Q Then there were concerns about Phoenix
17 being able to finish the buildings, do you recall
18 that?

19 A Yeah, I recall that they were almost
20 simultaneous at the time is my recollection. We
21 were not particularly notified by Efco, as I recall.
22 That through Bovis that this lien, and by the way,
23 did not finish it.

24 Q And then the final thing was the Bovis
25 suit over the improper installation of the windows.

Eli Cinq-Mars-redirect by Mack

1 A Yes, there were various lawsuits that
2 occurred at the same time. Bovis being the largest.

3 Q So there were basically only 3 claims
4 involved with Phoenix on this project, correct?

5 A Correct.

6 Q And now the Efco claim when it came in
7 2002, did National Grange offer to pay the amount
8 due on Building A?

9 A In 2002, I asked for an itemization as to
10 the glass that was incorporated in Building A and
11 what was incorporated in Building B. That requires
12 a shipping the invoices and things like that. The
13 glass looks the same on the two buildings. So we
14 wanted information regarding which was which. I
15 don't recall exactly when we offered to pay. But It
16 was after we got an itemization from Efco in terms
17 of exactly what was incorporated in Building A.

18 Q Once you got that itemization in the early
19 2002, 2003, you offered to pay the amount on
20 Building A.

21 A We did offer to pay the amount on Building
22 A on this Efco.

23 Q And Efco refused?

24 A That is correct.

25 Q And then ultimately it went on to trial,

1 and that's what the jury has already heard about.
2 So that's the course of that claim you offered to
3 pay, but they wouldn't take it. Now the second
4 claim for the completion of the work, I think you
5 testified that Building A was basically complete.
6 And you were notified.

7 A That is correct.

8 Q And then ultimately Phoenix did finish
9 Building A and B?

10 A That is correct.

11 Q So that one was resolved by Phoenix
12 performing in their contract?

13 A That is correct.

14 Q And then the third claim is the big
15 performance claim where they stripped the building.

16 A Yes.

17 Q And has that been resolved?

18 A Yes, that been resolved.

19 Q And National Grange settled that and paid
20 \$450,000.

21 A Yes, we did.

22 MR. MACK: That's all I have.

23 THE COURT: Recross?

24 MR. STANTON: Briefly, Your Honor.

25 Recross Examination by Mr. Stanton:

Eli Cinq-Mars-redirect by Mack

1 Q The terminology down, you're saying that
2 National Grange didn't deny that the bond existed on
3 Building B?

4 A Incorrect.

5 Q We're not denying that a bond. That's
6 incorrect. We are not denying that a bond existed
7 for Building, that's right A. We're not denying
8 that a bond existed for Building A, we're just
9 reserving the right to contend that it's invalid.
10 Is that clarification?

11 A Again, I will repeat. Our position was
12 that, we wrote a bond on Building A. You had a
13 \$914,000 bond penal sum. \$835. That if Bovis was
14 contending that we were responsible for Building B;
15 that that was a material change to the contract and
16 that would invalid based on case law; that would
17 invalidate our obligation; that would invalidate the
18 bond. And it would release us from obligation under
19 the bond.

20 Q And that contention depends on your
21 assertion that you're not sure whether you ever had
22 a copy of the complete contract when you wrote the
23 bond?

24 A Not at all. That assertion is based on
25 the bond that was written for Bovis.

1 Q Just to be perfectly clear, there is no
2 doubt that the contract has it in, the mention of a
3 second building, i.e., Building B.

4 A I think it is Exhibit E or B, or something
5 like that, buried way down in. Yes, it is in there.

6 Q There is no dispute that the contract has
7 a Building B mentioned in it. That's correct.

8 A Correct.

9 Q Right. And is it your testimony to this
10 jury that you are just not sure whether National
11 Grange read the contract when issuing the bond?

12 A Again, I am not an underwriter so I can't
13 testify as to what they did or did not do.

14 Q Okay. But you can testify to the legal
15 conclusions to be drawn from that.

16 A That's correct.

17 Q I got you. Now when Mr. Chitwood was
18 asking you questions about the bond, he said to buy
19 this bond we will give you a premium and Indemnity
20 Agreement. You made a big point to point out to him
21 there is a whole lot more than that that you ask for
22 before you issue a bond, correct?

23 A That's correct.

24 Q And you said we ask for a history of
25 financials. List of suppliers, lists of subs you

Eli Cinq-Mars-recross by Stanton

1 are going to use on the job. Right?

2 A That's not exactly. If I said that, I
3 misspoke. They asked for a list of subs that they
4 might have worked with in the past. Because they
5 send a letter out to them.

6 Q I got you.

7 A How well do they pay. Sort of a credit
8 check.

9 Q Right. So you would ask about the
10 financials. And you want the ability to audit them
11 or a copy of any audits that have been done.

12 A Usually they ask for audits.

13 Q So you ask for, as you said in your words,
14 a whole lot of information before you issue a bond.

15 A Normally an underwriter does, yes.

16 Q But your legal conclusion that you could
17 just potentially disregard the bond, even as to
18 Building A, is based upon your uncertainty that you
19 had a copy of the contract that is incorporated by
20 reference explicitly on the front page of both
21 bonds. Correct?

22 A That is not my legal conclusion. My
23 statement was, that that was our position with
24 Bovis.

25 Q So you took the position. It wasn't

1 necessarily a conclusion?

2 A Now you are in semantics. I am not quite
3 sure what you are asking.

4 Q Now both of those bonds have that \$8,188
5 in the upper corner.

6 A That's correct.

7 Q Is that one premium for both? Or is it
8 two times that?

9 A One premium for both.

10 Q And both of them have that \$914,000 excuse
11 me, \$914,835.00 sum.

12 A Correct.

13 Q Now is that, each one of them has that?
14 Or is that the total between the two?

15 A Each one of them has that.

16 Q So you would pay out 914,835 on the
17 payment bond. And 914,835 on---

18 A On the performance bond.

19 Q ---performance bond.

20 A A million 8.

21 Q But your -- didn't you say the Power of
22 Attorney was limited to one million dollars?

23 A This is all considered one bond. The bond
24 is a payment bond. One bond.

25 Q It's all one bond. Is it for a million or

Eli Cinq-Mars-recross by Stanton

1 more than a million?

2 A For \$914,000.

3 Q I am not sure -- I may have misunderstood
4 you. Are you saying that the payment bond, as you
5 stand ready to pay out 914,835 under that bond, that
6 you could also turn around and pay 914,835 under the
7 performance bond?

8 A In essence there is one bond. They are
9 called payment and performance bonds. There is only
10 one Power of Attorney that goes with it. The
11 liability to obligee, Bovis in this case, would be
12 \$914,000. And we could be obligated to claimants,
13 third party complainants for \$914,000.

14 Q For a total of over 1.8?

15 A That could be our exposure. But there is
16 one bond. And the bond penal sum is \$914,000 and
17 change.

18 Q I am not being facetious but when that
19 event occurs, do you go right behind the Power of
20 Attorney and say it was only good for a million?

21 A No, we don't.

22 Q And you're saying that what you did
23 benefited Phoenix?

24 A Well it lessened the exposure to Phoenix.

25 Q And you're saying that if you paid these

1 things when they were made, you would have ended up
2 paying out all this money that Mr. Mack wrote up on
3 the board.

4 A That's correct. We would have paid out a
5 whole lot more.

6 Q But you don't know that all of those
7 things would have occurred in that order if you had
8 paid the very first thing, right?

9 A No. If you're trying to go backwards,
10 there was a \$717,000 claim. And tropical storm
11 Gaston did come in and caused all that damage. The
12 two would not have negated the other. One would not
13 have negated the other. So both events would have
14 occurred.

15 Q But you didn't pay out one dime under the
16 payment bond. You didn't pay one dime of the
17 \$772,674 back when that was first made. You
18 investigated it.

19 A That is correct.

20 Q And if you had paid that, and if Phoenix
21 had gotten the 7 to \$8,000 that was owed to Phoenix
22 then Phoenix could have paid you back for that,
23 couldn't they?

24 A Phoenix could have done a lot of things.
25 They could have put up a -- release a lien bond to

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1 be the money. They could have done a number of
2 things.

3 Q We're talking about what if.

4 A Within that time---

5 Q What if, we're talking about the what if's
6 of National Grange, not the what if's of Phoenix.

7 A Sure within, if I can answer. Within that
8 time period the storm actually did hit. And so in
9 all likelihood Bovis would have still held on to the
10 money.

11 Q But now if I could ask the question is,
12 there was 7 or \$800,000 owed to Phoenix that it
13 couldn't get from Bovis, because Efco wasn't getting
14 paid, correct?

15 A Correct.

16 Q And Phoenix ultimately put that money in
17 to try to resolve claims at the end of the
18 construction defect lawsuit, right?

19 A I don't know what Phoenix did.

20 Q Would you look at Exhibit No. 6?

21 A Sure.

22 Q Page 9, Paragraph 53. Now the trial that
23 this order came out of, you were at that trial,
24 right?

25 A Yes, I was.

1 Q You testified at that trial.

2 A Yes, I was.

3 Q And it says here in this order that you
4 and counsel put in to evidence that as part of
5 overall settlement of Bovis' claim against Efco and
6 National Grange, Bovis obtained monies owed under
7 the Phoenix contract which were at least \$500,000.
8 But maybe as much as \$750,000. So you see that?

9 A I do see that.

10 Q Were you familiar with that at the time of
11 all that litigation?

12 A I was familiar that Bovis was still
13 holding the money, yes.

14 Q Right. And you're aware of fact that
15 Phoenix actually had its liability carrier come in,
16 in this litigation too, right?

17 A Yes, I am familiar with that.

18 Q And they, and you are familiar with the
19 fact that they, in addition to the Phoenix money,
20 that they wrote the check to Bovis.

21 A At this point and time, they have, it's my
22 understanding they wrote a check.

23 Q Finally did write the check.

24 A Yes, sir.

25 MR. STANTON: Those are all the questions

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1 I have. Thank you.

2 THE COURT: Recross?

3 MR. CHITWOOD: Your Honor, I have one
4 question.

5 THE COURT: Go right ahead.

6 Recross Examination by Mr. Chitwood:

7 Q Mr. Cinq-Mars, after two tries, I am still
8 confused about the numbers on the chart. We can
9 work that out and that would be the last question.

10 The bonds are together payment and performance.

11 A That's usually considered one bond.

12 Q But you feel was the case, that we're
13 talking about these bonds. So it has a total of
14 \$914,000 for both bonds.

15 A The bond penal sum is \$914,000.

16 Q And so that would include the payment bond
17 for 772? For Efco.

18 A What do you mean would include? The
19 payment bond is \$914,000. But the penal sum
20 excluded is 914.

21 Q The penal sum which includes both payment
22 and performance.

23 A That's correct.

24 Q So if you paid 772 to Efco under the
25 payment bond, there is only \$120,000, \$130,000 a

1 small amount left over.

2 A On this payment bond.

3 Q On the payment bond.

4 A It would still have exposure under the
5 performance bond.

6 Q And this is the part I am confused about.
7 The payment and performance Bond, the penal sum is
8 914.

9 A That's correct.

10 Q Does that mean it's 914 twice, or is it
11 914 or once?

12 A It's 914 to the obligee. And it's 914 to
13 the potential payment bond claims. Under the
14 payment bond. The obligee being Bovis. It's 914
15 under the performance bond aspect. And it's 914
16 under the payment aspect of the bond. Does that
17 help?

18 Q That clears it up. So in effect it is
19 possible to pay that out.

20 A It's possible, but realistically rarely
21 done.

22 Q Thank you. Your Honor, just one thing
23 that Mr. Stanton read in. The part of the
24 paragraph, part of the sentence. I'd just like the
25 entire sentence. If you would look at page 9 of

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1 Exhibit 6.

2 A Yes, sir.

3 Q Page 9. Paragraph 53.

4 A Yes, sir.

5 Q You read the first part of the sentence as
6 requested by the Mr. Stanton. Would you read the
7 entire sentence?

8 A Sure. As part of the overall settlement
9 of Bovis claims against Phoenix, Efco and National
10 Grange, Bovis retained monies owed under the Phoenix
11 contract which are at least 500,000, but are as much
12 as 750,000. Because of the window defects and
13 installation issues, there are funds that otherwise
14 would have been paid to Phoenix and National Grange.

15 MR. CHITWOOD: That's all I have.

16 THE COURT: You may come down. Thank you
17 very much.

18 MR. MACK: Your Honor, at this point, I
19 would like to publish a portion of the Answer that
20 Mr. Chitwood filed.

21 THE COURT: All right.

22 MR. MACK: Ladies and gentlemen, as part
23 of the process, the plaintiff files what is called
24 a Complaint. And then each of the defendants have
25 the opportunity to file what is called an Answer

1 under the rules. Certainly I can publish or I can
2 read to you part of response that the one or more
3 of the defendants have made. In this case, this
4 is the Answer and it's just a small portion of it.
5 But this is part of the Answer that was filed by
6 Mr. Chitwood pro se, and his wife Linda, pro se.

7 And this is unnumbered pages and
8 unnumbered paragraphs, but this is the
9 statement. "Furthermore, the bond described in
10 this Complaint only covers Building A." That's
11 all, Your Honor. And at this point, we would
12 need to publish some deposition excerpts. We
13 have previously provided these to the clerk and
14 to Mr. Stanton.

15 THE COURT: Ladies and Gentlemen, what
16 counsel is doing at this point, as he explained to
17 you, a lot of things go on before a case is ever
18 brought to court or brought in to court for trial.
19 And from the time the case is first filed until it
20 gets to the point where we are now, there is what
21 is called the discovery process. Both parties try
22 to find out and under the rules they are entitled
23 to find out what the other side contends or what
24 their position is on various issues.

25 And as a part of that process, the

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1 attorneys take the depositions. Sworn statements
2 of various people who may be witnesses in the
3 case. And they allowed to read those portions of
4 the depositions in to evidence at this time. Or
5 sometimes they're called live witnesses. You've
6 seen live witnesses. People are not available as
7 witnesses. And for various reasons under the
8 rules, the parties are allowed to publish. That
9 means present various portions of these
10 depositions. And that's what Mr. Mack and his
11 co-counsel are doing at this point. She is merely
12 reading the portions of the statements that were
13 taken. These were taken under oath just as though
14 they were in Court. Mr. Mack, you may proceed.

15 MR. MACK: Thank you, Your Honor. First
16 is the deposition of Brent Chitwood that was
17 taken on July 2, 2008. Look at page 6, line
18 15.

19 Q I Just want to start with some basic
20 personal background and general information. Would
21 you state your full name for the record, please.

22 A Christian Brent Chitwood.

23 Q Page 7, line 20. Tell me that little bit
24 about your education, if you would please.

25 A I have a B.S. degree in Accounting from

1 Newberry College.

2 Q What year did you earn that?

3 A 75.

4 Q Turn to Page 42, line 14. Well let's
5 shift gears a little bit, and talk just briefly
6 about the Renaissance project. Because several
7 volumes could be written on the Renaissance project,
8 as I understand. But if you can, just tell me your
9 involvement on behalf of Phoenix in the early stages
10 of the Renaissance project. And that's going on to
11 Page 43, line 24.

12 A I was only an observer up until the point
13 of the contract. That's when I became involved.
14 And then administratively, I would also had to
15 obtain the bond.

16 Q The next question, were you responsible
17 for obtaining the bond on this project?

18 A Yes.

19 Q Had you worked on projects or had Phoenix
20 Contract Glass worked on projects previously where
21 it had needed bonds?

22 A Yes.

23 Q So were you familiar with payment and
24 performance bonds?

25 A We had -- yeah, I mean I was very familiar

Eli Cinq-Mars-recross by Mr. Chitwood

1 with the concepts.

2 Q Page 46 line 3. Prior to the bond,
3 receiving the bonds for the Renaissance project, do
4 you ever -- or do you recall signing an Indemnity
5 Agreement as a condition of getting a bond?

6 A I don't -- I don't recall signing it. I
7 mean, I have seen a copy of it. And I, you know, I
8 am aware that my signature is on it. So I mean, but
9 I mean I....

10 Q So you admit your signature is on the
11 Indemnity Agreement with National Grange.

12 A Well certainly.

13 Q Page 57 line 19. But do you agree that
14 you did sign an agreement of indemnity with National
15 Grange?

16 A Yes.

17 Q And going down to line 24. Do you
18 acknowledge you signed an agreement of indemnity
19 with National Grange?

20 A Yes.

21 Q Page 80 line 23. Okay let me ask you
22 this. Does it say that anywhere in the document
23 that National Grange has to get your approval,
24 authorization or concurrence before making a
25 payment?

1 A If they pay, then the answer to your
2 question is no. That I am aware of. But I do not
3 have a document. The Indemnity Agreement and I have
4 no knowledge of it being in the document that I can
5 remember. I am not going to be able to point out a
6 paragraph, okay?

7 Q Page 94, line 10. Mr. Chitwood, you
8 indicated that you reviewed the Indemnity Agreement,
9 is that right?

10 A Yes.

11 Q Okay if I can find my copy of it now, here
12 we go. Do you recognize this document,
13 Mr. Chitwood?

14 A No.

15 Q Can you turn to page 6 of the document?

16 A Yes.

17 Q Do you see your signature on this page?

18 A No.

19 Q On page 6?

20 A I have a little issue with copies here.

21 Q Oh, there are two page 6's. Please turn
22 to the first page 6. Do you see your signature on
23 that page?

24 A Yes, sir.

25 Q How many times do you see it?

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1 A Twice.

2 Q The first time you signed under Phoenix
3 Contract Glass, is that right?

4 A Yes.

5 Q Did you acknowledge that is your
6 signature?

7 A Yes.

8 Q The second time you signed as an
9 individual. Do you acknowledge that that's your
10 signature?

11 A Yes.

12 Q Page 124, line 22. Okay, and just to
13 clarify you are not disputing the authenticity of
14 this contract, are you? You are not disputing you
15 signed this agreement of indemnity, are you?

16 A No.

17 Q You knowledge that's your signature on the
18 first page 6?

19 A That is my signature.

20 Q Next we are going to the deposition of
21 Christian Brent Chitwood taken April 4th 2007. This
22 is Peter Bernard in the Bovis litigation. Brent
23 Chitwood. And this is April 4th 2007. Turn to page
24 9, line 7.

25 Good morning, sir. Could you please state

1 your name on the record?

2 A Christian Brent Chitwood.

3 Q Line page 19 line 1. Let's talk about
4 Phoenix for a minute. You said, you, your company
5 started up in 1996, is that correct?

6 A Yes.

7 Q Who was involved in the start up Phoenix?

8 A Ronnie Clark and Skip Graham. Henry
9 Herbert Graham.

10 Q And yourself?

11 A And myself.

12 Q So the three of you were partners?

13 A Yes. Members of LLC.

14 Q Had you had any business dealings with the
15 other two gentlemen before 1996?

16 A I had never met Mr. Clark before.
17 Mr. Graham and I went to high school and briefly to
18 college together. I had helped him on one of his
19 business ventures for about two weeks. I helped him
20 out on something. But other than that, no.

21 Q Were either of the other two gentlemen
22 involved in the construction industry before Phoenix
23 was started up?

24 A Yes, both of them were involved in Glass.
25 Commercial Glass Subcontracting.

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1 Q Installation work?

2 A Yes.

3 Q And they worked for other companies?

4 A Yes.

5 Q And wanted to start their own company?

6 A That's correct.

7 Q And they asked you to become a member or a
8 partner in that entity?

9 A That's correct.

10 Q Now what was the business of Phoenix?

11 A It was specifically to have a commercial
12 glass subcontracting company as opposed to auto
13 glass or residential glass repair or any of the
14 others. It was strictly for replacement glass for
15 new construction, commercial building was what the
16 original intent was.

17 Q Page 22 line 13. Where was Phoenix
18 business primarily conducted?

19 A Generally during the first year, in the
20 Columbia market. But we did work in the first year
21 in Florence. Let's see, Charlotte, Florence,
22 Columbia. I think that's the only ones I remember
23 for the first year.

24 Q What type of projects were you working on?

25 A We did the Sunoco office building in

1 Hartsville near Florence. It's about a 30, 40,000
2 single story office building with floor to ceiling
3 glass panels in it. We did that. We did numerous
4 what's referred to in the industry, as store front
5 jobs that first year. We're starting out. The
6 large contractors you know, aren't going to allow
7 you to do a major job when you are starting out.
8 You don't have the ability. But so we did store
9 front, also referred to as a door and a side light
10 in a small retail buliding. Hundreds of them. And
11 we did a lot of repair first year as well.
12 Replacement on buildings like the one we are in. In
13 particular, the one next door. We did a lot of work
14 down here through Main Street.

15 Q How many employees did Phoenix have when
16 it started out?

17 A When it started?

18 Q Uh-huh. (Affirmative.) So Mr. Clark and
19 Mr. Graham actually performed a lot of installation
20 work themselves?

21 A Mr. Graham's role was as the estimator.
22 Mr. Clark's is the field supervisor. And my role is
23 financial. That's how the company was divided up.
24 We quickly began adding employees during the -- and
25 I think this is what you are wanting to know. But

Eli Cinq-Mars-recross by Mr. Chitwood

1 during the first year we had a very detailed growth
2 plan. As you grow, you have two things. You bring
3 on the employee. As soon as you bring them on, you
4 must find work for them all the time. So we would
5 sell into the market. Make sure we knew.
6 Hopefully, we would have the right employees in
7 place and build. Brought in a head shop -- head
8 shop fabricator.

9 Started buying trucks and grew slowly.
10 There was a period there in about year three, where
11 we reached break even point as far as volume. And
12 that's when we were in 20 and 25 total employee
13 company. Doing about 2 million a year in volume.
14 In that range 3 million.

15 Q Page 29, line 13. So the bond for the
16 Renaissance project that we'll look at, you are
17 personally obligated on those?

18 A Yes.

19 Q The surety company?

20 A Yes.

21 Q Is anyone else?

22 A All three of the members. Ronnie Clark,
23 Skip Graham and myself.

24 Q Page 32 line 22. So would it be accurate
25 to say that you have an interest to in seeing Efco

1 get paid the claim they've asserted, because
2 otherwise you are personally on the hook for
3 whatever is outstanding to them?

4 A That is true. I am personally on the hook
5 from either the bonding company or the note,
6 whichever way it would go. That is correct.

7 Q Page 37 line 14. Are Mr. Clark and
8 Mr. Graham personally obligated to National Grange
9 on the bonds for the Renaissance project?

10 A Yes, they are.

11 Q Page 98 line 21. When Bovis initially
12 made the claim against National Grange and National
13 Grange rejected the claim, what was Phoenix'
14 position concerning that claim?

15 A That Bovis should have paid us and not the
16 bonding company.

17 Q That's all from that deposition. This is
18 the Deposition of Linda Chitwood taken on
19 January 21, 2009, page 8, line 19. All right, would
20 you please state your full name for the record
21 please.

22 A Linda Nitara Chitwood.

23 Q Page 40 line 22. Okay, Ms. Chitwood, I m
24 going to show you what we have marked as Exhibit No.
25 2. It's sort of a long document. I am going to ask

Eli Cinq-Mars-recross by Mr. Chitwood

1 you to take a look at it. Take all the time you
2 need. Let me know when you are ready. I am going
3 to ask you a few questions about it.

4 A Okay.

5 Q If you will look at, I am going to direct
6 your attention to a few pages. If you will look at
7 page 6, in this document, do you see your signature
8 on that page?

9 A Yes.

10 Q Okay. You acknowledge that's your
11 signature.

12 A Yes.

13 Q And that's all from that deposition. Jury
14 to clarify for the jury, the Exhibit No. 2 in the
15 deposition may not be the same Exhibit No. 2 in the
16 exhibit book. You can check later on. But you see
17 what document it is. Next is the deposition of
18 Ronald L. Clark taken April 7, 2008. Page 6 line
19 25. If you would, state your full name for me
20 please.

21 A Ronald Lee Clark.

22 Q Page 25 line 24. If you could look at
23 what we've marked as Exhibit 1, it's right there to
24 your right.

25 A This?

1 Q Yes. If you would take a few minutes and
2 look at it. I am going to ask you a few questions
3 about it.

4 A Okay.

5 Q Are your ready?

6 A Uh-huh. (Affirmative.)

7 Q Do you recognize what this document is?

8 A It's an agreement of indemnity.

9 Q Have you ever seen it before today, do you
10 think?

11 A Yes.

12 Q How do you know that?

13 A Because I see somebody who has got my name
14 on there perfectly. It looks just like my
15 handwriting.

16 Q Is that your signature?

17 A Yes, it is.

18 Q Do you acknowledge that's your signature?

19 A I sure do.

20 Q Page 27 line 14. Did you ask an attorney
21 to read this before you signed it?

22 A No. I was asked to sign it by my
23 partners, and that's what I did.

24 Q Page 29, line 8. Do you know if you ever
25 sent a letter to National Grange after signing the

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1 Indemnity Agreement asking them to exclude any
2 property or anything you owed?

3 A I didn't write any letters.

4 Q Next deposition, is Ronald Clark taken
5 April 27, 2007. Page 8 line 6. And can you please
6 state your name?

7 A Ronald Clark.

8 Q Page 25, line 14. And do you know if you
9 were personally liable to National Grange Mutual
10 Insurance company, surety bond company, for the
11 Renaissance project?

12 A I am sure for everything I am liable.

13 MR. MACK: That's all from that
14 deposition. And the final deposition is of Susan
15 Clark. Dated April 7th 2008.

16 A Page 6, line 21. I just want to start off
17 with some general background information. If you
18 would, state your full name for me.

19 A Susan Fletcher Clark.

20 Q Page 21 line 21. I am going to show you
21 what we have marked as Exhibit 1, and let you take a
22 look at that. I have got an extra copy for your
23 lawyer.

24 A Okay.

25 Q And if you just want to take a few minutes

1 to take a look at it, if you would like, I am going
2 to ask you some questions about it. All right.

3 Let's well take it page by page. Look at page 1.

4 Do you see your family up there at the top?

5 A I do.

6 Q As an indemnitor?

7 A I do.

8 Q Let's flip to page 6, if you would. I
9 think your -- is that page 6? They are -- these are
10 different, no.

11 Q There is two page 6's. Well let's go to
12 the first page 6. Do you see your name on there?

13 A I do.

14 Q Is that your signature?

15 A It is.

16 Q Do you acknowledge that is your signature?

17 A Yes.

18 Q Is that your address there on the left
19 hand side?

20 A Yes.

21 Q IS that your Social Security Number?

22 A Yes.

23 Q Page 24, line 2. But you agree that is
24 your signature on there.

25 A It is, yes.

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1 Q Page 24 line 11. Did you ever send a
2 letter to National Grange asking them to exclude any
3 property from the Indemnity Agreement? Do remember
4 doing anything like that?

5 A No.

6 MR. MACK: That's all of the depositions,
7 Your Honor.

8 THE COURT: All right.

9 MR. MACK: That concludes our case.

10 THE COURT: Ladies and gentlemen, that
11 concludes the Plaintiff's case. The Defendant
12 has certainly the opportunity to present its
13 defense at this time. But I think at this
14 time, there is some legal matters I need to
15 take up with the attorneys before we continue.
16 The most efficient use of our time would be to
17 allow you take a lunch break at this time. It
18 is 12:30.

19 I have got something I have got to do in
20 another court matter that just came up this
21 morning. I have got to attend to at
22 2:00 o'clock. So I going to ask you to be back
23 in the jury room at 2:30. That will give you,
24 approach the bench, counsel. Let me just talk
25 to you about the schedule.

1 away from the jury, and I see no contradicting
2 evidence. Therefore, I would have to do it.
3 Motion is granted.

4 MR. STANTON: Thank you, Your Honor.

5 THE COURT: It is ironic or coincidental
6 that I have to grant a default against them in the
7 first place. It's almost a year ago.

8 Prior to the break, I had asked if there
9 were motions. And Plaintiff made a motion regarding
10 of the default of the defendants. Any other motions
11 for the record?

12 MR. MACK: Nothing further from the
13 plaintiff, Your Honor.

14 MR. STANTON: Nothing from the defendant,
15 Your Honor.

16 MR. CINQ-MARS: Yes, sir.

17 THE COURT: Who is your first witness,
18 Mr. Stanton?

19 MR. STANTON: Mr. Chitwood.

20 THE COURT: Bring the jury.

21 (Whereupon, the following takes place
22 within the presence of the jury.)

23 THE COURT: Mr. Stanton, you may proceed.

24 MR. STANTON: Thank you. May it please
25 the Court, the defendants call Mr. Brent Chitwood.

1 Brent Chitwood, being first
2 duly sworn, testified as follows:

3 Direct Examination by Mr. Stanton:

4 Q State your full name for the record.

5 A Christian Brent Chitwood.

6 Q Good afternoon, Mr. Chitwood. Let me
7 start by asking you to tell the jury a little bit
8 about yourself. Where you are from, what you do,
9 where you live at.

10 A I am from Columbia. Born and raised here.
11 Went to school here. Went to school in accounting.
12 Worked most of my career in banking and marketing.
13 And the last few years I have been involved in the
14 various real estate ventures.

15 Q How did you come to be associated with
16 Phoenix Contract Glass LLC?

17 A A friend of mine that I knew in high
18 school and college, approached me with a plan to
19 start a company. And his plan was to have one
20 person in sales, one person in finance, and one
21 person in the operation side. And it sounded like a
22 good plan to me, and so I got involved.

23 Q How did it go?

24 A It went according to plan. It started out
25 very good. And I learned a lot about construction

1 and construction contracts, long ago when we built
2 the company. And we were very successful and very
3 proud of what we accomplished.

4 Q And how did the company become interested
5 in this project, the Renaissance on Charleston
6 Harbor?

7 A Well as we grew, we developed
8 relationships with the various people in the
9 industry. There are various ways to get jobs. But
10 in particular, we had developed a relationship with
11 a salesman for Efco. Not necessarily Efco, but a
12 salesman for Efco. And he introduced us to the
13 contractor on this job, and we were invited to bid.
14 It was a very limited list of companies that were
15 invited to bid. And so we were able to negotiate,
16 because it wasn't really open; negotiate this
17 contract.

18 Q I am sorry, you said you were able to
19 negotiate?

20 A Yes.

21 Q And how did you -- off of what did you
22 base your bid?

23 A We based our bid on the plans and specs
24 that were provided. Which we then provided to the
25 material supplier to give us a quote for the

Brent Chitwood-direct by Stanton

1 material that was going to be on the job.

2 Q And I think we have been over this some.

3 So let's, I guess we won't go in to detail. The
4 general nature of the work was to install glass, and
5 glass framing and glazing?

6 A Yes. We're not a manufacturer. We don't
7 make glass. We don't put the glass together. And
8 this particular job was primarily, and I will make a
9 rough guess. But it probably was as high as in the
10 excess of 90 percent. What would be monumental
11 windows, that come already put together with the
12 glass in them. And they are very, very large and
13 very, very heavy.

14 And so essentially it was a matter of
15 taking these large giant windows and doors and
16 putting them in the building. So it was the labor
17 side of the business is what we did. I kind of
18 gloss over, say that quickly. But that is a very
19 hard thing to do.

20 Q And the, we may be leaving out some
21 details, but a great part of the glass dealt with
22 the sliding glass doors or setting or the punch
23 windows or the sliders in.

24 A The majority of it was the sliding glass
25 doors and the panels. You may have noticed on the

1 picture that it overlooked Charleston Harbor. And
2 so there would be one huge piece of set glass fixed.
3 Another fixed. And then a section that was a
4 slider. And then fixed. And pretty well glassed
5 all the way around, floor to ceiling. And that
6 floor to ceiling aspect is something that created a
7 lot of issues on the job. The initial design of
8 that created an issue.

9 Q Well I take it your bid was successful.

10 A Yes.

11 Q And were awarded the contract.

12 A Yes.

13 Q Now what was the scope of that contract in
14 terms of how much work you were going to do?

15 A Well the.....

16 Q I mean in terms of how many buildings you
17 might have or whatever.

18 A The contract was constructed to include
19 Building A. And a connector building called The
20 Plaza, which in the design connected. And
21 ultimately connected to the second Building A and B.
22 So the hard first contract was for A and The Plaza.
23 And that was for all the glass installation. And
24 providing the glass through our supplier for that.
25 And then integrated in that was an optional clause

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1 for Building B at a fixed price.

2 So it was agreed upon exactly at that time
3 how much we would do the second building for. And
4 that was also based on the bid from Efco at that
5 time. So it was a mirror image of the first
6 building. The pieces of glass and everything about
7 B and A were the same.

8 Q And were you awarded the contract and then
9 went out to get a bond, or did you have to get a
10 bond to get the contract?

11 A We had to be able to demonstrate that we
12 could do the bond before you could get the contract.
13 You have to be a bonded contractor through an
14 acceptable bonding company with the appropriate
15 rating.

16 Q So tell the jury what you went through in
17 general in order to get the bond that was needed in
18 order to get the contract.

19 A Well we had been doing bonding work, which
20 is bonding work will be any work that requires a
21 bond. And that's your larger contracts. Of course
22 that was our goal was to do that work. And we had
23 to operate within limits. We had to continually
24 present financial statements as they become
25 available on our internal performance. We had to

1 continually present our personal financial
2 statements.

3 Q To whom?

4 A To, well at that time, we were only
5 dealing with one bonding company. It's not like you
6 change bonding companies. You a -- you can. But
7 you have a bonding limit. And then you get each one
8 underneath that limit as you go. And then you are
9 continually updating your information. So to us,
10 this was a continuation of the process that we have
11 been before.

12 Q What bonding company?

13 A With National Grange.

14 Q So are you saying that they would bond you
15 on more than one project?

16 A Yes. I mean they were within our limits.
17 And....

18 Q How would that work if you had say a,
19 before this project, do you remember what your
20 limits were?

21 A I certainly don't remember a specific one.
22 In the range of half a million dollars.

23 Q Let's say as a hypothetical if you were
24 loaned \$500,000, would they bond you on two \$500,000
25 projects that were going on at the same time?

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1 A No, no. We would have to do say a
2 \$250,000 project. And then maybe \$250,000 project.
3 But before we could get to the third \$250,000
4 project, we would have to have completed the work in
5 the exposure so that the overall was under. And we
6 kept a log of all of our jobs that were involved
7 with this, to keep the progress.

8 Q So the bond you could get was based on the
9 in essence sort of the amount of work in progress
10 that was going on at a particular time?

11 A That is the exactly the name of the form
12 was the work in progress document that was used.
13 Now you know it's certainly not automatic. I mean,
14 especially you still have to submit the
15 documentation and you have to be approved. But it's
16 all within the framework of the overall limits and
17 the work in progress.

18 Q So you could be bonded on three, you had a
19 limit of \$500,000. You could be bonded on three
20 \$250,000 projects under certain circumstances.
21 Namely that there wasn't more than a certain amount
22 going on at one time.

23 A My understanding of how we work as to the
24 limitation, I mean if you had already for example,
25 purchased all the material in the first bond, the

1 first \$250,000 and you already paid the supplier,
2 then we could get that to no longer be counted
3 against our overall limits. You know, it was
4 something that we spent a lot of time on and paid a
5 lot of attention to.

6 Q And you spent a lot of time with National
7 Grange or its underwriters submitting those things?

8 A Not that much with the underwriters.
9 Normally we would go through Mr. BrownLee, and he
10 would submit the information to whomever. In this
11 particular case it being a larger job, and a special
12 job. Ms. Day came and visited our office;
13 specifically, because of this job.

14 Q So the process on this particular job when
15 you went to get the bond you went to Mr. Brownlee?

16 A Yes, he was our contact. Our primary
17 contact.

18 Q And then what was -- just take the jury
19 through the process, what would you tell him. What
20 did y'all talk about? What did you do from there?

21 A Well we're in a job. We're getting ready
22 to try to negotiate this job. We think it's going
23 to be coming up here. It's pretty large. It's in
24 two pieces. First piece is 900. We have never
25 bonded one that large before. You know, what are we

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1 going to do? You think we can get there. Well how
2 are things going. Well we're making money. Well
3 let's get all the money together and fill out the
4 bond questionnaire and let's meet and see what we
5 can do.

6 And so the bond questionnaire lists
7 everything that they would need in order to evaluate
8 the decision on whether or not they would approve
9 the bond.

10 Q And then would you tell them that the
11 contract would involve Building A in a Plaza and a
12 potential later face and with Building B---

13 A Yes.

14 Q Mirroring Building A?

15 A Yes.

16 Q And did you all discuss how that would
17 work in terms of work in progress?

18 A We specifically built a projected work in
19 progress document. We looked at the financials to
20 determine, you know, basically was it going to work
21 out as far as our internal cash flows. And you know
22 because they -- they have to look at what we're
23 doing. And of course it's a great process for us as
24 well.

25 Q Now did you know whether Mr. Brownlee

1 could just approve the bond, or whether he had to go
2 somewhere else to get that approved?

3 A No, he would -- he is the agent not the
4 company. He's just the agent. He provided the
5 information to whomever. I mean, it might have been
6 from time to time say we might not have done
7 business with National Grange previously. It could
8 have been a different bonding company before. But
9 we would still go through Mr. BrownLee as to -- as
10 he represented different companies.

11 Q Now did you end up talking to anybody else
12 associated with National Grange in the process of
13 trying to obtain a bond?

14 A Yes, the underwriter Cynthia Day came to
15 our office.

16 Q Okay. What do you mean by the
17 underwriter?

18 A An underwriter is I guess, a different
19 word for that, kind of like an evaluator. They
20 would have a set of standards that they apply. And,
21 excuse me, but I come from the banking background,
22 so I kind of accept that. And it's very similar to
23 applying for a loan. Very similar. But they
24 evaluate all of the facets of the request, and
25 compare it to various standards. In other words, is

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1 their working capital proper to do this. You know,
2 is it under limits. And they go through and they go
3 through and do all the evaluations of all of the
4 information that was submitted.

5 And I assume that, and this is strictly an
6 assumption on my part, and it's in banking,
7 depending on where the limit was, as to whether or
8 not who had to approve a bond. You might have
9 somebody that could approve a \$100,000 at the local
10 level and then it goes the higher it is. So, and I
11 don't know what their process was. But I know that
12 she came and we provided her with the information.

13 Q Now when she came, was that a lengthy
14 meeting?

15 A There were two meetings. And I don't
16 remember it being for hours and hours. But I do
17 remember spending hours and hours preparing the data
18 to provide her. And so I don't think the meeting
19 was that lengthy, but the information covered was
20 extensive.

21 Q And in that information covered and in
22 looking at the evaluating, did you discuss what the
23 job would include in terms of which buildings, or
24 how many buildings you were going to build?

25 A Well we certainly did, because that was a

1 major concern. We were, of course, because we lived
2 it every day. We were very aware of what our
3 overall limits were. So we knew that we couldn't do
4 a 1.6 million dollar job, because our limits
5 wouldn't get us there. So that was a major part of
6 the conversation is okay, "Now how does this work?"
7 In between the first and second meeting, it was
8 worked out that oh, well, go back and figure out
9 what the exact math is between Building A, buying
10 the material, getting the money from the general
11 contractor, paying it to the supplier. That
12 building being pretty well finished. Your -- the
13 liability going away for that building. Then that
14 would allow us to be able to go and sign the
15 contract for Building B. And in everything within
16 the limits. Some I mean that's what makes that
17 memory so clear to me; is that that was in fact the
18 major issue about the conversation, was how are we
19 going to do this.

20 Q In discussing the transition, or essential
21 transition for Building A and Building B still being
22 within our limits?

23 A Right, if we had not worked something out
24 there, then we couldn't have done it at all.

25 Q And under that, you're saying

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1 that Building B you all treated it -- you could have
2 treated it almost as if you were going to go off and
3 do a building down the street for a different
4 general contractor.

5 A That's correct. But we treated it as if
6 it was a foregone conclusion that B was going to
7 happen. Because you had to assume that it was going
8 to happen in your projections to make sure that you
9 weren't making a mistake. I mean: "Can we do
10 this."

11 Q Right.

12 A So to be to prudent, we had to assume it
13 was going to happen. If it didn't happen then, you
14 know, that wouldn't cause us to go over on anything.

15 Q And was the potentiality of the Building B
16 something that was in the contract?

17 A Yes. Specified as to the specs., the
18 plans, and the amount.

19 Q And did you -- did you furnish everything
20 to National Grange and its underwriters that was
21 requested of you?

22 A Oh, absolutely.

23 Q Is there any chance you would have given
24 them only 2 pages of a 40-plus page contract?

25 A I don't see how we could have done that.

1 How would they have been willing to approve it? It
2 couldn't have gotten through underwriting with only
3 the first page.

4 Q Did you conceal anything from them?

5 A Certainly not.

6 Q Are you aware of anybody else concealing
7 anything from them at all?

8 A No, what was in their best interest was in
9 our best interest at that time.

10 Q So you have explicitly covered the
11 potentiality of Building B.

12 A Yes.

13 Q And then was there a fee for the issuance
14 of the bond?

15 A Yes.

16 Q Do you know whether that was paid?

17 A Yes, it was paid.

18 Q And was the bond issued?

19 A Yes.

20 Q And did -- and Phoenix got the contract
21 with Bovis?

22 A Yes.

23 Q And Phoenix started the work on that
24 contract, right?

25 A Yes, sir.

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1 Q And to fast forward with a very general
2 question, do you know of anything Phoenix didn't do
3 that it said it would do?

4 A Let me think. That's a very broad
5 question. You know, when it got down to the very
6 end, the answer to that question is, yes, I do.
7 When it got to the very end of the contract and we
8 finished the buliding, they obtained their
9 certificate of occupancy, and the people moved in.
10 The issue came up about the sweating on these bay
11 windows. And so this is a very explicit answer. I
12 apologize for not as----

13 Q That's all right.

14 A We said we were going to install thermally
15 broken in, all of those bay windows. We know that
16 2, 24-foot pieces of non-thermally broken metal got
17 intermixed in there somewhere. A piece here, a
18 piece here. A piece here. It got intermixed by
19 mistake. So to answer your question, yeah, we said
20 we were going to put thermally broken in there. We
21 did make that mistake, and we didn't do it. The
22 people in the shop got the two pieces of metal mixed
23 up. So to answer your---

24 Q You're talking about a mistake.

25 A We made a mistake. We certainly intended

1 to. And the reason I bring that up is that we only
2 offered to fix that at that point and time. And we
3 were virtually out of business by that time. We
4 only offered to fix it if they paid us the contract
5 amount. We were, you know, we were at an impasse at
6 that point. We didn't have any way to fix it.

7 Q This is late in the---

8 A This was literally years later. They had
9 already moved in.

10 Q Well let's dial back a little bit.

11 A Sorry about the long answer.

12 Q Back to the beginning of when you got the
13 bond and started work on the project, and how did it
14 go?

15 A Well right from the start, we had the
16 wrong set of plans.

17 Q Was that your fault?

18 A No. They just didn't give us the right
19 ones.

20 Q They being?

21 A Bovis, I am sorry.

22 Q Okay. So what was the consequences of
23 that?

24 A A, almost \$300,000 increase in our
25 material costs from our supplier Efco.

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1 Q Was that your fault?

2 A No.

3 Q Did Bovis agree to make up the \$300,000?

4 A No, they claimed that it had to be
5 approved by the owner. And that they would submit
6 the request to the owner. And the owner denied the
7 request.

8 Q So then you refused to get the new
9 different specification product?

10 A Well we would liked to have, but the way
11 the contract was written it said that we must -- if
12 there was a dispute of any kind, or any change; that
13 we had to proceed with the project and then price it
14 at a later point. And the reason they put that in
15 there is so somebody can't be arguing and hold up
16 this great big construction project. So we had
17 assigned it, and we had to suck it up and keep
18 building.

19 Q So you went ahead anyway.

20 A Yes, sir.

21 Q And then what happened when you sent the
22 bill to Bovis?

23 A Well they wouldn't allow us to send the
24 bill for the higher amount. They would only allow
25 us to bill for the portion of the material that was

1 included in the original estimate not for the
2 change. So the more we built, the more material we
3 ordered, the further behind we got.

4 Q Now did Efco like that?

5 A Well Efco was calling me every day and
6 wanting to know what we were going to do to get
7 paid.

8 Q Did you ask Bovis how to get paid?

9 A We did. This was a major event in our
10 lives. And very controversial going on. What can
11 we do. What can we do. And they said -- they asked
12 for the internal costing information from Efco to
13 try to prove to them why the price went up by
14 \$300,000.

15 Q And those parties---

16 A They refused.

17 Q And a stalemate on that.

18 A They refused because they claimed that
19 information didn't exist, so there was an impasse.

20 Q And so you didn't get paid?

21 A We didn't get paid, but we still had to
22 keep being charged by the larger amount from Efco.

23 Q And then you had to keep sending people
24 out, and continue to work on the building?

25 A Yes. Which was another set of nightmare

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1 problems as well.

2 Q Well tell the jury briefly about that.

3 Were there problems with the building that you
4 didn't expect?

5 A I will make this as short as possible. I
6 wish that if there was any other way to do it. This
7 is a concrete building frame of which glass is an
8 exterior finish part of it. And so when you order
9 these doors that weigh 7, 800 pounds, each panel,
10 they are exact height. And the whole building is
11 just a series of exact widths and heights. And
12 however, Bovis when they were managing the building,
13 did not hold the framing to within the tolerances.

14 Q The tolerances, you mean, how much leeway
15 you have.

16 A Leeway. How much height and width. And
17 known as plus and minus. Now plus bigger than the
18 window was bad. Because it causes you to use more
19 caulk than what you're allowed to use. Which we had
20 a lot of. So there was a lot of arguments about
21 caulk. And I don't mean \$5,000 arguments. I mean
22 \$50,000 about caulking the excessive gaps. It's a
23 very difficult thing to do. It's a very, very
24 expensive process. So we are arguing about the
25 excessive gaps. And we have change order requests

1 going on with Bovis there.

2 Well in the meantime, we're paying our
3 people. We're paying the caulking. And it's just
4 running all this up.

5 Q How about the minuses? Were there any
6 minuses?

7 A Well there were minuses. And there were
8 two kinds of pluses. And there was a plus and a
9 minus where the door might be level or 10 feet wide.
10 it might be minus on one side and plus on the other.
11 And they, Bovis, had to take jack hammers and cut
12 grooves 10 inches wide down in the concrete for us
13 to get the big giant doors to fit. Then on the
14 other side it would be shimmed up in the air 4 or 5
15 inches.

16 Q Is there any problem installing a big,
17 giant door down in the grove in the concrete?

18 A It can potentially hit what's called the
19 post-tension cables. Which is what holds the
20 building essentially gives its rigidity and
21 structure. And so yes, it does weaken. And it is
22 very difficult to get underneath it. And upon
23 discovering this which was literally the first two
24 weeks, or a week or so of installation, we notified
25 them that we weren't going to continue with the job.

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1 We worked out an agreement with Bovis to
2 continue only when they assume the liability of
3 putting the caulk underneath our doors. We refused.
4 And they assumed that liability. Which...

5 Q Had they told you, if They instructed you
6 to put the caulk under the doors then it would be
7 their baby.

8 A No. No, we didn't put it under at all.
9 They did.

10 Q Oh, you didn't put it under there at all.

11 A No, we refused. We would did not touch
12 it, because we did not feel warranty the situation.
13 And their choice was, we either walk off and quit or
14 I guess they could have torn all the super structure
15 down and built it right. But in order to get us to
16 go forward, we agreed to allow them -- We put the
17 doors in. We agree to allow them to come in, and
18 they took a spatula and stuck this plastic concrete
19 underneath each door, because we wouldn't do it. We
20 said we didn't think it would work, but you can do
21 it if you want to.

22 Q Were there any other issues that you ran
23 in to? Any of the other windows, or do I address
24 that with somebody else?

25 A I can go on the next story. And the next

1 one after that. We can talk about the location of
2 the brick veneer.

3 Q Describe that briefly.

4 A And you mentioned this earlier. And
5 essentially you have an 8 story building, 80 to
6 90 feet tall. And the super structure, the
7 concrete portion, starts out and they start out with
8 the bricks say 3 inches apart in between under the
9 void. And the bricks go straight up, because they
10 have to build that perfectly straight. But the
11 super structure went out and in, to the point where
12 they had to shave the back of the bricks off in some
13 places. And in other places, the little metal brick
14 ties that hold it over didn't reach. So these
15 bricks didn't met the specs. That was one of the
16 reasons the bricks all had to be taken off because
17 the brick ties didn't all reach.

18 Q Well how did the bricks effect your work,
19 where did you install the window?

20 A Well the location of our windows has to be
21 a specific distance according to the plans from the
22 outside face of the brick. So what's called the
23 reveal, your window has to be exactly 2 inches from
24 the outside facing the brick. Well in one case that
25 means that we're no longer 3 inches to the void.

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1 The void might be 6 inches. So we had nothing to
2 attach to. So we have to stop, get an engineer.
3 Come up with a way around it. Put in special
4 straps. And ultimately and we get a change order,
5 and we have to go through all this material to
6 overcome these issues.

7 Q Was it in your agreement with Bovis'
8 original contract to build the building in that
9 manner?

10 A No.

11 Q To install the glass in that manner?

12 A No. No.

13 Q But you went ahead anyway?

14 A We're -- we made the decision repeatedly
15 because there is not one issue. I mean if they
16 just -- every opening had a different kind of
17 problem. Every, it just kept on and on and on.
18 And, you know, we finally just said look, we are in
19 this, and we are going to finish this building.

20 You know, nobody else is playing ball.

21 But, you know, I have to say all those were very gut
22 wrenching decisions that were made between the three
23 owner members of the corporation repeatedly. And my
24 partners let there -- you know, I can't think of the
25 word to describe it. Let their conscience drive

1 what we do. We decided to do the right thing, and
2 finish this contract and finish this building no
3 matter what it took. And what it took was,
4 everything we had. And it literally took all that
5 we had to get it finished. But we---

6 Q And you did this while Bovis wasn't paying
7 you for the 7 or \$800,000?

8 A That's correct.

9 Q And did National Grange help you complete
10 it?

11 A No.

12 Q Did National Grange help you pay Efco?

13 A No.

14 Q And you did have a bond from them,
15 correct?

16 A Yes.

17 Q You didn't keep anything from them when
18 you got that bond, did you?

19 A No.

20 Q Well what was the first claim that was
21 made by anybody under any one of these bonds that
22 you know of?

23 A Well the first claim was Efco filing the
24 lien against the building of which Bovis, the
25 general contractor, notified us. And according to

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1 our contract, we had to immediately remove the lien.

2 Q By lien, you mean that is something the
3 law allows them to do if there was a specific charge
4 against that property so that they could get paid?

5 A Yes. Yes. And that triggered the
6 general contractor Bovis, contacting National Grange
7 to say there's a supplier here not getting paid.
8 There's a lien, will you pay.

9 Q And did National Grange consult with
10 Phoenix on what to do?

11 A They consulted with Phoenix on the issues
12 of us continuing to finish the project. There was
13 no consultation on the issue of paying Efco other
14 than to say no, we don't have to.

15 Q And did Phoenix ever tell National Grange
16 not to pay Efco?

17 A No. I think, well I don't remember if we
18 ever said not to. I don't know why we would.

19 Q So then there were claims or expressions
20 of concern about Bovis about whether Phoenix could
21 finish the job. Were you aware of those concerns at
22 that time they were occurring?

23 A I can just characterize it this way. We
24 didn't battle with Bovis every day. I mean you
25 can't possibly have a building this big, with this

1 much stuff going on. At this point and time we had
2 25 employees not in the company, but on this job
3 site. I mean we were going like gang busters.

4 Bovis was concerned, because we told them
5 that our financial situation was dire. Well
6 certainly it was dire, because we were trying to get
7 these change orders approved that we were pouring
8 labor into, and ultimately quite a few of them were
9 approved. But we were trying to get these change
10 orders approved that are costing us money. And we
11 have got these bills with Efco that we are getting
12 further behind on, because they won't approve the
13 big change for the material. And so yeah, they were
14 very concerned about our overall ability to continue
15 as a company.

16 And National Grange did send Mr. Scott.
17 And we did walk -- Mr. Scott walked it with myself,
18 and with and other employees and with Bovis. And
19 did an evaluation to determine and went over a plan
20 that we had to meet the deadlines. And at that time
21 everybody said yeah, you all can do it.

22 Q At the time you had done most if not all
23 the work on Building A?

24 A There was certain portions of the store
25 front portions of The Plaza that needed to be done.

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1 But, you know, we were finishing up Building A. And
2 heavily going up the floors. It's for the jury, you
3 know, on a building this large, it is massive
4 subcontractors and everybody trying to get out of
5 each other's way. And everybody is trying to
6 coordinate it. And you're constantly having to
7 stop. You can't work on this opening. You've got
8 to go work on that one. This one is not ready.

9 And so as they're building the building
10 up, everybody is chasing them floor by floor up.
11 And so it's a battle.

12 Q Are you aware whether National Grange ever
13 admitted that it had issued a valid bond or an
14 enforceable bond to Bovis? Did they ever say, yeah,
15 the bond is good, we will pay during this period?

16 A No, during that period I was not aware of
17 the stance of the bonding company at that time was.
18 We'll send the inspectors and then the rest of this
19 we are going to wait and see. We don't have any
20 obligation over here. And they've got to prove to
21 us what is owed over here. And nobody apparently it
22 was never approved.

23 Q Were you aware of National Grange ever
24 offering to pay even \$120,000 to Efco?

25 A That was a surprise to me this week when I

1 heard those statements. I've never heard those
2 statements until this week.

3 Q Have you ever seen any document, you have
4 been familiar with all this litigation going on for
5 7 or 8 years, right?

6 A Yes.

7 Q Have you ever seen any documents where
8 that offer was made?

9 A I recently made another foray into the
10 four feet of documents that I have. And read every
11 one. And do not see, and did not see but one
12 document from National Grange. Just one.

13 Q Did it say, "We're willing to pay,
14 \$120,000?"

15 A No, it did not.

16 Q Now here you are with a receivable I'll
17 call it, from Bovis for 7 or \$800,000.

18 A Yes.

19 Q Is that the right amount? I am just using
20 kind of an approximation.

21 A No. There was a very complicated effort
22 to try to determine all of the changes that were
23 made. And there were changes made and it's hard to
24 explain. But, you know, here is the set of plans.
25 Oh, I am sorry. That's not the right set of plans.

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1 This is the right set of the plans. And oh, by the
2 way, we want to change these 21 doors on this level
3 and take those out. And we want to trade you the
4 replacement value of these. And we want to change
5 the height on these. And then it goes on and on and
6 on. I mean, literally there is all these things.
7 And so the final accounting for us on what was owed
8 by Bovis to us was 1.1 million.

9 Q But they were paying that to you?

10 A No.

11 Q Did you ever talk to National Grange about
12 "Would you like to go chase this a 1,100,000? Or
13 can you help us get the 1,100,000?"

14 A I think we were all hoping we would get
15 the lien removed. Bovis was saying we will release
16 all the money, because the only reason we won't give
17 you the money is there is a lien on the building.
18 The buildings are up, we owe you the money. Now
19 they didn't at that point had not agreed to the 1.4
20 million but the 870,000. So if we could get the
21 lien removed, we could then collect the money and
22 pay it back to the bonding company. And there was
23 no cooperation of -- there weren't that many
24 conversations with the bonding company. There were
25 more than one, maybe more than two. But it's not

1 like it was a weekly thing. And I characterized
2 them as adversarial. We got nowhere. And whatever
3 it was we wanted to do, it didn't happen.

4 Q Got you. And then along comes tropical
5 storm Gaston.

6 A Yes.

7 Q Had there been any inkling of any
8 construction defect claims, moisture problems before
9 tropical storm Gaston?

10 A Yes, there were issues with the design by,
11 on Efco's design on these huge floor to ceiling,
12 corner to corner glass walls. And it centered
13 around the thermal break. I made numerous trips
14 down there to try along with Efco and everyone else,
15 try to figure out why there was condensation getting
16 on with the metal. Some of the metals. And what
17 was so weird or we didn't understand is that it
18 would happen on one floor and not on another. It
19 wasn't like the whole building. I was like, this
20 one and this one and this one. And so there was a
21 lot of effort centered around how to fix those
22 issues.

23 Q But if you had -- if you had been more a
24 little more flush, do you think you could have
25 offered to fix any of that stuff? Or maybe do some

Brent Chitwood-direct by Stanton

1 constructive testing on it?

2 A We came up with the solution that was
3 ultimately completed for that portion of the
4 building and that problem. We also offered if they
5 would pay us what they owe us, to go in to the bay
6 windows. And contrary to Bovis' position, and we
7 could go in and replace those sticks of metal that
8 didn't have the right piece of metal in there. We
9 could certainly have replaced those without taking
10 them out. And without these other issues they
11 ultimately said. I don't know want to say it's no
12 big deal, because anything you do on an 8-story
13 building is a big deal. But most of work could have
14 had been done from the inside. In fact they were
15 specifically designed to apply the glass to be
16 installed from the inside rather than the outside.
17 which means you didn't have to rent a 120 foot high
18 man lift. And so, yeah, we could have fixed that
19 problem.

20 Q And you weren't proposing to do it at
21 night or anything.

22 A No, no. It's just to another repair. On
23 a buliding like that, you have punch list items
24 for every trade that's pages long that you work
25 through. And it's just part of the process. And we

1 would been glad to fix that. And we coordinated
2 with Efco right up to the end until the effects of
3 all this killed us.

4 Q Killed you. Killed Phoenix?

5 A Yes.

6 Q Or the rest in dispute?

7 A Well we'll see yet how many years I lost.

8 Q So is Phoenix any longer in business?

9 A No.

10 Q Did you -- well then Gaston comes along,
11 and there are more claims of a similar nature, I
12 guess?

13 A Well you know it's funny how perverse the
14 world can be. But all of the things we said that
15 were going to go wrong, and we are standing there in
16 Bovis' office saying, you can't do this. This isn't
17 going to work. When the horizontal rain came, all
18 of our predictions came true.

19 Q Then that's when National Grange came to
20 help, right?

21 A No.

22 Q Well what did they do? Did they send
23 another investigator?

24 A Yes.

25 Q Did you meet with that investigator?

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1 A Not that investigator, no.

2 Q Did, I mean, you met with the investigator
3 who came early on in the project to see if you all
4 could finish.

5 A Yes.

6 Q And this investigator after the storm was
7 the one who looked to see if he could figure out why
8 the water was getting in?

9 A Yes.

10 Q You didn't meet with him.

11 A No.

12 Q Did he ask to meet with you?

13 A I talked to him on the phone.

14 Q You didn't walk the building with him?

15 A Well somewhat embarrassingly at that point
16 and time, I wasn't able to walk the building any
17 longer.

18 Q Did you ever refuse to assist National
19 Grange in anything they were doing?

20 A The answer is no, because I wasn't really
21 aware of what National Grange was doing. The
22 relationship between Bovis and Phoenix when we were
23 essentially refusing -- Efco refused to give us a
24 warranty on the material. We were certainly trying
25 to coordinate the remaining warranty items that Efco

1 was willing to warrant. But they basically said, "If
2 we are not getting paid, we are not going to give
3 you a warranty." But there was a lot of issues with
4 the glass that was provided to Efco, and Efco
5 provided to us; that was either scratched, broken or
6 the film in between was bad. So Efco, so we were
7 coordinating all that.

8 Q And Efco did work with you.

9 A And Efco had to repaint some of the metal.
10 The doors that didn't. So there was a good bit of
11 coordination going on. But the relationship between
12 us and Bovis, finally got down to, "Guys we can't do
13 anything else for you." And it just kind of broke
14 down.

15 Of course by that time, we're being strangled to
16 death. When, you know, ironically when you worked hard
17 enough up to a position where you are doing bonded work,
18 and generally that would be nothing less than a \$100,000
19 contract. Whatever require bond. But very few over
20 \$100,000, you didn't -- you had to have a bond. Well when
21 this lien was placed on this job, then we're now unable to
22 get any bond from anybody. So if we could have resolved
23 this and made the lien go away and collected our money and
24 then paid them back, we could have moved forward. But we
25 couldn't.

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1 Q With other ones.

2 A With other ones. But we got strangled to
3 death. Couldn't go any further. And so anyway, I
4 don't know if I answered your question.

5 Q So you signed the contract with Bovis, and
6 you did what it said.

7 A Yes.

8 Q Except for any mistakes you might have
9 made.

10 A Yes.

11 Q And you finished Building A and you
12 finished Building B.

13 A Yes.

14 Q And people moved in.

15 A Yes.

16 Q And anyway the units were sold by the
17 owner. And the owner got his money and the people
18 moved in.

19 A Yes.

20 Q And then the complaints came when the
21 water came in.

22 A Yes.

23 Q And when you got started with all of this,
24 it was with a bond to National Grange where they
25 said they were giving you a bond, right?

1 A Yes.

2 Q And you were familiar with all this
3 litigation that went on. I mean you followed this
4 litigation that went on for 6 or 7 years?

5 A As best I could. A lot of the
6 negotiations and mediations and all were secret.
7 And they don't allow corporations other than the
8 attorney to be there. So a lot of this went on
9 without me being there. But I followed it as best I
10 could.

11 Q And then Phoenix actually had a insurance
12 company. A liability carrier.

13 A Yes.

14 Q That came in and defended against some of
15 these construction defect allegations, correct?

16 A Yes.

17 Q And they in the end decided to pay money
18 as well to Bovis?

19 A Yes.

20 Q And about how much was that?

21 A A fraction under a one million five.

22 Q A \$1,495,000?

23 A Yes.

24 Q And they weren't asking for Phoenix to pay
25 them or anybody else to pay them back for that,

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1 right?

2 A No.

3 Q And then whatever happened to the 1.1
4 million that Bovis owed Phoenix? Or whether it's a
5 million one or 700,000 or 800,000, what happened to
6 that receivable contract balance claim or whatever
7 we want to call it?

8 A Well along the way, I discovered that that
9 money was being applied against what our liability
10 insurance carrier was going to have to pay. And we
11 went to court. I guess we filed legal documents to
12 try to stop that payment from going to the insurance
13 carrier, because we felt it should go to Efco. Or
14 National Grange then Efco, ever how, I don't want to
15 say I didn't care how it worked out. But we know
16 Efco never got paid on this deal. And the money
17 that they were supposed to get was that receivable
18 that was sitting up.

19 Now we would liked to have the difference,
20 but that's a different discussion. The core of that
21 money should have gone to pay that lien that Efco
22 put on the building. And we tried our best to get
23 that done and failed.

24 Q And so then you say you went to court to
25 undo that---

1 A Yes.

2 Q ---proposed settlement?

3 A Yes.

4 Q And what was the result of going back in
5 and reopening or attempting to reopen the matter?

6 A I believe the first motion to change it,
7 or change the agreement was denied. And then there
8 was a subsequent appeal.

9 Q Did that appeal, was there a settlement
10 while the appeal was made?

11 A Yeah, the settlement was finally completed
12 while the appeal was pending.

13 Q And what -- did Phoenix end up getting any
14 more money?

15 A Well we continually negotiated with Bovis
16 saying this wasn't right that this money should go
17 to Efco, National Grange. And they -- we refused to
18 sign. We refused to agree. And ultimately we went
19 to Hartford, the insurance carrier, and said well
20 what can you do. And they were -- had other
21 potential liabilities. And so They said look, we
22 want to settle this. And if you will cancel our
23 other future insurance policies that you have, we'll
24 give you \$140,000 if you will agree to settle it.

25 Q So they asked you to release them from any

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1 other liabilities as well?

2 A Yes.

3 Q And so then Phoenix got \$140,000?

4 A Yes.

5 Q From its own insurance company?

6 A Yes. We make it sound easy, but that was
7 a lot of hard work to get some money out of nowhere.

8 Q And Phoenix is in default in this case,
9 right?

10 A Yes.

11 Q What ultimately happened to the \$140,000?

12 A It was given to National Grange.

13 Q You instructed us to send them the check?

14 A Yes.

15 Q Ultimately after some haggling?

16 A Yes.

17 Q But National Grange is suing you and your
18 wife and Mr. Clark and his wife and Mr. Graham,
19 still, correct?

20 A Yes.

21 Q Do you know how much they are suing for?
22 Have you been able to figure it out?

23 A Well it appears to be the same amount, I
24 can't remember 940.

25 Q Is that the exhibit book right there?

1 A Yes.

2 Q Look at Exhibit 8.

3 A 968,000.

4 Q That's the summary exhibit where they have
5 summarized all this?

6 A Yes.

7 MR. STANTON: I don't have any more
8 questions or comments. Now Mr. Mack may have some
9 for you. But I don't know if the court will
10 instruct you whether you have any for yourself.

11 A Thank you.

12 THE COURT: Mr. Mack.

13 MR. MACK: Thank you, Your Honor.

14 Cross Examination by Mr. Mack:

15 Q You talked about the \$140,000 that you
16 received or Phoenix received. Do you know if that
17 has ever actually been given to National Grange?

18 A Only that I was told that they were to
19 pick up the check from Mr. Stanton's office.

20 Q But you don't know if National Grange had
21 ever been given that check. You haven't seen where
22 they endorsed the check or anything, have you?

23 A No, I have no information of what happened
24 to the check, other than someone from your office
25 picked it up.

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1 Q You said that you thought this money
2 really should go to Efco. You never asked Hartford
3 to make the check out to Efco, did you?

4 A That -- no, that was discussed. Our
5 intent was, and, still trying to figure out how to
6 do these things. But it was our intent. But that's
7 not what we ultimately did.

8 Q The money was actually sent to
9 Mr. Stanton's office, correct?

10 A That's correct.

11 Q And that's shown in Exhibit No. 9? If you
12 look in the book.

13 A But this is the settlement and release
14 agreement. And it was included in the agreement,
15 yes.

16 Q I think it is actually -- actually on
17 pages aren't numbered. Paragraph 2.2?

18 A Yes.

19 MR. MACK: Your Honor, we would move to
20 admit Exhibit No. 9.

21 MR. STANTON: No objection.

22 THE COURT: Without objection.

23 (Phoenix Agreement marked Plaintiff's
24 Exhibit No. 9 into evidence.)

25 Q So rather than having Hartford send a

1 check to Efco, you had it sent to Phoenix' attorney,
2 is that right?

3 A Yes.

4 Q And you don't know if that money has ever
5 been given, or where it's wound up, or if National
6 Grange has ever seen that check, do you?

7 A I know it was made out to National Grange.
8 That's all I know.

9 Q Now as part of this settlement, Hartford
10 paid roughly a 1,500,000 for the defective work and
11 damages that Phoenix had done, didn't they?

12 A They paid one million five in settlement
13 with Bovis.

14 Q And that's as a result of problems created
15 by Phoenix, wasn't it?

16 A That was in their estimation of
17 settlement. They admitted no guilt.

18 Q And throughout or in the course of
19 litigation with Bovis, Phoenix had an attorney,
20 didn't they?

21 A Yes.

22 Q And did he -- strike that. And you
23 realize that the Bovis litigation went on for 2
24 maybe 3 years with lots of parties involved.

25 A Yes.

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1 Q With a lot going on.. And during the
2 course of that time, did you receive information
3 periodically from any sources relating to the claim?

4 A Yes.

5 Q So Phoenix wasn't being left high and dry.
6 They had an attorney during that litigation, right?

7 A We had an attorney under an agreement
8 provided by Hartford that the actions of that
9 attorney were limited.

10 Q That was a deal you negotiated with
11 Hartford, right?

12 A No.

13 Q Well how was it a deal if somebody didn't
14 negotiate it?

15 A It wasn't a deal. They provided an
16 attorney only under certain conditions.

17 Q And you accepted the services of that
18 attorney?

19 A I suppose I did. I don't remember
20 actually saying I accepted services. But we allowed
21 them to operate as our attorney.

22 Q They ultimately settled the suit on behalf
23 of Phoenix?

24 A And we ultimately obtained a different
25 attorney saying that that attorney did have the

1 authority to do what he did.

2 Q So your experience in dealing with
3 attorneys and getting attorneys when you need to get
4 them. Having them to take care of the affairs of
5 Phoenix or yourself, correct?

6 A I, my experience has been that what I
7 needed to get done, I couldn't get done. I couldn't
8 have anybody represent Phoenix on our 1.1 million
9 dollar claim. I had no way to do that.

10 Q And that ultimately was settled between
11 Phoenix and Hartford for about \$140,000, wasn't it?

12 A No.

13 Q The way they handled the one million
14 dollar receivable that you were claiming?

15 A No.

16 Q You got \$140,000 for that?

17 A No.

18 Q So Hartford just gave you \$140,000 for
19 nothing?

20 A No. It specifically says in the agreement
21 that we waived our future claims, and they give us
22 \$140,000. They also in that same Settlement
23 Agreement, the 750 or \$800,000 or 1.1 million, our
24 claim, Phoenix' claim was waived. So Hartford
25 became the beneficiary of that transaction.

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1 Q So you're saying Hartford got Phoenix'
2 million dollars, and we could gave it back to you?

3 A If I understand the indemnification
4 agreement properly, Hartford got National Grange's
5 money.

6 Q But it's money that you're claiming
7 Phoenix was owed under the contract from Bovis?

8 A It is money that National Grange owed.

9 Q Did National Grange help contract with
10 Bovis?

11 A No. They had a contract with us giving
12 the rights to those monies to them.

13 Q But ultimately a million dollars that
14 Hartford got credit for, they gave Phoenix a
15 \$140,000?

16 A No. I have already answered that
17 question.

18 Q Well let's move on. You have been
19 involved in the banking and business world for a
20 good long while, haven't you?

21 A Yes, sir.

22 Q So you experience dealing with contracts
23 and business issues and so forth?

24 A Yes.

25 Q And you said you negotiated this contract

1 with Bovis. It wasn't just a bid, lowest bid. Or
2 taking this one, you negotiated the contract,
3 correct?

4 A Yes.

5 Q And you were the one who negotiated the
6 contract with Bovis?

7 A No. The amount of the contract and the
8 negotiations was done by my partner as to the
9 amount. And the review of the contract and the
10 final signing of the contract and some modifications
11 of the contract were done by me.

12 Q So you were involved in negotiating the
13 contract.

14 A I did and I signed the contract.

15 Q And you signed the contract.

16 A Yes.

17 Q And you agree to the price and proceed
18 clause that was in the contract, didn't you?

19 A Yes.

20 Q So that was part of the negotiations:
21 "Here is the contract." There was no reason that
22 Phoenix had to sign this contract if they agreed
23 with any terms in it, was there?

24 A Would you repeat that?

25 Q This was a negotiated contract. If you

Brent Chitwood-cross by Mack

1 didn't agree to the contract terms or price,
2 anything else, you would have simply said, we won't
3 sign it, correct?

4 A What the disagreement, the answer to that
5 is, yes, we didn't have to sign it. But the
6 disagreement wasn't the inclusion of the price and
7 proceed clause. It was the interpretation by Bovis
8 of how that clause was going to be used. Which I
9 would still take exception to today.

10 Q But you could have walked away from the
11 deal if you didn't like the terms of deal, Correct?

12 A My understanding of the terms of the
13 contract on the day when I decided not to walk away
14 from it were, you know, that's what I understood it
15 to be. That's not what they understood it to be.
16 So I could have walked away, but they did something
17 different than what was in the contract.

18 Q And when you had that disagreement, did
19 you consult with an attorney?

20 A Yes.

21 Q And as a result of that consultation, did
22 you go back to complete the work?

23 A We proceeded to continue working while
24 exploring other legal avenues.

25 Q So you went back to work and completed the

1 project, correct?

2 A Our exposure by stopping, would be greater
3 than -- was creating more liability. So you just
4 continue and then argue somewhere else. Similar to
5 the way insurance companies agree to pay without,
6 because the exposure is so high.

7 Q Now let's switch gears a little bit
8 talking about exposure. Talking about getting the
9 bonds and the amount of the bonds and so forth. Now
10 you knew that you couldn't get a bond for a million
11 six that would cover both Buildings A and Buildings
12 B, didn't you?

13 A That's correct.

14 Q And so that's when you got the bond to
15 cover Building A, correct?

16 A Yes.

17 Q You just didn't have the resources for
18 such a large job, is that correct?

19 A Not simultaneously. We had the resources
20 to complete the job, which we did.

21 Q Now you are talking about as you were
22 working out the job and paying off suppliers and
23 what not, that takes care of some of the payment
24 bond issues. But the performance bond issues still
25 are out there, aren't they? Just as in this case

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1 after the project was completed and the rains came,
2 there was a big performance bond claim. So that
3 never went away, did it?

4 A That's calculated within the work in
5 progress sheet.

6 Q But that liability doesn't go away, does
7 it?

8 A It doesn't go away for anyone, for
9 whatever it is, 14 years.

10 Q Now as far as Building B is concerned,
11 Phoenix never paid a premium for a bond on Building
12 B, did they?

13 A We did not.

14 Q Now the Efco lien when it was filed, it
15 was a lien filed on both Building A and Building B,
16 wasn't it?

17 A I don't know the answer to that question.

18 Q Now when the Efco lien was filed, Phoenix
19 had an attorney, didn't they? That was Mr. Stanton.
20 Don't you recall that?

21 A Yes.

22 Q Now there has been a lot of talk about how
23 long the Efco suit went on. So I just want to see
24 if you recall some of things that happened that
25 maybe caused it to go wrong. And Mr. Stanton was

1 representing Phoenix in the Efco suit, isn't that
2 right? In the lien. When the lien was filed.

3 A But I mean he was an attorney that did
4 work for us during that time, yes.

5 Q Do you recall that the Efco suit was filed
6 by Efco in Richland County originally in 2003?

7 A This is the suit from Efco against
8 Phoenix?

9 Q It was against Phoenix, against Bovis,
10 against Renaissance, the owners. Do you recall
11 that?

12 A Yes.

13 Q Do you recall that the case was
14 transferred to Charleston as a result of issues
15 raised by the parties? By the, specifically the
16 building owners, Renaissance? Do you disagree with
17 that?

18 A No, I just never thought about the fact
19 that it got transferred to Charleston. But I guess
20 it did. Lots of cases were consolidated.

21 Q Now do you recall that Renaissance filed a
22 motion and got the case dismissed as to Renaissance?
23 The Efco claim as to Renaissance?

24 A No, I don't recall that.

25 Q Do you recall that that dismissal got

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1 appealed? Do you recall that?

2 A I don't remember these particular details.

3 Q Now somewhere along the line in one of
4 your depositions you mentioned that Phoenix
5 basically shut its doors around sometime in 2004.
6 Is that correct?

7 A I don't remember the exact year, I
8 apologize for that. But there was a year near the
9 end where we became a significantly smaller company.
10 And then we finally sold the trucks and closed the
11 doors.

12 Q And you just quit opening the mail?

13 A Not completely, but that's probably not
14 too far off.

15 Q Now going back to the Efco claim and just
16 give the jury some sense of why it went on so long.
17 So after the owner got out, and Efco appealed that
18 Order, then Bovis filed a motion to be dismissed.
19 And do you recall that that motion was granted and
20 Bovis was dismissed?

21 A No, I don't recall that.

22 Q And do you recall if Efco appealed that
23 Order and lost?

24 A I was, I am sure, busy doing other things
25 at that time.

1 Q And you mentioned this earlier that Efco
2 claims got consolidated into the Bovis claim. Do
3 you remember that happening?

4 A I didn't remember the order of any of
5 these, no.

6 Q Do you recall that the judge decided the
7 glass claim and the construction defect claim or the
8 payment claim and the defect's claim should be
9 separated. And they got split back out again. Do
10 you recall that?

11 A No.

12 Q Do you recall the first time the case was
13 called for trial down in Charleston before Judge
14 Jefferson, and you came down prepared to testify?

15 A Yes.

16 Q Do you recall that Judge Jefferson tried
17 to get Efco to settle, and they wouldn't do it? Do
18 you recall that?

19 A No.

20 Q The case didn't get tried at that time
21 though, did it?

22 A No.

23 Q And then Efco got a new lawyer, and we
24 actually tried the case last or January 08, do you
25 recall that?

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1 A Yes, I do recall that.

2 Q Now you testified earlier that you never
3 heard that National Grange had offered to pay Efco.
4 Now you were at the trial in January of '08, weren't
5 you?

6 A Not for all of it.

7 Q You don't recall hearing the testimony
8 from Mr. Cinq-Mars that they had offered to pay in
9 the 2003, time frame or some earlier time frame?

10 A No, sir.

11 Q And you don't recall the testimony, I
12 think it was of Mr. Sebastian Efco, that they turned
13 down that offer?

14 A No, sir, I don't remember that.

15 Q Mr. Chitwood, you do recall signing the
16 agreement of indemnity, don't you?

17 A I don't recall that particular day, but I
18 have no issue of the fact that I did sign it. I
19 just don't recall that particular day.

20 Q Now you can turn to the exhibit in the
21 book, if you would like to take a little closer
22 look. First of all, looking on the first Page 6.

23 A Section 2?

24 Q Exhibit 1. And looking at the first Page
25 6. That's your signature, isn't it?

1 A Yes, sir, it is.

2 Q Both on behalf of Phoenix Contract Glass,
3 and also individually?

4 A Yes, sir.

5 Q And now switching back just a little bit
6 before we look at this, you had also signed a
7 personal guarantee to Efco, hadn't you?

8 A Yes.

9 Q So you personally guaranteed to pay Efco
10 for both Building A, Building B. And whatever
11 materials you might buy from them, didn't you?

12 A Yes.

13 Q So if National Grange had paid on Building
14 B even though they might not be obligated to, that
15 would benefit you a great deal personally, wouldn't
16 it?

17 A By how?

18 Q You had agreed to pay Efco for Building B.

19 A Yes.

20 Q So if National Grange paid your bill then
21 you would certainly be in a lot better shape. To
22 the tune of 600,000 or so, correct?

23 A My intention well to answer your question
24 is, I would have less liability. But my intention
25 was for National Grange to be paid by the money owed

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1 to us by Bovis.

2 Q Which Bovis didn't pay because of the
3 defects and all the problems in the glass.

4 A No, sir, the agreement doesn't say that.

5 Q You're claiming that Bovis owed Phoenix a
6 million dollars or so.

7 A Yes, sir.

8 Q Which they didn't pay?

9 A Yes, sir.

10 Q And Bovis said because of all the problems
11 with the glass we're not going to pay that?

12 A No, sir. Their attorney said in court
13 that they knew they had an obligation to pay
14 someone. And they negotiated that payment with
15 Hartford.

16 Q Hartford. So you contend and this is
17 going back over. I think we have talked about that
18 enough. Let's talk about the agreement that you
19 signed. Now you had the chance to read this
20 agreement before signing it, didn't you?

21 A Yes, sir.

22 Q And just like the contract with Bovis, if
23 you didn't agree with it, you could have just not
24 signed it and not gotten the bonds, right?

25 A That's correct, sir.

1 Q And based on your years in business, you
2 understood what you were signing?

3 A I would say that I understood it for the
4 most part. Absolutely, yes, sir.

5 Q So the third paragraph was called
6 indemnity and hold harmless. Now do you understand
7 what this first sentence. It says "Contractor,"
8 which would be Phoenix. "And Indemnitors," which
9 would be you, your wife, the other owners, "Shall
10 exonerate, hold harmless, indemnify, and keep
11 indemnified, the surety," that's National Grange,
12 from and against any and all claims, demands and
13 liability for losses, costs, and expenses of
14 whatsoever kind or nature including court costs,
15 counsel fees, investigative costs and from and
16 against any and all other such losses and expenses
17 which the surety may sustain or incur." And that
18 was in the agreement.

19 A Yes, sir.

20 Q And you agreed to that.

21 A Yes, sir.

22 Q And you've seen the amounts that National
23 Grange has spent in connection with this bond,
24 haven't you?

25 A I have seen the claims they made. Yes,

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1 sir.

2 Q And that amount is shown in Exhibit No. 8
3 in the book?

4 A Yes.

5 Q Which is \$968,332.29, correct?

6 A Yes.

7 Q So that's the amount that you agreed to
8 repay National Grange under this provision, isn't
9 it?

10 A That is what I agreed to repay assuming
11 that the information is correct, which I haven't
12 audited. But the intent of that agreement is for
13 them to be repaid.

14 MR. MACK: That's all I have.

15 THE COURT: Mr. Stanton?

16 MR. STANTON: Brief redirect.

17 Redirect Examination by Mr. Stanton:

18 Q Mr. Chitwood, just like Mr. Mack asked you
19 about the Bovis agreement and the price and proceed
20 clause, or as you said, the proceeds and price
21 clause. When you signed that agreement with Bovis,
22 it wasn't so much that you disagreed with the
23 clause, as you disagreed with the later spirit in
24 which they sought to enforce it, is that correct?

25 A That's correct.

1 Q Did you assume when you saw a provision in
2 the Bovis' contract that said if we have a
3 disagreement, you have got to go ahead now and we
4 will argue about it later. Did you assume that
5 would be dealt with in an even handed and honest and
6 reasonable manner?

7 A Yes.

8 Q And was it your experience when it
9 actually came down to Bovis' employing that clause,
10 was it your experience that they deployed that
11 clause in a way you thought it was intended?

12 A No, It was deployed in a way that I never
13 anticipated, being an accountant; in that, the
14 clause specifically lays out an accounting process
15 of which how are we going to resolve this dispute.
16 Laid it out specifically. I accepted it at its
17 face, which was not the case.

18 Q So it wasn't a matter of disagreeing with
19 the clause when you signed the contract. It was
20 disagreeing with what the circumstances were at the
21 time they tried to use that clause.

22 A Yes.

23 Q And I have the same question for you about
24 this Exhibit No. 1 here. The one that says you sold
25 your soul and your first born to National Grange.

Brent Chitwood-redirect by Stanton

1 Okay. Was it your assumption that that agreement
2 didn't say what it says in there?

3 A No. I assumed that we would -- we're
4 signing the indemnity in exchange for the bond.

5 Q Right. So now my question is, did you
6 have this ^{dis}agreement with signing the Indemnity
7 Agreement when you signed it?

8 A No.

9 Q Do you have a disagreement with paying
10 National Grange nearly a million dollars now, after
11 all this? After there has been no -- nothing but
12 repudiation of the bond?

13 A Yes.

14 MR. STANTON: No more questions.

15 MR. MACK: Just briefly, Your Honor.

16 THE COURT: Certainly.

17 Recross Examination by Mr. Mack:

18 Q I am a little confused. When I read it, I
19 didn't see anywhere in there where it said you sold
20 your soul. Does it say that anywhere in there?

21 A No, sir, it does not.

22 Q Does it say that you sell your first born
23 son?

24 A It doesn't say that, no.

25 Q All it says is that you will reimburse

1 National Grange for the money they spend, correct?

2 A That is an excellent summary.

3 Q And that's all National Grange is asking
4 for is to be reimbursed the money they are out of
5 pocket. Isn't that your understanding?

6 A That's what they're asking for.

7 Q You talked earlier that you had gone
8 through your files. You can only find one letter.
9 And then you said something about or Mr. Stanton may
10 have said something National Grange entirely
11 repudiating the bond.

12 MR. MACK: Your Honor, if I may approach
13 the witness?

14 THE COURT: Yes, sir.

15 Q If I can maybe refresh your recollection a
16 little bit. Is this the letter you were talking
17 about?

18 A Yes.

19 Q And you received it in February of 2002?

20 A Yes.

21 Q And in the letter, Mr. Cinq-Mars although
22 the project has more than one phase, our bond in the
23 amount of \$914,835, covered phase one. Didn't he
24 say that?

25 A Yes, sir. I can see that. Thank you.

Brent Chitwood-recross by Mack

1 Q And over on Page 2, Mr. Cinq-Mars says,
2 "National Grange Mutual bonded the \$914,000 project
3 at the Renaissance Charleston Harbor. That was
4 phase one or Building A." Does that refresh your
5 recollection in looking at this letter?

6 A Yes, sir.

7 Q So in 2002, National Grange is saying we
8 bonded Building A, which is what is in the case
9 through all this litigation, hasn't it?

10 A That same letter says they repudiate, no,
11 I am sorry, that would not be the correct word. The
12 same letter says the position that was earlier
13 stated by Mr. Cinq-Mars; that if Bovis takes the
14 position that Building B is covered under the bond
15 and they did, that they, and I don't claim to know
16 the exact word you have in your hand. But they
17 declare both bond A and B and returned the premium
18 to us.

19 And what you're referring to. "If you
20 contend that the bond covers Building B, please
21 advise immediately, because this will discharge
22 National Grange for all liability under the bond.
23 National Grange will return the original bond
24 premium since it's being discharged."

25 A Is that the terminology you are referring

1 to?

2 Q Yes. National Grange has never returned
3 the premium on the bonds. They paid the claim on
4 Building A \$450,000. They offered to pay Efco
5 several times on Building A, is that correct?

6 A Yes.

7 Q But continued in the court saying that
8 they didn't have a bond on both A and B in court.
9 That's all I have, Your Honor.

10 THE COURT: It's discretionary. I will
11 allow it.

12 MR STANTON: May we introduce the letter
13 in to evidence?

14 MR. MACK: We object, Your Honor, on the
15 same basis. I simply used it to refresh his
16 recollection.

17 MR. STANTON: Your Honor,---

18 THE COURT: I understand. I am going to
19 allow it. I think 106 you opened the door,
20 Mr. Mack, I am going to allow the letter. The
21 ruling.

22 MR. MACK: Your Honor, could we get a
23 clean copy that is not highlighted?

24 THE COURT: Absolutely.

25 MR STANTON: We would just introduce it as

Brent Chitwood-recross by Mack

1 Defendant's Exhibit No. 1.

2 THE COURT: You may come down. Approach
3 the bench, counsel.

4 (Whereupon, the attorneys approach the
5 bench and confer with judge.)

6 THE COURT: Ladies and gentlemen, let's
7 take a short break. Juror No. 76, I am still
8 watching the clock for you, okay. But we have a
9 relatively short witness next. I think we can get
10 that witness done before you have to leave. So
11 take a short break. It won't be as long. Your
12 learn, one thing you learn when you come up here,
13 if it's a 10 minute break sometimes it -- I don't
14 have a good watch. Tell them to knock on the jury
15 room door when they are ready. Stand at ease for
16 10 minutes or 9 minutes. Whenever the jury is
17 ready.

18 (Whereupon, the court takes a short
19 break.)

20 THE COURT: You may bring the jury.
21 Counsel, you may call your next witness.

22 MR. STANTON: May it please the court, the
23 defendants call Mr. John Brownlee.

24 John Brownlee, Being First
25 duly sworn, testified as follows:

1 THE CLERK: Speak into the microphone and
2 state your full name.

3 A John Brownlee.

4 Direct Examination Mr. Stanton:

5 Q Good afternoon, Mr. Brownlee. Would you
6 tell the jury where you are from, and what your
7 background is? Education, work and what you do?

8 A I was born and reared in Orangeburg.
9 Spent all my life in South Carolina. I have been an
10 insurance agent for 40 plus years.

11 Q And where do you work?

12 A Ellison Insurance Agency downtown.
13 Columbia.

14 Q And what does the Ellison Insurance Agency
15 do?

16 A We sell all the products offered by the
17 company that you represent to the customers who
18 choose to do business with us.

19 Q How long has the Ellison Agency been in
20 business?

21 A The agency was founded in 1912.

22 Q And where is it located?

23 A Main Street. 1338 Main Street.

24 Q You have been here in the courtroom in the
25 last day or so?

Brent Chitwood-recross by Mack

1 A Yes.

2 Q You have heard Mr. Chitwood describe going
3 to the Ellison Agency and talking to you about
4 getting a bond.

5 A Yes.

6 Q Would you tell the jury what the general
7 procedure is, your relationship with Phoenix, and
8 how they came to approach you about this particular
9 bond?

10 A Phoenix Contract Glass was a customer of
11 mine from the beginning of the founding of that
12 company. I wrote the property and casualty
13 insurance, the worker's compensation, and all lines.
14 At that point, the company sought to do larger jobs
15 that required bonding. I also sought out and
16 facilitated those. I came up with sureties, so I
17 could contract to write the bonds.

18 Q Now what was your relationship with
19 National Grange?

20 A I had a contract with National Grange. A
21 surety contract to write surety.

22 Q What was the procedure for writing a
23 surety contract or a bond for National Grange?

24 A First of all, I had -- I was a licensed
25 agent that appointed with National Grange. I had a

1 Power of Attorney with National Grange. That Power
2 of Attorney had a limit of one million dollars on
3 it. It was a restricted Power of Attorney. It
4 gave me no underwriter authority or a judgment could
5 exercise on any contract surety in the performance
6 of payment procedurally for, and that would be
7 pretty standard with any surety that I represent. I
8 do not have any powers which included authority to
9 underwrite contract performance and payment.

10 Q Go ahead.

11 A In a situation where there is a client
12 with a need, I would typically complete the
13 necessary forms, and assemble the information. But
14 prior to submitting the underwriting to review and
15 make a determination, as to how they would look at
16 that risk in terms of assigning a capacity limit to
17 that judgment would be to the underwriting stamp of
18 that company.

19 That could entail as it did in this
20 situation because of the circumstances in the
21 company's needs, introducing a surety field
22 underwriter to one of my customers to get to know
23 them. And much the same way as has been related
24 here, a couple of times that the contract surety is
25 very similar to going to the bank to borrow money.

John Brownlee-direct by Stanton

1 It's a financially underwritten process. The surety
2 field underwriter, or underwriter, getting to know
3 my customer, enhances my customer's opportunities
4 with that surety.

5 Q And did you introduce Phoenix to an
6 underwriter for National Grange?

7 A Yes, I did.

8 Q And did, would this particular bond to
9 National Grange require you to provide National
10 Grange with information pertaining to the project?

11 A The procedure is standard. I would have
12 to submit essentially the same information to any
13 surety including National Grange.

14 Q In the process of, and I understand that
15 you don't do the underwriting. You don't decide --
16 you don't make the decision whether bond is actually
17 written or not.

18 A Right.

19 Q Who makes the decision whether the bond is
20 going to be written or not?

21 A I would assume that that is either made in
22 the field or the home office level depending upon
23 the level of the authority of the field underwriter.
24 And whether that decision had to be delegated in the
25 home office.

1 Q And then if I understand you correctly,
2 you simply received the approval or not the
3 approval. And if it is approved then you are
4 allowed to go ahead and sign for the company.

5 A That's correct.

6 Q And in this case, you did receive the
7 approval, and you did sign for the client.

8 A That's correct.

9 Q That's your name that appears on the both
10 of those bonds in Exhibit No. 2.

11 A That's correct.

12 Q Signing for National Grange under Power of
13 Attorney.

14 A Right.

15 Q Now this particular bond, was there any
16 discussion by you or the owners of Phoenix with
17 National Grange or its underwriters about a job or
18 how that would go?

19 A Yes. It really necessitated bringing in a
20 field underwriter to discuss it because of the size
21 of the project.

22 Q And you provided all the information we
23 requested from you?

24 A To the best of my knowledge, we did give
25 you every bit of information that you requested by

John Brownlee-direct by Stanton

1 the company.

2 Q And you heard Mr. Chitwood testify
3 regarding the meeting where you discussed how the
4 project would go in terms of how Building A might
5 dovetail with -- did I say -- how Building B might
6 dovetail with Building A. Do you remember that
7 meeting?

8 A I remember having discussions about the
9 project as a whole, and the project in respects to
10 Building A.

11 Q Did you understand that the contract had a
12 provision in it that they in all likelihood that
13 there would be a Building B under that contract?

14 A It was my understanding at the time that
15 the contract that was initiated was to provide the
16 services to Building A with a stipulation in there
17 on consent and approval from the contractor on
18 completion of Building A, that they would award or
19 consider the award for the second phase of Building
20 B that you refer to.

21 Q You heard Mr. Chitwood talk about the work
22 in progress analysis that one provides to a surety
23 from time to time?

24 A Right.

25 Q And how that work in progress analysis

1 shows potentially more than one bonded project in
2 existence at one time?

3 A Right.

4 Q Is that the same methodology that you all
5 discussed about Building A and Building B?

6 A Well to begin with, and in surety
7 relationship, our primary objective up front with a
8 surety is to establish what we refer to as a
9 capacity. That capacity limit is an assessment of
10 the company's ability to perform jobs, either
11 singularly or multiply up to a certain amount.
12 Financial information about the company determines
13 that level. This company was still in it's growing
14 stages. And there were major concerns in the size
15 of the contract about whether there was sufficient
16 working capital, cash on hand to support the job
17 that they were going to undertake without running
18 into a problem with it.

19 We spent an hour to two hours in the
20 offices of Phoenix Glass reviewing reports that
21 Mr. Chitwood pulled off of his in house computing
22 and spread sheets based on his cash flow analysis
23 and the company's position that would indicate how
24 they would go about funding the project. And
25 supporting both the payment of materials on the

John Brownlee-direct by Stanton

1 project and the labor of the project. All of that
2 was taken into consideration preliminary to the
3 approval of the bond.

4 That capacity limit that was established
5 at that time was predicated on that information, and
6 was sufficient to handle the one building. Assuming
7 that the project ran as it did, at the completion of
8 one building, you would start the second building.
9 The work in progress report indicates the amount of
10 work that company has on hand under bond in any
11 particular time. And that is a measure of whether
12 or not there is any bondable difference there even
13 though some jobs may not be complete.

14 If you have a million dollar capacity,
15 you might have three jobs going on at the same time.
16 And as those jobs are completed you are increasing
17 the capacity to take on more work as long as there
18 are not other influences that would cause decisions
19 to be made otherwise by the surety. It's not
20 automatic. But the intent is there. And the
21 understanding is there; that that capacity limit is
22 somewhat of a floating thing, giving the company
23 some degree of understanding of what's the level of
24 workable is, with bonded work.

25 Q So your discussion does include how

John Brownlee-direct by Stanton

1 Building B would be handled.

2 A My understanding at the time was Building
3 B would not even begin until Building A was
4 complete.

5 Q Right. I mean you certainly discussed
6 Building B?

7 A That was a major concern, and it is not --
8 it was not even for sure that Building B was going
9 to be awarded to Phoenix Glass at the time of those
10 discussions.

11 Q Right. But you all wanted to make sure
12 the bases were covered if it was.

13 A Yes.

14 Q And the bond was ultimately approved by
15 National Grange and was issued.

16 A The bond was issued and was approved.

17 MR. STANTON: No more questions.

18 MR. MACK: And I recognize that the jury
19 has a time issue. We may be pushing it if I do
20 the cross examination.

21 THE COURT: The cross examination may be
22 somewhat lengthy, is that what you are saying?

23 MR. MACK: It may be. I may be able to
24 pare it down overnight.

25 THE COURT: All right.

John Brownlee-direct by Stanton

1 MR. MACK: But I don't want to create a
2 problem for madam juror.

3 THE COURT: All right, ladies and
4 gentlemen, you get a half hour off today. You have
5 paid for a full day, but you only worked how many
6 ever hours we worked. We are going to adjourn for
7 the evening so that Juror No. 76 will make her
8 class. What are you taking?

9 THE JUROR: Human services.

10 THE COURT: I am sure you will do well.
11 Let's reconvene in the morning. Is 9 o'clock too
12 earlier? Okay. All right. 12. 13 heads
13 shaking. Let's reconvene in the morning at nine.
14 I think we are going to finish this case tomorrow.
15 Thank you very much. Don't discuss this case
16 among yourselves when you return to the jury room
17 or with anyone else over the evening hours. Thank
18 you very much.

19 (Whereupon, at 4:37 p.m. the jury
20 dismissed.)

21 (Whereupon, the following takes place
22 outside the presence of the jury.)

23 THE COURT: Mr. Brownlee, you will given
24 the same instructions as I gave to Mr. Cinq-Mars.
25 Go get yourself a steak, but you can't watch the

APPENDIX DIVIDER

E

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 2 of 2)

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ORIGINAL

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2007-CP-40-8435

National Grange Mutual)
Insurance Company,)

Plaintiff)

vs.)

TRANSCRIPT OF RECORD
(Trial)

C. Brent Chitwood and Linda N.)
Chitwood, Ronald L. Clark and)
Susan F. Clark,)

Defendants.)

April 8, 2009
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE; and a
jury

APPEARANCES:

FRANCIS M. MACK, ATTORNEY AT LAW
EMILY R. GIFFORD, ATTORNEY AT LAW
Attorneys for the Plaintiff

M. BARON STANTON, ATTORNEY AT LAW
Attorney for Clark Defendants

C. BRENT CHITWOOD, PRO SE DEFENDANT

JENNY H. WILLIAMS
Official Circuit Court Reporter
(803) 576-1743

1 (Jury in at 9:12 a.m.)

2 **THE BAILIFF:** Your Honor, the jury is present.

3 **THE COURT:** Thank you very much. Good morning,
4 ladies and gentlemen. Thank you for being with us
5 again this morning. We're ready to continue with the
6 trial. The witness is Mr. Brownlee. You're still
7 under oath.

8 JOHN BROWNLEE, after being reminded he is still
9 duly sworn, testifies as follows:

10 CROSS EXAMINATION

11 **BY MR. MACK**

12 **Q** Good morning, Mr. Brownlee.

13 **A** Good morning.

14 **Q** We just want to ask you a few questions about the
15 relationship. I think you testified yesterday that
16 when Phoenix was first organized you got involved
17 with them helping them get all their insurance. Is
18 that correct?

19 **A** That's correct.

20 **Q** So you were their agent to get their property and
21 casualty insurance?

22 **A** Right.

23 **Q** And all the Workers' Comp. Is that correct?

24 **A** Right.

25 **Q** So all of you were working with them as their agent

1 to handle all their insurance needs?

2 A That's right.

3 Q And then once they got bigger and looking for bonds,
4 you were working as their agent to get bonds for
5 them. Is that right?

6 A That's correct.

7 Q And I don't know if you have really seen this chart.
8 It's a long distance away. But just to kind of get
9 an idea of where you would have fit on this, you were
10 Phoenix's agent in getting the insurance and the
11 bonds and so forth. So you would kind of be in this
12 block?

13 A That's right.

14 Q Okay. I just want to get the chronology of things
15 straight. And these are the Exhibits that have been
16 marked. If you'd look at Exhibit 1, that's the
17 agreement of indemnity. Isn't that correct?

18 A That's correct.

19 Q And that was dated, if you look up at the top,
20 February 16, 2000?

21 A That's what is indicated, yes.

22 Q Then if you look at the bonds themselves which are
23 Exhibit 2, if you'd look at the second page, they're
24 dated December 1st, 2000. Is that right?

25 A That's correct.

1 Q So bonds were about ten months -- after the bonds for
2 the Renaissance project-- were about ten months after
3 the indemnification agreement was signed?

4 A That's what is indicated.

5 Q And just to clarify some terminology. Yesterday
6 there was some talk about the penal sum of the bonds.
7 If you'd look at Exhibit 2, is the dollar value
8 that's put in the bond, is that what is called a
9 penal sum?

10 A Yes, it is.

11 Q And that represents the value of the contract that's
12 being bonded?

13 A Yes, it does.

14 Q And your Power of Attorney that's attached to the
15 bonds and that you testified yesterday was limited to
16 no contract greater than a million dollars. Is that
17 right?

18 A That's correct.

19 Q Now, when Phoenix came to you to get the bonds, the
20 bond for the Renaissance project, it was your
21 understanding that they were going to get a bond on
22 Building A. Building A would be complete and then
23 they would start on Building B and see what could be
24 done on that. Is that right?

25 A Essentially, yes.

1 Q And as you've heard from the testimony, that's not
2 exactly the way things went, based on what you've
3 heard?

4 A From what I've heard in here, I'm not really sure
5 about the time aspects of when Building One was
6 finished and Building Two started.

7 Q Okay.

8 A I really don't have any personal knowledge of that
9 timeframe.

10 Q Now, I think you testified yesterday when you were
11 talking about the work in progress that a contractor
12 would have, I think you testified that as you
13 complete jobs you can get new bonds. And I think you
14 said that it's not automatic that you get new bonds.
15 Isn't that correct?

16 A There are no guarantees. It's a forever moving
17 underwriting issue. It's reasonable for someone to
18 expect that if they have the capacity limit, that as
19 long as there is no underwriting issues that would
20 impair the continuance of the issue of the bonds,
21 that you would continue to get bonds up to and not
22 exceeding the capacity limit.

23 Q But it's not automatic, is it?

24 A No, it is not automatic.

25 Q Each job stands on its own?

1 **A** Each contract stands on its own.

2 **Q** You have to go back and get new bonds on new
3 contracts, on new buildings, correct?

4 **A** Essentially, yes.

5 **Q** Do you recall your deposition being taken by a
6 Mr. Steven Ray on July 24, 2007?

7 **A** Mm-hmm (affirmative).

8 **Q** I'm handing you a copy of your deposition. I just
9 want you to look at it in a couple of places with me.
10 If you'd turn to page 43, please. Actually 42, page
11 42 right at the bottom.

12 **A** Okay.

13 **Q** Mr. Ray asked you the question beginning on line 25
14 right at the bottom which carries over to the next
15 page, "Do you recall Cynthia Day ever asking
16 questions of you to pass along to the folks at
17 Phoenix Contract Glass regarding the proposed
18 subcontract?" And what was your answer to that
19 question?

20 **A** I said: "No, because to the best of my recollection,
21 the contract she received was for the one building."

22 **Q** Okay. So the information given to Ms. Day was for
23 one building. Is that right?

24 **A** The underwriting that she undertook at the time that
25 she was evaluating the risk was on the premises that

1 Phoenix Contract had, the contract to install the
2 glass in Building A. The understanding, as I recall,
3 was that Building A and the timeframe of the two
4 buildings being constructed after the first contract
5 was completed, they would be out of Building A. And
6 essentially there would be a second building that
7 they may. At that point there was no definite
8 guarantee they would even get the contract on
9 Building B as I recall, as it was represented to us.
10 So essentially, that is the answer.

11 Q The contract that was given to Ms. Day was for the
12 one building. That's what you said in 2007?

13 A I didn't read the contract personally. I can't
14 attest to exactly what the contract says.

15 Q Okay. Now, you heard Mr. Chitwood. I think you were
16 here when he testified that all of the contract
17 documents were a stack, I think something like this
18 or pretty big stack of everything. Did you have a
19 complete set of all the contract documents?

20 A I have never reviewed or never -- the only thing that
21 I ever asked for from him was essentially the first
22 pages or two that would identify the contract title
23 and what the project was that would at least give me
24 something to reference to in anything that I had to
25 do with the process.

1 Q Okay.

2 A But I never personally reviewed the contract in part
3 or in entirety.

4 Q And you passed on to Ms. Day what Mr. Chitwood had
5 given you?

6 A Whatever I was given that she had asked for would
7 have gone to the company.

8 Q Now, if you'd turn on over to page 46 of your
9 deposition?

10 A Okay.

11 Q And looking down at line 18, and Mr. Ray asked you
12 the question, "Do you recall being informed at any
13 time prior to the issuance of the performance and
14 payment bond on the Renaissance Project for Phoenix
15 Contract Glass that the phase-two work, the second
16 building, was to be incorporated into Phoenix
17 Contract Glass's subcontract via change order?" And
18 what was your answer to that?

19 A I said, "No, I do not have any recall of the specific
20 conversation with her about that." But the comment
21 was not to be taken out of text. The answer was
22 given to the specific question of whether or not at
23 the time that we were negotiating for the contract,
24 that the phase two was discussed as part of the first
25 building and the scope of the work that was involved

1 in it.

2 Q Okay. But your answer to that question, you don't
3 recall any specific conversation with her, meaning
4 Ms. Day, about that? That was your answer then,
5 wasn't it?

6 A Not about the Building B, except that that was out
7 there--

8 Q It was a possibility?

9 A -- as a possibility. That was disclosed openly in
10 the conversations because that was all part of trying
11 to determine whether or not the liquidity of Phoenix
12 Glass would support the total project as it evolved.

13 Q But the liquidity of Phoenix wouldn't support both
14 buildings at once, would it?

15 A Not at that time in their history.

16 Q If you'd turn on over to page 51.

17 MR. STANTON: Not to be a stickler, but I want
18 to object. It's hearsay, improper impeachment. I
19 don't understand why we're reading the depositions
20 from another case. The witness is here.

21 THE COURT: Well, it may be impeachment. I
22 don't know. I'm going to allow it. Overruled. Go
23 ahead.

24 Q If you'd turn on over again to page 51, line 7. You
25 were asked by Mr. Ray, "To your understanding is the

1 contract that's being referred to the entire
2 subcontract agreement between Phoenix Contract Glass
3 and Bovis Lend Lease dated September 30, 2004, the
4 Renaissance on Charleston Harbor Project?" And what
5 was your answer to that?

6 A It's my understanding that the statement is in
7 respects only to the contract portion that this bond
8 represents the 914,835.

9 Q Okay. And what is your understanding based on?

10 A It was based on what he was going to be awarded the
11 contract to do at that given time.

12 Q Okay. And when you were asked the question in 2007,
13 "And what is your understanding based on", what was
14 your answer then?

15 A Say again now?

16 Q If you would just read your response at line 17?

17 A Okay. "It's based on the fact that was the condition
18 that we discussed in the first building and this was
19 the amount of the subcontract for the first
20 building."

21 Q Okay. And then you were asked, "Did anyone ever
22 state to Mr. Chitwood or others at Phoenix Contract
23 Glass that amounts above \$914,835 would not be
24 covered by the bond?" And what was your answer?

25 A "I don't have any recall of that, but any amount

1 exceeding the 914 on this portion of the contract or
2 that first building would not have been covered
3 because this was the amount of the contract."

4 Q That's all I have.

5 **THE COURT:** Redirect.

6 REDIRECT EXAMINATION

7 BY MR. STANTON

8 Q Mr. Brownlee, just to be clear though, Phoenix was a
9 customer of yours for other insurance purposes and
10 came to you looking for bonds as well. Correct?

11 A Right.

12 Q Now, you weren't without a relationship with National
13 Grange either, correct?

14 A No.

15 Q What was your relationship with National Grange?

16 A I was an appointed agent. I had a contract with
17 National Grange.

18 Q You were an appointed agent and had a contract with
19 National Grange?

20 A I had a license to write business at that time with
21 National Grange, surety with National Grange.

22 Q And you were authorized to sign bonds for National
23 Grange when National Grange approved that being done,
24 correct?

25 A Within the scope of the authority that was in writing

1 and granted by that contract relationship with
2 National Grange.

3 Q Right. And you mentioned the contract that Phoenix
4 had with Bovis, that you don't recall reading that
5 entire contract yourself?

6 A No.

7 Q That wasn't your job, was it?

8 A No.

9 Q All right. Your job was to wait until National
10 Grange approved the bond, give them any information
11 that they asked for, and then when they approved it,
12 then you could write it?

13 A My job in the relationship amounts more to a
14 facilitator than anything else. I am an
15 intermediator. That's a go-between the company and
16 the customer. But, yes, I had no authority in my
17 contract with National Grange to approve or give any
18 judgment opinion that would have influenced the
19 writing of that bond other than in support of the
20 documents and all that went along with the
21 underwriting requirements for the company to review
22 and approve.

23 Q Right. And Mr. Mack asked you about the contract
24 that was given to Ms. Day. Was that the contract
25 between Bovis and Phoenix?

1 **A** That would have been the contract.

2 **Q** Right. And you've heard several references to the
3 fact that that has the option for Building B in it?

4 **A** I can't attest to that because I never really read
5 the contract.

6 **Q** But you've heard testimony about that?

7 **A** Based on the testimony, I would tend to believe that
8 at least references to the second phase was in the
9 contract at the time that it was delivered to
10 National Grange to be reviewed.

11 **Q** Right. And the bonds that were written actually
12 state on the first page that the contract between
13 Bovis and Phoenix is incorporated by reference into
14 the bond as a part of it, correct?

15 **A** If that's on the first page.

16 **Q** Right. And they also limit the amount of the bond to
17 \$914,835?

18 **A** Yes.

19 **Q** Now, you've heard Mr. Cinq-Mars say the other day
20 that there could actually be a claim for -- under the
21 payment bond -- for that \$914,835; and theoretically
22 there could also be a claim for 914,835 under the
23 performance bond. Is that your understanding?

24 **A** That's my understanding. But theoretically that's a
25 little bit outside of the realm of possibilities.

1 The payment bond is there to assure that the
2 subcontractor's payment to labor and materials are
3 paid; therefore, for the owner not to incur a lien on
4 his premises that he's paying somebody to build for
5 him. In fact the payment bond, as the project moves
6 forward and payments for materials are made and
7 payment for labor is made, the potential claim under
8 a payment bond is continuously reducing itself. So
9 hypothetically the only time you could max out both
10 sides would be the first day of the contract if you
11 turned around and walked off the job, I reckon. I
12 don't know.

13 Q But you heard him say that theoretically that they're
14 not -- 914,835 is not the sum total of both bonds;
15 that actually each bond stands for that type of
16 coverage in its own respect?

17 A Yes. The payment bond is strictly for the payment of
18 the materials and labor. The performance bond
19 assures performance on the contract.

20 Q Now, did National Grange know that it had limited you
21 with the Power of Attorney for a million dollars?

22 A Well, absolutely. That came directly from National
23 Grange.

24 Q That's their decision?

25 A That's their decision, yes.

1 Q So they're giving you the Power of Attorney to write
2 bonds for a million dollars knowing that you could be
3 writing a payment and performance bond that
4 theoretically could have claims against both?

5 A Right.

6 Q In excess of a million dollars?

7 A Right.

8 Q The meeting that you had though with Ms. Day, am I
9 not clear that one of the primary purposes of that
10 meeting as you said was to look at the liquidity of
11 Phoenix and its ability to do potentially the whole
12 project, including both Building A and Building B?

13 A The supposition was always in there that Phoenix
14 could potentially end up with the contract extended
15 to include the second phase of it. There were no
16 guarantees to Phoenix it's my understanding at the
17 time that this was taking place that that was going
18 to come about. But the concern was for the liquidity
19 in Phoenix at the time. Because, you know, there
20 could not be that much work ongoing on the bond that
21 would support both the projects unless Building A was
22 substantially completed.

23 Synonymously, it would be the same as if John
24 Doe came to Phoenix and said: I've got this building
25 I want you to put glass on and I want it bonded. And

1 building two didn't even exist in this contract. Had
2 they substantially completed Building A for this
3 project, then it would have opened up the possibility
4 of bonding this second possibility, unrelated to
5 this. But if the Building A was not substantially
6 completed, they didn't have the liquidity to take on
7 more bonded work or projects. That would have
8 exhausted or impaired their working capital to do the
9 two jobs together.

10 Q Okay. And so you all discussed that and then the
11 decision was National Grange's as to whether to issue
12 the bond for this contract that incorporated this
13 contract by reference on its very first page?

14 A That is right.

15 Q Right. And National Grange did make that decision
16 and did authorize you to sign the bonds?

17 A That is right.

18 Q Right. And what's your understanding of the word
19 bond?

20 A Bond?

21 Q Does it mean you're bound? It binds one?

22 A Bound. You know, simply a bound instrument where
23 someone is standing in your shoes in the event
24 they're needed to.

25 Q Okay. That's all my questions. Just let me check

1 with Mike.

2 CROSS EXAMINATION

3 **BY MR. CHITWOOD**

4 **Q** Mr. Brownlee, could you give me your general
5 knowledge of how a change order is handled within the
6 framework of an existing bond? Do you have any
7 knowledge on that?

8 **A** It's my understanding that change orders generally
9 come about during the phase of the contract and the
10 change orders would be reckoned with at the end of
11 the project; and if it increased the indemnity that
12 the contract represented, then the principal would be
13 billed for the additional premium between the
14 difference of the original indemnity and then the
15 increased total contract amount.

16 **Q** Given the discussions between Phoenix and yourself
17 and National Grange and from what you've heard in
18 testimony, do you believe that Phoenix was aware that
19 there was a change order described and agreed to in
20 the contract? That's a long question. Were you
21 aware that Phoenix knew there was a change order?

22 **A** I was aware that there was a possibility of Phoenix
23 being awarded the second phase of that project. I
24 was not -- again, I did not read the contract in its
25 entirety. So I can't respond to you and answer the

1 question with any affirmity (ph) because I don't know
2 if it was a written in the contract change order
3 preemptive to the contract being signed or not.

4 Q Right. Now, refresh me about how many bonds you may
5 do in a year? I'm not talking about bid bonds. It
6 would be payment performance bonds.

7 A Well, that varies significantly. But, you know,
8 right now no one is doing a whole lot. But we
9 probably would do a half a dozen or more.

10 Q Would it be fair to say that the bonding underwriter
11 always received a full copy of every contract on
12 those bonds?

13 A I think that -- I think that the bond, the surety
14 would always want to know exactly what the nature of
15 the project was that they were agreeing to stand in
16 financially for.

17 Q And it was your recollection or is it your
18 recollection that the contract that you did not read
19 was supposed to be forwarded to Ms. Day for
20 underwriting?

21 A It is my understanding that the company was forwarded
22 the contract in its entirety.

23 Q And that was part of the request of information?

24 A They had asked for the contract to be reviewed, which
25 is normal.

1 Q Which is normal? Okay. That is what I was trying to
2 get to. Thank you. Thank you.

3 THE COURT: Recross.

4 RE CROSS EXAMINATION

5 BY MR. MACK

6 Q Mr. Brownlee, I think you used the terminology, your
7 role is primarily as facilitator?

8 A Right.

9 Q You get the information from Phoenix, you pass it
10 along to National Grange. Is that correct?

11 A In most cases, yes.

12 Q And then after National Grange approves the bond, you
13 simply, you basically fill out the paperwork and sign
14 it. Is that a fair statement?

15 A Right. It's a matter of formality at the time that I
16 put my name to something. It's -- all the decisions
17 are made.

18 Q And in this particular case you didn't review the
19 contract documents that Phoenix gave you which you
20 passed on to National Grange. Is that right?

21 A I don't recall whether I actually passed the contract
22 document or whether it went directly from Phoenix.
23 It could have been either/or, and I don't have a
24 recall of that.

25 Q So you have no idea of whether the material actually

1 given to National Grange said anything about Building
2 B or Phase Two, do you?

3 **A** I don't know. Again, I didn't read the contract
4 documents.

5 **Q** That's not part of your rôle, to read the contract?

6 **A** To interpret the contract, no.

7 **Q** But you said I think that you had the first few pages
8 of the contract that you passed along?

9 **A** Only for purposes of reference number and reference
10 to the project for whatever was going on with the
11 negotiations for that bond.

12 **Q** Now, you were talking about the operation for the
13 payment bond. The materials are supplied to the
14 subcontractor. There is some assurance that the
15 suppliers will be paid. Now, if a supplier provides
16 material to a building that is not bonded, even
17 though there may be a bond over on another building,
18 are the materials used in the nonbonded building? Is
19 the surety responsible for paying for those if it's
20 not used on the bonded project?

21 **A** I don't think the surety is responsible for anything
22 that's not inherently inclusive in the contract.

23 **Q** And that would be used in the building being
24 constructed that's covered by the bond?

25 **A** Right.

1 Q That's all I have.

2 THE COURT: All right, sir. You may come down.
3 Thank you, very much. May this witness be excused?

4 MR. STANTON: Without objection.

5 MR. MACK: No objection.

6 THE COURT: Next witness.

7 MR. STANTON: May it please the Court. The
8 Defendants call Cynthia Day.

9 CYNTHIA D. DAY, after being duly sworn,
10 testifies as follows:

11 THE CLERK: Thank you. Have a seat in the
12 witness stand and give the court reporter your name.

13 THE WITNESS: It's Cynthia Diane Day.

14 COURT REPORTER: Thank you.

15 DIRECT EXAMINATION

16 BY MR. STANTON

17 Q Good morning, Ms. Day.

18 A Good morning.

19 Q You were the underwriter for National Grange, a field
20 underwriter, I believe?

21 A Yes.

22 Q Your job was to look at the paperwork concerning the
23 project, the scope of the job and financial
24 background on Phoenix?

25 A That was one portion of my job.

1 Q And you met with Mr. Brownlee who just testified at a
2 point before the bonds were issued?

3 A Yes.

4 Q And Mr. Chitwood was also in the meeting?

5 A Not the first meeting.

6 Q There were two meetings?

7 A Yes.

8 Q One with Mr. Brownlee?

9 A Yes.

10 Q And then another with Mr. Brownlee and Mr. Chitwood?

11 A And the other two owners.

12 Q And the other two owners. And National Grange did
13 issue the bonds?

14 A For?

15 Q The payment and performance bonds that are Exhibit --
16 I don't know if you've seen them. May I approach,
17 Your Honor?

18 **THE COURT:** Yes, sir.

19 Q Directing your attention to these Exhibits marked --
20 the Exhibit marked as 2. Those are the payment and
21 performance bonds that were issued?

22 A Yes.

23 Q Thank you. No more questions.

24 CROSS EXAMINATION

25 **BY MR. MACK**

1 Q Ms. Day, during the meetings--

2 THE COURT: I'm not sure about the order.

3 MR. MACK: Mr. Chitwood can certainly go ahead.

4 THE COURT: If you want to go ahead, that's
5 fine. Go ahead.

6 MR. CHITWOOD: Okay.

7 CROSS EXAMINATION

8 BY MR. CHITWOOD

9 Q Hi, Ms. Day.

10 A Hi.

11 Q I would also like to ask you about change orders, as
12 part of a contract about what the ordinary procedure
13 might be, your understanding of that?

14 A Typical change orders can be handled in a couple of
15 different ways. Typical change orders, a contractor
16 can go ahead and submit them to his agent and which
17 turns them over and sends them to the surety. If
18 there is any change and difference in printing within
19 a certain amount they can go ahead and charge them
20 on. But typically change orders are for a reasonable
21 amount, nothing extraordinary.

22 Q Right. You say typically. That would always be
23 under the understanding that it would not exceed the
24 total limit assigned to a customer, these change
25 orders?

1 **A** Again, I mean, typically change orders are for small
2 amounts to a contract, nothing extraordinary.

3 **Q** Right. But they would be limited to the total limit,
4 bond limit for a customer? A customer would say --
5 I'll give you a specific example. Let's say there
6 was a million dollar limit that a company knew that
7 they had on their line, on their bond limit, and
8 there was a contract for \$800,000 and there were
9 change orders that came in for 100,000. It's
10 underneath the limit?

11 **A** There is no limit specified for change orders as far
12 as there's no line of credit passed over to a
13 contractor.

14 **Q** There's no line of credit?

15 **A** No.

16 **Q** I didn't say line of credit. We're talking about a
17 maximum bond limit that is expressed to a customer
18 saying under no circumstances can you have more than
19 this at any one time.

20 **A** There is -- I mean, I'm not sure what you're asking.
21 With a change order there is nothing put out for a
22 contractor saying that you can bind a company up to a
23 certain amount for a change order.

24 **Q** Right. There is nothing saying that you can't get
25 them; there is nothing saying that you can?

1 A Right.

2 Q Okay. Well, then how does this work? When you go
3 and you obtain a contract to build a building, I
4 won't say there's always change orders, but change
5 orders are expected. It happens. It's a very
6 complex building. So are those change orders not
7 covered? Or I don't understand how if you don't know
8 what your limit is what you would expect.

9 A The limit is what's on the face of the bond.

10 Q Right. But you're saying the change orders are
11 allowed which would exceed the face of the bond?

12 A I don't really know how to answer that. There's a
13 clause in the bond usually for change orders.

14 Q Yes. And do you have I believe the bond, it's
15 Exhibit -- is it 1 or 2?

16 A The bond is Exhibit 2.

17 Q Exhibit 2. There is a paragraph there that specifies
18 changes. It's about three quarters of the way down
19 the page.

20 A Are you referring to where it starts, "Where the
21 surety agrees that no change, extension of time,
22 alteration, addition, omission or other modification
23 of the contract documents as specified in the
24 contract shall in any way effect this obligation
25 under the bond and the surety hereby waives notice of

1 such changes, extensions of times, alterations,
2 additions, omissions and other modifications"?

3 Q Right. So there are changes you don't even --
4 they're not even asked. They agree that they don't
5 even have to be notified of those changes?

6 A What is reasonable and customary.

7 Q Right. And that is what we're trying to reach here,
8 is what is reasonable and customary. If a contractor
9 knew that the responsibility under the bond was going
10 to be reduced and specifically planned and mapped
11 out -- had a plan to make sure that the total amount
12 of the bond was never exceeded, that the liability
13 for the bonding company was never exceeded, would
14 that demonstrate to you that that would be a normal
15 way to handle a change order?

16 A No.

17 Q No?

18 A No. Change orders are like -- not to handle the
19 contractor. If he wants to replace the door, he
20 doesn't have to go back to the surety and say: Do I
21 have your permission? This is going to cost 100 more
22 dollars; do I have your permission to do that?

23 Q So you're very familiar then with how a change
24 order -- how you felt a change order should go. I
25 mean, it's small things is what you're saying. Do

1 you remember that the contract specifically states
2 that this Building B was going to be executed under a
3 change order under that contract?

4 A No.

5 Q No. Is that because you didn't read the contract?

6 A Documentation that I was presented never had anything
7 to refer to a Building A or a Building B. I
8 underwrote the job based on a project called the
9 Renaissance for 914,000 some odd dollars. I never
10 knew anything about there was more than one building.

11 Q So you didn't read the contract?

12 A I read what I was presented.

13 Q Did you ask for a copy of the contract?

14 A I asked for the contract that presented to what
15 Phoenix's obligation was. Nothing that I received
16 mentioned anything about a Building B, nor was it
17 mentioned in the meetings that I had with you or John
18 Brownlee.

19 Q Did you ask for a copy of the total contract, all the
20 pages of the contract?

21 A We never get a total copy of the contract because as
22 mentioned before, there is numerous pages to a
23 contract.

24 Q Do you know how many pages this contract was? Not
25 the contract documents and not the plans and specs,

1 but the contract itself? Do you know how many pages
2 it was?

3 A No.

4 Q So I'm confused. How do you evaluate the risk of a
5 contract, of you obtaining or issuing a bond on a
6 contract without actually reading the contract? How
7 do you go about filling out the underwriting forms
8 and evaluating the risk for a financial instrument
9 without reading it? How do you go about doing that?

10 A Well, first of all, this job was -- you know, John
11 Brownlee calls me, says he wants to meet with me
12 because Phoenix Glass has a larger job around 800,000
13 that they were in the process of negotiating and he
14 wanted to meet with me. So I met with John Brownlee.
15 Based on my meeting with John Brownlee, we were
16 talking about a project that was around \$800,000 and
17 that he was to schedule.

18 And we met with you along with Chip and along
19 with Ronald to discuss one project for around
20 \$800,000. You also presented me at that meeting with
21 a document that outlined the cost of the project of
22 914,000 down to the dollar at that meeting. At no
23 point in time was I ever told, was I ever given
24 anything that disclosed about a Building B.

25 Q How do you evaluate a contract without reading the

1 entire contract?

2 **A** I read what I thought was the contract, which was the
3 gist of what was the obligations for Phoenix Glass,
4 which in turn was going to be what we were committing
5 to. Never -- and when I was going there, Phoenix
6 Glass, I was having to ask why you guys were
7 interested in doing a job that from my standpoint of
8 900 or 800,000 to start with was doubled from what
9 you guys had done in the past.

10 So I needed to get comfortable of why and how
11 you were justifying looking at a job that was
12 \$900,000 from a financial standpoint; and not only
13 that, from an experience standpoint. If I had ever
14 at any point in time knew you were looking at a job
15 for a million six, I would have declined it with John
16 at the first meeting and there wouldn't have been a
17 meeting with you.

18 **Q** So because of the increased risk that you perceived,
19 you did a very detailed evaluation of our ability to
20 perform this job?

21 **A** Yes.

22 **Q** Is that correct?

23 **A** Yes.

24 **Q** But in that detailed evaluation you elected to not
25 read the contract?

1 **A** I read what I was presented. I never got anything
2 that said anything about a Building B. What I was
3 presented was one project and it was going to be from
4 \$914,000. That's what I was underwriting on and was
5 trying to get comfortable with, you guys looking at a
6 job for that large, when the largest job to my
7 paperwork that you had done in the past was \$300,000.

8 **Q** Because of this concern that you had, you elected to
9 not read the contract. Is that correct?

10 **A** No. I read everything that I had and was presented.
11 I asked questions in the meeting. And at no time did
12 you guys ever disclose -- that would be you, John
13 Brownlee, Skip or Ronald -- ever disclose to me that
14 you guys were looking at a Building B at the same
15 time as a Building A. I only knew about one project,
16 one building.

17 **Q** Did you ask for the contract?

18 **A** Yes. I got it. And again, what I was presented,
19 there was nothing in there that related to a Building
20 B.

21 **Q** Did you ask for a copy of the total contract since
22 it's obvious that the first two pages aren't the
23 complete contract?

24 **A** I don't know that I specifically said the total
25 contract. I asked for a copy of the contract. And

1 what I was presented, I took that. And based on the
2 questions that I asked you guys that you all told me
3 about the job, what it consisted of, I asked the
4 job -- I was asking you specific questions. One of
5 the questions was how much materials was on this job,
6 how much of that 914,000 was involved in materials,
7 how you guys were going to bill for that.

8 You told me that you guys were going to have
9 four tractor trailers that you all were going to have
10 on the owner's site, that you would be able to turn
11 those materials over very quickly and bill for them
12 to the owner so that the obligation for all those
13 materials would be gone early on.

14 Q Thank you, Ms. Day.

15 CROSS EXAMINATION

16 BY MR. MACK

17 Q Ms. Day, when you are underwriting a contract or
18 underwriting a bond, do you rely on principals such
19 as Phoenix to give you the appropriate documents?

20 A We rely on the principal along with the agent that's
21 involved.

22 Q And the documents you were provided by Phoenix, by
23 the Ellison Agency, didn't include any mention of
24 Building B?

25 A No, it did not.

1 **Q** In talking about change orders, you used the example
2 of the door, if you change the type of door and it
3 costs \$100 or so. And that's in the normal course of
4 business?

5 **A** Yes.

6 **Q** Would you say it's extraordinary to add by a change
7 order a complex building that has eight floors? Is
8 that sort of extraordinary, an entire new building?

9 **A** It is.

10 **MR. MACK:** That's all I have.

11 **THE COURT:** Redirect.

12 **MR. STANTON:** Just one question.

13 REDIRECT EXAMINATION

14 **BY MR. STANTON**

15 **Q** Where is what you were presented?

16 **A** I've turned everything I had to National Grange.

17 **Q** Thank you.

18 **THE COURT:** Anything further of this witness?

19 **MR. MACK:** Nothing further, Your Honor.

20 **MR. CHITWOOD:** No.

21 **THE COURT:** Thank you very much. You may come
22 down. May this witness be excused?

23 **MR. MACK:** No objection.

24 **THE COURT:** Without objection. Next witness.

25 **MR. STANTON:** May it please the Court. The

1 defense calls Mr. Ronald Clark.

2 RONALD CLARK, after being duly sworn, testifies
3 as follows:

4 **THE CLERK:** Thank you. Have a seat in the
5 witness stand and give the court reporter your name.

6 DIRECT EXAMINATION

7 **BY MR. STANTON**

8 Q Good afternoon, Mr. Clark.

9 A Hello.

10 Q Could you tell the jury a little about where you're
11 from?

12 A Oh?

13 Q Where were you born?

14 A Oh. I'm from Texas. I graduated from high school
15 there. I joined the Glaizer's Union out of high
16 school in '68.

17 Q What is a Glaizer?

18 A A Glaizer cuts glass, builds buildings. I build
19 high-rise buildings. I've done it my whole life. In
20 fact, I did the Bank of America building years and
21 years and years ago. I put the granite glass around
22 it. That's how I met my sweet wife here, building a
23 building.

24 Q Is that what brought you to --

25 A And I took three years of drafting, blueprints, what

1 you had to do to be able to get into the union. And
2 it's very lucrative. After I passed everything in
3 three years and did good, I got \$2.25 an hour. That
4 was good.

5 Q What brought you to South Carolina or to Columbia?

6 A Well, I would say my sweetheart. But I didn't meet
7 her until I came here to build this building. And I
8 left here, about a year it took me to build that
9 building. And in the meantime, I met my wife and I
10 decided that this is what would be my home because I
11 traveled all over the United States. That's all I
12 do, is just build high-rise buildings.

13 Q How long have you all been married? Oh, I'm sorry.
14 How long have you been a --

15 A Oh, 20 years about.

16 Q No. You can't -- that's okay. How long have you
17 been in Columbia roughly?

18 A Probably 15, 15 years or so. Because I did go back
19 on the road just for a short period of time and then
20 came back here.

21 Q Now, how did you come to be associated with Phoenix
22 Contract Glass?

23 A I went to work for a company, a glass company -- I'm
24 not going to say any names -- but that's where I met
25 Skip Graham. And he give [sic] me an opportunity

1 that he's always wanted to do and he was just waiting
2 for somebody to come along that -- well, he depended
3 on me as far as making sure things were right.

4 Q And what was -- you did become part owner in the
5 company?

6 A That is correct.

7 Q All right. What was your primary job or primary
8 involvement in the company?

9 A I was responsible for running the crews, measuring
10 the jobs, getting materials to the jobs and insuring
11 that they were put in right. And we did excellent.

12 Q Now, were you involved in any way in any of the
13 bonding process that you've heard discussed here?

14 A No, sir. I stay out -- I don't understand it. I
15 don't understand any of this. But, no. I just know
16 my job.

17 Q Right. Other than to sign that Exhibit that they
18 referred to earlier, correct?

19 A When I'm told I need to sign, I sign.

20 Q Okay. What was your primary involvement in this
21 particular project, the Renaissance project?

22 A Actually that was a pretty simple job, or it should
23 have been. What I saw on paper was nice slabs and
24 everything. We put them in the hole. I thought this
25 is going to be a gravy-train job, and it turned out

1 to be a nightmare, because Brent thinks he knows, but
 2 he wasn't on site all the time. But just the fact of
 3 not just saying how heavy these things are. We were
 4 told we had to get everything up in the building,
 5 which there was nobody there that was coordinating
 6 the adjacent trades. We got all of our material up
 7 there with not even sheetrock on the walls.

8 Q Well, let me interrupt you. The problems that Brent
 9 described in his testimony, you were here for that,
 10 right?

11 A Uh-huh (affirmative).

12 Q Those were in fact problems?

13 A Oh, yeah, yeah. Well, I'm going into--

14 Q He said he didn't --

15 A -- labor issues. I mean, we spent a lot of money on
 16 that job because we had to move materials constantly
 17 out of other people's way to work so they could put
 18 their stuff in. Like putting the cart before the
 19 horse. It was terrible. Now, if you -- I was
 20 promised a second building by the contractor was
 21 going to be so much better because the first building
 22 was atrocious.

23 I mean, we're not -- when I'm talking digging
 24 that deep in concrete all the way across and you've
 25 barely a patio door down in it and then they bring

1 stuff up to it, that's why we wouldn't caulk them. I
2 didn't want to be liable for that stuff. And they
3 said: No, we're just going to be sealed. Well, they
4 did seal it. They sealed up all the weepholes. They
5 sealed up everything. And I told them it was going
6 to happen.

7 Q Was any of that y'all's fault?

8 A No. But the second building was just as bad, if not
9 worse.

10 Q Did you do your job?

11 A I did my job well. I don't -- that's -- when it came
12 out that we did some sorry work, I was very upset. I
13 had to bite my tongue. We did exactly what it said
14 on the prints. I do this for forever. I've got --
15 no. What we had to tie to, in fact, I wouldn't put
16 some windows in because there was nothing to tie to.
17 There's a space between the inside and outside brick,
18 I couldn't put no screws; open void. Had to get EFCO
19 to design some steel plates to put down that we had
20 to install just so we could tie our windows in in a
21 lot of cases.

22 Q You understand that then you all were blamed for
23 that?

24 A Oh, yeah. And we furnished all the labor to put it
25 in.

1 Q Did you finish your work?

2 A Yes, we did.

3 Q Did you finish Building A?

4 A We finished Building A and finished Building B. And
5 I never got a paycheck for most of Building B, me or
6 Brent, because we didn't have the money. We
7 couldn't -- we had to pay a lot of people.

8 Q Those are all my questions.

9 THE COURT: Cross examination. Mr. Chitwood?

10 MR. CHITWOOD: No thank you, sir. No.

11 THE COURT: No questions?

12 MR. MACK: Just very briefly, Your Honor.

13 CROSS EXAMINATION

14 BY MR. MACK

15 Q Mr. Clark, you relied on Mr. Chitwood for the
16 business side of the company?

17 A That's the smart thing about me. Yes.

18 Q You were out in the field having to deal with Bovis
19 and all the problems with Bovis and the other
20 subcontractors?

21 A That is correct.

22 Q But you do agree that you signed the agreement of
23 indemnity?

24 A Yes.

25 Q And you agree that whatever it says you're bound to

1 that?

2 **A** My assumption is this is what -- I guess. I don't
3 know what I signed. I just know I had to sign.

4 **Q** Did you talk to Mr. Chitwood about it before you
5 signed it?

6 **A** Maybe to the point of just saying that to get this
7 job we've got to sign this.

8 **Q** And you relied on him to give you the information
9 that you might have needed before you signed it?

10 **A** Oh, I'm sure he did. I mean, there was no trickery
11 or nothing. No. No.

12 **Q** That's all I have.

13 **A** No.

14 **THE COURT:** Anything further?

15 REDIRECT EXAMINATION

16 **BY MR. STANTON**

17 **Q** Now, Mr. Clark, as opposed to agreeing with whether
18 you signed something at the beginning, you've been
19 here in the courtroom for the last two and a half
20 days, right?

21 **A** Yes, sir.

22 **Q** Do you agree with -- do you think everything that
23 happened to you all after that was fair?

24 **A** No.

25 **Q** Okay.

1 **A** No.

2 **THE COURT:** Anything further?

3 **MR. MACK:** Nothing further, Your Honor.

4 **THE COURT:** All right. You may come down, sir.
5 Thank you, very much.

6 **THE WITNESS:** Thank you, sir.

7 **THE COURT:** Next witness.

8 **MR. STANTON:** May it please the Court. The
9 defense calls Ms. Susan Clark.

10 SUSAN F. CLARK, after being duly sworn,
11 testifies as follows:

12 **THE CLERK:** Thank you. Have a seat in the
13 witness stand and give the court reporter your name.

14 **THE WITNESS:** Susan Fletcher Clark.

15 **COURT REPORTER:** Thank you.

16 DIRECT EXAMINATION

17 **BY MR. STANTON**

18 **Q** Good morning, Susan.

19 **A** Good morning.

20 **Q** You are Ronnie Clark's wife?

21 **A** I am.

22 **Q** How long have you been married?

23 **A** Twenty years.

24 **Q** Were you involved in the -- well, where are you from
25 originally?

1 A I am from Camden originally.

2 Q And you live here in Columbia?

3 A I live here in Irmo. I worked in Columbia.

4 Q What did you do?

5 A I was a public health nurse, a registered nurse for
6 40 years and public health nurse for 30 years. And
7 I'm retired now.

8 Q Were you involved in the ownership or management of
9 Phoenix Contract Glass?

10 A No. I'm not an owner.

11 Q Were you involved in managing or running the company
12 in any way?

13 A No. Just listening to my husband. No.

14 Q And you didn't work for Phoenix?

15 A No.

16 Q Your only involvement in this whole thing was signing
17 that Exhibit 1?

18 A Yes.

19 Q Those are all my questions.

20 A Thank you.

21 CROSS EXAMINATION

22 **BY MR. MACK**

23 Q Ms. Clark, your husband was one of the owners of
24 Phoenix. Isn't that right?

25 A That's correct.

1 Q And you do agree that you did sign the agreement of
2 indemnity?

3 A Yes, sir.

4 MR. MACK: That's all I have.

5 THE COURT: All right, ma'am. You may come
6 down. Thank you very much.

7 MR. STANTON: That concludes the Defense's case,
8 Your Honor.

9 THE COURT: Mr. Chitwood?

10 MR. CHITWOOD: That concludes the case.

11 THE COURT: Anything further from the Plaintiff?

12 MR. MACK: Your Honor, if we could take a break.
13 I don't know if I'll have any rebuttal, but I think
14 it might be an appropriate time to maybe let the jury
15 take a brief break while I confer a little bit.

16 THE COURT: Let me explain something. Ladies
17 and gentlemen of the jury, that concludes the
18 evidence in this case. Now, there are some legal
19 matters I need to take up with the attorneys before
20 the final arguments and the case is turned over to
21 you for deliberation. That process is going to take
22 probably about 30 minutes or so. So I'm going to
23 just let you go to the jury room.

24 I don't want you to leave the building. If they
25 need to take a walk or something like that,

1 Mr. Whittle will certainly accommodate you. There's
2 just some matters that I've got to take up with the
3 attorneys before we wind up this case. So just
4 relax. You got coffee and doughnuts back there,
5 Mr. Whittle?

6 **THE BAILIFF:** We don't have doughnuts but we
7 have soft drinks and crackers and that sort of thing.
8 We've got some refreshments.

9 **THE COURT:** Thank you. Please go to the jury
10 room. Don't discuss the case among yourselves while
11 you're in the jury room. We'll call you when we're
12 ready.

13 (Jury out at 10:14 a.m.)

14 **THE COURT:** All right. While the jury is out, I
15 think we need to discuss -- well, let me ask you
16 first, are there any motions?

17 **MR. MACK:** Yes, Your Honor. We would move for a
18 directed verdict under Rule 50 both as to liability
19 and damages. The Defendants have acknowledged their
20 execution of the indemnification agreement. The
21 amount of damages is undisputed. And we would move
22 for a directed verdict.

23 **THE COURT:** All right. What's the defense's
24 position?

25 **MR. STANTON:** The defense opposes.

1 **THE COURT:** I understand.

2 **MR. STANTON:** I don't believe there is any
3 dispute about the signatures on the indemnity
4 agreement. I believe there is a dispute on the
5 damages. They put in an Exhibit that says as of
6 March 31st this is what their damages are. And one
7 of them is only that there's an Order for \$140,000.

8 And I don't know if it's all in evidence or
9 whether the Court takes judicial notice of it or not,
10 but I know it's clearly in evidence that that Order
11 is still on appeal. I think it's clearly in evidence
12 that they haven't even paid the 140,000 that's listed
13 on there. And I don't believe there's any dispute
14 that in that appeal there's a cross appeal by them to
15 claim they don't owe any of that 140,000.

16 Also, there is evidence that Phoenix sent them a
17 check, a lawyer's trust account check last week,
18 picked up from my office before 4:00 on April the 2nd
19 for \$140,000. That's been mentioned. So the fact
20 that if there were liability, there are some damages
21 I don't think is disputed. The amount of damages is
22 certainly disputed.

23 Then as to liability, the defenses that have
24 been raised by the Clarks include breach of duty of
25 the good faith and fair dealing, breach of fiduciary

1 duty and many similar sounding things. There is --

2 **THE COURT:** All right. Just hold it one minute.
3 Well, let's get something -- let's try to put this in
4 perspective. There's no -- as to the indemnity
5 agreement, there's no issue for the jury to decide
6 with regard to the indemnity agreement as far as I
7 can tell. Do you disagree with that?

8 **MR. STANTON:** What aspect of the indemnity
9 agreement? The fact that it was signed, I don't
10 believe there's any dispute that it was signed.

11 **THE COURT:** Well, both your clients have
12 indicated that they are obligated to indemnify
13 National Grange according to the terms of that
14 agreement. I mean, what's the issue for the jury to
15 decide?

16 **MR. STANTON:** The issue is, I think the tenor of
17 their testimony is that they signed it and they know
18 that it says that they're supposed to pay National
19 Grange back for everything. But their defense, their
20 affirmative defense, is that National Grange's rights
21 under that indemnity agreement to seek to enforce
22 that are vitiated by National Grange's lack of good
23 faith and fair dealing and the breach of fiduciary
24 duty in the way that they handled the bond which was
25 part and parcel of that relationship.

1 **THE COURT:** Mr. Mack?

2 **MR. MACK:** Your Honor, first of all, they did
3 not raise breach of fiduciary duty in their answer in
4 any way. So that is not framed by the pleadings.
5 Secondly, there is simply no evidence of any lack of
6 good faith. Under the terms of the agreement
7 National Grange is entitled to investigate, which
8 they did; or is required to investigate, which they
9 did.

10 They are allowed to settle claims as they come
11 in, which they did. They tried to settle the EFCO
12 claim. They didn't settle it because of anything
13 National Grange did, but EFCO wanted money on a
14 building that wasn't covered by the bond. So there
15 is simply no evidence of lack of good faith in their
16 handling.

17 **THE COURT:** Well, there's certainly no testimony
18 about lack of bad faith -- I mean of bad faith or
19 lack of good faith. There's certainly no expert
20 testimony that would say that the Plaintiff acted in
21 bad faith. Where is the bad faith evidence that's in
22 the record? Not just what you perceive, Mr. Stanton,
23 but where is the bad faith evidence?

24 **MR. STANTON:** The bad faith evidence is as
25 follows, Your Honor. There is evidence that National

1 Grange knew there was a Building B in the contract.
2 There is evidence that National Grange issued a bond.
3 There is ample evidence that the bond specifically
4 incorporated the entirety of that contract. There is
5 evidence that they gave a Power of Attorney limited
6 to a million dollars to an agent to write bonds that
7 they knew could have exposures of \$1.8 million. Yet
8 there is evidence that they denied knowledge of
9 Building B which was in the contract. There is
10 evidence that they not only repudiated the coverage
11 of Building B but threatened that if Building B were
12 pursued they would take the position there was no
13 Building A; namely, no bond at all.

14 The whole purpose of this indemnity agreement is
15 to get them to issue a bond. And under the indemnity
16 agreement they are given all types of latitude which
17 the law of South Carolina says must be exercised in
18 good faith.

19 You know, when you're given an extreme amount of
20 discretion and you put somebody else in an extremely
21 vulnerable situation, you have to do what you're
22 doing in a contentious manner. And it shows that
23 what they did was they went forward from the very
24 beginning, essentially trying to find every reason
25 they could to not pay under the bond; not just to not

1 pay under it, but even say that the bond was no good.

2 There is evidence in the record that they never
3 paid a dime in claims from 2002 'til 2008. They
4 state that they offered to pay something on Building
5 A, but there is absolutely no documentary proof or
6 anything on that, simply a vague statement that they
7 think they did so. It's undisputed that -- excuse
8 me. There is evidence in the record that they knew
9 that when they were doing this their actions were
10 killing this company, killing the company and killing
11 the principals of the company.

12 There is evidence in the record that they knew
13 their actions were delaying the ability of Phoenix to
14 make repairs and running up the potential claims
15 under the performance bond, which they were denying
16 existed. There is evidence in the record that, like
17 I said, -- well, in Exhibit 8 they've even put in,
18 you know, the claim that they're seeking \$154,966.49
19 that they have yet to pay, which is still on appeal
20 and which they are presently contending they don't
21 owe any of. In Exhibit 8, they're claiming they're
22 owed all this money and they haven't acknowledged
23 that a check was sent to them for \$140,000 last week,
24 a lawyer's trust account check.

25 **THE COURT:** There is no evidence of that.

1 **MR. STANTON:** I believe Mr. Chitwood testified
2 that that was his understanding, that a check --

3 **THE COURT:** Unless you want to testify, there's
4 no evidence in the record.

5 **MR. STANTON:** I will if necessary. It was
6 hearsay but it was not objected to. And he said: My
7 understanding is the check was made out to National
8 Grange and sent last week. I thought that was in the
9 record. And I heard no dispute of it. And I'll tell
10 you as an officer of the court it was sent and it was
11 picked up by 4:00 by Mr. Mack's firm.

12 **MR. MACK:** Your Honor, as to the 140,000, Mr.
13 Chitwood -- this was a long dispute. And this is
14 what Judge Barber I think got a little put out with
15 both of us about. Mr. Stanton called me up on
16 Thursday, "I'm sending the check payable to National
17 Grange." Well, if anything, that would be an offset
18 to any judgment, presuming that there are no problems
19 or whatever with it.

20 **THE COURT:** Collection.

21 **MR. MACK:** But that's a red herring, Your Honor.

22 **MR. STANTON:** Well, I just want to note that we
23 had questions by Mr. Mack about whether that existed
24 or not, which tends to cast doubt on what Mr.
25 Chitwood said about sending them \$140,000 check.

1 **THE COURT:** Well, all right.

2 **MR. STANTON:** I'll move past that one, Your
3 Honor. But so long as we got on the record that that
4 would be an offset against whatever does happen in
5 this case. They've taken the position that the
6 building -- in the record they have taken the
7 position that the Building B option had to be done
8 within a certain time limit. Yet, in the record,
9 they've also taken the position that they're not sure
10 they ever got the contract.

11 **THE COURT:** Why didn't you put the contract in
12 evidence? I mean, this whole argument about Building
13 B would perhaps be moot if you had just put the
14 contract in evidence. Now everybody is left to
15 speculate what the contract says or doesn't say. He
16 says it says one thing. Ms. Day says it's something
17 completely different.

18 **MR. STANTON:** Mr. Cinq-Mars, their
19 representative, admitted from the stand that the
20 contract contains an option for Building B.

21 **THE COURT:** Well, an option and a change order
22 and all that sort of thing is not -- I mean, you're
23 going to get me talking about my interpretation of
24 the facts. But if I agree with you that there is an
25 issue for the jury to decide with regard to damages,

1 and you can take that and run with it any way you
2 can. I do think that the indemnification agreement,
3 that the Plaintiff is entitled to a directed verdict
4 on that issue.

5 **MR. STANTON:** Well, our whole case is about lack
6 of good faith and fair dealing. And--

7 **THE COURT:** Well, I'm going to tell the jury.
8 What I tell the jury is probably not what you're
9 thinking I'm going to tell the jury.

10 **MR. STANTON:** Well, I can't help that, Your
11 Honor. I understand. I just wanted to respond to
12 their directed verdict motion. And be clear that,
13 you know, that the same can be asked of the Plaintiff
14 who bears the burden of proof in this case. They put
15 in a bond as Exhibit 2. It incorporates the contract
16 in its entirety as part of the bond and they don't
17 even produce the contract.

18 I'd like to point that out to the jury as
19 evidence of kind of the same shell game that's gone
20 on since 2002. I think there is evidence of bad
21 faith in the record, Your Honor. I really can't say
22 much more than that. And I think that the jury
23 should be charged on it and on breach of fiduciary
24 duty, and we should let the jury decide --

25 **THE COURT:** Wait a minute. Hold on. Slow down.

1 What's the fiduciary duty? Where is the fiduciary
2 duty?

3 **MR. STANTON:** The fiduciary duty between a
4 surety and --

5 **THE COURT:** Show me any case that says that.

6 **MR. STANTON:** It's in one of our requests to
7 charge. There's a case cited. I believe it's the
8 Chapman case, Your Honor. And then the bad faith one
9 is most recently mentioned in the Masterclean case.

10 **MR. MACK:** Your Honor, when you plead fiduciary
11 duty either as an affirmative defense or as a
12 counterclaim -- any cause of action, fiduciary duty
13 is not in the case.

14 **MR. STANTON:** I can pull out my answer and look
15 at all 14 defenses that we outlined, 14 affirmative
16 defenses that were pled.

17 **THE COURT:** Well, I'm looking at them.

18 **MR. STANTON:** I'm not. But I'm sure that the
19 tenor of it, when we say bad faith, that that
20 includes the tenor of what I'm talking about.

21 **THE COURT:** Well, you plead breach of
22 obligations under the relationship. So I assume
23 that's breach of contract?

24 **MR. STANTON:** Not --

25 **THE COURT:** Let me finish.

1 **MR. STANTON:** I'm sorry, Your Honor.

2 **THE COURT:** You plead setoff. You plead failure
3 to mitigate. You plead latches. You plead failure
4 to do equity. You plead res judicata. You plead
5 statute of limitations. And you plead statute of
6 frauds.

7 **MR. STANTON:** Right. And breach of fiduciary
8 duty would be fairly subsumed under the second
9 defense.

10 **THE COURT:** Fairly subsumed?

11 **MR. STANTON:** Where there are 9 -- let's see --
12 photographs numbered 5 through 9 explaining the
13 circumstances of this defense. And it says that the
14 Plaintiff breached its obligations under the
15 relationship. As a matter of law in the Chapman
16 case, one of those obligations under relationship is
17 a fiduciary obligation and specific facts are pled in
18 that it failed to timely pay on the bond and caused
19 Phoenix to fail to collect a draw and consequently go
20 out of business.

21 It goes on. It gives the facts of in what
22 manner they failed. And that's what we've I believe
23 proved in the case, that they have breached the
24 duties under this relationship, one of which is good
25 faith and fair dealing and another is breach of

1 fiduciary duty of a surety to its principal.

2 **MR. MACK:** Your Honor, under the Masterclean
3 case which is really on all fours with this, you
4 know, the bond is designed to protect the obligee,
5 not the principal. And that's under Headnotes 8 and
6 9, and that's what all the testimony has --

7 **THE COURT:** Why don't you hand it to me? How
8 about it, Mr. Stanton?

9 **MR. STANTON:** The Masterclean case, Your Honor,
10 is one of the most recent pronouncements in this
11 area. It deals with that the issue addressed there
12 was, one, it was a certified question from the
13 District Court, the Federal District Court, I
14 believe, to the South Carolina Supreme Court and is
15 asking if there was an ability of a principal to sue
16 its surety in tort for affirmative damages for the
17 breach of the duty of good faith and fair dealing.
18 And the second question asked in the Masterclean case
19 was; if so, what are the parameters or elements of
20 that claim?

21 Due to the response that the Supreme Court came
22 up with, they didn't outline the elements. They
23 didn't answer the second question. What they did was
24 they went through and they said obviously, clearly no
25 dispute, there is a duty of good faith and fair

1 dealing inherent in all contracts and such a duty
2 exists as between a surety and its principal. That
3 would be National Grange and Phoenix, national Grange
4 owing that duty to Phoenix.

5 But what they said was we're not sure whether we
6 want to join those jurisdictions which allow an
7 affirmative tort claim against the surety. I think
8 in that instance it was for -- well, I've forgotten
9 the facts -- whether it was for failure to pay a
10 claim.

11 But in any respect, they went through and they
12 analyzed. It was a split of jurisdictions, some
13 saying there should be a suit allowed and some saying
14 not. And they went through a lot of law on that
15 trying to reconcile that not only between
16 jurisdictions but with past South Carolina law. And
17 what they said was you've got a three-part
18 relationship and the primary argument of the people
19 who wanted the affirmative suit was to say this is
20 just like insurance.

21 You know, in the insurance realm, you've got a
22 Nichols action for bad faith, you can sue your
23 insurer if they exercise bad faith in settling an
24 insurance claim. This is just like insurance, so we
25 should have that same right. And the Supreme Court

1 said no, it's not just like insurance. It's like it
2 in some respects.

3 First argument: Well, it's regulated by the
4 Insurance Commission; therefore, the same type of bad
5 faith action should be there. The Supreme Court said
6 just because it's regulated by the Insurance
7 Commission doesn't mean it's insurance. That's not a
8 sufficient reason.

9 The second reason: They said, well, our case
10 law says that suretyship, a contract of suretyship,
11 like an insurance agreement, should be construed
12 against the surety because they have these
13 over-wielding contracts that are almost contracts of
14 adhesion and it's a very sensitive relationship. The
15 Supreme Court said no, that is the law. You should
16 construe it against the surety because there is that
17 type of relationship, but that's a principle of
18 construction and that doesn't make them an insurance
19 company.

20 So they went through all this and they looked at
21 the differences between insurance companies and
22 surety companies and finally came to the conclusion
23 that because of the inherit nature of the
24 relationship, you shouldn't be able to sue them for
25 damages but--

1 **THE COURT:** What's the difference in what you're
2 contending than suing for damages? It's the same
3 thing. You're using it as an affirmative defense.

4 **MR. STANTON:** Here's where I hit the button
5 right on the head. When they got to the very end of
6 Masterclean, if you look at the very end of it, they
7 said, you know, that doesn't mean that the principal
8 cannot raise the breach of duty of good faith and
9 fair dealing as an affirmative defense. We're going
10 to fully allow that. That's fine. We're just not
11 going to allow you to sue them for damages.

12 And we're not suing them for damages. We're
13 raising it as an affirmative defense to defeat their
14 claim for indemnity under an agreement that was given
15 to them to get them to issue the bond they say they
16 didn't issue.

17 So Masterclean is affirmative permission from a
18 South Carolina Supreme Court on a certified question
19 that this cause of action -- excuse me -- that this
20 affirmative defense exists and is permitted, and so
21 at the very end of the case after they discuss all
22 the reasons they couldn't sue for damages.

23 **THE COURT:** How about that?

24 **MR. MACK:** Your Honor, taking the evidence in
25 the light most favorable to the Defendants, there is

1 simply no evidence of bad faith. As Masterclean
2 says, once the principal is in default, the primary
3 obligation of the surety is to the obligees; to EFCO
4 and Bovis. National Grange tried to resolve the EFCO
5 matter. It's currently on appeal. EFCO has lost two
6 appeals, got a new lawyer and didn't do too good that
7 time around either. They settled with Bovis.
8 They've acted in good faith throughout. There's
9 simply no -- even taking the evidence in the light
10 most favorable to the Defendants, as you're required
11 to do, there is no evidence of bad faith handling.
12 The surety did what it was supposed to do. It
13 investigated. It settled claims.

14 **MR. STANTON:** That's a jury question, Your
15 Honor. You know, the fact that their primary duty,
16 you know, is to their -- Mr. Mack says their primary
17 duty is to their obligee. What Masterclean reminds
18 you is that doesn't mean they don't have a single
19 duty to their principal. They can't ignore them and
20 do things that unreasonably hurt them and then turn
21 around and ask to be paid back for.

22 **MR. MACK:** Your Honor, an example of bad faith
23 handling would have been if National Grange had
24 simply -- when the claims came in, regardless of any
25 issues -- simply wrote the checks and then came back

1 asking for 2.4 million. That would be the bad faith,
2 the improper claims handling.

3 **THE COURT:** What about the -- in a bad faith
4 situation, other than the facts as laid out in this
5 case, is there any duty to produce evidence of bad
6 faith from an expert standpoint that they acted
7 unreasonably, that the Plaintiff acted unreasonably
8 in handling these claims?

9 I'm asking because I don't know. It would seem
10 to me that in any other similar type situations some
11 sort of testimony is required or should be required
12 to indicate there's bad faith. Or do we just go on
13 the facts of the case and let the jury decide whether
14 there's bad faith or not bad faith?

15 **MR. MACK:** I think in the surety realm, that is
16 a specialized area both of construction law, surety
17 law. The practices of the construction industry--

18 **THE COURT:** Or practices of the surety itself.

19 **MR. MACK:** -- practices of the surety would be
20 the topic for expert testimony. What is good faith,
21 what is bad faith under the practices of the surety
22 industry? What is proper claims handling processes?

23 **THE COURT:** Are you saying that as an
24 experienced litigator in this field, or are you
25 saying that you have case law to support that?

1 **MR. MACK:** Just as an experienced litigator. I
2 don't have case law at hand, Your Honor.

3 **MR. STANTON:** And of course--

4 **THE COURT:** It would seem to me there should be
5 some burden to show bad faith. When you're claiming
6 bad faith, there should be some burden other than a
7 mere factual recitation of what the Defendant
8 believes is bad faith. But we don't have it.

9 **MR. STANTON:** My response, Your Honor, is that
10 the bad faith, the existence or nonexistence of bad
11 faith, might be a permissible subject of expert
12 testimony on which neither party has proffered an
13 expert, but it's not a required subject of expert
14 testimony. I'm not aware of any case law that says
15 that it has to be like a medical malpractice action
16 where the standard of care has to be established by
17 expert opinion testimony. It's not a profession
18 where you need somebody to state what the standard of
19 care is.

20 And even, you know, in that most extreme
21 example, the medical malpractice case, you don't have
22 to have in every single case expert testimony, even
23 on the standard of care. There's a small area of law
24 where they say, you know, the jury can see something
25 that's glaring enough.

1 **THE COURT:** Right. I'm familiar with it.

2 **MR. STANTON:** And in this instance you've got a
3 surety company, experienced surety company that sits
4 there on the stand that writes a bond, that
5 incorporates a contract by reference and then takes
6 the position for five years that they can't make up
7 their mind whether they've seen the contract or not.

8 **THE COURT:** What about your second cause of
9 action, Mr. Mack?

10 **MR. MACK:** That was subject to a motion to amend
11 which was never heard. So it's just the indemnity
12 agreement.

13 **THE COURT:** Right. That's no longer part of
14 this case?

15 **MR. MACK:** That is not in the case. That's
16 correct, Your Honor. Actually it's never been in the
17 case.

18 **THE COURT:** Okay. All right. Let's take a
19 ten-minute break. Let me think this over. Because I
20 think the decision on the summary judgment motion
21 pretty well will portend what the instructions to the
22 jury will be. I mean, it's sort of all wrapped up in
23 the same argument. And, Mr. Mack, do you have
24 proposed charges?

25 **MR. MACK:** We have handed some up.

1 **THE COURT:** Do we have them? All right.

2 **MR. STANTON:** And, Your Honor, I think to date
3 we've handed up request numbers 1 through 11, as
4 well.

5 **MR. MACK:** And, Your Honor, on the issues of
6 good faith/bad faith, we have some proposed charges,
7 not from South Carolina law but from Maryland which
8 addresses the issue. But this may be helpful.

9 **MR. STANTON:** Fifteen is the last one I've got
10 from you all.

11 **MR. MACK:** This does set some of the guidelines
12 on bad faith and shows that it is more than simply a
13 recitation of the facts. And as an affirmative
14 defense, obviously the Defendants have the burden of
15 proving bad faith, which to reiterate, I don't think
16 they have.

17 **THE COURT:** All right. We'll stand at ease.
18 All right. We'll stand at ease for 15 minutes.

19 (Whereupon, a break is taken)

20 **THE COURT:** Counsel, you've flooded me with
21 requests to charge, and not only requests to charge
22 but several legal issues that I think I need just to
23 try to get it right, as they say. So I think -- one
24 minute. Hold on. So I think what I am going to do
25 is let this jury go to lunch. It's 11:30. We can

1 keep working on this because I want to try to get a
2 clear set of instructions for the jury.

3 They're not as experienced as you are in
4 contract law and damages and all that sort of thing,
5 and indemnity. I know you've tried your best to make
6 them understand it. And I never underestimate the
7 intelligence of a jury. But I do think in this case
8 it ought to be fairly clear what their decisions have
9 to be. So I'm just going to send them to lunch and
10 we'll continue to work on it. Any objection?

11 **MR. MACK:** None from the Plaintiff, Your Honor.

12 **MR. STANTON:** None from the Defense, Your Honor.

13 **MR. CHITWOOD:** No, sir.

14 **THE COURT:** All right. Bring the jury, please.

15 (Jury in at 11:25 a.m.)

16 **THE BAILIFF:** Your Honor, the jury is present.

17 **THE COURT:** All right. Thank you. Ladies and
18 gentlemen of the jury, at this stage of the
19 proceedings, the procedure would be for the attorneys
20 to make their final arguments to you and my charge --
21 and I give you my charge to you on the law of the
22 State of South Carolina. Because there are some
23 somewhat complex issues in this case, I want to try
24 to make that instruction to you as clear as possible
25 in terms of what you are being asked to decide. The

1 attorneys have their own respective ideas of what
2 they'd like for you to decide, but it's my
3 responsibility to decide which of their positions
4 clearly sets forth a framework for you to decide
5 these issues.

6 So we're not quite complete with that process.
7 I have been talking with the attorneys. But there is
8 no sense in having you sit back there and just wait
9 while we go through this process. So I think it's a
10 more efficient use of our time to allow you to just
11 excuse you now until 1:00. We'll call that the --
12 let's say 1:30, at which time we'll be ready to
13 present the final decision to you and give the case
14 to you for a decision.

15 So with that I'm going to excuse you now until
16 1:30. Again, don't discuss the case when you return
17 to the jury room among yourselves or with anyone else
18 over the lunch hour, lunch two hours. Have a
19 pleasant lunch. Thank you, very much.

20 (Jury out at 11:27 a.m.)

21 **THE COURT:** All right. I want to go through
22 your proposed jury instructions. Understand that I
23 have a basic set of instructions involving contracts
24 and contract disputes, but this is a little bit
25 different. So sort of bear with me on this. The

1 Plaintiff's charge No. 1, Mr. Stanton, do you have
2 any objection?

3 **MR. STANTON:** Oh, I'm sorry. I have instruction
4 No. 2. I may not have their number 1. No objection
5 to number 1.

6 **THE COURT:** All right. Number 2?

7 **MR. STANTON:** No objection to number 2.

8 **THE COURT:** 3? 3 and 4 are somewhat
9 duplicative.

10 **MR. STANTON:** I don't have an objection to --

11 **THE COURT:** 3?

12 **MR. STANTON:** -- 3. Nor to number 4. But Your
13 Honor may end up providing them.

14 **THE COURT:** Well, there's no testimony about
15 anybody being unable to read and understand. I think
16 4 is superlative. Wrong word. Duplicative. Now,
17 here we get into breach of contract. I mean, this is
18 the law with regard to breach of contract, but I
19 think they need to understand what the contract is
20 we're talking about. I mean, I think this probably
21 needs to be tailored to an indemnification agreement
22 as opposed to a straight simple contract. And so I'm
23 not sure, Mr. Mack, that all of this language applies
24 when you're talking about an indemnification
25 agreement as opposed to any other typical contract.

1 **MR. MACK:** We have some later charges on the
2 indemnity agreement.

3 **THE COURT:** Well, do you think this one is
4 necessary then? Or the entire --

5 **MR. MACK:** Probably not, Your Honor.

6 **THE COURT:** I can talk about breaches.

7 **MR. MACK:** I think just a general charge of
8 contract. The parties are bound, something along
9 those lines.

10 **THE COURT:** How about your first paragraph? Of
11 course I'll define what a contract is.

12 **MR. MACK:** Right. I think that would be
13 sufficient.

14 **THE COURT:** Mr. Stanton?

15 **MR. STANTON:** You're saying first paragraph only
16 of Plaintiff's No. 5 I think is a fair statement of
17 law. And if they can find some way to apply it, I
18 don't have any objection to that.

19 **THE COURT:** And 6, we're getting into the same
20 type things, meeting of the minds.

21 **MR. MACK:** Again, just general charge on
22 contracts would be sufficient.

23 **THE COURT:** We don't have to go through offer
24 and acceptance. You agree, Mr. --

25 **MR. STANTON:** I think. And, Your Honor, as a

1 general charge on contracts, and this may be in lieu
2 of some of that.

3 **MR. MACK:** And in this case they've admitted
4 they entered into the contract, so the contract
5 formation language isn't really necessary based on
6 what we've seen.

7 **MR. STANTON:** Bear in mind though we do want
8 charges so that National Grange admits that they
9 issued the bonds.

10 **THE COURT:** There's no question about that.

11 **MR. STANTON:** I can take it or leave it. So I
12 have no problem with not charging it.

13 **THE COURT:** Well, when that becomes an option,
14 we'll leave it. And the same on 7. These are
15 damages. We're not talking about damages for the
16 Plaintiff in this case, are we?

17 **MR. MACK:** That would be under the
18 indemnification charge.

19 **THE COURT:** Okay. Well, we'll get to that.

20 **MR. MACK:** I think we have the damages charge,
21 number 9, probably covers that.

22 **THE COURT:** All right. I'll not give 7. And
23 I'm not going to give 8 just because there's no
24 equitable indemnity issue here and I think that just
25 serves to confuse the jury. Agree?

1 *MR. MACK:* If we could just tailor it to
2 contractual indemnity.

3 *THE COURT:* Well, as I say, there are two forms
4 but you can only consider one.

5 *MR. MACK:* That would be good, Your Honor. And
6 just take out any references to equity.

7 *MR. STANTON:* So what's left?

8 *THE COURT:* Not much left.

9 *MR. MACK:* Well, we take out the last sentence
10 of the first paragraph and then in the second
11 paragraph, second sentence, take out the term, "Or in
12 equity".

13 *MR. STANTON:* All right. So we take out the
14 first sentence as well, right, of the charge?

15 *THE COURT:* No. I think you just start with
16 contractual indemnity.

17 *MR. STANTON:* So take out the first sentence.

18 *THE COURT:* And the last sentence of the first
19 paragraph.

20 *MR. STANTON:* Right. So we've got contractual
21 indemnity involves a transfer of risk ending with the
22 relationship between the parties.

23 *THE COURT:* Right.

24 *MR. STANTON:* And then the next paragraph as it
25 stands except "or in equity" is taken out after the

1 parentheses.

2 **MR. MACK:** Well, we would need to take out--

3 **THE COURT:** Take out either.

4 **MR. MACK:** Yeah. Such that.

5 **MR. STANTON:** Such that.

6 **MR. MACK:** Parties as such.

7 **MR. STANTON:** Or that involve.

8 **MR. MACK:** If we could word it, "The right to
9 indemnity arises whenever the relationship between
10 the parties is established by contract there is an
11 obligation." That would just clarify that.

12 **THE COURT:** All right. That's a fair statement.

13 **MR. MACK:** And I think if we're looking at
14 number 9, to avoid confusion, if we take out the last
15 phrase, "in a third party action."

16 **THE COURT:** Any objection?

17 **MR. STANTON:** I do have a little objection to 9
18 stated that way. Let me see if I can articulate it.
19 If it said, "If you find that there is a right of
20 indemnification." But the language in the contract
21 gives rise to a right --

22 **THE COURT:** I think it's fair. Attorney's fees.
23 Is it in there?

24 **MR. MACK:** Yes, sir.

25 **THE COURT:** Attorney's fees is in the contract?

1 **MR. MACK:** Yes, Your Honor.

2 **THE COURT:** 11 is out. 12 is out.

3 **MR. MACK:** Your Honor, we withdraw 13. I think
4 it's covered by the others.

5 **THE COURT:** What's the issue about a broker?

6 **MR. MACK:** I don't know what his argument may
7 be, but at one point he was characterizing John
8 Brownlee as a broker for National Grange, an agent
9 for National Grange. But he is -- under the law of
10 South Carolina -- he is Phoenix's agent for agency
11 law purposes.

12 **MR. STANTON:** That's an incorrect statement,
13 Your Honor. I object to the charge.

14 **THE COURT:** Well, I probably would object to any
15 argument that the broker was an agent of the surety.
16 His testimony, he is the middle man. I mean, he's
17 a--

18 **MR. CHITWOOD:** He had a written agreement, Your
19 Honor.

20 **THE COURT:** He's got a Power of Attorney.

21 **MR. STANTON:** Right. His testimony is that he
22 acted as an agent of Phoenix. And his testimony was
23 also that he was an agent under a contract with
24 National Grange.

25 **THE COURT:** Well, is this an issue that the jury

1 needs to decide?

2 *MR. STANTON:* I don't know that --

3 *THE COURT:* What possible consequence--

4 *MR. STANTON:* -- I don't know that it's a charge
5 that's necessary.

6 *MR. MACK:* If he doesn't argue it in closing,
7 then it's not really necessary. I think it's clear
8 to the jury. But if they're going to try to portray
9 somehow that if Mr. Brownlee had known -- which he
10 denied knowing about Building B or knowing it was in
11 the contract -- if they're trying to argue that
12 somehow him knowing about Building B binds National
13 Grange, then we would need this charge. If they're
14 not going to argue that, then it would be
15 superfluous.

16 *THE COURT:* Maybe we just need to wait and see.

17 *MR. STANTON:* Good point.

18 *THE COURT:* I just don't think you need to add
19 another element in here that may tend to confuse the
20 jury.

21 *MR. STANTON:* My tentative plan, Your Honor, was
22 I might just go over what Mr. Brownlee said, you
23 know, which was that he was an agent for them, he
24 authorized the thing when he was told that it was
25 approved. I don't think I'm going to go into

1 extensive agency arguments for an imputation of
2 knowledge argument in that there is other testimony
3 that they knew they had the contract available to
4 them. So it may not be an issue, Your Honor.

5 **THE COURT:** Well, let's hope not.

6 **MR. STANTON:** I object to the charge.

7 **THE COURT:** I may give it if circumstances
8 require it in my mind. 15. How about the word
9 "tertiary"?

10 **MR. MACK:** That's the terminology that's used in
11 the case. I don't know if we could clarify that.

12 **MR. STANTON:** I object to the charge the way
13 it's phrased. It reads like a charge on the facts.
14 It's taken from a case that runs for -- I don't
15 know -- probably ten or twelve pages.

16 **THE COURT:** But isn't that what Masterclean
17 says?

18 **MR. STANTON:** Like so many things, you know, one
19 sentence pulled out of a case that says the bond --
20 not a bond -- but the bond is designed to protect the
21 obligee and not the principal.

22 **THE COURT:** Well, why don't we say and/or
23 payment or performance bonds are...?

24 **MR. STANTON:** You know, I mean, if it ends up
25 following with a charge that says this is not to say

1 that the surety owes no duties to the principals and
2 I will let you know what those are, you know, I -- it
3 looks a little bit like a charge on the facts.

4 **THE COURT:** I don't think so. I'm going to use
5 it. I'll change it to "payment or performance bonds
6 are designed to protect the obligee and not the
7 principal." 17?

8 **MR. MACK:** We handed up, too, Your Honor, 16 and
9 17.

10 **THE COURT:** I'm sorry, 16 was under it. Let's
11 go to 16 then.

12 **MR. MACK:** I don't think we had marked them when
13 we handed them up.

14 **THE COURT:** We did. Well, I'm not sure we
15 should have marked it 16 then. The reasonableness
16 requirement.

17 **MR. STANTON:** Okay. That's 17 by my number,
18 right? The reasonableness requirement.

19 **THE COURT:** All right. That's 17. All right.
20 16 is the factors to be considered.

21 **MR. MACK:** That's correct, Your Honor.

22 **THE COURT:** All right.

23 **MR. STANTON:** I object to it in that it's not
24 the issue that's raised by our defense; and,
25 therefore, I don't know that it's an issue in the

1 case. We're not claiming that they made a settlement
2 they shouldn't have made. We're claiming that they
3 never made a settlement, never made a payment and
4 denied there was a bond until they were forced to
5 pay. This is talking about when somebody says, you
6 know, you've paid something you shouldn't have paid.
7 So it might confuse the jury in that it really is not
8 the issue that's going to be before them.

9 **THE COURT:** How about it, Mr. Mack?

10 **MR. MACK:** Your Honor, we made the settlement
11 with Bovis of 450,000. And it may be a question; is
12 that a reasonable settlement under the exposure? We
13 tried to make the settlement under the EFCO claim.
14 So I think settlement is one of the issues in the
15 case.

16 **THE COURT:** Okay. How about 17?

17 **MR. STANTON:** Again, that's going to confuse the
18 jury even more because I assume it relates to the
19 reasonableness requirement citing the same case. So
20 now we're going on to talk about a standard that
21 applies only in cases where you're focusing on why
22 they should have gone out and paid.

23 **THE COURT:** How about it, Mr. Mack? Is that one
24 really necessary?

25 **MR. MACK:** One of the issues they are raising is

1 that National Grange should have paid on Building B.
2 So I think it ties in. The wording may be, or at
3 least the first part of it, I think would be clear.
4 If we could just delete the last phrase, "such as
5 making".

6 **THE COURT:** All right. I'll give it. Now, Mr.
7 Stanton's charges. Well, let me make sure. Mr.
8 Chitwood, these proposed charges submitted by Mr.
9 Stanton, have you had an opportunity to review them?

10 **MR. CHITWOOD:** Yes, sir. In advance.

11 **THE COURT:** Are they -- well, that goes without
12 saying. Do you have any objection to these, or do
13 you want to incorporate these, adopt these as your
14 requests to charge?

15 **MR. CHITWOOD:** I'd like to adopt them. We did
16 them in conjunction. Thank you, sir.

17 **MR. STANTON:** Would Mrs. Chitwood adopt them as
18 well? Would you like to adopt these charges? You're
19 requesting he charge the same thing we're requesting
20 that he charge them?

21 **MRS. CHITWOOD:** I don't know what he's saying.

22 **THE COURT:** I can't hear you.

23 **MRS. CHITWOOD:** I do not know what to say to
24 that.

25 **THE COURT:** Well, that's your answer then.

1 Where is the ambiguity? What's the ambiguity?
2 There's really been no testimony about an ambiguity.
3 Everybody agrees that the bond to incorporate the
4 contract, if that was your issue.

5 **MR. STANTON:** Your Honor, it may not be. This
6 was prepared back when we were arguing over a now
7 moot issue.

8 **THE COURT:** Well, that's what we've got now in
9 front of us.

10 **MR. STANTON:** I think--

11 **THE COURT:** Do you abandon that, Mr. Mack?

12 **MR. MACK:** We would object, Your Honor. There
13 is no testimony regarding ambiguities in the
14 contract. It says what it says.

15 **MR. STANTON:** We'll withdraw it.

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

18 **MR. MACK:** No objection to number 2.

19 **THE COURT:** Number 3?

20 **MR. MACK:** No objection.

21 **THE COURT:** Number 4?

22 **MR. MACK:** Just a moment, Your Honor. I just
23 want to see if that's the --

24 **MR. STANTON:** Here's what I think. I think
25 first of all, from the case, that term "scrupulously"

1 is not in the case.

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

9 **MR. STANTON:** I don't know what else -- what
10 other good there would be in having the duty and
11 pointing out the breach if there were no
12 consequences.

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

20 **MR. STANTON:** And, you know, I'm not sure I
21 have -- can put my hands on a copy of it right now
22 but Masterclean does --

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

25 **MR. STANTON:** Yeah. I'm trying to picture in my

1 mind the last page of it that says, you know--

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

4 **MR. STANTON:** -- says you can't sue for damages
5 but you can certainly raise it as a defense against
6 indemnification. You say if it's a defense against
7 indemnification that would mean it would defeat
8 indemnification. May I, Your Honor?

9 **THE COURT:** Sure.

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

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

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

25 **MR. MACK:** I think that's an argument that goes

1 to damages, not an element of the case.

2 **THE COURT:** You can always read the sword and
3 the shield to the jury. But you've taken it one step
4 further in my opinion. And you're asking me to -- if
5 they find bad faith -- to ignore the damages issue
6 and just automatically jump over the whole issue of
7 damages to nullify the -- you see what I'm saying?
8 The entire claim for damages you've made, bad faith
9 may get them out of a portion of it. I don't know.
10 They may have acted in bad faith for this settlement
11 but not for that settlement. But to just
12 automatically say it precludes indemnification, I
13 don't believe the case says it and I don't believe
14 that's the law.

15 **MR. STANTON:** Maybe we could craft something
16 that--

17 **THE COURT:** Well, it's crafting time.

18 **MR. STANTON:** Let's see.

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

23 **THE COURT:** Right.

24 **MR. MACK:** Rather than a shield to --

25 **MR. STANTON:** We just want to keep our own head,

1 Your Honor. That's all we want. We want to keep our
2 own head. We don't want theirs. Let me see what
3 that language is then.

4 **THE COURT:** Well, we can't delay on it. I just
5 don't think it's an accurate statement of the law.

6 **MR. STANTON:** Could --

7 **THE COURT:** Number 5.

8 **MR. MACK:** Your Honor, we object. There's no
9 support, no case law. I don't know that this is the
10 law of South Carolina. I have no touchstone to look
11 to see where it came from.

12 **MR. STANTON:** And, Your Honor, as you can tell
13 from my requests to charge, we do not site any
14 authority for it. I did not have time to look
15 either.

16 **THE COURT:** All right. Well, we'll just
17 overlook that one.

18 **MR. STANTON:** Well, we do request that it be
19 charged so that it's clear to -- I'll tell you how to
20 get there. They're suing these people because they
21 signed that contract and the law of good faith and
22 fair dealing in all contracts requires that they use
23 good faith and fair dealing with respect to these
24 people. So that duty is owed to them. And I want to
25 make it clear the duty is not just owed to Phoenix,

1 but to anybody they're suing under that contract.

2 **THE COURT:** You can make that abundantly clear
3 but I'm not going to tell them that. Now, we get
4 down to probably the nub of this discussion, and that
5 is--

6 **MR. MACK:** 6, 7 and 8 all go to the fiduciary
7 duty issues which they have not raised in their
8 pleadings.

9 **MR. STANTON:** Your Honor, is that the subject
10 that we're discussing, is about whether it's raised
11 in the pleadings or not or whether it's a proper
12 statement?

13 **THE COURT:** Whether you're going to get any
14 charge on fiduciary duty.

15 **MR. STANTON:** Well, I understand if the only
16 objection is whether it's fairly raised in the
17 pleadings. First of all, there is no requirement in
18 the pleading rules in South Carolina for the last 100
19 years that you give your defense or your cause of
20 action a name. You're supposed to plead the facts
21 which give rise to the belief or defense that you're
22 asserting. That's what we've done. And even looking
23 at the pleadings themselves back when they were made,
24 they fairly bring up the notion of the duties under
25 the relationship of the parties.

1 Secondly, we have gone through in our opening
2 statement and indicated what the case was going to be
3 about. We've gone ahead and we've put up evidence
4 and we've tried the case basically with those issues
5 in mind without objection to anything being
6 irrelevant to those things.

7 Thirdly, I believe it's Rule 50 something, one
8 of the rules makes clear what the common law in this
9 state has always been, and that is that -- I may be
10 getting off on this a little bit. I think the rule
11 on judgments. Essentially the notion that you get
12 the relief you're asking for, whether you call it by
13 name or not. Actually Rule 50 may not be -- the
14 rules on judgment may not be the applicable ones.
15 But the rules on pleadings is the main part, is if
16 you've pled the facts that constitute your defense,
17 there is no requirement that you give them a name.

18 And yet we've said, you know, we've laid out
19 facts saying they breached their duties under the
20 relationship. And then even to go further in
21 enumerating affirmative defenses, the one that says
22 unclean hands says you've done wrong and you're
23 barred from relief by doing wrong.

24 So I don't think the pleadings is any basis for
25 cutting out a charge on fiduciary duty. And then

1 that only remains then as to whether they're correct
2 charges. And the Chapman case says that a surety
3 owes a fiduciary duty to its principal. Controlling
4 law. Court of Appeals, anyway.

5 **MR. MACK:** But breach of fiduciary duty is a
6 separate cause of action giving rise to several.

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

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

15 **THE COURT:** Then he says you failed and
16 continued to fail to prosecute the claim of Phoenix
17 against Bovis, which I think is probably moot at this
18 point. They pursued it and resolved it.

19 **MR. STANTON:** No, sir, Your Honor. That's part
20 of the unreasonableness of it, is that there was a
21 claim by Phoenix against Bovis which by Phoenix's
22 reckoning was about a million one. Some other people
23 had other figures floating around, and that early in
24 the game --

25 **THE COURT:** What was their duty? What was her

1 duty to pursue a claim of Phoenix against Bovis?

2 **MR. STANTON:** The indemnity agreement, Your
3 Honor, as they kept saying, gives them the right but
4 not the duty to do all sorts of things. If the
5 indemnity agreement says --

6 **THE COURT:** I mean, they were supposed to file a
7 breach of contract action against Bovis for the
8 unpaid balances? Is that what you're suggesting?

9 **MR. STANTON:** I'm saying that their --

10 **THE COURT:** They chose not to do it themselves?

11 **MR. STANTON:** -- their indemnity agreement says
12 that as the surety they can come in and take over all
13 our receivables, all our equipment, everything we've
14 got, and that they have a right -- they claim that
15 they had a right to take anything we had to get in
16 there and get their bond claim resolved.

17 And we had a claim by EFCO saying we haven't
18 been paid. And EFCO is asking that the bonding
19 company pay EFCO. And the only reason EFCO -- we
20 couldn't pay EFCO is because Bovis wouldn't give us
21 the money. The surety had the right to go to Bovis
22 and say, let's work this out. We can get the bond.
23 We can get the lean off if you'll give us the money.
24 And when they didn't do that, then the rest of the
25 entire litigation, you know, they never pursued that

1 money.

2 **THE COURT:** I don't think that's the
3 responsibility of the --

4 **MR. CHITWOOD:** Your Honor, my reading of this is
5 that it's not an option as to whether or not they are
6 assigned this receivable, that the indemnification
7 agreement automatically gives it to them.

8 **THE COURT:** No question about that. They're not
9 required to file a lawsuit to collect your accounts.

10 **MR. CHITWOOD:** But it says they are. We've
11 already assigned it to them. It doesn't say they
12 have to go and file a lawsuit in our behalf.

13 **THE COURT:** Well, that's what this portion of
14 the complaint says, that they were to prosecute your
15 claim against Bovis. And I say that's not their
16 obligation. Now, so I don't think that that
17 paragraph 6 gets you to a fiduciary duty.

18 7, you say they failed to perform under the
19 performance bond. How about that, Mr. Mack? I mean,
20 is there any difference between that and failure to
21 pay on the payment bond?

22 **MR. MACK:** The same scenario, Your Honor. In
23 fact, on the performance bond, Bovis said, we're
24 going to go ahead, strip the building. They didn't
25 let any of the subs or bonding companies come in and

1 do anything. So the suit was filed. Bovis started
2 work. Eventually, National Grange did settle up with
3 Bovis. So they --

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

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

11 **THE COURT:** All right. Well, let's move on
12 to -- not leaving the instructions -- but move on to
13 the Chapman case itself. And Chapman, as I read it
14 on page 7, at least my page 7, under discussion sub
15 head number 3 or note number 3, quotes Black's Law
16 Dictionary, 1979. And two words in there in defining
17 confidential relation says, period, "A fiduciary
18 relation, it is a particular relation that exists
19 between client and attorney, principal and agent,
20 principal and surety." It's got those words in
21 there. Since -- and it really doesn't go much
22 further in talking about principal and surety.
23 However, moving forward to 1998, in the case of
24 American Fire and Casualty Company vs. John Land
25 Johnson, do you have that?

1 **MR. MACK:** I don't have that case with me, Your
2 Honor.

3 **THE COURT:** Well, this is a case involving a
4 probate judge in Lexington County who apparently made
5 off with some funds or something and the fidelity
6 bond paid Lexington County \$30,000. And in the
7 discussion, the holding in that case was that the
8 surety did not act in bad faith in doing that. But
9 they are certainly classified as a surety and that it
10 was a factual determination by the trial Court
11 because it was on a summary judgment motion -- I
12 mean, on a directed verdict motion.

13 And Judge Stevens ruled that the surety did not
14 act in bad faith by paying the county's claim. But
15 the discussion in that case cites Chapman. And it
16 says, although there are no South Carolina cases
17 which address a bad faith claim in a principal surety
18 relationship, they quote Chapman, this Court in
19 Chapman V. CNS recognized that, "A relationship
20 between a principal and his surety is a confidential
21 or fiduciary relation."

22 This Court went on to state that, "The law, in
23 order to prevent undue advantage from the unlimited
24 confidence or sense of duty which the relation
25 naturally creates requires the utmost degree of good

1 faith in all transactions between the parties."

2 So there is South Carolina law that recognizes
3 that the principal/surety relationship is a
4 confidential or fiduciary relation. Now, what do I
5 do about that?

6 **MR. MACK:** Well, Your Honor, first of all, in
7 the John Land Johnson case, that was a fidelity bond,
8 not a contract bond.

9 **THE COURT:** Well, they use --

10 **MR. MACK:** And I think the Masterclean case
11 discusses the contract bonds in the context this is a
12 commercial transaction. The parties are free to
13 contract or not contract and so forth. So I think
14 there is a distinction there between the fidelity
15 bonds and the contract bonds. Obviously, the Court
16 in John Land Johnson didn't need to address that.
17 There are certain elements of a fiduciary
18 relationship.

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

24 **THE COURT:** Well, what would be the effect of
25 recognizing that there is a fiduciary duty? Would

1 that be -- does that impose greater duties than good
2 faith and bad dealings? I mean, does it impose a
3 higher standard? And this John Johnson says, "Utmost
4 degree of faith in all transactions." Good faith.

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

10 **THE COURT:** Okay. Mr. Stanton, convince me
11 otherwise.

12 **MR. STANTON:** I don't know what I can say other
13 than it is appropriate. There were no distinctions
14 made in any of those cases in the dictionary, in
15 Black's Law Dictionary, in Chapman, or in the
16 American Fire and Casualty.

17 **THE COURT:** Are we going to the Court of Appeals
18 on Black's Law Dictionary?

19 **MR. STANTON:** I'm simply saying that there were
20 no distinctions made in any of those authorities or
21 none that they relied on that I know of between
22 fidelity bonds and some other kind of bond. It says
23 principal and surety, and that's what we have here.
24 And we have exactly what's described in there which
25 is where you sign a very -- you put yourself in a

1 very trusting relationship with the surety when you
2 sign something that says you can run off and do all
3 this kind of stuff and then there is a reciprocal
4 duty back that, well, you'd better do it bearing, you
5 know, my circumstances in mind. So these are still
6 the circumstances described in those cases and in the
7 rationale.

8 **THE COURT:** All right.

9 **MR. MACK:** But, Your Honor, the Masterclean case
10 makes it clear -- and this is again in the
11 construction -- the contract bond, the bond is
12 designed to protect the obligee, not the principal.
13 There are fiduciary duties that might flow to some of
14 the obligees but it's not designed to protect the
15 principal.

16 **THE COURT:** All right. Well, I may be wrong,
17 Mr. Stanton, but I tend to agree with the Plaintiff.
18 I do think certainly you've got a good faith and fair
19 dealing argument but I don't think I'm going to
20 extend it to a fiduciary duty argument. So with
21 regard to 6, 7, 8, and 8, I deny your request to
22 charge. As to number 9, estoppel, what's that about?
23 And are we going to again confuse the jury?

24 **MR. STANTON:** That is withdrawn, Your Honor.

25 **THE COURT:** All right. 10, latches.

1 **MR. STANTON:** The same, withdrawn.

2 **THE COURT:** And 11, material alteration of risk.

3 **MR. STANTON:** That is somewhat germane. I was
4 anticipating that there may have been some -- maybe I
5 didn't know if they were going to have any more
6 charges on any of that. I don't know how much sense
7 this will make to the jury.

8 **THE COURT:** Not much.

9 **MR. STANTON:** It's very short.

10 **THE COURT:** It doesn't make much sense to me.

11 **MR. STANTON:** Well, they argued in a lot of
12 their various efforts not to pay out under the bond.
13 They said that B was such a change in the material
14 risk that they didn't owe anything under the bond for
15 B or A.

16 **THE COURT:** Yeah, I understand. You can argue
17 that.

18 **MR. STANTON:** This is an old case where they're
19 basically saying, well, you know, if you give
20 somebody an extension of time or something like that,
21 that's not a material risk. And Mr. Mack stated in
22 his opening and I think maybe their witness also said
23 that, you know, that the change order was executed,
24 that Bovis maybe didn't add Building B in a timely
25 manner. So this is addressed to the fact that simply

1 letting somebody do something a little bit later is
2 really not an excuse to get out of paying the entire
3 bond.

4 **THE COURT:** I understand. I'm not going to
5 further confuse the jury with that charge. You can
6 argue it. All right. Now, I don't have any charge
7 on -- any of your charges on good faith and fair
8 dealing.

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

11 **THE COURT:** On yours?

12 **MR. MACK:** Defendant's.

13 **THE COURT:** Oh, I'm sorry.

14 **MR. MACK:** Defendant's.

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

17 **MR. STANTON:** We've got charge 2.

18 **THE COURT:** Yeah.

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

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

24 **MR. STANTON:** Right. And I just need to -- my
25 main problem is there was one of mine that -- it was

1 number 6, I think -- the one where I said we needed
2 to craft something or have them charged on something
3 if they weren't going to be told that bad faith would
4 discharge the indemnity.

5 **THE COURT:** Well, you've got --

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

7 **MR. MACK:** It's number 4.

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

9 **THE COURT:** Just hold up.

10 (Pause)

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

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

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

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

25 **THE COURT:** No bad faith.