

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Court of Common Pleas

AUG 29 2012

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge **S.C. Supreme Court**

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

National Grange Mutual Insurance Company, ... Respondent,

v.

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

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

APPENDIX
(Volume 3 of 3)

C. Brent Chitwood and
Linda N. Chitwood
131 Casco Bay Road
Irmo, SC 29063
803-429-4816

APPELLANTS PRO SE

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

ATTORNEY FOR PETITIONERS
RONALD L. CLARK AND SUSAN F. CLARK

Mason A. Summers, Esquire
Francis M. Mack, Esquire
Emily R. Gifford, Esquire
RICHARDSON PLOWDEN &
ROBINSON, PA
1900 Barnwell Street (29201)
P.O. Drawer 7788
Columbia, SC 29202
803-771-4400

ATTORNEYS FOR RESPONDENT

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1 **MR. STANTON:** I tend to believe it's synonomous,
2 Your Honor.

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

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

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

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

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

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

19 **THE COURT:** All right. Thank you.

20 **MR. STANTON:** Thank you.

21 **THE COURT:** We'll stand at ease until 1:15.

22 (Whereupon, a lunch break is taken)

23 **THE COURT:** Anything further?

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

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

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

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

13 **MR. MACK:** And, Your Honor, we have an objection
14 to it. One, he has added language that is not in the
15 case which will tend to confuse bad faith -- which
16 again as I've indicated connotes some evil motive --
17 with simply lack of good faith. And quite honestly,
18 we don't see that there has been any evidence of bad
19 faith in this case. The issue is did they act in
20 good faith. So we would object to this charge.

21 **MR. STANTON:** Well, again, Your Honor, the
22 request -- the part Mr. Mack refers to is the last
23 sentence which I thought was necessary for
24 clarification.

25 **THE COURT:** Well, one place you say it's a

1 shield and one place you say it's a defense.

2 **MR. STANTON:** Yes, Your Honor.

3 **THE COURT:** What's that tell the jury?

4 **MR. STANTON:** That it's a defense, it may be
5 used as a shield. And the language of the
6 Masterclean case, they're saying you can use it as a
7 sword to go get damages. Masterclean says there's no
8 tort action.

9 **THE COURT:** I understand that.

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

12 **THE COURT:** Look at this both of you, please.

13 (Pause)

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

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

18 **THE COURT:** All right. Mr. Mack, will you open
19 and close?

20 **MR. MACK:** Yes, Your Honor.

21 **THE COURT:** All right. I've been in criminal
22 court so long that sometimes you tend to -- I want to
23 transpose the rules. Well, in that case, are you
24 ready for the jury?

25 **MR. MACK:** Ready for the jury.

1 **THE COURT:** I don't think they're here yet. But
2 are you ready for the jury, both parties?

3 **MR. CHITWOOD:** Yes, sir.

4 **MR. STANTON:** Yes, sir.

5 **THE COURT:** All right. We'll wait until the
6 jury gets here and we'll start on time, for a change.
7 I'm just going to check on the jury. Just remain
8 seated.

9 (Pause)

10 **THE COURT:** Bring the jury.

11 (Jury in at 1:33 p.m.)

12 **THE BAILIFF:** Your Honor, the jury is present.

13 **THE COURT:** All right. Ladies and gentlemen,
14 we're now ready to conclude the trial. Counsel, you
15 may begin with your final remarks.

16 **MR. MACK:** May it please the Court?

17 **THE COURT:** Yes, sir.

18 **MR. MACK:** Mr. Foreman, ladies and gentlemen of
19 the jury, first of all, I want to thank you once
20 again for being on this jury. You have been
21 attentive. You have listened to the evidence. You
22 will have some documents to review. You've taken
23 notes. You've been a very good jury. We see a
24 number of juries over the years, and you have taken
25 the time to be here. And we certainly appreciate

1 your doing this, doing your civic duty to help the
2 parties resolve this dispute.

3 You've heard a lot. You've seen a lot. And now
4 your real job begins. Now, when we started I told
5 you that this case was going to sound complicated,
6 and I think probably that is your impression at this
7 point, that it's been fairly complicated. You've
8 heard about construction projects, about windows,
9 about jack hammering out concrete. You've heard
10 about condensation on metal, all the things about
11 this project down near Charleston.

12 You've heard a lot about bonds. I would guess
13 that most of you prior to the start of this trial had
14 never really given any thought to construction bonds,
15 but now you know an awful lot more. You've heard a
16 lot of things.

17 But as I said initially, this is really a very
18 simple case. It's about an agreement and whether the
19 owners of Phoenix should live up to their agreement.
20 This is one page from the agreement. You'll have the
21 entire thing in the Exhibit book when you go back.

22 So it's a simple case. Should the owners of
23 Phoenix do what they said they would do? And you
24 heard either by way of deposition testimony or live
25 testimony everyone agreed that they signed the

1 indemnity agreement. There's no question about that.

2 The owners of Phoenix were running a
3 construction company dealing in hundreds of thousands
4 of dollars. It was a pretty big operation doing
5 well. They were working on a complex set of
6 buildings. And you'll have these photos when you go
7 back. You can get a sense of how big this project
8 is. There are 50 units in each building, so 100
9 houses in essence were being built.

10 This is a very high-end project. It's on the
11 harbor down at Charleston, very nice construction.
12 Phoenix negotiated this contract. It wasn't simply
13 submit a bid and if you're low you get it and then
14 you're stuck with it. They negotiated the contract.
15 You've heard Mr. Chitwood talk about all of the
16 contract documents. When we put it all together, it
17 was a stack, and I don't recall exactly how high, but
18 a pretty big stack.

19 And he was correct. It's a pretty complex
20 project. They negotiated that. And Phoenix is
21 overall a sophisticated company in dealing with this.
22 And as you heard for a number of years they were very
23 successful, had been making good money. Things were
24 going well. And they kind of wanted to step up a
25 level, get involved in bigger projects. Mr. Chitwood

1 had been in business a number of years. He's a
2 pretty savvy businessman.

3 Well, what happened on this project? According
4 to Mr. Chitwood, nothing was their fault. The
5 architect's plans were bad. There were multiple sets
6 of plans. The owners wouldn't pay for change orders
7 for changes. None of the other subs built their part
8 of the building right. They battled with Bovis on
9 management every day trying to get things done.
10 Bovis didn't interpret the contract properly. The
11 only mistake that Phoenix admitted making was there
12 were two pieces of aluminum, 24 feet long, that got
13 put in the wrong place or the wrong type of material,
14 that was the incorrect material.

15 A couple of questions for you to think about
16 when you go back for your deliberation. If the only
17 problem in two, eight-story buildings, 100 houses was
18 simply two pieces of aluminum 24 feet long that could
19 be replaced from the inside of the building; a couple
20 of questions: Would Bovis have spent over a million
21 dollars replacing just the bay windows on the project
22 as well as the other work they did on some of the
23 other windows?

24 Another question. Would Phoenix's insurance
25 company, Hartford, have paid a million and a half

1 dollars if the only problem was two 24-foot pieces of
2 aluminum? Would National Grange have paid \$450,000?
3 Just think about these when you're going back to your
4 deliberation.

5 Now, let's shift gears and talk a little bit
6 about the Building A, Building B issue. You've heard
7 lots and lots of testimony about that. Mr. Chitwood
8 pretty much said that if National Grange had paid
9 EFCO on Building B, none of this would have happened.

10 Well, this is what we call a red herring. It's
11 thrown in to confuse things, try to confuse everyone.
12 National Grange issued a bond on Building A. It's
13 never denied that it issued a bond on Building A.
14 Now, there are some legal arguments that if you try
15 to force us to pay \$17,000 or a million 6, there may
16 be some legal implications for it. But National
17 Grange never denied that they issued the bond on
18 Building A.

19 Now, Mr. Chitwood testified that he knew that he
20 couldn't get a bond on both Building A and Building B
21 at the same time. It was just too big. Mr. Brownlee
22 said basically the same thing. Ms. Day, when you
23 heard her testimony, two buildings this size would
24 simply have been way too much for Phoenix. Phoenix
25 never paid a premium for a bond on Building B, so

1 there was a bond on Building A, but not on B. And
2 this is what the judge down in Charleston ruled. And
3 you'll see his Order in there.

4 Now, since there was a bond on Building A,
5 National Grange offered to pay EFCO on Building A.
6 EFCO wanted the full \$770,000. National Grange
7 couldn't force them to take it. They offered it but
8 EFCO refused and continued on with the litigation.
9 National Grange paid Bovis on Building A, and you'll
10 see the check in there where they paid that. So if
11 you take in all the testimony, I think it's clear
12 that National Grange simply didn't issue a bond to
13 cover Building B.

14 Now, Mr. Chitwood was in a little different
15 situation. As you heard him testify, he had
16 personally guaranteed EFCO that they would get paid
17 on both Building A and Building B. So he was on the
18 hook for Building B regardless. So obviously if
19 National Grange would pay for Building B, a building
20 that they didn't cover, it would help Mr. Chitwood
21 out significantly of the \$772,000.

22 Building A was 120,000, roughly. So Building B
23 was 652. So it was certainly to Mr. Chitwood's
24 advantage if National Grange had gone ahead and paid
25 the 650,000 and then he wouldn't be facing that

1 obligation. Now, Mr. Chitwood also seemed to say
2 that National Grange should have simply wrote checks
3 and not spent money investigating claims, sending
4 people down, sending the consultants, sending the
5 engineer, shouldn't have spent money on attorney's
6 fees.

7 Well, if National Grange had done that instead
8 of the \$968,000 that we're asking for today, National
9 Grange would be -- if they had simply wrote the
10 checks, that's the amount that would have been spent
11 cleaning everything up rather than doing what a
12 surety is supposed to do: Investigate, make
13 reasonable decisions and resolve things.

14 So, ladies and gentlemen, the A versus B
15 Building, that's simply a red herring thrown in to
16 try to confuse you. Again, this is a simple case.
17 The owners of Phoenix were involved in a
18 sophisticated construction company. They were
19 dealing in hundreds of thousands of dollars building
20 complex buildings, doing well until they got involved
21 on a project that maybe was a little too big for
22 them.

23 Bovis was a difficult contractor to deal with,
24 as you heard Mr. Clark say. Bovis was just killing
25 them out there with not properly planning, doing

1 things. But that's between Phoenix and Bovis. The
2 people who are here today, the owners of Phoenix,
3 their wives, signed the agreement. They agreed to
4 reimburse National Grange if it paid any money
5 because of what happened.

6 And the question that you will need to answer
7 when you go back after everything is, should they
8 live up to their agreement and reimburse National
9 Grange \$968,332.29? Now, I'll get to talk to you
10 again in just a little bit, in a little while just to
11 close everything out. But I certainly want to thank
12 you for your attention.

13 **THE COURT:** Mr. Stanton.

14 **MR. STANTON:** Thank you, Your Honor. Ladies and
15 gentlemen, I would guess that probably you get
16 thanked two or three times a day for your attention
17 and patience. And maybe you're tired of hearing it,
18 but I'd be remiss for not thanking you also. We do
19 appreciate your being here and are particularly
20 conscious of the fact that you've all mostly been
21 able to stay awake. It's hard to sit there in a
22 chair that long no matter how good it is. I hope
23 actually some of it's been interesting.

24 As Mr. Mack said, you've learned a little bit
25 about at least to be careful before you buy a luxury

1 condominium on Charleston Harbor. But let's hope
2 you've picked up a few other things, too.

3 The way this works is we started out telling you
4 what we thought you were going to see. Then you saw
5 it during the trial. You saw the witnesses, some of
6 the evidence, documentary evidence, pictures. And
7 this is the point where we get to tell you what we
8 think you saw. So it's a way of reminding you of
9 things. And the judge has very nicely suggested that
10 you take notes if you care to. I hope you have.
11 We'll tell you that.

12 Then the judge will tell you what the law of
13 South Carolina is that pertains to what you've heard.
14 And it's your job to take those two things and put
15 them together and come up with a result. And the
16 result that we are asking you to come up with is to
17 enter a verdict in favor of Mr. Clark and Mrs. Clark;
18 namely, a verdict for the Defendants, and let them go
19 home and not pay National Grange \$968,000 or whatever
20 it is that's on that Exhibit.

21 And the reasons are these. In a nutshell, as we
22 told you at the beginning, you know, we agree that a
23 deal is a deal; that if you say are you going to do
24 something you should do it. But, you know, that
25 applies not just to these people. It applies to

1 these people as well.

2 I don't think you've seen anybody come in and
3 say that there's an issue about whether or not these
4 folks signed this indemnity agreement. You'll see
5 it. It's Exhibit No. 1, I think. And the paper
6 Exhibits will go back with you to the jury room. You
7 can look at those.

8 But don't leave your common sense behind. And
9 don't leave what you remember about the testimony
10 behind. The testimony is just as good or better
11 evidence as the documents. But you get to take some
12 of these back. The agreement of indemnity is the
13 Exhibit 1, and there hasn't been any contention that
14 they didn't sign it.

15 You know, there has been a statement that they
16 maybe didn't read it too good, the Clarks at least
17 didn't read it too carefully, but nobody has gone on
18 about not understanding it. It's a Draconian
19 agreement that says National Grange has wide latitude
20 to go out and do things. Okay. There is no dispute
21 about that.

22 What there is a dispute about -- so don't get
23 caught up on it; this is a simple case. There's no
24 dispute you signed the agreement and you owe us a
25 million dollars. That's not what the case is about.

1 The case is about we signed an agreement and you
2 signed an agreement and you didn't do under your
3 agreement what you were supposed to do and you didn't
4 do it in a way that took into account the extremely
5 vulnerable position we've put ourselves in with you.

6 We've put ourselves in your hands. Okay. If
7 you needed to come in or if the bond was called upon,
8 and it's a bond -- I mean, for Pete's sake, the word
9 bond, I think everybody knows what that means.

10 Exhibit 2, somewhere if you read it, you know, there
11 is this sort of archaic language here about, "We as
12 surety are held and firmly bound." We as surety are
13 firmly bound. That's where the word bond comes from.
14 They're firmly bound. Okay. Count on us. Okay.

15 And they're telling the obligee, Bovis, and the
16 suppliers, count on us. But it's Phoenix who's gone
17 to them and asked them to issue that bond. Okay.

18 So, yeah, we signed an agreement. I say we. The
19 Clarks signed along with Phoenix Contract Glass and
20 the other husbands and wives.

21 What the case is about is when we signed that
22 agreement and National Grange signed its agreement
23 and we put ourselves in their hands, there is a
24 reciprocal duty that the law imposes. They could
25 have three pages in here or 25 pages in here telling

1 about what duties they don't have. Okay.

2 The law as the judge will tell you says in all
3 contracts in South Carolina there is an implied -- in
4 law, duty of good faith and fair dealing.
5 Particularly where you have a contract that gives one
6 of the parties a lot of power, the expectation is
7 they will use that power in a reasonable, honest,
8 decent way.

9 Okay. And we're saying that by virtue of that
10 that they didn't do it. And that is something called
11 bad faith or lack of good faith and fair dealing.
12 And the judge should instruct you that that is a
13 defense to a claim of indemnity under an indemnity
14 agreement like this. That is a defense.

15 So we're not talking about we denied these
16 people signed the agreement. We're not saying the
17 people didn't understand the agreement. Even though
18 they may not have fully understood it, they knew it
19 was a pretty serious agreement. But they had and
20 were entitled to have a reasonable expectation of
21 good faith and fair dealing. And if that's not what
22 occurred, that's a defense to a claim of indemnity.

23 Just to state the obvious, what is a claim of
24 indemnity? It's a claim that somebody needs to pay
25 somebody back. National Grange went out on its own,

1 paddled its own canoe, took its own path, decided
2 here is how we're going to act. Okay. And only
3 after years of all of the stuff you've heard about,
4 then they said, now pay us back.

5 And the Clarks and I think the other Defendants
6 are probably in the same boat, but they speak for
7 themselves, are saying: Don't make us pay them back.
8 If they want to take that approach, if that's how
9 they want to do business, if that's how they want to
10 run a surety company that's supposed to stand firmly
11 bound, then let them do that. But don't let them
12 come in here and ask these nice people to pay them a
13 million dollars after all this time.

14 Now, what is some of that evidence of bad faith?
15 The bond itself, Plaintiff's Exhibit 2, the bond
16 itself. Let me see if I can find it in my notes
17 here. The bond itself, Plaintiff's Exhibit 2, has
18 right here in the middle where you see the words
19 Bovis Land Lease, it describes the contract with
20 Bovis and it says: Which is hereby referred to and
21 made a part hereof as if fully set forth herein.
22 Okay. That's the bond that they stand firmly bound
23 to follow.

24 All right. You heard about how that bond came
25 about. There was a nice gentleman here in Columbia

1 who has worked for -- lived in the area for 40 years,
2 worked for Ellison Agency for 20 more years. Maybe
3 he worked for them 40 years. Ellison Agency, a
4 company here in Columbia, has been in insurance and
5 the bond business for almost a century said: I have
6 a contract with National Grange to write their bonds.
7 I'm allowed to sign their bonds after they approve
8 them. Okay. He said they approved the bond. They
9 are big boys, as you can tell. They have people who
10 can read. All right. The bond itself incorporates
11 the contract.

12 You heard the primary witness, who himself is
13 also a lawyer, admit from the witness stand -- and
14 that's part of the evidence you take back to the jury
15 room with you -- admit from the witness stand that
16 the contract, which is a part of the bond, included
17 the option for Bovis to make Phoenix do Building B.

18 You heard him say that the primary focus of
19 their discussions when they got together with the
20 field underwriter was to look at how Building A and
21 Building B would dovetail in terms of how much work
22 in progress there would be at a given time so that
23 they could stay -- I don't know what the term they
24 use for it -- but sort of their limit.

25 So, I mean, if they're spending an hour or two

1 hours talking about Building A and Building B and
2 Building A and Building B, you know, you'd kind of
3 think they know about Building B. All right. And
4 for that matter, if they could disaffirm knowing
5 about that, it's in their bond. It says the contract
6 is part of the bond and the contract has Building B
7 in it. All right. So there is what they stand
8 firmly bound to do.

9 What's the first thing that happens? There is,
10 I think, only one Defense Exhibit. I guess Plaintiff
11 gets the yellow color and it says Plaintiff's
12 Exhibit. And the Defendant gets the blue color which
13 is the Defendant's Exhibit. And it's Defendant's
14 Exhibit 1.

15 Now, both the parties can refer to the Exhibits.
16 There's stuff in them that's interesting for both
17 sides, I guess. But look at this one with the blue
18 thing on it. I think that's the only Exhibit that's
19 a Defendant's Exhibit. This is the first response in
20 2000 and -- it ought to be 2002, February 12th of
21 2002. Okay.

22 The first time anybody says we've got a claim
23 under this bond, you get this letter back, and it's
24 written by Mr. Cinq-Mars here. It's three pages and
25 it reads like David Letterman's Top 10 Reasons why

1 our bond is no good. Here's not one reason why our
2 bond is not good, but let me think of every reason;
3 let me count the ways our bond is no good.

4 And Mr. Mack said in his closing argument that
5 we have never denied that we issued a bond on
6 Building A. Okay. Let's look at semantics. Okay.
7 If everybody wants to talk about the words and what
8 words mean. Okay. Maybe they've never denied they
9 issued a bond on Building A, but here's what they did
10 do.

11 They said we never issued a bond on Building B.
12 We're not going to cover Building B. We don't care
13 how important it is to anybody, how much trouble it
14 causes, whether Phoenix crashes and burns, whether
15 the people who are associated with Phoenix go home
16 with no supper and no houses. We don't care; no
17 Building B. And what it says is, and if you want to
18 push your luck, no Building A either. Okay.

19 So maybe they didn't technically deny that they
20 issued a bond on Building A. They simply said that
21 but, you know, even though we did, we're going to
22 raise a defense and say that we're not obligated. So
23 if you want to make that distinction, make it.

24 Oh, but it's full of other stuff. He says --
25 let me point out first thing, second photograph --

1 "Although the project has more than one phase, our
2 bond in the amount of \$914,835 covered phase one."

3 The performance and payment bond was issued with
4 a Power of Attorney having a limit of a million
5 dollars. They have a guy here in Columbia who writes
6 business for them. They give him a Power of Attorney
7 and say it's limited to a million dollars. And then
8 they hide behind that even though there can be
9 different projects in place at different times. And
10 they get working progress reports that aren't an
11 exact science where the risk can change. Now,
12 they're going to pull the, "Okay. He's limited to a
13 million dollars."

14 Well, the bond he wrote was, you know, \$914,835.
15 Mr. Cinq-Mars, his own sworn testimony here said you
16 know what? And even under the 914,835, there's a
17 payment side and a performance side. You know,
18 theoretically that was sort of two different things
19 that could be 1.8 in exposure. Do you suppose maybe
20 they have the million dollar limit there in case that
21 ever happens, too, so they can hide behind that? But
22 it goes on.

23 I'll let you all read it, but you can find --
24 maybe you can count them, the reasons why they're not
25 going to pay. 2002. Okay. And one of them says:

1 If you contend that the bond covers Building B,
2 please advise immediately as this will discharge
3 National Grange of all liability under the bond.
4 That means Building A as well. National Grange will
5 return the original bond premium since it is being
6 discharged.

7 This is a company that started out saying it was
8 firmly bound. So if the theme of this case is if you
9 say you're going to do something, should you do it,
10 it's a two-way street. They knew that Building B was
11 in the contract. They admitted it from the stand.
12 They issued the bond. The bond incorporates the
13 contract. Okay.

14 They gave their agent a Power of Attorney
15 limited to a million dollars to issue bonds which
16 they said could be for 1.8 in exposure. They denied
17 knowledge of Building B later. They said we didn't
18 know Building B was in there. And yet in his
19 letter -- they said they didn't know Building B was
20 in there -- but in his letter he says, you know,
21 another thing; Bovis didn't exercise their change
22 order rights in time to add Building B. So they did
23 that. They not only repudiated Building B but took
24 the position that if anybody wanted to in good faith
25 explore Building B, they were going to deny Building

1 A as well.

2 Now, let's look. What did they actually do?
3 From 2002 to 2008 they didn't pay one dime in claims
4 under Building A, Building B, under payment or
5 performance. They litigated. They spent 300
6 something thousand dollars in attorney's fees. And
7 sure, it was a big messy case with a lot of lawyers,
8 and things are expensive.

9 They have a summary Exhibit here. Let me find
10 it. Exhibit 8. Okay. It's got on here, here's what
11 they want you to award against these nice people.
12 \$968,000. Legal fees, 312,558.67. You'll get this
13 back in the jury room. It's Exhibit 8. Consulting
14 fees, 50,000 and some odd dollars. Settlement in the
15 Bovis suit, 450,000. They ought to have dates beside
16 this. I mean, that would be -- that settlement in
17 the Bovis suit -- would have been in -- if you look
18 at some of the other Exhibits, would have been in
19 2008.

20 Okay. And then the EFCO Order. Notice it says
21 EFCO Order and it doesn't say payments made. It says
22 payments made or monies owed. EFCO Order. That's
23 the EFCO Order. That's Exhibit No. 6. The testimony
24 was that they haven't even paid that yet. They've
25 been ordered to pay it. They haven't paid it. And

1 they've appealed. EFCO appealed the Court. They've
2 appealed the Order. And their witness admitted from
3 the stand that this is not even the last word. There
4 is another court that's going to decide what is going
5 to be owed under that. So they already want that.

6 And you heard Mr. Chitwood testify that Thursday
7 of last week Phoenix sent them a check for the whole
8 \$140,000 that Phoenix got settling or selling its own
9 insurance policies back to its insurance company.
10 That's not on there. Firmly bound, okay. So they
11 didn't pay a dime in claims.

12 And Mr. Cinq-Mar's letter here, 2002, look at
13 that Order though. That Order, Exhibit 6, that's in
14 2008. And if you want some reading, I mean, it's a
15 bunch of pages. It's like 14 pages. And there the
16 judge goes through the positions that the parties
17 have. They're still taking the same positions in
18 2008. No Building B. And you know what? No
19 Building A either. And then the judge disagreed and
20 said, well, let's at least give them Building A. But
21 they didn't even pay out on Building A. They said
22 that they offered to pay some money on Building A
23 early on, but they never said when.

24 In all the exhibits they have produced they have
25 never produced a single Exhibit that shows where they

1 made that offer or anybody's response to that offer.
2 We do see that in 2002, and in 2008 they're still
3 saying we're not liable for Building A. Or we might
4 not be if you all don't -- if you push your luck on
5 Building B.

6 You've heard that as a result of this, Phoenix
7 early in the project lost its bonding. They couldn't
8 do other jobs. Phoenix couldn't get paid by Bovis.
9 Phoenix had to go in and work its fingers to the bone
10 and do everything it could. And principals put
11 everything they could into finishing the buildings
12 while National Grange did nothing on the payment
13 bond.

14 You heard from Mr. Chitwood, I believe, that
15 before tropical storm Gaston they had already found
16 there were some problems with some of the windows and
17 that Phoenix, despite the circumstances, was willing
18 to try to fix them. No help there.

19 And did you hear that they had a consultant come
20 down after tropical storm Gaston and say: Well,
21 we're here to see what the problems were; and that
22 Bovis decided on its own to move forward and strip
23 the skin off the whole building.

24 You think by the time some surety has come in
25 and told you, yeah, count us out, you don't have a

1 bond, you don't have Building B, if you push your
2 luck, no Building A; do you think Bovis is going to
3 stand around and wait to find out how that fix is
4 going to go? No.

5 So there are more damages. In fact, Mr. Mack in
6 his closing said, you know, here are some questions
7 for you to answer. If there were just a few problems
8 caused by Phoenix, why would Bovis replace all this
9 glass? You remember the problems weren't just caused
10 by Phoenix. The problems were caused by a building
11 that wasn't straight; and then Bovis made, among
12 others, the masonry contractor come in and do their
13 work and they had a change and a void and all this
14 other stuff. Well, when they had to tear off all the
15 masonry, all the brick on this building. Then
16 they're into windows. So that's not necessarily
17 Phoenix's fault.

18 What you've got -- and you all are the judges --
19 is some conscientious people who came in and did
20 their level best to do everything they could do,
21 everything they had agreed to; and the people who
22 said they'd be firmly bound, who from the beginning
23 said, not really, now want these people to continue
24 to pay them.

25 So they knew their actions were, if not delaying

1 repairs, that certainly no good faith, no good faith
2 effort to come in and try to help get the thing
3 solved before it became a big problem. They knew
4 their actions were killing Phoenix. And they've
5 taken not one but numerous positions on why they
6 don't think their bond was any good.

7 Well, if the bond wasn't any good, then why
8 should they have to be indemnified for what they
9 ultimately were required to pay out under their bond?
10 They settled the Bovis suit two weeks before trial in
11 the end of 2007 and a judge made them pay. Except
12 they haven't paid yet. A judge ordered on the
13 payment bond.

14 A couple of notes, and I'll try to wrap it up.
15 When Mr. Chitwood, who is not a lawyer, here
16 defending himself, was attempting to cross examine
17 the witness, Mr. Cinq-Mars who is a lawyer on some
18 issue, Mr. Cinq-Mars -- I don't know if you can
19 remember it. I can remember it as clear as day. He
20 said: Oh, Mr. Chitwood, there are a lot of things we
21 asked for before issuing a bond. Just remember that.
22 There are a lot of things they asked for before
23 issuing a bond.

24 But they can't seem to find it or even introduce
25 into evidence. We didn't introduce it either. But

1 they've given you Plaintiff's Exhibit No. 2 here, the
2 bond, a part of which is the contract. Where is the
3 contract? We asked for a lot of things before
4 issuing a bond. But where is the contract? And by
5 that, I mean the contract between Bovis and Phoenix,
6 the one that has Building B in it.

7 Mr. Cinq-Mars on a couple of other things said,
8 you know, just reiterated the same thing. He was
9 asked about why didn't you go try to get this,
10 whether it was 7 or 800 thousand or a million one
11 that was owed to Phoenix? And he said: I don't know
12 how we could have because we didn't bond Building B.
13 There is live testimony. Yet in another part of his
14 testimony he said that Bovis had told him that Bovis
15 used the money to do repairs. So which is it?

16 If you look at the settlement agreement with
17 Bovis, between National Grange and Bovis, that's
18 Plaintiff's Exhibit 4, it's got a case caption on it.
19 In there it says -- I'm sorry. Is that the
20 settlement agreement between -- page 9, paragraph 53?
21 I must have the wrong document. Oh, it's not the
22 settlement agreement. I'm sorry. It's Plaintiff's
23 6, which is that judge's Order from Charleston.

24 Page 9, paragraph 53 says: As part of the
25 overall settlement of Bovis' claims against Phoenix,

1 EFCO and National Grange, Bovis retained monies owed
2 under the Phoenix contract which are at least
3 \$500,000 but may be as much as 750,000. So
4 apparently, that wasn't something that was resolved
5 until the very end.

6 We as lawyers don't have any idea what's going
7 through your head. We don't know if we've covered
8 everything, not covered enough, left something out or
9 whether we've covered the same things too many times.
10 I don't want to take up any more time. I don't want
11 to omit anything or fail to answer any questions.

12 We have tried to be as comprehensive as we could
13 be in as short a period of time as possible, and all
14 I can do ask you is to listen very carefully to what
15 the judge instructs you on the law, apply it
16 conscientiously and be fair to Mr. and Mrs. Clark.

17 We'd ask to you return a verdict of zero for the
18 Plaintiff; namely, a verdict in favor of Defendants,
19 and to find that National Grange did not stand firmly
20 bound and that their actions were not in good faith
21 and not fair dealing, given the circumstances. Thank
22 you very much.

23 **THE COURT:** Mr. Chitwood.

24 **MR. CHITWOOD:** Good afternoon. Thank you. I do
25 appreciate your patience with me as I tried to do

1 this on my own. And I'll try to start by telling you
2 a story and at the end I'm going to make a few
3 detailed points and then we'll be done. Lots of
4 construction lingo and legal lingo, and I hope that
5 you can get through it. I learned a lot about the
6 construction lingo and the legal lingo over the last
7 ten years the hard way.

8 This case is like a lot of disputes. He said
9 this; they did that. And you have to decide based on
10 the testimony as to who is telling the truth. Three
11 guys, one is here and myself, started a glass
12 company. It literally started out as me working
13 another job. They quit their jobs. We took Ronnie's
14 truck, used truck, and started it, two men on a
15 truck. And I worked at nights.

16 And then we hired somebody else, and we grew, we
17 learned, and we got bigger and we learned more about
18 what we were doing. We hired people. We invested
19 our own money and we kept growing. Then we borrowed
20 money and we stuck to our plan and we kept on going.

21 We finally got to a point where people said you
22 can't do a larger job because we don't know whether
23 you can pay us or not. That's the supplier, the
24 people that bring the material to the job. We're not
25 sure you're going to pay us because it's a tough

1 world out there. The general contractor says, well,
2 we don't know, we don't think we want to do business
3 with you because we're not sure you could finish the
4 job. So these are bonded jobs. You go get bonded
5 and we'll talk.

6 So we go get bonded and we do a little small job
7 under a bond, and we do another and another. Finally
8 the opportunity, as they talk about, comes up. And
9 so we find this big insurance company who specializes
10 in issuing these promises to the general contractor
11 and the supplier on our behalf. And we buy this bond
12 and we give them two things. We give them money and
13 we give them an agreement. Straightforward.

14 Okay. It's very complex. Did I understand
15 every detail about all the things that might could go
16 wrong? Probably not. But I understood the concept.
17 If it goes wrong, you'll do this. Okay. But we had
18 done jobs before. We knew what things going wrong
19 was all about. And we saw that if you keep working
20 and you do the right thing, it works out. Because,
21 you know, if you finish the building, you've got all
22 this money sitting out there and then it's all going
23 to get worked out. So that's what we did.

24 Do we have problems? Sure we did. But, you
25 know, we had pages and pages of punch lists where we

1 had to go back and fix our problems. It's a huge,
2 huge building, lots of problems. We're fixing them
3 as we go. You know, they've got a certificate of
4 occupancy, which means the problems were resolved
5 through our hard work.

6 But here is the key point as to the
7 relationships that were going on here in that
8 three-party relationship. At the end of Building A,
9 Bovis says: We want you all to do Building B. I
10 mean, why would they ask us to do Building B if
11 things were so bad? No, things weren't so terrible
12 as that it was a very difficult working relationship.
13 We worked together.

14 You know, at one point in time we were helped.
15 But we weren't helped by the people who gave us the
16 bond. We were helped by other people. We were
17 helped by taking out mortgages on our homes,
18 borrowing money from family, investing it in our
19 company. We put everything we could in while waiting
20 for this agreement that we made to be honored. It
21 didn't happen. It just didn't happen.

22 What we got was a letter from a lawyer. It made
23 me feel like a fool. Here I am going through, I've
24 got a contract; and, I mean, it's a doozy of a
25 contract, 43-page contract. And I knew it was there,

1 and I know that I told them it was there. They're a
2 big, sophisticated insurance company. And then they
3 come up in a letter saying: Well, the bond, the
4 change order that's in the contract doesn't apply.

5 Well, wait a minute. And you tell me that you
6 didn't even get the contract? A big insurance
7 company, you didn't even get the contract? They
8 point to that agreement over and over and over again.
9 We signed it. Yeah, we signed it. They did, too.
10 They did, too. They didn't keep their part of it.

11 It says verbatim: The indemnitors assign,
12 transfer and set over to the surety the rights and
13 property described hereafter. And they are all
14 monies retained that may be due or become due of any
15 contract. Go back and read that part. What that
16 says is it doesn't say we have the option of not
17 paying and investigating and this, that and the
18 other. It says we own all of your receivables. We
19 own everything that is owed to you by Bovis. It's
20 theirs. We signed it over. We signed the document
21 and said: Here it is. They wouldn't take it.

22 You have to look at the evidence and ask why
23 didn't they take the money. Why didn't they take the
24 money? I have theories. But what does the evidence
25 say about why they didn't take the money? They

1 didn't take the money because Mr. Cinq-Mars says, oh,
2 Bovis spent the money elsewhere. I don't think that
3 was shown. They didn't send the money anywhere.

4 The document that they provided says in the
5 agreement that that money was owed to Phoenix and it
6 was negotiated for in an agreement after that date.
7 So it was still on the table and they owed it. But
8 they wouldn't take it. Could it be something to do
9 with their trying to avoid future liability? Could
10 that be the reason they wouldn't take the money?

11 Why wouldn't they take the money? Because they
12 were afraid. They were afraid. They didn't want to
13 admit this part over here because if they took the
14 money they'd be admitting. It's more of the shell
15 game. It's a lawyer trying to find everything they
16 can to not pay, to reduce their liability.

17 It's the first thing that they did, was what can
18 we think of to put in this document so that we don't
19 have to pay? And they spent hundreds of thousands of
20 dollars saying we don't have to pay. How can we
21 figure out how not to pay? How many reasons can we
22 have not to pay?

23 And in the meantime, my partners are putting
24 everything they've got, and myself, and we're working
25 without paychecks. We're borrowing money. We're

1 borrowing our future. We're spending our children's
2 inheritance, college fund and everything else,
3 everything else. They know we don't have anything
4 left, but they're still here wanting what we don't
5 have.

6 There was a point made by Mr. Mack, that I'm up
7 here trying to get them to do something that avoids
8 me having to pay EFCO. Well, first of all, there's
9 no evidence that I signed this agreement with EFCO,
10 but I did. Why didn't they sue me for it? It wasn't
11 because they didn't get paid, because they didn't get
12 paid. Why didn't they sue me for it? They didn't
13 think I owed it. They didn't think I owed it to
14 them.

15 They thought that Bovis, their money was there.
16 They didn't come after me personally. Why? I can
17 tell you why I think. They thought it was owed by
18 Bovis and they know that I did everything I could to
19 honor my agreement and my partner did, too. That's
20 why they didn't chase us, because they knew what was
21 right; they knew what was fair, that we were doing
22 the right thing.

23 And I testified that we repeatedly stood in the
24 parking lot, our famous parking lot, in front of our
25 building and said: What are we going do? What are

1 we going to do? And we always said the same thing.
2 Ronnie must have said it a hundred times. Do the
3 right thing and it will take care of itself. Just
4 keep going and it's going to be okay. So today, I
5 ask you to be fair. We did the right thing. We
6 signed an agreement. We kept our part as best we
7 could. They didn't. Thank you.

8 **MR. MACK:** Thank you, Your Honor.

9 **THE COURT:** Mr. Mack.

10 **MR. MACK:** Ladies and gentlemen, this will be
11 the last time you hear from the lawyers. The next
12 step will be when the judge instructs you on the law.
13 He'll explain to you what the law of South Carolina
14 is as it applies to this particular dispute. So I'll
15 try to be brief and just touch on a couple of things.

16 First of all, this case isn't about insurance.
17 I told you that at the beginning. You've heard us
18 talk about even though National Grange Mutual
19 Insurance Company, this is about surety bonds, an
20 entirely different area of law. And when you go back
21 you can take a look at the evidence and any notes
22 you've taken and your recollection of the testimony.

23 Just a couple of things. There has been some
24 talk in closing about good faith. One of the things
25 that the judge will instruct you is that payment and

1 performance bonds are designed to protect the
2 obligee. In this case it would be EFCO and Bovis,
3 not the principal. That's one of the things about
4 surety law. I mean, this case, what would be good
5 faith? Under the bond, when claims are made, the
6 bonding company is supposed to go out and investigate
7 and try to settle those claims. And that's what
8 National Grange did in this case.

9 Bad faith would have been simply, okay, EFCO is
10 saying they're owed money. We'll write them a check.
11 Bovis says it covers everything. We'll write them a
12 check. We don't have to worry because we have the
13 principals, the owners of the company and their
14 wives. We'll go back and get whatever we spend.
15 That's not what National Grange did. They acted in
16 good faith.

17 They investigated the claims, settled them where
18 appropriate, tried to settle the EFCO claim but
19 couldn't because EFCO was asking for way more than
20 what was covered by the bonds. If National Grange
21 had been acting in bad faith, they would have simply
22 written the checks and we would be here today talking
23 about 2.4 million dollars. That's not what we're
24 talking about. We're talking about the results of
25 the good faith investigation and the work that was

1 done and the expenses incurred by National Grange.
2 So instead of 2.4 million, it's 968,000, which is a
3 lot of money. There is no question by anyone's
4 measure that is a lot of money. But when you're
5 running a big, sophisticated construction company
6 doing large buildings, dealing in hundreds of
7 thousands of dollars, the dollars mount up.

8 Now, when you go back and think about the
9 evidence and look at the evidence, the owners of
10 Phoenix haven't presented any evidence of what
11 National Grange should have done differently. The
12 only claim is, well, they should have just paid.

13 Think about it. Their witness, they called
14 Mr. John Brownlee, who has what? Thirty or forty
15 years experience in writing bonds, dealing with
16 bonds? He never testified that National Grange did
17 anything wrong.

18 They called Ms. Cynthia Day as their witness.
19 She never testified that National Grange did anything
20 wrong. The only person who said National Grange
21 should have done something differently was Mr.
22 Chitwood. And he said, well, they should have just
23 paid EFCO whether or not they owed it.

24 Building B, National Grange did not owe any
25 money on Building B. If you look at Mr. Cinq-Mar's

1 letter and look at the whole letter and give it a
2 fair reading -- and this was in 2002, when Bovis, one
3 of the obligees, is making the claim -- Although the
4 project has more than one phase, our bond in the
5 amount of \$914,835 covered phase one which is
6 Building A. He admitted it in 2002. They've
7 admitted it throughout.

8 They've never denied that it covers Building A.
9 He repeated it again on the second page. So there
10 was a big dispute about Building A. Building B, was
11 Building B included? And again, this is what has
12 been thrown in to try to confuse everything. If you
13 read all the evidence, you will see that only
14 Building A was covered.

15 The Clarks and Mr. Chitwood made a big deal
16 about, well, the contract, the contract, the contract
17 between Bovis and Phoenix, that it talks about
18 Building B. They've made a big deal of it, but they
19 didn't bring the copy in for you to see. If they
20 think it is that important, I think it would have
21 been helpful for you to have the contract. But that
22 was their decision whether or not they thought it was
23 important, and you don't have a copy of the contract.

24 Now, there's been a lot of talk about how long
25 things went on and when things got resolved and when

1 things got settled. Now, National Grange -- and you
2 will see in one of the Exhibits, and this one has
3 gotten kind of loose, Exhibit 4 -- that National
4 Grange settled with Bovis the dispute in 2008. Well,
5 EFCO-- pardon me -- Phoenix didn't settle with Bovis
6 until 2009, a year later on. Throughout all of the
7 litigation in the EFCO case Phoenix was a Defendant
8 in the EFCO case. Mr. Stanton represented them in
9 the EFCO case.

10 In the Bovis case, Phoenix had an attorney.
11 Hartford provided an attorney for them. And then
12 later on Mr. Stanton became Phoenix's attorney in the
13 Bovis case. So they've been represented by attorneys
14 throughout the entire course of the litigation. And
15 the attorneys are there to protect their rights. A
16 lot of things are handled between attorneys in
17 litigation versus party-to-party once a lawsuit is
18 filed.

19 Now, the language in the bond, "firmly bound",
20 who is National Grange firmly bound to? Not to
21 Phoenix. They're firmly bound to the obligee, which
22 is Bovis, and under the payment bond for the benefit
23 of the suppliers. So look at National Grange's
24 actions in relation to EFCO. Did National Grange
25 make reasonable efforts to settle the EFCO claim?

1 You've heard all the testimony. You'll see what's
2 there.

3 Did National Grange make reasonable efforts to
4 resolve the Bovis claim? You've heard all the
5 evidence on that. So that is the firmly bound. Who
6 are they firmly bound to? And as the judge will
7 instruct you, it is to the obligees, not to the
8 principal. Going back and again looking, considering
9 the evidence, take a look. We've introduced evidence
10 what National Grange actually paid by way of
11 settlements.

12 Now, the EFCO claim isn't resolved. They're
13 either going to pay 150 something thousand that's in
14 the Order; or, if that is reversed, they're going to
15 pay over a million dollars. They aren't asking for
16 that million dollars that is still floating out
17 there. They're simply asking for the amount the
18 judge has ordered them to pay, that they expect to
19 pay, that they've set up reserves and assume that
20 they are going to pay.

21 So National Grange is being reasonable in what
22 it's asking for even though the number is very large.
23 The owners of Phoenix got into big business to do all
24 this work. They've told National Grange that if you
25 act as our surety to help us get this job -- they

1 couldn't get the job without a bond -- we'll pay you
2 back if you spend any money.

3 I grew up down in Calhoun County out in the
4 country. My daddy didn't have much education but he
5 was a wise man; he was a smart man. And he taught me
6 by word and example. And one of the things he taught
7 me: Don't make many promises in life; but when you
8 make a promise, the ones you do make, live up to
9 them. That's important. It may not be easy to live
10 up to your promises; it may not be pleasant to live
11 up to your promises, but once you give your word, you
12 should follow through.

13 Now, the judge will talk to you about contracts
14 and what the law is in indemnification. But at the
15 end it's simply about sticking to your word when you
16 make a promise. The owners of Phoenix promised to
17 reimburse National Grange if it had to pay any money.
18 National Grange paid \$968,332.29. So the question
19 for you to answer: Should the owners do what they
20 said they would do? Thank you very much.

21 **THE COURT:** All right, ladies and gentlemen.
22 You've heard the evidence, the arguments of counsel.
23 I will now explain to you the law as it applies to
24 this case.

25 National Grange Mutual Insurance Company, the

1 Plaintiff, claims that its been injured by the
2 actions of the Defendants, Brent Chitwood, Linda
3 Chitwood, Ronald Clark and Susan Clark. Those are
4 the four remaining Defendants in this case. And in
5 bringing this lawsuit the Plaintiff claims that the
6 Defendants should compensate it in damages.

7 I remind you again that during this trial you
8 and I have certain duties to perform. As the trial
9 judge, it's my responsibility to preside over the
10 trial, and I also have the duty to rule on the
11 admissibility of the evidence offered during the
12 course of the trial. You are to consider only the
13 evidence that is before you. You are to consider
14 only the testimony which has been presented from the
15 witness stand, any Exhibits which may have been made
16 a part of the record and any stipulations of the
17 counsel, of the parties. I have the additional duty
18 to charge you the law applicable to this case.

19 It's your duty as jurors to accept and apply the
20 law as I now state it to you. If you think you have
21 any idea as to what the law is or what the law ought
22 to be and it does not agree with what I now tell you
23 the law is, you must forget that idea because you're
24 sworn to accept the law and apply the law exactly as
25 I state it to you.

1 In every case tried in this court before a jury,
2 the jury becomes the sole and exclusive judge of the
3 facts. A trial judge cannot comment on or make any
4 statement about the facts of the case. Since you are
5 the sole judges of the facts, do not think by
6 anything that I may have said during the course of
7 the trial that I have any opinion about the facts in
8 this case. The law does not permit me to have an
9 opinion about the facts in the case.

10 The burden of proof in this case is by what's
11 known as a preponderance of the evidence. A
12 preponderance of the evidence simply means by the
13 greater weight of the evidence. It is evidence which
14 as a whole shows that the fact sought to be proved is
15 more likely true than not true.

16 Now, this can be illustrated by imagining a set
17 of scales. When the case begins, the scales are
18 even. After all the evidence has been presented, if
19 the scales remain even or if they tip even slightly
20 in favor of the Defendant, then the Plaintiff has
21 failed to meet that burden of proof and would not be
22 entitled to recover.

23 If, on the other hand, the scales tip even
24 slightly in favor of the Plaintiff, the Plaintiff
25 will have met its burden, and you should return a

1 verdict for the Plaintiff. The preponderance of the
2 evidence is not determined by the number of
3 witnesses. Instead, it must be determined by the
4 greater weight of all of the evidence.

5 Now, generally there are two types of evidence
6 presented during a trial: Direct evidence and what
7 we call circumstantial evidence. Direct evidence is
8 the testimony of a person who claims to have actual
9 knowledge of a fact, such as an eye witness. It is
10 evidence which immediately establishes the main fact
11 to be proved.

12 Circumstantial evidence, on the other hand, is
13 proof of a chain of facts or circumstances indicating
14 the existence of some fact. It is evidence which
15 immediately establishes what are known as collateral
16 facts from which the main fact may be inferred.

17 Circumstantial evidence is based on inference
18 and not on personal knowledge or observation, but the
19 law makes absolutely no difference between the weight
20 or value to be given to either circumstantial
21 evidence, nor is a greater degree of certainty
22 required of circumstantial evidence than of direct
23 evidence.

24 Now, to determine the facts in this case you
25 will have to evaluate the credibility, which means

1 the believability of each witness. Some of the
2 things you may consider as you decide whether or not
3 to believe a particular witness's testimony about
4 some matter include: What was the manner and
5 appearance of the witness who testified? Was he or
6 she straightforward or hesitant in answering? Was
7 the testimony of a witness consistent or
8 inconsistent? How did the witness come to know the
9 facts that he or she testified to, and what was his
10 or her ability to know those facts?

11 Is there some reason a witness would want to
12 give testimony which would help or hurt one side or
13 the other? In other words, was the witness biased or
14 prejudiced? And was the testimony of a witness
15 strengthened or weakened by other testimony or
16 evidence in the case?

17 You can believe as much or as little of each
18 witness's testimony as you think proper. You may
19 believe the testimony of a single witness against
20 that of many witnesses or just the opposite. You do
21 not determine the truth of the matter merely by
22 counting the number of witnesses presented by each
23 side. And throughout this process you have but one
24 objective: To seek the truth regardless of its
25 source.

1 Now, this case should be considered and decided
2 by you as an action between two persons of equal
3 standing in the community or of equal worth. By
4 holding the same or similar stations in light -- and
5 by that I mean a corporation is entitled to the same
6 fair trial at your hands as a private individual.
7 The law is no respecter of persons. All persons
8 including corporations, stand equal before the law
9 and are to be dealt with as equals in a court of
10 justice.

11 In this case, the Plaintiff claims that the
12 Defendants breached an indemnification agreement that
13 existed between the parties. In order to recover for
14 breach of an indemnification agreement, the Plaintiff
15 must prove by the preponderance or the greater weight
16 of the evidence that the Plaintiff and the Defendants
17 entered into a binding indemnification agreement,
18 that the Defendants unjustifiably breached that
19 indemnification agreement, and that the Plaintiff has
20 suffered damages as a result of the Defendant's
21 breach of the indemnification agreement.

22 This means the first thing the Plaintiff must
23 prove by a preponderance or greater weight of
24 evidence is that the parties entered into a binding
25 indemnification agreement. An indemnification

1 agreement is a type of contract. It is an agreement
2 entered into by two or more parties in which each
3 party agrees to perform certain acts. It is more
4 than the mere exchange of promises.

5 For the agreement to be considered binding, the
6 parties must have intended to enter into the
7 agreement and must have reached a mutual
8 understanding of the terms of that agreement. This
9 is sometimes called a meeting of the minds. The
10 parties must intend to be mutually bound by the
11 agreement.

12 Contractual indemnity involves a transfer of
13 risks for consideration, and the contract itself
14 establishes the relationship between the parties.
15 The right to indemnity arises when the relationship
16 between the parties is such that there is an
17 obligation on the part of one party to indemnify the
18 other, as where one person is exposed to liability by
19 the wrongful act of another person in which he does
20 not join.

21 What's a breach? The Plaintiff must show by a
22 preponderance or greater weight of the evidence that
23 the Defendants have unjustifiably breached the
24 indemnification agreement. The word "breach" means
25 failure without legal excuse to perform a promise

1 that forms the whole or a part of the indemnification
2 agreement.

3 This includes the refusal of a party to
4 recognize the existence of the indemnification
5 agreement or the doing of something inconsistent with
6 the existence of the indemnification agreement. A
7 party breaches an indemnification agreement when that
8 party does not perform as agreed under the agreement
9 by failing to carry out a term, promise or a
10 condition of the agreement.

11 Every contracting party owes a duty to the other
12 party to the contract and to the public to learn the
13 contents of a document before he signs it. In other
14 words, a person who signs a contract or other written
15 document cannot avoid the effect of the document by
16 claiming he did not read it. A person signing a
17 document is responsible for reading the document and
18 making sure of its contents.

19 That is to say, every contracting party owes a
20 duty to the other party to the contract and to the
21 public to learn the contents of a document before he
22 or she signs it. One who signs a written instrument
23 has the duty to exercise reasonable care to protect
24 himself. Such duty requires that he read the
25 contract which he signs.

1 Every contract or indemnification agreement
2 imposes upon each party a duty of good faith and fair
3 dealing in its performance and its enforcement. The
4 Plaintiff entered into an indemnification agreement
5 with the Defendants; and therefore, owed the
6 Defendants a duty to discharge its obligations with
7 respect to the indemnification agreement in good
8 faith and to deal fairly with the Defendants in all
9 matters appurtenant thereto.

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

19 Now, under our law a principal may raise bad
20 faith refusal to pay as a defense to a surety's claim
21 for indemnification. In order to prove this defense,
22 the Defendant must prove that the surety company
23 refused to perform its obligations under the bond
24 because of bad faith or unreasonable action, which is
25 a violation of the implied covenant of good faith and

1 fair dealing under the bond.

2 The Defendant must prove that there was no
3 reasonable basis to support the decision or decisions
4 of the surety company to delay or deny payment. If
5 there is any reasonable ground for contesting the
6 claim, there is no bad faith. It's not necessarily
7 bad faith or unfair dealing when the surety
8 company -- for the surety company to resort to a
9 court action to resolve the dispute.

10 Now, the factors to be considered in determining
11 whether a surety made a reasonable good faith
12 settlement under the terms of the bond and the
13 indemnity agreement are the following: One, the
14 obligations of the surety as provided by the terms of
15 coverage of the bond; two, whether the principal has
16 made more than generalized demands that the surety
17 deny the claim; three, the cooperation or lack
18 thereof by the principal in dealing with the surety;
19 and, four, the thoroughness of an investigation
20 performed by the surety. The reasonableness
21 requirement is meant only to filter out the most
22 egregious, careless, or inattentive conduct short of
23 fraud of a surety.

24 Now, payment and performance bonds are designed
25 to protect what they call -- you've heard this

1 term -- the obligee and not the principal. A bond's
2 primary obligation rests on the principal to perform
3 the contract. When the principal fails, the surety
4 performs according to the terms of the bond, the
5 surety is then entitled to indemnity from the
6 principal. Once the principal defaults, its interest
7 are tertiary to the obligee and the surety.

8 If you find that the language in the contract
9 gives rise to indemnification, the person seeking
10 indemnity is entitled to reimbursement for all
11 damages, costs, and expenses incurred. If the
12 language of the contract; that is, the
13 indemnification agreement, provides for the payment
14 of attorney's fees in an indemnification action, you
15 must award reasonable attorney's fees to the party
16 seeking indemnification.

17 Now, ladies and gentlemen, the case is going to
18 be turned over to you in just a few minutes. I'm
19 required to declare the law as I have done through
20 these instructions to help and guide you to a just
21 and lawful verdict. Whether some of these
22 instructions will apply will depend on what you find
23 to be the facts. The fact that I've instructed on
24 various subjects in this case, including indemnities,
25 must not be taken as indicating an opinion of this

1 Court as to what you should find to be the facts or
2 which party is entitled to your verdict.

3 Your verdict must represent the considered
4 judgment of each juror. In order to return a
5 verdict, it's necessary that each juror agree. In
6 other words, your verdict must be unanimous. All 12
7 of you must agree on your verdict. Your verdict
8 cannot be based on sympathy, passion, prejudice,
9 emotion, or any other consideration that is not in
10 evidence in this case. Remember at all times that
11 you are not partisans favoring one party over the
12 other. You are judges, judges of the facts. Your
13 sole interest is to seek the truth from the evidence
14 in this case.

15 Now, ladies and gentlemen, if you'll bear with
16 me just a moment, I'm going to ask counsel to come to
17 the bench. I have one matter I need to discuss with
18 them and then the case will be turned over to you.

19 (Whereupon, a bench conference is had)

20 **THE COURT:** All right, ladies and gentlemen.
21 Mr. Foreman, I have prepared -- I just wanted the
22 attorneys to make sure I haven't committed an error
23 here -- I have prepared for you a verdict form. Once
24 the jury has made a decision, there are still your
25 verdicts, just two things you can decide.

1 First; we, the jury, by unanimous consent find
2 for the Plaintiff against the Defendants in the
3 amount of blank dollars; or, we, the jury, by
4 unanimous consent find for the Defendants. Pretty
5 plain and simple. Once the jury has made their
6 decision if you will sign it and date it, knock on
7 the jury room door, we will receive your verdict.

8 All right, ladies and gentlemen. You may now
9 retire to the jury room, but don't begin your
10 deliberations until you get all this evidence that's
11 been presented during the course of the trial. Once
12 you receive the evidence and the jury verdict form,
13 you may begin your deliberations. Thank you very
14 much.

15 (Jury out at 2:55 p.m.)

16 **THE COURT:** Mr. Whittle?

17 **THE BAILIFF:** Yes, sir.

18 **THE COURT:** Have the alternate wait in the hall.

19 **THE BAILIFF:** All right.

20 **THE COURT:** No. Just a minute. In the hall.

21 **THE BAILIFF:** In the hallway?

22 **THE COURT:** Yeah. All right. Any exceptions to
23 the charge from the Plaintiff?

24 **MR. MACK:** None from the Plaintiff.

25 **THE COURT:** From the defense?

1 **MR. CHITWOOD:** None.

2 **MR. STANTON:** Only the ones we noted during the
3 charge conference about the Defendants 4, 5, 6
4 through 8. Number 4 was the one about the remedy for
5 the breach of a duty of good faith and fair dealing.
6 Your Honor did charge something on that but not the
7 charges submitted. 5 was pointing out that the
8 indemnitors were entitled to the same defenses. And
9 6 through 8 were the ones pertaining to fiduciary
10 duty, which Your Honor already stated his position on
11 those, but I just wanted to note those for the
12 record.

13 We did take an exception at the charge
14 conference to Plaintiff's 16 and 17 as inapplicable;
15 and, therefore, confusing in that those pertain to
16 the standard that might be applied in a case where
17 the principal is claiming the surety shouldn't have
18 paid a claim.

19 **THE COURT:** I didn't give those.

20 **MR. STANTON:** That was 16 and 17.

21 **THE COURT:** I beg your pardon. I did give
22 those. You're correct.

23 **MR. STANTON:** That deals with paying a claim
24 when you shouldn't have; whereas, our claim is that
25 they repudiated the bond and then didn't timely pay

1 or help. And what happens in that charge number 17,
2 it tends to change the standard from the good faith
3 and fair dealing standard, which includes just a
4 violation of community standards, to requiring
5 something, quote, just short of fraud. They may be
6 confused by that.

7 **THE COURT:** All right. What's the Plaintiff's
8 position?

9 **MR. MACK:** Your Honor, we think the charge
10 fairly reflects the evidence and the law of South
11 Carolina.

12 **THE COURT:** All right. Well, I respectfully
13 deny your motion, Mr. Stanton. I think we've got as
14 much in front of them as we could and as close to the
15 law of the state of South Carolina as we could make
16 it. I think it's a fair charge, and I respectfully
17 deny your motion. All right. Let's check the
18 evidence, make sure it's all in evidence.

19 **MR. MACK:** Would the Court's Exhibit go back
20 with them?

21 **THE COURT:** Sure.

22 (Pause)

23 **THE COURT:** All right, counsel. Any objection
24 to dismissing the alternate?

25 **MR. MACK:** No objection, Your Honor.

1 **MR. STANTON:** No objection.

2 **THE COURT:** All right. Bring the alternate
3 after you've delivered that to the jury.

4 (Whereupon, the jury begins deliberating at
5 approximately 3:00 p.m.)

6 **THE COURT:** Mr. Chitwood, do you object to
7 dismissing the alternate?

8 **MR. CHITWOOD:** No, sir, I do not. Thank you.

9 **THE COURT:** It wouldn't do you any good anyway.
10 He wants to go home.

11 **MR. CHITWOOD:** I'd like him to get off.
12 (Whereupon, the alternate is excused from the trial
13 of the case)

14 **THE COURT:** All right. We'll stand at ease
15 until we hear from the jury.

16 (Whereupon, a break is taken)

17 **THE COURT:** All right. Just bring her. I've
18 got to do something with my lady that's got a class.

19 (Whereupon, the juror enters the courtroom)

20 **THE COURT:** Ms. Daniel, I'm just reading your
21 note again. It indicates you have class yesterday,
22 today and tomorrow. Is that correct?

23 **JUROR:** Yes, it is.

24 **THE COURT:** Well, I'm not going to be able to
25 adjourn court early today.

1 **JUROR:** Okay. That's no problem.

2 **THE COURT:** I wanted to call you in if you have
3 to make some calls. I need you to stay with the jury
4 because we don't have an alternate any more. So I'm
5 just going to have to ask you to stay with us until
6 the decision is made. It may happen in time for you
7 to get to your class but it may not. So I'm sorry if
8 you missed your class. If you need -- that's about
9 all I wanted to say to you. If you need to make a
10 phone call, the bailiff will help you do that.

11 **JUROR:** Okay then.

12 **THE COURT:** Thank you very much.

13 (Whereupon, the juror leaves the courtroom)

14 **THE COURT:** We'll wait on the jury.

15 (Whereupon, a break is taken)

16 **THE COURT:** Counsel, the jury has been out three
17 hours. I have a commitment at 7:00. I'm sure that
18 juror that I kept here will not want to hear that.
19 But I'm supposed to do a trial course at the law
20 school. So what I plan to do is bring the foreman
21 in, not ask him anything about deliberations other
22 than if they are close to making a decision and if
23 they would prefer to go home for the evening.

24 And I'm probably not going to give them a lot of
25 choice. If they'd rather go home for the evening now

1 or if they're close enough, if they think they can
2 complete their deliberations by 6:30, I'm not going
3 to push them to do that, I mean, because that's --
4 that would be improper; but tell them if they
5 haven't, we'll probably have to adjourn, reconvene in
6 the morning. Any objection?

7 **MR. MACK:** No objection, Your Honor.

8 **THE COURT:** All right.

9 **MR. STANTON:** No.

10 **MR. CHITWOOD:** No, sir.

11 **THE COURT:** Bring the foreman. That's
12 Mr. Scott.

13 (Whereupon, the foreman enters the courtroom)

14 **THE COURT:** Mr. Scott, how are you doing?

15 **FOREPERSON:** All right, sir.

16 **THE COURT:** Let me ask you, Mr. Scott. I don't
17 want to know anything about the deliberations or if
18 you've taken a vote or if there's numbers one way or
19 the other. In other words: Some for, some against,
20 I don't want to know any of that. I just wanted to
21 know -- I wanted to tell you that I have a commitment
22 that I can't get out of at 7:00.

23 You all have been deliberating for three hours.
24 I need you to tell me if you think the jury is close
25 to making a decision within the next, say, 30

1 minutes. And, if not, what I'm contemplating is
2 allowing you to go home and come back and reconvene
3 in the morning and continue deliberations. Can you
4 tell me if you think that the jury is close to making
5 a decision, or do you think it is going to be some
6 time?

7 **FOREPERSON:** Oh, we was [sic] taking another
8 vote at the time that I got called in here.

9 **THE COURT:** Okay.

10 **FOREPERSON:** So I don't know right offhand.

11 **THE COURT:** Okay. Well, why don't you go back
12 in the jury room, continue deliberations. I'm
13 telling you and you can tell the jury that if we
14 can't make it by 6:30, because I'm going to have to
15 travel some to get to this appointment, we're
16 probably going to have to come back in the morning.
17 I'm not trying to put any pressure on anybody to do
18 anything quickly if they're not ready. They
19 shouldn't try to rush into a decision.

20 **FOREPERSON:** That's understandable.

21 **THE COURT:** All right. Thank you very much,
22 Mr. Scott.

23 **THE BAILIFF:** Do you want him to knock on the
24 door and tell one of us and so we can let you know?

25 **THE COURT:** Well, sure. Or he can come back

1 out.

2 (Pause)

3 **THE BAILIFF:** Your Honor, we have a verdict.

4 **THE COURT:** All right. The defense ready? Can
5 you call upstairs and tell them to come down? In the
6 meantime, the Plaintiff ready to receive the verdict?

7 **MR. MACK:** Yes, Your Honor.

8 **THE COURT:** The Defense ready to receive the
9 verdict?

10 **MR. STANTON:** Yes, Your Honor.

11 **MR. CHITWOOD:** Yes, sir.

12 **THE COURT:** All right. Bring the jury.

13 (Jury in at 6:15 p.m.)

14 **THE BAILIFF:** Your Honor, the jury is present.

15 **THE COURT:** All right. Thank you very much.

16 Mr. Foreman, has the jury reached a verdict?

17 **FOREPERSON:** Yes, we have.

18 **THE COURT:** Will you hand it to the bailiff,
19 please?

20 (Foreperson complies)

21 **THE COURT:** All right, Madam Clerk. Please
22 publish the verdict.

23 **THE CLERK:** Yes, Your Honor. In the Court of
24 Common Pleas for the Fifth Judicial Circuit, State of
25 South Carolina, County of Richland, National Grange

1 Mutual Insurance Company vs. C. Brent Chitwood, Linda
2 M. Chitwood, Ronald L. Clark, Susan F. Clark; we, the
3 jury, by unanimous consent find for the Plaintiff
4 against the Defendants in the amount of \$10,000.
5 Signed Wayne Scott. Mr. Foreman, is this your
6 verdict and the verdict of the entire jury?

7 **FOREPERSON:** Yes, it is.

8 **THE COURT:** Any desire to poll the jury?

9 **MR. MACK:** No, Your Honor.

10 **THE COURT:** All right. All right, ladies and
11 gentlemen. Thank you very much. That concludes your
12 service on this case and your service this week. I
13 know you've been thanked, but I am going to do it one
14 more time. On behalf of myself and the entire
15 judicial system here in Richland County, I want to
16 thank you for your efforts in this case. These
17 matters must be resolved. And this system that we
18 have, the willingness of jurors to come and sit and
19 make these decisions is so important to the judicial
20 system we have here in Richland County, in this
21 state, and in this nation for that matter.

22 I tell jurors all the time this system can do
23 without me, can do without these attorneys, but it
24 cannot do without you. You're such an important part
25 of the judicial system in this country that your role

1 in our judicial system was written into the
2 Constitution by the United States and by the founding
3 fathers of this country. Your role is extremely
4 important. I hope you understand that and I hope you
5 understand how appreciative we are for your service.

6 I hope your week with us here has been somewhat
7 educational; maybe not always pleasant, but it's a
8 service that has to be performed by our citizens.
9 And you have well and truly tried this case since you
10 took the oath when you started this case on Monday.

11 I'm going to dismiss you now. The clerk has
12 work excuses for you if you need them. I wish you
13 all have a happy Easter season. Good luck to all of
14 you, and thank you very much for your service. You
15 are now dismissed.

16 (Whereupon, the jurors are excused from the
17 trial of the case)

18 **THE COURT:** All right, counsel. Anybody request
19 ten days for post-trial motions?

20 **MR. MACK:** Yes, Your Honor; we would request ten
21 days.

22 **THE COURT:** All right. Ten days post-trial
23 motions. Thank you very much.

24 **MR. STANTON:** Thank you, Your Honor.
25

Transcript of July 22, 2009 hearing of National Grange's
post-trial motion; Title page, and 2-21

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS
07-CP-40-8435

NATIONAL GRANGE MUTUAL
INSURANCE COMPANY

-vs-

PHOENIX CONTRACT GLASS, LLC,
C. BRENT CHITWOOD, LINDA N.
CHITWOOD, RONALD L. CLARK,
SUSAN F. CLARK, HENRY
GRAHAM III, AND RENEE L.
GRAHAM

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WEDNESDAY, JULY 22, 2009
COLUMBIA, SOUTH CAROLINA

B E F O R E:

HONORABLE G. THOMAS COOPER, JUDGE.

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

FRANCIS M. MACK, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

M. BARON STANTON, ESQUIRE
ATTORNEY FOR DEFENDANT CLARKS

MR. C. BRENT CHITWOOD
PRO SE DEFENDANT

DIANNE A. RUTLEDGE
CIRCUIT COURT REPORTER

I N D E X

1

2

3 CERTIFICATE OF COURT REPORTER 22

4

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E X H I B I T S

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12 (NO EXHIBITS WERE INTRODUCED DURING THE HEARING.)

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1 THE COURT: ALL RIGHT. MR. MACK, THESE ARE YOUR
2 MOTIONS?

3 MR. MACK: YES, YOUR HONOR. THANK YOU. I'LL TRY TO
4 BE RELATIVELY BRIEF. WE HAVE FILED OUR MEMO IN SUPPORT AND
5 YOU WERE THE TRIAL JUDGE, SO YOU KNOW ALL THE BACKGROUND OF
6 THE ENTIRE MATTER.

7 WE HAD FILED OUR POST-TRIAL MOTIONS. WE HAD ASKED --
8 OUR MOTIONS ARE ASKING EITHER FOR A DIRECTED VERDICT, JNOV,
9 NEW TRIAL ON DAMAGES ONLY, NEW TRIAL NISI ADDITUR, OR FOR
10 YOU TO ENTER JUDGMENT PURSUANT TO THE THIRTEENTH JUROR
11 RULE.

12 THE BASIC PREMISE OF ALL THESE MOTIONS, THE BASIC
13 GROUNDS, ARE THAT THE JURY IGNORED THE EVIDENCE AS TO
14 DAMAGES AND ENTERED A VERDICT BASED ON PASSION, CAPRICE,
15 PREJUDICE, OR PARTIALITY.

16 AT THE TRIAL LIABILITY WAS ESSENTIALLY UNCONTESTED.
17 THIS WAS BASED ON A WRITTEN INDEMNIFICATION AGREEMENT. THE
18 PARTIES CONCEDED THAT THEY SIGNED THE AGREEMENT. IT IS
19 UNAMBIGUOUS. THEY HAD AGREED TO REIMBURSE NATIONAL GRANGE
20 FOR ANY EXPENSES, FOR ANY COSTS THAT NATIONAL GRANGE
21 INCURRED.

22 NOW, THEY CONTESTED LIABILITY IN THE SENSE OF SAYING,
23 WELL, WE REALLY DON'T THINK WE SHOULD PAY THAT. BUT THERE
24 WAS NO EVIDENCE TO CONTEST LIABILITY. AND THE JURY IN FACT
25 FOUND LIABILITY.

1 AS TO DAMAGES, ONCE AGAIN, ANY OF THE TESTIMONY FROM
2 THE DEFENDANTS WAS BASICALLY SPECULATIVE, WE DON'T THINK
3 THOSE ARE GOOD NUMBERS OR FAIR NUMBERS. BUT THE BASIC
4 DAMAGES WERE UNDISPUTED.

5 NATIONAL GRANGE PAID BOVUS (PHONETIC), THE OBLIGEE ON
6 THE BOND, \$450,000 TO SETTLE THE CLAIM. THIS WAS TO SETTLE
7 THE CLAIM ON ONE BUILDING. THERE WERE CLAIMS ON TWO --
8 MULTIPLE BUILDINGS, TWO BUILDINGS. THE TOTAL AMOUNT
9 CLAIMED BY BOVUS WAS IN THE MILLIONS OF DOLLARS.

10 NATIONAL GRANGE PAID \$450,000 TO SETTLE THE CLAIM, AND
11 EVIDENCE WAS INTRODUCED AS TO THAT. A COPY OF THE CHECK
12 WHERE NATIONAL GRANGE PAID WAS INTRODUCED.

13 IN MR. STANTON'S MEMO HE RAISES THE ISSUE, WELL,
14 THAT'S NOT A REAL CANCELED CHECK.

15 WELL, THE BANKS DON'T RETURN CANCELED CHECKS THESE
16 DAYS. EVERYTHING IS SCANNED, ENTERED INTO THE SYSTEM, AND
17 THE CHECKS ARE DESTROYED. THIS IS UNDER THE FDIC
18 REGULATIONS.

19 BUT MOST IMPORTANTLY, THERE WAS NO OBJECTION DURING
20 THE TRIAL THAT SOMEHOW THIS WASN'T AN AUTHENTIC DOCUMENT,
21 THAT SOMEHOW NATIONAL GRANGE DIDN'T PAY \$450,000. IT WAS
22 UNCONTROVERTED THAT THEY PAID THAT.

23 NATIONAL GRANGE PAID EXPENSES FOR CONSULTANTS AND
24 ATTORNEYS IN DEFENDING THE BOVUS CLAIM, DEFENDING THE EFCO
25 (PHONETIC), WHICH WAS THE PAYMENT BOND CLAIM, INCURRED

1 EXPENSES OF \$372,366.41.

2 ONCE AGAIN, THERE WAS NO EVIDENCE THAT THIS WAS
3 UNREASONABLE OTHER THAN JUST THE SPECULATIVE TESTIMONY,
4 WELL, THIS SEEMS REAL HIGH. IT WENT ON A LONG TIME, BUT
5 THERE WAS NO EVIDENCE, NO QUESTIONING, WELL, THIS IS
6 UNREASONABLE, THIS SHOULDN'T BE INCLUDED, JUST NOTHING IN
7 OPPOSITION TO THAT.

8 AND THEN THE FINAL PIECE OF THE DAMAGES WAS THE CLAIM
9 BY EFCO UNDER THE PAYMENT BOND. THERE WAS A JUDGMENT, A
10 TRIAL ON THAT PAYMENT BOND CLAIM IN CHARLESTON. JUDGE
11 YOUNG ENTERED AN ORDER PROVIDING FOR PAYMENT OF
12 \$154,966.49.

13 AGAIN, THAT WAS A CLAIM -- ORIGINALLY THE CLAIMANT
14 SAID TWO BUILDINGS WERE COVERED. JUDGE YOUNG RULED THAT
15 ONLY ONE BUILDING WAS COVERED AFTER HEARING THE EVIDENCE IN
16 THE CASE, AND THAT WAS THE AMOUNT THAT HE SAID WAS DUE.

17 EFCO APPEALED THAT, AND THAT WAS ONE OF THE
18 UNCERTAINTIES AT THE TRIAL: WHAT WOULD HAPPEN WITH THAT?
19 WOULD IT BE 154,000 OR WOULD IT BE OVER A MILLION DOLLARS?

20 IN THE MEAN TIME NATIONAL GRANGE HAS SETTLED WITH EFCO
21 FOR \$320,000, SO THAT IS NOW DETERMINED.

22 SO THE TOTAL AMOUNT THAT NATIONAL GRANGE PAID FOR THE
23 BOVUS CLAIM, WHICH WAS A PERFORMANCE BOND CLAIM, FOR THE
24 EFCO CLAIM, WHICH WAS A PAYMENT BOND CLAIM, AND FOR THE
25 ATTORNEYS FEES AND CONSULTANTS IS A \$1,142,000. ALL OF

1 THIS WAS WELL DOCUMENTED AND THERE'S BEEN NO EVIDENCE TO
2 CONTRADICT THAT OTHER THAN THE GENERAL TESTIMONY, WELL,
3 THAT SEEMS TOO MUCH. DOESN'T SEEM FAIR.

4 NOW, THE JURY APPARENTLY -- OF COURSE, WE DON'T KNOW
5 EXACTLY WHAT THE JURY MAY HAVE DONE OR WHAT THEIR
6 DELIBERATIONS WERE. AND AS YOU RECALL, IT WAS VERY LATE IN
7 THE EVENING, AND THERE WAS SOME TIME PRESSURE. APPARENTLY,
8 THEY JUST DECIDED THEY WOULD FAVOR A PRO SE DEFENDANT OVER
9 A CORPORATE DEFENDANT WHEN IT RETURNED THE VERDICT FOR ONLY
10 \$10,000 OUT OF A MILLION DOLLAR LOSS, WHICH WAS WELL
11 DOCUMENTED.

12 NOW, PHOENIX ARGUED BAD FAITH.

13 THE COURT: HE WANTS TO HEAR YOU ARGUE.

14 MR. MACK: PHOENIX ARGUED BAD FAITH, BUT THEY
15 PRESENTED NO EVIDENCE OF BAD FAITH OTHER THAN SIMPLY, ONCE
16 AGAIN, THE SPECULATIVE TESTIMONY, WELL, NATIONAL GRANGE
17 SHOULD HAVE SETTLED THE BOVUS CLAIM QUICKER AND SOONER AND
18 LESS EXPENSIVE THAN THEY DID.

19 WELL, THE KEY TO ALL OF THIS, AS YOUR HONOR HEARD
20 DURING THE TRIAL, THE BOND AT ISSUE COVERED BUILDING A.
21 BOVUS CONTENDED -- EFCO CONTENDED THAT IT COVERED BOTH
22 BUILDING A AND BUILDING B. AND THIS WAS A STRONG BONE OF
23 CONTENTION, AND IT WAS A SIGNIFICANT ISSUE THROUGHOUT ALL
24 OF THE INVESTIGATION THAT NATIONAL GRANGE DID IN TRYING TO
25 RESOLVE THIS.

1 AND JUDGE YOUNG ULTIMATELY RULED THAT IT ONLY COVERED
2 BUILDING A.

3 AND THIS MADE A DIFFERENCE IN THE EXPOSURE THAT
4 PHOENIX AND THE INDEMNATORS FACED. FOR INSTANCE, IN THE
5 EFCO MATTER, BUILDING A WAS \$150,000. IF IT HAD BEEN BOTH
6 BUILDING A AND B, IF NATIONAL GRANGE HAD SIMPLY -- WHEN THE
7 CLAIM CAME IN THEY PAID IT, THAT WOULD HAVE BEEN ROUGHLY
8 \$750,000. SO THERE WAS A SAVINGS BY LITIGATING IT OF
9 \$600,000, RATHER THAN SIMPLY PAYING IT. THAT'S NOT BAD
10 FAITH TO INVESTIGATE AND TO LITIGATE AN IMPORTANT ISSUE.

11 THE SAME THING ON THE CLAIM BY BOVUS. THEY CLAIMED
12 TWO BUILDINGS WERE INVOLVED. DAMAGES EXCEEDING \$5 MILLION.
13 NATIONAL GRANGE WAS ABLE TO SETTLE IT FOR \$450,000. SO
14 NATIONAL GRANGE DID WHAT IT WAS SUPPOSED TO DO.

15 THE DEFENDANTS, ONCE AGAIN, SAY, WELL, THERE'S BAD
16 FAITH IN THERE SOMEWHERE BUT THEY DIDN'T OFFER ANY EVIDENCE
17 OF BAD FAITH. NO WHAT IS THE STANDARD OF CARE, HOW SHOULD
18 BONDING COMPANIES HANDLE THINGS, WAS THIS FAIR AND
19 REASONABLE?

20 THE COURT: LET'S MOVE ON TO THE PROCEDURAL ASPECTS OF
21 THIS. YOU'VE ASKED FOR FIVE DIFFERENT OPTIONS THAT YOU'VE
22 LAID IN FRONT OF THE COURT. AND FIRST IS THE DIRECTED
23 VERDICT MOTION, WHICH YOU SAY -- AND I FRANKLY DIDN'T
24 RECALL. YOU SAY IN YOUR MEMORANDUM THAT THE APPROPRIATE
25 MOTION WAS MADE AT THE CLOSE OF THE EVIDENCE AND THE MOTION

1 WAS NOT RULED UPON; IS THAT ---

2 MR. MACK: I BELIEVE THAT'S CORRECT, YOUR HONOR.

3 THE COURT: IS THAT THE BASIS OF -- I MEAN, IS THAT
4 CORRECT IN THE RECORD?

5 MR. STANTON: MAY IT PLEASE THE COURT, MY IMPRESSION
6 WAS THAT YOUR HONOR DENIED IT. BUT I THINK PROCEDURALLY IT
7 DOESN'T REALLY MAKE A DIFFERENCE WHETHER YOU DENIED IT OR
8 WHETHER YOU DEFERRED IT.

9 THE COURT: WELL, TO ME IT'S HIGHLY UNLIKELY THAT I
10 WOULD HAVE FAILED TO RULE ON A MOTION FOR A DIRECTED
11 VERDICT AT THE CLOSE OF THE EVIDENCE.

12 MR. MACK: AS I RECALL AT THE CLOSE OF THE PLAINTIFF'S
13 EVIDENCE, WE MOVED FOR DIRECTED VERDICT AND IT WAS OVER A
14 LUNCH BREAK OR OVER THE EVENING BREAK. AND WHEN YOU CAME
15 BACK -- OR WHEN WE CAME BACK, WE STARTED UP. YOU WERE
16 GOING TO TAKE IT UNDER ADVISEMENT. YOU HAD SOME THINGS YOU
17 WANTED TO LOOK AT ON THAT. AND THAT WAS BOTH MY
18 RECOLLECTION AND ATTORNEY GIFFORD.

19 THE COURT: WELL, PROBABLY SHOULD HAVE BEEN PROMPTED.
20 BUT I DON'T THINK THAT AT THIS TIME -- AND, MR. STANTON'S
21 MEMORANDUM POINTS OUT THAT IT'S A LITTLE BIT LATE TO BE
22 GRANTING A DIRECTED VERDICT. SO I DON'T THINK THAT'S A
23 PROPER REMEDY FOR YOUR CLIENT IF HE IS ENTITLED TO A REMEDY
24 AT ALL.

25 YOUR NEXT GROUND IS A JUDGMENT NOTWITHSTANDING THE

1 VERDICT. AND WHAT'S THE DIFFERENCE BETWEEN THAT AND A
2 THIRTEENTH JUROR FINDING?

3 MR. MACK: THEY ARE VERY SIMILAR. THE THIRTEENTH
4 JUROR RULE BASICALLY GIVES YOUR HONOR THE OPTION OF MAKING
5 A TOTALLY INDEPENDENT EVALUATION OF THE EVIDENCE VERSUS THE
6 JNOV. I THINK YOU ARE REQUIRED TO GIVE SOME -- I'M DRAWING
7 A BLANK ON THE TERM -- GIVE THE BENEFIT OF THE DOUBT TO THE
8 OTHER PARTY. BUT UNDER THE THIRTEENTH JUROR YOU CAN ---

9 THE COURT: IN BOTH OF THEM YOU ASK FOR \$968,332.29 ON
10 EITHER ONE.

11 MR. MACK: THAT'S CORRECT, YOUR HONOR. THE END RESULT
12 IS THE SAME.

13 THE COURT: RIGHT. AND THEN YOU MOVE FOR A NEW TRIAL
14 ON DAMAGES ALONE.

15 MR. MACK: THAT'S CORRECT, YOUR HONOR.

16 THE COURT: WHAT'S THE BASIS FOR THAT? YOU SAY THE
17 JURY'S ALREADY FOUND LIABILITY BECAUSE THEY FOUND LIABILITY
18 IN THE AMOUNT OF \$10,000?

19 MR. MACK: THAT'S CORRECT, YOUR HONOR. AND UNDER THE
20 RECENT CASE THAT CAME OUT JUST TWO MONTHS AGO, DILLON
21 VERSUS FRAZIER -- AND THAT'S CITED IN OUR MEMO -- THE COURT
22 DISCUSSED THE ISSUE OF GRANTING A NEW TRIAL.

23 THE COURT: ALL RIGHT.

24 MR. MACK: AND, ACTUALLY, THAT WAS A NEW TRIAL
25 ABSOLUTE.

1 THE COURT: OKAY. NEW TRIAL ABSOLUTE OR ---
2 MR. MACK: ON THE ISSUE OF DAMAGES.
3 THE COURT: THE ISSUE OF DAMAGES.
4 MR. MACK: THE JURY HAS FOUND LIABILITY.
5 THE COURT: OR JUST A NEW TRIAL?
6 MR. MACK: EITHER ONE WOULD BE FINE, YOUR HONOR.
7 THE COURT: OKAY. ALL RIGHT. WELL, LET ME HEAR FROM
8 MR. STANTON.
9 (PAUSE.)
10 THE COURT: MR. STANTON, WHAT'S YOUR POSITION?
11 AND, MR. CHITWOOD, I SEE YOU DIDN'T FILE ANYTHING.
12 ARE YOU SORT OF ---
13 MR. CHITWOOD: NO, SIR, YOUR HONOR. I FILED TO JOIN
14 IN WITH THE PARTIES ON THEIR ARGUMENTS.
15 THE COURT: THAT'S FINE. I JUST WANT IT ON THE
16 RECORD.
17 GO AHEAD, MR. STANTON.
18 MR. STANTON: YOUR HONOR, I BELIEVE HE ACTUALLY FILED
19 SOMETHING ---
20 MR. CHITWOOD: YES, IT'S FILED WITH THE CLERK.
21 THE COURT: WHAT IS THAT? I'VE GOT YOUR AFFIDAVIT.
22 I'VE GOT CLARKS' MEMORANDUM. I'VE GOT YOUR MEMORANDUM.
23 MR. CHITWOOD: I FILED A COPY WITH THE CLERK
24 YESTERDAY.
25 THE COURT: OH, YESTERDAY.

1 MR. CHITWOOD: AND THEY PUT THAT IN YOUR BOX
2 YESTERDAY.

3 THE COURT: AND WHAT WAS IT? WHAT DID YOU FILE?

4 MR. CHITWOOD: IT WAS JUST WITH THE CLERK OF COURT.

5 THE COURT: WHAT DID YOU FILE?

6 MR. CHITWOOD: TO JOIN IN WITH THE CLARKS ON THEIR
7 ARGUMENTS.

8 THE COURT: THAT'S FINE. I'LL ACCEPT THAT. I JUST
9 DIDN'T SEE IT.

10 ALL RIGHT. MR. STANTON.

11 MR. STANTON: YOUR HONOR, IN A SIMILAR VEIN, IN AN
12 ATTEMPT TO BREVITY, MAY I INCORPORATE OUR ARGUMENTS THAT
13 ARE IN THE BRIEFS WE SENT?

14 THE COURT: ABSOLUTELY.

15 MR. STANTON: AND I'LL TRY TO HIGHLIGHT.

16 THE COURT: LET'S PUT IT THIS WAY. I WILL TELL YOU, I
17 AM NOT GOING TO GRANT A DIRECTED VERDICT, SO YOU CAN JUST
18 PASS OVER THAT.

19 MR. STANTON: ALL RIGHT. AND THEN, AGAIN, WE FILED
20 SORT OF A COMPREHENSIVE MEMORANDUM OPPOSING THE MOTIONS.
21 AND THEN ONCE WE RECEIVED NATIONAL GRANGE'S WE FILED A
22 BRIEF LITTLE RESPONSE TO THAT.

23 THE COURT: YES, I HAVE THAT.

24 MR. STANTON: AND I THINK -- I'LL TRACK MOST OF THAT.
25 LET ME GET A COUPLE THINGS WHILE ON TOP OF MY HEAD. THE

1 THIRTEENTH JUROR DOCTRINE -- I THINK THAT MAY BE
2 MISUNDERSTOOD. WE DID CITE A CASE IN ONE OF OUR BRIEFS
3 CLARIFYING THAT. IT DOESN'T GIVE THE COURT THE OPTION TO
4 ENTER A JUDGMENT OR CHANGE THE RESULT IN ANY WAY OTHER THAN
5 TO ESSENTIALLY GRANT A MISTRIAL; THAT'S MY READING OF THE
6 THIRTEENTH JUROR DOCTRINE. IT ADDS THE JUDGE AS A
7 THIRTEENTH JUROR, WHO IS THEN ACTING AS A THIRTEENTH JUROR
8 COULD REFUSE TO AGREE WITH THE JURY, THUS RESULTING IN
9 ESSENTIALLY A NEW TRIAL.

10 BUT I DON'T THINK THE THIRTEENTH JUROR DOCTRINE GIVES
11 THE JUDGE THE ABILITY TO DO ANY TYPE OF A NISI ADDITUR OR
12 REMITTITUR OR ENTER A MONETARY JUDGMENT DIFFERENT FROM WHAT
13 THE JURY DID. THAT'S JUST A LITTLE PROCEDURAL MATTER.

14 DID YOUR HONOR SAY YOU WOULD NOT BE GRANTING A
15 DIRECTED VERDICT OR JNOV?

16 THE COURT: NO, I DID NOT SAY THAT.

17 MR. STANTON: I'LL START WITH JNOV. THE CASE LAW IS
18 CLEAR, JNOV IS THE EXACT SAME STANDARD AS A DIRECTED
19 VERDICT. AND IT'S TAKEN AT THE EXACT SAME TIME OF THE
20 TRIAL. SO IF DIRECTED VERDICT -- IF THERE'S -- FOR ANY AND
21 ALL REASONS A DIRECTED VERDICT COULD, SHOULD, OR WERE
22 DENIED, THEN THE SAME THINGS APPLY TO JNOV.

23 EVEN SITTING POST-TRIAL AFTER A VERDICT, THE QUESTION
24 ON JNOV IS SHOULD A DIRECTED VERDICT HAVE BEEN GRANTED AT
25 THE TIME THE MOTION WAS MADE WITH WHAT WAS PENDING IN THE

1 TRIAL AT THAT TIME? AND WE'VE TRACKED THAT IN OUR BRIEF,
2 CLARIFIED THAT AT THE TIME THE DIRECTED VERDICT MOTION WAS
3 MADE, THERE WAS A FAIR AMOUNT TALK ABOUT THE BAD FAITH
4 DEFENSE -- BUT AT THE TIME THE DIRECTED VERDICT MOTION WAS
5 MADE AT THE CLOSE OF EVIDENCE, THE CLARKS HAD STILL
6 NUMEROUS OTHER DEFENSES PENDING AS WELL.

7 I WON'T GO IN TO THAT AT LENGTH, BUT WHAT I DO WANT TO
8 DO IS GO THROUGH THE GIST OF WHAT I THINK IS AT BEST A NEW
9 TRIAL MOTION.

10 THE COURT: OKAY.

11 MR. STANTON: TO RECAP THE OUTLINE OF THE TRIAL, WE
12 TRIED THE CASE FOR TWO AND A HALF, THREE DAYS. IT WAS ON
13 THREE DIFFERENT CALENDAR DAYS. THERE WERE, I THINK, SIX
14 LIVE WITNESSES, DEPOSITION EXHIBITS -- EXCUSE ME,
15 DEPOSITION EXCERPTS, A NUMBER OF EXHIBITS, MOST OF THE
16 EXHIBITS PRODUCED BY NATIONAL GRANGE.

17 AND I'LL STOP RIGHT THERE AND CLARIFY THAT
18 ADMISSIBILITY OF EVIDENCE IS NOT THE SAME AS SOMETHING
19 BEING ADMITTED IN FACT. OBVIOUSLY, SOMETHING COULD BE
20 ADMITTED INTO EVIDENCE AND STILL BE DENIED AND THE JURY
21 COULD STILL REJECT BASED ON CREDIBILITY SOMETHING THAT'S
22 ADMITTED INTO EVIDENCE. THE FACT IT'S SUBMITTED INTO
23 EVIDENCE DOESN'T MEAN IT'S ADMITTED BY THE OTHER PARTY.

24 WE WENT THROUGH THE TRIAL AND A LOT OF OUR FOCUS WAS
25 ON THE DEFENSE OF BAD FAITH. AND I'LL REVIEW THAT EVIDENCE

1 IF NECESSARY. BUT PROCEDURALLY WHERE THE TRIAL WENT WAS WE
2 GOT TO THE DIRECTED VERDICT STAGE AND WE STARTED TALKING
3 ABOUT THE LAW APPLICABLE TO THE CASE.

4 AND THEN YOUR HONOR -- AROUND THAT TIME WE HAD A
5 CHARGE CONFERENCE. AND WE TALKED ABOUT THE BAD FAITH
6 DEFENSE. NATIONAL GRANGE ADDUCED THE MASTER CLEAN CASE AS
7 ONE THAT SAID YOU CAN'T SUE A SURETY FOR BAD FAITH.

8 WE POINTED OUT THAT THAT SELF SAME CASE ACTUALLY SAYS
9 ON THE LAST PAGE, BAD FAITH IS A DEFENSE IN AN INDEMNITY
10 CLAIM BY A SURETY. THE WHOLE CASE WAS ABOUT A SEPARATE
11 ISSUE OF WHETHER THERE IS A TORT OF BAD FAITH, ONE WHERE
12 YOU COULD SUE FOR DAMAGES LIKE YOU COULD SUE AN INSURANCE
13 COMPANY.

14 THE SUPREME COURT IN THE MASTER CLEAN CASE SAID AS A
15 CAUTION, THIS DOES NOT MEAN THAT IT'S NOT AVAILABLE
16 CONTRACTUALLY. AND THERE BY CONTRACTUALLY, I MEAN, IN TORT
17 YOU HAVE A BAD FAITH DUTY ARISING BECAUSE OF THE SPECIAL
18 NATURE OF AN INSURER OR SOME OTHER PARTY WHERE THEY OWE YOU
19 A COMMON LAW, A DUTY, ALMOST INDEPENDENT OF THE CONTRACT
20 WHERE THE BREACH CAUSED DAMAGES. THAT'S A TORT THAT THE
21 SUPREME COURT SAID WE'RE NOT GOING TO LET YOU HAVE AGAINST
22 A SURETY THE WAY YOU COULD HAVE IT AGAINST YOUR OWN
23 LIABILITY CARRIER.

24 HOWEVER, AS YOUR HONOR KNOWS, IN SOUTH CAROLINA IT'S
25 HORNE BOOK LAW THAT EVERY CONTRACT HAS IN IT AN IMPLIED

1 DUTY OF GOOD FAITH AND FAIR DEALING.

2 RESTATEMENT SECOND OF CONTRACTS COVERS ALL THAT. OUR
3 CASES CITED -- WENT OVER ALL THAT.

4 AND ON BEHALF OF THE CLARKS, I SUBMITTED A REQUEST TO
5 CHARGE THAT WENT THROUGH DEFINING BAD FAITH AND TELL THE
6 JURY IT WAS A DEFENSE TO AN INDEMNITY ACTION, JUST LIKE THE
7 SUPREME COURT SAID IN THE MASTER CLEAN CASE.

8 AND, YOUR HONOR, I BELIEVE IT WAS EVEN SUA SPONTE. I
9 THINK YOUR HONOR INDEPENDENTLY WAS LOOKING AT THAT, BEING
10 VERY CAREFUL, AND RAISED THE ISSUE, WELL, MR. STANTON, YOU
11 KNOW, IS IT ALL OR NOTHING? I'M NOT QUOTING HERE, BUT THE
12 GIST OF IT WAS, I DON'T KNOW. SHOULD WE -- IF I REMEMBER
13 WHAT YOUR HONOR WAS ASKING EVERYBODY THERE. I DON'T KNOW
14 IF I SHOULD CHARGE THIS THIS WAY. THE JURY MIGHT GET THE
15 IDEA THAT IF THERE'S ANY BAD FAITH, THE WHOLE THING IS OUT
16 THE WINDOW. ISN'T IT POSSIBLE THAT THEY COULD FIND SOME
17 THINGS WERE AFFECTED BY BAD FAITH AND MAYBE SOME WEREN'T?

18 AND YOUR HONOR INDICATED RELUCTANCE TO CHARGE OUR BAD
19 FAITH CHARGE AS SUBMITTED.

20 WE CAME BACK AFTER LUNCH OR BREAK, AND I GAVE ANOTHER
21 ATTEMPT AT A CHARGE. I THINK I HAND WROTE IT LIKE A
22 REQUEST TO CHARGE AND ALL THE ELEMENTS NECESSARY AND
23 TRUNCATED SOME OF THE LANGUAGE THAT I HAD ADDED TO IT
24 SAYING -- THAT INDICATED IT MIGHT BE A COMPLETE DEFENSE.

25 AND BASICALLY, ALL WE WERE ABLE TO DO -- WHICH IS

1 CHARGE THE EXACT LANGUAGE OF THAT MASTER CLEAN CASE WHERE
2 IT SAYS, IT MAY BE -- IT IS -- IT IS A DEFENSE AND IT MAY
3 BE USED AS A SHIELD.

4 YOUR HONOR WENT THROUGH -- AND BY THE WAY, AT THAT
5 POINT, THERE WAS NO OBJECTION BY NATIONAL GRANGE -- NOT
6 ONLY TO THAT CHARGE, BUT NO OBJECTION TO ANY PART OF THE
7 COURT'S CHARGE.

8 THEY PUT IN SOME ADDITIONAL REQUEST TO CHARGE, SOME OF
9 WHICH I OBJECTED TO. BUT THERE WERE NO OBJECTIONS TO THAT
10 CHARGE.

11 AND THEN WE WENT FORWARD. AND IN RELIANCE ON THOSE
12 CHARGES, I MADE MY CLOSING ARGUMENT TO THE JURY. MR. MACK
13 MADE HIS. AND, YOU KNOW, THINGS AREN'T ALWAYS A FAILURE OF
14 A PARTY. SOME TIMES A PARTY DECIDES THEY'RE GOING TO TAKE
15 THEIR CHANCES WITH THE WAY THINGS ARE LAID OUT. SO WE GO
16 THROUGH. AND IN RELYING ON THAT, I MADE MY CLOSING
17 ARGUMENT AND MR. MACK MADE HIS.

18 AND THEN YOUR HONOR CHARGED EXACTLY WHAT YOU SAID YOU
19 WERE GOING TO CHARGE.

20 AND, AGAIN, NO OBJECTION BY NATIONAL GRANGE TO THE
21 CHARGE..

22 I HAD NOTED -- I MADE NOTE OF A FEW LITTLE OBJECTIONS
23 TO THE CHARGE.

24 THE JURY WAS OUT FOR 3 ½ HOURS FROM 2:55 IN THE
25 EVENING. THEY RETURNED A VERDICT AT ABOUT 6:30 IN THE

1 EVENING. AND IT WAS ABOUT 6:00 THAT YOUR HONOR CALLED THEM
2 IN AND KIND OF JUST CHECKED WITH THEM TO SEE THAT THINGS
3 WERE MOVING.

4 SO THROUGH THE WHOLE TRIAL THEY WERE ALLOWED TO TAKE
5 NOTES. AND NOT ONLY THAT, THEY WERE AWAKE. THEY SAT UP
6 AND THEY DID, THEY TOOK NOTES NOT ONLY DURING THE EVIDENCE,
7 BUT THEY TOOK NOTES DURING YOUR HONOR'S CHARGE, AND THEY
8 TOOK NOTES DURING THE CLOSING ARGUMENTS. AND ALMOST ALL OF
9 THEM TOOK NOTES.

10 SO HERE WE HAVE AN ATTENTIVE JURY, PROPERLY CHARGED,
11 NO OBJECTIONS. AND YOUR HONOR DID NOT CHARGE THAT BAD
12 FAITH WAS AN ALL OR NOTHING DEFENSE. THAT WAS IN FAVOR OF
13 NATIONAL GRANGE. IT GAVE THEM A CHANCE TO GET SOME DAMAGES
14 EVEN IF THEY DID ACT IN BAD FAITH.

15 THE JURY CAME BACK WITH A VERDICT OF \$10,000 INSTEAD
16 OF NEARLY A MILLION DOLLARS THAT NATIONAL GRANGE ASKED FOR.
17 I THINK THE MAXIMUM THEY WERE ASKING FOR WAS \$968,000 --
18 SOMETHING ---

19 THE COURT: WHAT COULD HAVE POSSIBLY BEEN THE
20 RATIONALE FOR A \$10,000 VERDICT?

21 MR. STANTON: 99 PERCENT OF WHAT NATIONAL GRANGE WAS
22 IMBUED WITH BAD FAITH.

23 AND I CAN GET TO THE EVIDENCE -- THERE IS A CHALLENGE
24 I THINK NOW TO WHETHER THERE WAS EVIDENCE IN THE RECORD OF
25 BAD FAITH.

1 WELL, FIRST OF ALL, THAT PART WASN'T MADE ON A
2 DIRECTED VERDICT, THEREFORE IT CAN'T BE MADE ON JNOV. AND
3 I BELIEVE IT'S PEE DEE VERSUS ROSS OR PEE VERSUS ROSS THAT
4 SAYS YOU CAN'T QUESTION SUFFICIENCY OF EVIDENCE ON A NEW
5 TRIAL MOTION IF YOU HAVEN'T MADE IT IN THE DIRECTED VERDICT
6 MOTION.

7 SO I THINK THAT ARGUMENT IS OFF LIMITS PROCEDURALLY.
8 NEVERTHELESS, IN OUR FIRST COMPREHENSIVE BRIEF WE WALKED
9 THROUGH THE EVIDENCE OF BAD FAITH. AND I THINK THE GUIDING
10 LIGHT ON THAT EVIDENCE IS WHAT WAS THE JURY TOLD WOULD BE
11 BAD FAITH? AND I WOULD REPRODUCE THE CHARGE, AND I READ,
12 AND IT'S AN ACCURATE CHARGE. AND, I MEAN, JUST FOR SAMPLE,
13 SOMEWHERE IN THAT CHARGE IT SAYS, PART OF BAD FAITH HAS TO
14 DO WITH MAINTAINING FAITHFULNESS TO A COMMON PURPOSE.

15 HERE'S A GROUP OF PEOPLE WHO PUT THEIR WIVES AND
16 HOUSES ON THE LINE TO BACK UP THIS COMPANY, AND THEY SIGNED
17 AN INDEMNITY AGREEMENT THAT TELLS THE SURETY, YOU KNOW, YOU
18 CAN COME GET US FOR WHAT YOU SPEND, ASSUMING IT'S SPENT IN
19 GOOD FAITH AND THAT YOU ACT IN GOOD FAITH.

20 AND SO THEY'RE IN THIS PRETTY VULNERABLE POSITION
21 HERE. AND THE AGREEMENT -- IT'S AN EXHIBIT IN THE CASE. I
22 DON'T KNOW IF IT'S NO. 4. IT'S A SETTLEMENT AGREEMENT
23 BETWEEN BOVUS AND NATIONAL GRANGE WHERE THEY SPENT \$450,000
24 AFTER ABOUT 5 YEARS OF LITIGATION.

25 THAT AGREEMENT -- ALTHOUGH THE EXHIBIT THAT WAS PUT IN

1 WASN'T SIGNED BY NATIONAL GRANGE, I DON'T KNOW WHY. IT HAD
2 A CONFIDENTIALITY CLAUSE IN THERE THAT SAID IT COULDN'T BE
3 SHOWN TO ANYBODY, AND THAT INCLUDED THE PEOPLE THAT THEY
4 ARE NOW ASKING TO PAY THEM BACK FOR IT.

5 THE OTHER THING ABOUT THE SETTLEMENT AGREEMENT, IT
6 NEVER SAID WHAT THEY WERE SETTLING. IT DIDN'T SAY WE'RE
7 SETTLING A PERFORMANCE BOND CLAIM OR WE'RE SETTLING
8 BUILDING A OR BUILDING B. IN FACT, IT ALSO DIDN'T SAY,
9 WE'RE NOT SETTLING A BAD FAITH CLAIM.

10 THERE WAS NO EVIDENCE IN THERE OF EXACTLY WHAT ALL
11 THEY WERE SETTLING. I MEAN, AFTER 5 YEARS OF LITIGATION,
12 THEY COULD ---

13 THE COURT: I CAN'T REARGUE THE EVIDENCE IN THIS CASE.

14 MR. STANTON: I JUST WANTED TO SAY, WE TRACKED THE
15 EVIDENCE. THERE'S AMPLE EVIDENCE IN THERE OF NOT ONLY
16 IGNORING PHOENIX ENTIRELY, NOT WORRYING ABOUT ANY OF THE
17 EFFECTS AT ALL ON PHOENIX, ON DOING THINGS THAT HURT
18 PHOENIX, ON REFUSING TO HONOR THE VERY BOND THAT PHOENIX
19 SIGNED THE INDEMNITY AGREEMENT IN ORDER TO GET. AND THEN
20 THERE ARE EVEN SOME THINGS ABOUT THAT THAT APPEAR TO BE
21 SORT OF DISINGENUOUS WHEN YOU LOOK THROUGH. YOU KNOW, THEY
22 CLAIM THEY DIDN'T KNOW WHAT THE BOND COVERED.

23 THE COURT: GO AHEAD.

24 MR. STANTON: I'D BE HAPPY TO RESPOND FURTHER ON WHAT
25 THE EVIDENCE SUPPORTS. BUT IN SUMMARY, ONE, I THINK THEIR

1 MOTION IS PROCEDURALLY BARRED IN THAT IT WASN'T SPECIFIC
2 WHEN IT WAS A DIRECTED VERDICT MOTION NOR JNOV MOTION. IT
3 DIDN'T EVEN GO IN TO SUFFICIENCY OF EVIDENCE. IT SAID
4 THERE WAS NO DISPUTE OF LIABILITY OR DAMAGES, AND THERE WAS
5 DISPUTE IN BOTH OF THEM.

6 SECONDLY, IF YOU SPECULATE ON GOING IN TO BAD FAITH
7 AND ALL THAT, IT'S TOO LATE NOW TO ARGUE THE LAW. THEY
8 DIDN'T OBJECT TO IT. IT WAS PROPERLY CHARGED ANYWAY, BUT
9 IT'S TOO LATE TO OBJECT TO IT, AND THERE'S EVIDENCE TO
10 SUPPORT WHAT THE JURY WAS CHARGED.

11 THE COURT: ALL RIGHT. MR. MACK.

12 MR. MACK: JUST VERY BRIEFLY, YOUR HONOR. AND I
13 REALIZE YOUR TIME PRESSURES.

14 THE ISSUE OF THE CONFIDENTIALITY CLAUSE, MR. CHITWOOD
15 SIGNED A SIMILAR AGREEMENT WITH BOVUS THAT CONTAINED A
16 CONFIDENTIALITY CLAUSE. WE GOT PERMISSION FROM BOVUS TO
17 DISCLOSE IT; SO THAT'S KIND OF A RED HERRING THAT'S THROWN
18 IN THERE.

19 IN ANY EVENT, THERE'S SIMPLY NO BASIS IN THE EVIDENCE
20 FOR A VERDICT OF \$10,000. IT'S CLEAR THE TERMINOLOGY,
21 PUTTING THEIR WIVES AND COMPANY ON THE LINE -- THESE ARE
22 THE THINGS THAT APPEAL TO THE PASSION, CAPRICE, PREJUDICE,
23 AND PARTIALITY OF THE JURY.

24 WE ASK THAT OUR MOTION BE GRANTED.

25 THE COURT: YES.

1 MR. STANTON: I FORGOT TO MENTION ONE THING, AND THAT
2 IS THAT THE LAW OF SOUTH CAROLINA IS THE APPELLATE COURTS
3 OF SOUTH CAROLINA EXERCISE EVERY REASONABLE PRESUMPTION IN
4 FAVOR OF THE VALIDITY OF THE GENERAL VERDICT.

5 THERE WAS NO OBJECTION TO THE FORM OF THE VERDICT. WE
6 ALL AGREE TO THE GENERAL FORM OF THE VERDICT. AND THE CASE
7 ON THAT IS THE FAMOUS GOLDKIST CASE. IT'S A UCC CASE. AND
8 IN THAT CASE, THE COURT OF APPEALS CLARIFIED THAT THE
9 PARTIES AGREED TO THE GENERAL VERDICT, THEY COULDN'T THEN
10 GO IN THERE AND PICK OUT WHAT IT THOUGHT IT MIGHT HAVE
11 MEANT, WHETHER SOMETHING WAS WRONG. IN THAT CASE THEY
12 UPHELD A VERDICT OF \$2500 FOR A SEED COMPANY FOR IT'S CLAIM
13 FOR \$38,885 EVEN THOUGH THAT GENERAL VERDICT CAME BACK AND
14 COURT OF APPEALS DETERMINED THAT THE FRAUD CLAIM HAD
15 IMPROPERLY BEEN SUBMITTED TO THE JURY -- THE COURT OF
16 APPEALS SAID STILL -- SINCE THERE WAS ANOTHER GROUND IN
17 THERE THAT COULD HAVE SUPPORTED THAT VERDICT, WE'RE NOT
18 GOING TO TOUCH IT.

19 THE COURT: ALL RIGHT. I'VE HAD A PRELIMINARY REVIEW
20 OF YOUR MEMORANDUMS. I'M GOING TO CHECK THE CASE LAW.
21 I'LL LET YOU KNOW.

22 MR. MACK: THANK YOU, YOUR HONOR.

23 MR. STANTON: THANK YOU, YOUR HONOR.

24 THE COURT: THANK YOU VERY MUCH.

25 --- END OF TRANSCRIPT OF RECORD ---

The Clarks' requests to charge, numbers 2-8, 11 and 12

DEFENDANTS' REQUEST NUMBER 2
Plaintiff owed Defendants a Duty of Good Faith and Fair Dealing

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

Restatement (Second) of Contracts § 205 (1981).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC, et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April____, 2009

DEFENDANTS' REQUEST NUMBER 3
Meaning of Good Faith and Fair Dealing

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

Restatement (Second) of Contracts § 205 cmt. a (1981).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC, et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April____, 2009

DEFENDANTS' REQUEST NUMBER 4
Breach of Duty of Good Faith Forestalls Plaintiff's Right to Indemnity

The remedy for a surety's breach of its obligation to its principal to honor the terms of a bond or contract in good faith is to deny the surety's claim for indemnification against its principal. This is true where the surety breaches its obligation scrupulously to perform in accordance with the terms of the bond or contract and to perform its obligations in good faith.

Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 377 (2001) (citing Bernard L. Balkin & Keith Witten, Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety, 28 Tort & Ins. L.J. 611, 623 (1993); Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1998); American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998)).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC, et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April 3, 2009

DEFENDANTS' REQUEST NUMBER 5

The duties owed by a surety such as the Plaintiff here are also owed to the indemnitors who joined in the contract. The individual defendants are entitled to raise defenses whether the principal raises them or not.

DEFENDANTS' REQUEST NUMBER 6
Plaintiff Owes Defendants a Fiduciary Duty

The relationship between the Plaintiff and the Defendants was that of a surety and its principal and indemnitors. In order to prevent undue advantage from the circumstances which the relation naturally creates, the law imputes a fiduciary duty on the part of the Plaintiff to the Defendants.

Chapman v. The Citizens and Southern National Bank of South Carolina, 302 S.C. 469, 476 (Ct. App. 1990).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April ___, 2009

DEFENDANTS' REQUEST NUMBER 7
Nature of the Fiduciary Duty

A fiduciary duty requires the utmost degree of good faith in all transactions between the parties. It appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed.

Chapman v. The Citizens and Southern National Bank of South Carolina, 302 S.C.469, 476 (Ct. App. 1990).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April ___, 2009

DEFENDANTS' REQUEST NUMBER 8

Remedy for Breach of the Fiduciary Duty

One remedy for a breach of fiduciary duty is to deny the breaching party the compensation or other benefits of the transaction or relationship -- that is to say, relieve the nonbreaching party of the duty to compensate the breaching party.

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April __, 2009

DEFENDANTS' REQUEST NUMBER 11
Material Alteration of Risk

A mere extension of time and indulgence to obligee or principal does not release the surety.

State Agricultural & Mechanical Soc. of South Carolina v. Taylor et al., 104 S.C. 167, 88 S.E. 372 (1916).

National Grange Mutual Insurance Company v. Phoenix Contract Glass, LLC et al.
Richland County Court of Common Pleas, Columbia, South Carolina
Civil Action No.: 2007-CP-40-8435, April ____, 2009

Δ's Request No. 12

A principal is allowed to assert a surety's bad faith as a defense to indemnification. A principal may use bad faith as a shield in contract against a surety seeking indemnification. Breach of the duty of good faith and fair dealing is a defense to a claim for indemnification.

Masthclean.

NG Mut. v. Phoenix et al., April 8, 2009
2007-CP-40 - 8435

Plaintiff's exhibits 1-11



National Grange Mutual
Insurance Company
A Mutual Street America company

Hereinafter called The Company



Old Dominion
Insurance Company
A Mutual Street America company

Hereinafter called The Company

AGREEMENT OF INDEMNITY

THIS Agreement of Indemnity (hereinafter called Agreement) made and entered into this 16th day of February, 2000 by and between Phoenix Contract Glass, LLC

as CONTRACTOR and C. Brent Chitwood; Linda N. Chitwood; Ronald L. Clark; Susan F. Clark; Henry H. Graham, III; Renee L. Graham, Individually

as INDEMNITORS, and The Company (indicated above), as SURETY,

WHEREAS, the CONTRACTOR, in the performance of contracts and the fulfillment of obligations generally, whether solely in its own name or as co-venturer with others may desire, or be required, to give or procure certain BONDS, and;

WHEREAS, at the request of the CONTRACTOR and the INDEMNITORS and upon the express understanding that this Agreement should be given, the SURETY has executed or procured to be executed, and may from time to time hereafter execute or procure to be executed, said bonds on behalf of the CONTRACTOR, and;

WHEREAS, the INDEMNITORS have a substantial, material or beneficial interest in the obtaining, renewing, continuing, or substituting of the bonds, and;

WHEREAS, SURETY has relied upon and will continue to rely upon the representations of CONTRACTOR and INDEMNITORS as to their character, identity, control, beneficial ownership, financial condition and existence in executing or procuring bonds;

NOW THEREFORE, in consideration of the above stated premises, the CONTRACTOR and INDEMNITORS for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, hereby covenant and agree with the SURETY, its successors and assigns, as follows:

DEFINITIONS

FIRST: Where they appear in this Agreement, the following terms are defined as set forth in this section:

BOND means an undertaking, a contract of suretyship, guaranty or indemnity, an agreement, consent or letter to provide such an undertaking or contract, and the continuation, extension, alteration, renewal or substitution of such an undertaking, contract, agreement, consent or letter, whether with the same or different penalties and conditions, executed or procured by the SURETY.

CONTRACT means an agreement between CONTRACTOR and a third party, together with all associated documents (including but not limited to general and special conditions, specifications and drawings) for which SURETY executes or procures the execution of a bond.

EVENT OF DEFAULT means any one or more of the following:

(A) Any declarations of default by an obligee on any BOND, abandonment, forfeiture, or breach of, or failure, refusal or inability to perform, any contract or obligation contained in a bond, whether actual or alleged;

(B) Any failure, delay, refusal or inability of the CONTRACTOR to pay claims, bills or other indebtedness incurred in, or in connection with the performance of any contract, to the extent due in whole or in part;

(C) The failure to perform, or comply with any of the terms, covenants or obligations in this Agreement;

(D) The failure to pay or discharge, when due, any indebtedness of the CONTRACTOR to the SURETY;

(E) An assignment by the CONTRACTOR for the benefit of creditors, or the appointment, or an application by the CONTRACTOR for the appointment, of a receiver or trustee for the CONTRACTOR or its property, whether insolvent or not, or an application by the CONTRACTOR for reorganization or arrangement under any bankruptcy laws of the United States or of any State, possession or territory of the United States, or if proceedings for the appointment of a receiver or trustee, for liquidation or for the reorganization or arrangement of the CONTRACTOR shall be initiated by other persons;

(F) If the CONTRACTOR or INDEMNITOR is an individual, the CONTRACTOR'S or INDEMNITOR'S death, absconding, disappearing, incompetency, being convicted of a felony or imprisoned, or if the CONTRACTOR or INDEMNITOR is any other type of entity, any change or threat of change in the character, identity, control, arrangement, beneficial ownership or existence of the CONTRACTOR or INDEMNITOR;

(G) Any proceeding or the exercise of any rights by any individual or entity which deprives or impairs CONTRACTOR'S use of its plant, machinery, equipment, plans, drawings, tools, supplies or materials;

(H) The happening of any event other than those specified in (A) through (G) which, in the SURETY'S sole opinion, may expose SURETY to loss, cost or expense.

68-1121 (11/98)

PLAINTIFF'S
EXHIBIT

- 1 -
468

FEB 07 2001
COPY filed by H. O. Claiborne, III
2/7/02

CONTRACTOR means any one, combination of, or all of the named individuals, firms or corporations set forth including any of their present or future subsidiary corporations which they may now or hereafter control or be affiliated with, or their successors in interest, whether alone or in joint venture with others not named herein, including any such entity for which SURETY executes bonds.

SURETY means The Company (Indicated on Page 1), and its successors, assigns, affiliates, associates and subsidiary companies.

NOTICE TO SURETY OF ANTICIPATED CHANGE IN NATURE OF CONTRACTOR OR INDEMNITORS

SECOND: Written notice must be given by CONTRACTOR or INDEMNITORS to SURETY at its Keene, New Hampshire bond office, located at 55 West Street, Keene, NH 03431, at the earliest practical time of any anticipated change or negotiations entered into by CONTRACTOR or INDEMNITORS for any anticipated change in the character, identity, control, arrangement, beneficial ownership (including, if a corporation, ownership of more than 5% of the stock of CONTRACTOR or INDEMNITOR), or existence of the CONTRACTOR or INDEMNITORS.

INDEMNITY AND HOLD HARMLESS

THIRD: The CONTRACTOR and INDEMNITORS shall exonerate, hold harmless, indemnify and keep indemnified the SURETY from and against any and all claims, demands and liability for losses, costs, and expenses of whatsoever kind or nature, including court costs, counsel fees, investigative costs, and from and against any and all other such losses and expenses which the SURETY may sustain or incur.

- (A) By reason of having executed or procured the execution of Bonds;
- (B) By reason of the failure of the CONTRACTOR or INDEMNITORS to perform or comply with any of the covenants or conditions of this agreement;
- (C) In enforcing any of the covenants or conditions of this Agreement;
- (D) In making any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid bond premium in connection with any Bond;
- (E) In prosecuting or defending any action or claim in connection with any Bond, whether SURETY at its sole option elects to employ its own counsel, or permits or requires CONTRACTOR and INDEMNITORS to make arrangements for the SURETY'S legal representation.

Payment shall be made to the SURETY by the CONTRACTOR and INDEMNITORS as soon as liability exists or is asserted against the SURETY, whether or not the SURETY shall have made any payment thereof. Such payment shall be either equal to the amount of any reserve set by the SURETY, or equal to such amount as the SURETY, in its sole judgment, shall deem sufficient to protect it from loss. The SURETY shall have the right to use the deposit, or any part thereof, in payment or settlement of any liability, loss or expense for which the INDEMNITORS would be obligated to indemnify the SURETY under the terms of this Agreement.

In the event of any payment by the SURETY, the CONTRACTOR and INDEMNITORS further agree that in any accounting between the SURETY and the CONTRACTOR, or between the SURETY and the INDEMNITORS, or either or both of them, the SURETY shall be entitled to reimbursement for any and all disbursements made by it in good faith in and about the matters contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity, or expediency existed; and that the vouchers or other evidence of any such payments made by the SURETY shall be prima facie evidence of the fact and amount of the liability to the SURETY. In addition to the payments to be made to SURETY as set forth above, CONTRACTOR and INDEMNITOR agree to pay to SURETY interest on all disbursements made by SURETY at the maximum rate permitted by law calculated from the date of each disbursement.

ASSIGNMENT

FOURTH: The CONTRACTOR, and the INDEMNITORS as their interests may appear hereby assign, transfer and set over to SURETY the rights and property described hereafter, as collateral, to secure any and all obligations in this Agreement and any other indebtedness or liabilities of the CONTRACTOR to the SURETY, whether heretofore or hereafter incurred:

- (A) All the rights of the CONTRACTOR in, and arising in any manner out of any CONTRACT;
- (B) All the rights, title and interest of the CONTRACTORS or INDEMNITORS in and to all machinery, equipment, plant, tools, inventory and materials which are now, or may hereafter be, utilized in connection with any contract, regardless of whether they are located at a construction site, in storage elsewhere, or in transit anywhere;
- (C) All the rights, title and interest of the CONTRACTOR in and to all subcontracts and purchase orders let or about to be let in connection with any CONTRACT and in and to all SURETY bonds supporting such subcontracts or purchase orders;
- (D) All the rights, title and interest of the CONTRACTOR in and to any actions, causes of action, claims or demands whatsoever which the CONTRACTOR may have or acquire against any party to the CONTRACT, or actions, causes of action, claims or demands arising out of or in connection with any CONTRACT including but not limited to those against obligees on bonds, design professionals, subcontractors, laborers or materialmen or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools, inventory or other equipment in connection with or on account of any CONTRACT and against any SURETY or sureties of any obligee, subcontractor, laborer, or materialmen;

(E) All monies retained and any and all monies that may be due or hereafter become due to amount of any CONTRACT whether bonded or unbonded;

(F) Any and all rights, title, interest in, or use of any patent, copyright or trade secret which is or may be necessary for the completion of any bonded work; and

(G) All monies due or to become due to CONTRACTOR on any policy of insurance relating to any claims arising out of the performance of any CONTRACT, including, but not limited to, claims under builders risk, fire, employee dishonesty or workers compensation insurance policies, including premium refunds.

The assignments shall become effective as of the effective date of each bond executed by SURETY. The SURETY agrees to forbear exercising the rights granted to it under this Fourth section until the occurrence of an EVENT OF DEFAULT.

SETTLEMENTS

FIFTH: SURETY shall have the exclusive right in its name or in the name of the CONTRACTOR to adjust, settle or compromise any claim, counterclaim, demand, suit or judgment involving any bond or to take whatever other action it may deem necessary, expedient or appropriate. SURETY'S determination as to whether any such claim, counterclaim, demand, suit or judgment should be settled or defended shall be binding and conclusive upon the CONTRACTOR and INDEMNITORS.

PROSECUTION OF CLAIMS

SIXTH: SURETY shall have the full and exclusive right, in its name or in the name of the CONTRACTOR, but not the obligation, to prosecute, compromise, release or otherwise resolve any of the claims, causes of action or other rights assigned to SURETY in the fourth paragraph above, entitled assignment, upon such terms as SURETY, in its sole discretion shall deem appropriate.

PREMIUMS

SEVENTH: The CONTRACTOR and INDEMNITORS will pay to the SURETY all premiums and charges of the SURETY for the bonds.

TRUST FUND

EIGHTH: The CONTRACTOR and INDEMNITORS covenant and agree that all payments received for or on account of any CONTRACT shall be held in trust as a trust fund for the payment of obligations incurred or to be incurred in the performance of any CONTRACT and for labor, materials and services furnished in the prosecution of the work in any CONTRACT or any extension or modification thereof. It is expressly understood and declared that all monies due and to become due under any CONTRACT are also trust funds, whether in the possession of the CONTRACTOR or INDEMNITORS or otherwise. The trust funds shall be for the benefit and payment of all obligations for which the SURETY may be liable under any bonds. The trust shall inure to the benefit of the SURETY for any liability or loss it may have or sustain any bond, and this agreement and declaration constitute notice of such trust.

PERFECTION OF SECURITY INTEREST

NINTH: This agreement shall constitute a security agreement for the benefit of the SURETY and also a financing statement, both in accordance with the provisions of the Uniform Commercial Code or similar statute and may be so used by the SURETY without in any way abrogating, restricting or limiting the rights of the SURETY under this Agreement or under law or in equity. SURETY may add such schedules to this Agreement describing specific items of security covered hereunder as shall be necessary.

TAKEOVER

TENTH: Upon the occurrence of an EVENT OF DEFAULT, the SURETY shall have the right, but at its option and in its sole discretion and is hereby authorized, with or without exercising any other right or option conferred upon it by law or by the terms of this Agreement, to take possession of any part or all of the work under any CONTRACT, and at the expense of the CONTRACTOR and INDEMNITORS to complete or arrange for the completion of the same.

CHANGES

ELEVENTH: The SURETY, at its sole option, is authorized and empowered, without notice to or knowledge of the INDEMNITORS, to agree or refuse to agree to any change whatsoever in any bond, or any CONTRACT, including, but not limited to, any change in the time for the completion of any CONTRACT and to payments or advances thereunder before the same may be due, and to assent to or take any assignment or assignments, to execute or consent to the execution of any continuations, extensions or renewals of any bond and to execute any substitute or substitutes therefore, with the same or different conditions, provisions and obligees and with the same or larger or smaller penalties. It is expressly understood and agreed that the INDEMNITORS shall remain bound under the terms of this Agreement even though any such assent by the SURETY does or might substantially increase the liability of said INDEMNITORS.

ADVANCES

TWELFTH: The SURETY, at its sole option, is authorized and empowered to guarantee loans, to advance or lend to, or for the account of, the CONTRACTOR any money, which the SURETY in its sole discretion may see fit to do, reserving to itself, however, the absolute right to cancel any such guarantee and to cease advancing or lending money to the CONTRACTOR or for the account of the CONTRACTOR with or without cause and with or without notice to the CONTRACTOR. All money expended by the SURETY, or lent or advanced from time to time, or for the account of, the CONTRACTOR or guaranteed by the SURETY, and all related costs and expenses incurred by the SURETY, shall be loss to the SURETY for which the CONTRACTOR and the INDEMNITORS shall be responsible, notwithstanding that said money or any part thereof should not be so used by the CONTRACTOR.

BOOKS AND RECORDS

THIRTEENTH: At any time, and until such time as the liability of the SURETY under all bonds is terminated or SURETY is fully reimbursed all amounts due to it under the Agreement, the SURETY shall have the right of access to the books, records, accounts, and documents of the CONTRACTOR and INDEMNITORS, wherever located, for the purpose of inspection, copying or reproduction. Any financial institution, depository, materialman, supply house, or other person, firm, or corporation, when requested by the SURETY, is hereby authorized to furnish the SURETY any information requested, including, but not limited to, the status of the work under any CONTRACT being performed by the CONTRACTOR, the condition of the performance of any CONTRACT and payments of accounts. Upon the occurrence of an EVENT OF DEFAULT, CONTRACTOR and INDEMNITORS, upon SURETY'S request, shall immediately turn over to SURETY, or its designee, at a place and in a manner designated by SURETY such books, records, accounts, documents and CONTRACTS in whatever form, as requested by SURETY.

DECLINE EXECUTION

FOURTEENTH: CONTRACTOR and INDEMNITORS are not obligated to request the SURETY to execute, provide or procure any bond required of them in the performance and fulfillment of obligations; furthermore the SURETY has the right to decline to execute, provide or procure any bond requested by CONTRACTOR. If SURETY does execute, provide or procure the execution of a bid bond or proposal bond, or agrees or consents to provide such CONTRACT of suretyship, SURETY retains the right to decline to execute the final bond (including, but not limited to, performance, payment or maintenance bond(s)) that may be required in connection with any award that may be made under the bid proposal or tender to which the bid proposal bond or agreement or consent to provide such CONTRACT of suretyship is given.

WAIVER OF NOTICE

FIFTEENTH: The INDEMNITORS hereby waive notice of the execution of any bond and of the acceptance of this agreement. CONTRACTOR and INDEMNITORS hereby waive all notice of any default, payment or any other act or acts giving rise to any claim under any bond, as well as notice of any and all liability of the SURETY under any bond, and any and all liability on their part hereunder, to the end and effect that, the CONTRACTOR and the INDEMNITORS shall be and continue liable hereunder.

SUITS

SIXTEENTH: Separate suits may be brought by SURETY to enforce the terms of this agreement as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether previously or subsequently arising.

The CONTRACTOR and each INDEMNITOR is the agent for the CONTRACTOR and all INDEMNITORS for the purpose of ~~accepting service of any process in the jurisdiction on which the CONTRACTOR or INDEMNITORS accepting the process resides, is domiciled, is doing business or is found.~~

In the event SURETY shall file suit at law or in equity to enforce the terms of this agreement, SURETY shall be entitled to recover its own attorneys' fees and expenses in connection with such suit.

SET OFF

SEVENTEENTH: SURETY may reduce the amount of CONTRACTOR'S and INDEMNITOR'S(S') liability to SURETY hereunder by applying to such liability any money payable to CONTRACTOR and/or INDEMNITORS by SURETY. The money payable to CONTRACTOR or INDEMNITORS may be, but is not limited to, any money payable by SURETY as an insurer of CONTRACTOR or INDEMNITORS or as an insurer of any other individual or legal entity, or any money payable to CONTRACTOR or INDEMNITORS as a return of unearned or other premiums, or money payable to settle a claim of CONTRACTOR or INDEMNITORS against SURETY or any individual or other legal entity insured or bonded by SURETY.

OTHER SURETIES

EIGHTEENTH: If the SURETY procures the execution of any bond by other sureties, or executes the bonds with co-sureties or reinsures any portion of said bonds with reinsuring sureties, then all the terms and conditions of this agreement shall inure to the benefit of such other sureties, co-sureties and reinsuring sureties, as their interests may appear.

TERMINATION

NINETEENTH: If CONTRACTOR or INDEMNITORS previously executed an agreement in favor of SURETY, SURETY'S accepting this agreement neither terminates such previous agreement nor relieves CONTRACTOR or INDEMNITORS from liability to SURETY.

This agreement may be terminated as to CONTRACTOR or any INDEMNITORS upon written notice to SURETY by CONTRACTOR or INDEMNITORS, or by CONTRACTOR'S or INDEMNITOR'S legal representatives or successors, by registered or certified mail addressed to SURETY at its home office at The Bond Department, 55 West Street, Keene, New Hampshire 03431.

Termination of this agreement shall not be effective until thirty (30) days after receipt of said written notice by SURETY.

Termination of this agreement shall not relieve the CONTRACTOR or INDEMNITORS from liability to SURETY arising out of bonds executed, provided or procured by SURETY on behalf of CONTRACTOR prior to the effective date of such termination and for which this agreement is part of the consideration on which SURETY relied in executing, providing or procuring such bonds.

It is understood and agreed that oral notice to or constructive notice to any agent or employee of SURETY shall not constitute effective notice of termination under this agreement.

NOTIFICATION TO INDEMNITORS

TWENTIETH: The INDEMNITORS agree among themselves and hereby acknowledge to SURETY that notification by SURETY to any one INDEMNITOR shall constitute notification to all INDEMNITORS.

SUBORDINATION OF INDEMNITORS

TWENTY-FIRST: The CONTRACTOR and INDEMNITORS waive and subordinate all rights of indemnity, subrogation and contribution each against the other until all obligations to the SURETY under this agreement, at law or in equity, have been satisfied in full.

HOMESTEAD

TWENTY-SECOND: The CONTRACTOR and the INDEMNITORS hereby waive, to the extent permitted by law, so far as their respective obligations under this agreement are concerned, all rights to claim any of their property including their respective homesteads, as exempt from levy, execution, sale or other legal process under the laws of any State, Territory or Possession.

POWER OF ATTORNEY

TWENTY-THIRD: The CONTRACTOR and INDEMNITORS hereby irrevocably nominate, constitute, appoint and designate the SURETY, through its authorized representative(s), as their attorney-in-fact with the right but not the obligation, to exercise all of the rights of the CONTRACTOR and INDEMNITORS assigned, transferred and set over to SURETY in this agreement, and in the name of the CONTRACTOR and INDEMNITORS to make, execute, and deliver any and all additional or other assignments, documents, or papers, checks, drafts, warrants or other instruments made or issued in payment of any obligation to which SURETY has the right to receipt of payment pursuant to this agreement deemed necessary and proper by the SURETY in order to give full effect not only to the intent and meaning of the within assignments, but also to the full protection intended to be herein given to the SURETY under all other provisions of this Agreement. The CONTRACTORS and INDEMNITORS hereby ratify and confirm all acts and actions taken and done by SURETY as such attorney-in-fact.

SEVERABILITY AND PARTIAL EXECUTION

TWENTY-FOURTH: If any provision or provisions, or portion thereof, of this agreement shall be void or unenforceable under the laws of any jurisdiction governing its construction, this agreement shall not be void or vitiated thereby, but shall be construed and enforced within the same effect as though such provision or provisions, or portion thereof, were omitted.

In case any of the parties mentioned in this agreement fail to execute the same, or in case the execution hereof by any of the parties shall be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this agreement of the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed.

NOTICE TO SURETY

TWENTY-FIFTH: The CONTRACTOR and INDEMNITORS shall promptly provide written notice to the SURETY at the Bond Department, 55 West Street, Keene, New Hampshire 03431, of either of the following events:

- (1) Notice by any obligee on any bond to the CONTRACTOR that the CONTRACTOR is in default or has failed or refused to perform any CONTRACT obligation;
- (2) Notice by any obligee on any bond to the CONTRACTOR that the CONTRACTOR cure its performance or show cause as to why the CONTRACTOR should not be terminated for default.

GENERAL PROVISIONS

TWENTY-SIXTH: SURETY'S rights hereunder shall be deemed to be cumulative with, and in addition to, all other rights of SURETY, however derived. SURETY is not required to exhaust its remedies or rights against CONTRACTOR or to await receipt of any final dividends from the CONTRACTOR before asserting its rights against any one or more INDEMNITORS.

This agreement is to be liberally construed so as to protect, exonerate and indemnify SURETY.

The paragraph titles as contained in this agreement are descriptive only and do not restrict or modify the terms of this agreement. In the event of any inconsistency between the paragraph titles and the terms of this Agreement, the terms of this Agreement shall control.

WAIVER AND MODIFICATION

TWENTY-SEVENTH: The rights and remedies afforded to the SURETY by the terms of this agreement may not be waived or modified orally and no written change or modification shall be effective until signed by an employee of the SURETY.

MERGER AND CONSOLIDATION

TWENTY-EIGHTH: THE CONTRACTOR AND INDEMNITORS HAVE READ AND UNDERSTAND THIS AGREEMENT. EXCEPT FOR ANY PREVIOUS INDEMNITY AGREEMENT EXECUTED BY CONTRACTOR OR INDEMNITORS THIS AGREEMENT OF INDEMNITY CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. NO OTHER SEPARATE AGREEMENTS OR UNDERSTANDING, PAST, PRESENT OR FUTURE WHETHER ORAL OR WRITTEN CHANGE THE TERMS OF THIS AGREEMENT.

Address: 1717 Peeples Street
Columbia, SC 29203
 SS # or ID #: 57-1047335

Contractor: PHOENIX CONTRACT GLASS, LLC
 By: C. Brent Chitwood, Member
 (Signature and Title)
 Date of Birth: _____

Address: 131 Casco Bay Road
Irmo, SC 29063
 SS # or ID #: 247-90-2028

Indemnitor: C. Brent Chitwood
 By: C. Brent Chitwood
 (Signature of Indemnitor)
 Date of Birth: 8/22/53

Address: 131 Casco Bay Road
Irmo, SC 29063
 SS # or ID #: 250-90-2391

Indemnitor: Linda N. Chitwood
 By: Linda N. Chitwood
 (Signature of Indemnitor)
 Date of Birth: 6/15/51

Address: 9 Olde Stream Ct.
Irmo, SC 29063
 SS # or ID #: 454-94-2583

Indemnitor: Ronald L. Clark
 By: Ronald L. Clark
 (Signature of Indemnitor)
 Date of Birth: 2/18/49

Address: 9 Olde Stream Ct.
Irmo, SC 29063
 SS # or ID #: 036-28-8381

Indemnitor: Susan F. Clark
 By: Susan F. Clark
 (Signature of Indemnitor)
 Date of Birth: 1/7/44

Address: 207 Claude Bundrick Road
Blythewood, SC 29016
 SS # or ID #: 248-02-4335

Indemnitor: Henry H. Graham, III
 By: Henry H. Graham, III
 (Signature of Indemnitor)
 Date of Birth: 10/18/53

** Personal, corporate and partnership acknowledgements and additional signature pages if necessary will be added to this Agreement as addendums.

MERGER AND CONSOLIDATION

TWENTY-EIGHTH: THE CONTRACTOR AND INDEMNITORS HAVE READ AND UNDERSTAND THIS AGREEMENT. EXCEPT FOR ANY PREVIOUS INDEMNITY AGREEMENT EXECUTED BY CONTRACTOR OR INDEMNITORS THIS AGREEMENT OF INDEMNITY CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. NO OTHER SEPARATE AGREEMENTS OR UNDERSTANDING, PAST, PRESENT OR FUTURE WHETHER ORAL OR WRITTEN CHANGE THE TERMS OF THIS AGREEMENT.

Address: _____ Contractor: _____
 _____ (Full Name of Contractor)
 _____ By: _____
 _____ (Signature and Title)
 SS # or ID #: _____ Date of Birth: _____

Address: _____ Indemnitor: _____
 207 Claude Bundrick Road Renee L. Graham
 _____ (Full Name of Indemnitor)
 Blythewood, SC 29016 By: *Renee L. Graham*
 _____ (Signature of Indemnitor)
 SS # or ID #: 250-15-7518 Date of Birth: 11/17/57

Address: _____ Indemnitor: _____
 _____ (Full Name of Indemnitor)
 _____ By: _____
 _____ (Signature of Indemnitor)
 SS # or ID #: _____ Date of Birth: _____

Address: _____ Indemnitor: _____
 _____ (Full Name of Indemnitor)
 _____ By: _____
 _____ (Signature of Indemnitor)
 SS # or ID #: _____ Date of Birth: _____

Address: _____ Indemnitor: _____
 _____ (Full Name of Indemnitor)
 _____ By: _____
 _____ (Signature of Indemnitor)
 SS # or ID #: _____ Date of Birth: _____

Address: _____ Indemnitor: _____
 _____ (Full Name of Indemnitor)
 _____ By: _____
 _____ (Signature of Indemnitor)
 SS # or ID #: _____ Date of Birth: _____

** Personal, corporate and partnership acknowledgements and additional signature pages if necessary will be added to this Agreement as addendums.

* Attention Notaries * Please type or print your name below your signature and include your address.

INDIVIDUAL NOTARIZATIONS

State of South Carolina)
County of Richland) ss:
On this 16th day of February, 2000, before me
personally came G. Brent Chitwood; Linda W. Chitwood; Ronald L. Clark; Susan F. Clark;
Henry H. Graham, III; Renee L. Graham
to me known, and known to me to be the individual(s) who executed the foregoing instrument, and that (she) (he) (they) executed the same.
Address: 1717 Peoples St.
Columbia, SC 29202
Notary: Donna D. Whiten
My Commission Expires: June 4, 2009

State of South Carolina)
County of Richland) ss:
On this 16th day of February, 2000, before me
personally came _____
to me known, and known to me to be the individual(s) who executed the foregoing instrument, and that (she) (he) (they) executed the same.
Address: 1717 Peoples St.
Columbia, SC 29202
Notary: Donna D. Whiten
My Commission Expires: June 4, 2009

PARTNERSHIP NOTARIZATION

State of _____)
County of _____) ss:
On this _____ day of _____, _____, before me
personally came _____
to me known, and known to me to be one of the firm of _____
and acknowledge that he/she executed the foregoing instrument as the act of the said firm.
Address: _____
Notary: _____
My Commission Expires: _____

State of _____)
County of _____) ss:
On this _____ day of _____, _____, before me
personally came _____
to me known, and known to me to be one of the firm of _____
and acknowledge that he/she executed the foregoing instrument as the act of the said firm.
Address: _____
Notary: _____
My Commission Expires: _____

Attention Notaries * Please type or print your name below your signature and include your address.

CORPORATION NOTIFICATION

State of: South Carolina

County of: Richland

) ss:

On this 16th day of February, 2000, before me personally came C. Brent Chitwood

to me known, who, being by me duly sworn, did depose and say that he/she resides in 131 Casco Bay Road,
Irmo, SC 29063 that he/she is the Administrative Member Manager of the
Phoenix Contract Glass LLC corporation

which executed the foregoing instrument; that he/she knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation; and that he/she signed his/her name to the said instrument by like order.

Address: 1717 Peoples St.
Columbia, SC 29202

Donna D. Whiten
Notary: Donna D. Whiten

My Commission Expires: June 4, 2009

02/07/02 15:49 FAX 1 603 358 1349
02/07/2002 11:32 FAX 843 881 8430
SENT BY PHOENIX CONTRACT GLASS

NGM BOND
BILL - RENAISSANCE
003 114 0030,

008/013
007/012
PAGE 10721

23902600 14 3.0330.000

Performance Bond

Bond No. S 617325

Premium Amount \$ 8,188.

KNOW ALL MEN BY THESE PRESENTS,

That we, Phoenix Contract Glass, 1717 Peoples Street, Columbia, SC 29203
(Full Name and Address of Subcontractor)

(hereinafter called the Principal), as Principal, and National Grange Mutual Insurance Company
(Full Name and Address of Surety)

Keene, New Hampshire

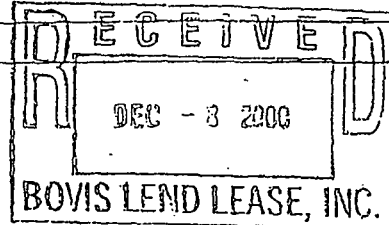
a corporation duly organized under the laws of the state of New Hampshire
(hereinafter called the Surety), as Surety, are held and firmly bound unto:

Bovis' Name: Bovis Lend Lease, Inc.

Bovis' Address: P. O. Box 1563

(Bovis address) Mt. Pleasant, SC 29464

(hereinafter called the Obligor)



In the sum of Nine Hundred Fourteen Thousand, Eight Hundred Thirty Five & No/100 U.S. Dollars
(\$ 914,835.00), for the payment of which we, the said Principal and the said Surety, bind
ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal entered into a certain Contract dated September 30, 2000,
(Month, Day) (Year)

with Bovis Lend Lease, Inc. for:

(Proj #) 23902600

(Project name) The Renaissance On Charleston Harbor

(Project location) Mt. Pleasant, SC

(Dual Obligor Rider attached)

which is hereby referred to and made a part hereof as if fully set forth herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall promptly and faithfully perform said Contract, within the time provided therein and any extension thereof that may be granted by the Obligor, and during the life of any guaranty required under said Contract, and shall also promptly and faithfully perform any and all authorized modifications of said Contract that may hereafter be made, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

The Surety agrees that no change, extension of time, alteration, addition, omission or other modification of the Contract Documents, as specified in the Contract, shall in any way affect its obligations under this Bond, and the Surety hereby waives notice of any such changes, extensions of time, alterations, omissions or other modifications.

Whenever Principal shall be, and declared by Obligor, to be in default, in breach, and/or to have failed to perform in any manner under the Contract, the Obligor having performed its obligations thereunder, the Surety shall promptly remedy the default by one of the following:

1. Complete the Contract in accordance with its terms and conditions.
2. Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or if the Obligor elects, upon determination by the Obligor and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Obligor, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, and pursuant to the Contract, the amount set forth in the first paragraph hereof. The term "balance of the Contract price," as used in this paragraph, shall mean the total amount payable by Obligor to the Principal under the Contract and any amendments thereto, less the amount properly paid by Obligor to the Principal.

02/07/02 15:49 FAX 1 603 358 1349
02/07/2002 11:32 FAX 843 881 8430
SENT BY: PHOENIX CONTRACT GLASS;

NGM BOND
BLL - RENAISSANCE

009/013
008/012

3. Pay to Obligor the full amount of the penal sum above stated.

For projects located in the State of Connecticut, Surety is liable for and is obliged to pay any interest, costs, penalties or attorneys' fees imposed upon the Principal under any provisions of Connecticut Public Act 99-153, entitled "An Act Concerning Fairness in Financing in the Construction Industry."

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligor named herein or the heirs, executors, administrators, successors or assigns of the Obligor.

Principal and Surety shall not be liable to the Obligor unless the Obligor has performed its obligations to the Principal in accordance with the terms of said Contract.

Sealed with our seals and dated this First day of December, 2000
(Day) (Month) (Year)

Janice L. Jelford
(Attested By)

By: PHOENIX CONTRACT GLASS
(Principal)
John T. Brownlee, III Member
(Title)

SEAL

NATIONAL GRANGE MUTUAL INSURANCE COMPANY

Janice L. Jelford
(Attested By)

John T. Brownlee, III
(Attorney-in-Fact)
John T. Brownlee, III

SEAL

*Attach Power-Of-Attorney

02/07/02 15:49 FAX 1 603 358 1349
02/07/2002 11:32 FAX 843 881 8430

NGM BOND
BLL - RENAISSANCE

010/013
009/012

Labor and Material Payment Bond

Bond No. S 617325 Premium Amount \$ 8,188.

KNOW ALL MEN BY THESE PRESENTS,

That we, Phoenix Contract Glass, 1717 Peoples Street, Columbia, SC 29203
(Full Name and Address of Subcontractor)

(hereinafter called the Principal), as Principal, and National Grange Mutual Insurance Company
(Full Name and Address of Surety)
Keene, New Hampshire

a corporation duly organized under the laws of the state of _____
(hereinafter called the Surety), as Surety, are held and firmly bound unto:

Bovis' Name: Bovis Lend Lease, Inc.

Bovis' Address: P. O. Box 1563

(Bovis address) Mt. Pleasant, SC 29464

(hereinafter called the Obligor)

In the sum of Nine Hundred Fourteen Thousand, Eight Hundred Thirty Five & No/100 U.S. Dollars
(\$ 914,835.00), for the payment of which we, the said Principal and the said Surety, bind ourselves, our heirs,
executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal entered into a certain Contract dated September 30, 2000,
(Month, Day) (Year)

with Bovis Lend Lease, Inc. for:

(Proj #) 23902600

(Project name) The Renaissance On Charleston Harbor

(Project location) Mt. Pleasant, SC

(Dual Obligor Rider attached)

which is hereby referred to and made a part hereof as if fully set forth herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall promptly make payment to all claimants as hereafter defined, for all (1) labor and material used or reasonably required for use in the performance of the Contract, (2) pension, welfare, vacation and any other supplemental employee benefit contributions payable under collective bargaining agreements with respect to persons employed upon said work, and (3) federal, state and local taxes and contributions required to be withheld or paid with respect to the employment of persons upon said work that may hereafter be made, then this obligation shall be void; otherwise, it shall remain in full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or a subcontractor of the Principal, for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.
2. The above-named Principal and Surety hereby jointly and severally agree with the Obligor that every claimant as herein defined, who has not been paid in full, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Obligor shall not be liable for the payment of any cost or expenses of any suit.
3. No suit or action shall be commenced hereunder by any claimant:
 - a. After the expiration of the minimum period of limitation permitted by any law controlling the construction hereof.
 - b. Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the Project, or any part thereof, is situated, and not elsewhere.

02/07/02 15:50 FAX 1 603 358 1349
02/07/2002 11:32 FAX 843 881 8430

NGM BOND
BLL - RENAISSANCE

011/013
010/012

For projects located in the State of Connecticut, Surety is liable for and is obliged to pay any interest, costs, penalties or attorneys' fees imposed upon the Principal under any provisions of Connecticut Public Act 99-153, entitled "An Act Concerning Fairness in Financing in the Construction Industry."

Principal and Surety shall not be liable to the Obligor unless the Obligor has performed its obligations to the Principal in accordance with the terms of said Contract.

Sealed with our seals and dated this First day of December, 2000
(Day) (Month) (Year)

Janice L. Leford
(Attested by)

By: PHOENIX CONTRACT GLASS
C. Brant Catwood, Member
(Principal) (Title)

SEAL

Janice L. Leford
(Attested by)

NATIONAL GRANGE MUTUAL INSURANCE COMPANY
John T. Brownlee, III
(Surety) (Attorney-in-Fact)

SEAL

*Attach Power-Of-Attorney

02/07/02 15:50 FAX 1 603 358 1349

NGM BOND

012/013
011/012

02/07/2002 11:33 FAX 843 881 8430

BLL - RENAISSANCE

BY: PHOENIX CONTRACTGLASS;

803 714 0890;

OCT-20-00 5:59;

PAGE 2/2

From: K. Allen Lindsay 8774303059 To: Eddie Brown

Date: 10/10/2000 Time: 9:55:46

Page 2 of 2

DUAL OBLIGEE RIDER

PERFORMANCE & PAYMENT BOND

This Rider is attached to and made a part of Bond No. S 617325
(the "Bond") dated concurrently with the execution of this Rider, issued by National Grange Mutual Insurance Co. as "Surety", on behalf of Phoenix Contract Glass as "Principal" and in favor of Bovis Lend Lease, Inc. as "Obligee".

NOW THEREFORE, the undersigned agree that the Bond is amended as follows:

- 1 The following parties are added to this Bond as obligees:

The Renaissance on Charleston Harbor, LLC.

Wachovia Bank N/A

(Co-obligee)

- 2 The aggregate liability of the Surety under said Bond, to the Obligee and the Co-obligee, as their interests may appear, is limited to the penal sum of the Bond and provided, further, that the Surety may, in the event of a written request by either Obligee or the Co-obligee, make any payments under said Bond jointly to the Obligee and the Co-obligee.

Nothing herein contained shall be held to change, alter or vary the terms of the above described Bond except as hereinbefore set forth.

Signed, sealed and dated this 1st day of December, 2000.

PHOENIX CONTRACT GLASS
Principal

By C. Brent Chisholm (SEAL)

Name C. Brent Chisholm

Its Member

NATIONAL GRANGE MUTUAL INSURANCE COMPANY
Surety

By John T. Brownlee, III (SEAL)

Name John T. Brownlee, III

Its Attorney-in-Fact

02/07/02 15:50 FAX 1 603 358 1349
02/07/2002 11:33 FAX 843 881.8430

NGM BOND
BLL - RENAISSANCE

013/013
012/012



A Main Street America company

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That the National Grange Mutual Insurance Company, a New Hampshire corporation having its principal office in the City of Keene, State of New Hampshire, pursuant to Article V, Section 2 of the By-Laws of said Company, to wit:

"Section 2. The board of directors, the president, any vice president, secretary, or the treasurer shall have the power and authority to appoint attorneys-in-fact and to authorize them to execute on behalf of the company and affix the seal of the company thereto, bonds, recognizances, contracts of indemnity or writings obligatory in the nature of a bond, recognizance or conditional undertaking and to remove any such attorneys-in-fact at any time and revoke the power and authority given to them." Pursuant to said by-law does hereby make, constitute and appoint LINDA A HOMER, JOHN T BROWNLEE III,
FRANCIS W ALTMAN JR, JANICE L TILFORD,

its true and lawful Attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed, bonds, undertakings recognizances, contracts of indemnity, or other writings obligatory in the nature of a bond subject to the following limitation:

1. No one bond to exceed One Million Dollars (\$1,000,000.00).

and to bind the National Grange Mutual Insurance Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the National Grange Mutual Insurance Company, and all the acts of said Attorney are hereby ratified and confirmed.

This power of attorney is signed and sealed by facsimile under and by the authority of the following resolution adopted by the Directors of The National Grange Mutual Insurance Company at a meeting duly called and held on the 2nd day of December 1977:

Voted: That the signature of any officer authorized by the By-Laws and the company seal may be affixed by facsimile to any power of attorney or special power of attorney or certification of either given for the execution of any bond, undertaking, recognizance or other written obligation in the nature thereof; such signature and seal, when so used being hereby adopted by the company as the original signature of such office and the original seal of the company, to be valid and binding upon the company with the same force and effect as though manually affixed.

By execution of this Power of Attorney, National Grange Mutual Insurance Company does hereby revoke, rescind and declare null and void any previous Power of Attorney at any time previously furnished to the aforesaid individuals or agencies.

IN WITNESS WHEREOF, The National Grange Mutual Insurance Company has caused these presents to be signed by its Corporate Secretary and its corporate seal to be hereto affixed this 04TH day of November, 1999. THIS APPOINTMENT AND TERMINATE AUTOMATICALLY AS OF DECEMBER 31ST, 2002, unless sooner revoked as provided.

NATIONAL GRANGE MUTUAL INSURANCE COMPANY By: _____

THIS POWER IS INVALID IF RED DIAGONAL IMPRINT "NATIONAL GRANGE MUTUAL INSURANCE COMPANY, KEENE, NEW HAMPSHIRE" IS NOT SHOWN IN ITS ENTIRETY.

State of New Hampshire, County of Cheshire

On this 04TH day of November, 1999, before the subscriber a Notary Public of the State of New Hampshire and for the County of Cheshire duly commissioned and qualified, came William C. McKenna of the National Grange Mutual Insurance Company, personally known to be the officer described herein, and who executed the preceding instrument, and he acknowledged the execution of same, and being by me fully sworn, deposed and said that he is an officer of said Company, aforesaid: that the seal affixed to the preceding instrument is the corporate seal of said Company, and the said corporate seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Company; that Article V, Section 2 of the By-Laws of said Company is now in force.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal at Keene, New Hampshire this 04TH day of November, 1999.

Notary Public

My Commission Expires: May 1, 2003

I Lyn E. Landry, Assistant Vice President of the National Grange Mutual Insurance Company, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney executed by said Company which is still in force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company at Keene, New Hampshire, this First day of December, 2000.

Assistant Vice President

68-7340.003

WARNING — Any unauthorized reproduction or alteration of this document is prohibited. This power is void unless seals are readable the certification seal at the bottom is embossed. The diagonal imprint, warning and confirmation must be in red ink

CONFIRMATION Of validity of attached bond, call NGM at: Keene 603-358-1335, Richmond 804-270-3611 ext. 138; Syracuse 315-434-1410

As of July 31, 2007

BOVIS LEND LEASE, INC.'S AMENDED ALLOCATION OF REPAIR COSTS

No.	Repair Items	Repair Cost	Amount Attributable to Spence and Merchants Bonding Co.	Amount Attributable to Fersu Merchants Bonding Co. and/or Acrocrete	Amount Attributable to Phoenix Contract Glass/ National Grange Mutual Insurance	Amount Attributable to EFCO	Amount Attributable to Southern Pan/ National Fire Insurance Co.	Amount Attributable to Williamson's Welding	Amount Attributable to Level 5 Interiors/ Western Surety Company	Amount Attributable to Carolina Concrete	Amount Attributable to Waterlight/ Harleysville Mutual Ins Co.	Amount Attributable to CR Hipp/Federal Insurance Company	Attributable to Masters Mechanical/ U.S. Fidelity and Guaranty
Windows													
1	Repair of Punched Windows												
	Foam Brick Cavity at Window Jamba and Window Frames	\$86,390			\$86,390	\$86,390							
	Anchor Clips and Shims for Windows	\$21,086			\$21,086								
	Triple Window Attachment	\$1,644			\$1,644								
	Window Support Angle	\$248,184			\$248,184								
	Osleto Sill Clip	(\$3,400)			(\$3,400)								
	Cut Sill Fasteners	\$6,620			\$6,620								
	Transom Window Repairs	\$108,525			\$108,525	\$108,525							
2	Replacement of Bay Windows	\$1,132,640			\$1,132,640	\$1,132,640							
3	Patio Door Repairs	\$545,517			\$545,517		\$545,517			\$545,517			
Brick													
4	Repair of Shelf Angles	\$232,602						\$232,602					
5	Repair and Replacement of Building Felt	\$69,543	\$69,543		\$69,543			\$69,543	\$69,543				
6	Demolition and Replacement of Brick Walls												
	Demo brick/re-build brick	\$1,491,734	\$1,491,734		\$1,491,734	\$1,491,734		\$1,491,734	\$1,491,734				
	Install sill pan flashing	\$60,221	\$60,221		\$60,221	\$60,221		\$60,221	\$60,221				
	Install head pan flashing	\$55,340	\$55,340		\$55,340	\$55,340		\$55,340	\$55,340				
	Install peel and stick flashing at windows	\$621,036	\$621,036		\$621,036	\$621,036		\$621,036	\$621,036				
	Install miscellaneous brick caulking	\$24,993	\$24,993		\$24,993	\$24,993		\$24,993	\$24,993		\$24,993		
	Install flashing at brick/balcony intersection	\$48,408	\$48,408		\$48,408	\$48,408		\$48,408	\$48,408				
	Install extender flashing/peel and stick at shelf angles	\$264,001	\$264,001		\$264,001	\$264,001		\$264,001	\$264,001				
	Install flashing with end dams at 3rd and 7th floors	\$137,599	\$137,599		\$137,599	\$137,599		\$137,599	\$137,599				
Stucco													
7	Stucco Window Area and Flashing Repairs												
	Install flashing at stucco wall/balcony areas	\$826,052		\$826,052						\$826,052			
	Remove and replace stucco at windows to add flashing	\$381,840		\$381,840	\$381,840								
	Install flashing at stucco windows	\$219,241		\$219,241	\$219,241								
	Install sill pan flashing at stucco windows	\$31,022		\$31,022	\$31,022	\$31,022							
	Install head pan flashing at stucco windows	\$28,509		\$28,509	\$28,509								
	Install control joints	\$28,987		\$28,987									
	Recoat stucco	\$123,142		\$123,142	\$123,142					\$123,142			
	Repair crack in stucco	\$2,000		\$2,000									
	Install miscellaneous stucco caulking	\$12,870		\$12,870	\$12,870	\$12,870							
Miscellaneous													
8	Repair of Fresh Air Intake Vents	\$4,066										\$4,066	
9	Replacement of Sheathing Board	\$54,992	\$54,992	\$54,992	\$54,992	\$54,992	\$54,992	\$54,992	\$54,992			\$54,992	
10	Post-tension Cable Repairs	\$24,270											\$24,270
11	Removal, Repair and Replacement of Precast Concrete Lintels	\$37,665	\$37,665	\$37,665	\$37,665			\$37,665	\$37,665				
	Subtotal	\$6,927,359	\$2,865,552	\$1,708,655	\$5,809,382	\$3,196,326	\$600,509	\$3,049,746	\$2,865,552	\$1,494,711	\$24,993	\$59,058	\$24,270
Percentage (%) of Responsibility for Above Repair Items			41.37%	24.67%	83.86%	46.14%	8.67%	44.02%	41.37%	21.58%	0.39%	0.85%	0.35%
Staging, Logistics, General Conditions, Construction Administration, Attorneys' Fees and Consultants' Fees Allocated on a Percentage Basis													
12	Interior Finishes Repair	\$102,610											
13	Sitework	\$85,000											
14	Scaffolding	\$823,789											
15	Site Remediation	\$47,668											
16	Bovis's General Conditions, Insurance, Permits and Licenses	\$1,100,000											

PLAINTIFFS
EXHIBIT

3

BOVREP 30763

As of July 31, 2007

No.	Repair Items	Repair Cost	Amount Attributable to Spence and Merchants Bonding Co.	Amount Attributable to Ferst/ Merchants Bonding Co. and/or Acrocrete	Amount Attributable to Phoenix Contract Glass/ National Grange Mutual Insurance	Amount Attributable to EFCO	Amount Attributable to Southern Pan/ National Fire Insurance Co.	Amount Attributable to Williamson's Welding	Amount Attributable to Level 5 Interiors/ Western Surety Company	Amount Attributable to Carolina Concrete	Amount Attributable to Watertight/ Harleysville Mutual Ins Co.	Amount Attributable to CR Hipp/Federal Insurance Company	Attributable to Masters Mechanical/ U.S. Fidelity and Guaranty
17	LZA	\$1,088,000											
18	Bovis's Share of SKA Fees	\$445,000											
19	Attorneys' Fees	\$1,933,690											
20	Consultants' Fees	\$440,000											
21	Tropical Storm Ernesto Prep.	\$27,114											
22	Post-Gaston Clean-Up / Inspection Costs	\$175,000											
23	Bovis's Cost of Funds for the Repairs	\$951,719											
	Subtotal	\$7,219,590											
	Less Settlement Monies Received From the Lessard Architectural Group	\$ (1,401,206)											
	Total of Staging, Logistics, etc.	\$5,818,384											
	Percentage (%) Allocation of Responsibility for Staging, Logistics, etc.		\$2,406,816	\$1,435,123	\$4,879,380	\$2,684,838	\$504,376	\$2,561,524	\$2,406,816	\$1,255,428	\$22,402	\$49,604	\$17,050
24	Settlement of Homeowners' Resultant Damages Claims	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271	\$1,018,271
	TOTAL	\$13,764,014	\$6,290,639	\$4,162,049	\$11,707,033	\$6,899,235	\$2,123,158	\$6,629,541	\$6,290,639	\$3,768,410	\$1,065,666	\$1,126,833	\$1,059,591
1 The full amount of each repair has been attributed to each subcontractor responsible for the repair cost. The Subcontracts and applicable law make the Subcontractors, their bonding companies and Insurers jointly and severally liable for all of Bovis Lend Lease, Inc.'s claimed damages and Bovis Lend Lease, Inc. expressly reserves its rights to seek recovery of all damages on a joint and several basis. 2 This document represents Bovis Lend Lease, Inc.'s cost of the repairs being performed at the Renaissance on Charleston Harbor through July 31, 2007. This cost summary does not include any costs associated with repair of the roof, garage wall issues or other claims asserted by the Renaissance on Charleston Harbor Homeowners Association which are not included in the current scope of repairs. The full amount of each repair has been attributed to each subcontractor responsible for the repair cost. Bovis reserves the right to revise this spreadsheet as the repairs are completed and the repair costs are finalized. Also, this document does not include Bovis's consequential damages recoverable under Article 26 of the Subcontract Agreements, which Bovis seeks recovery of as a result of the Subcontractors' and Sureties' default. 3 The Attorneys' Fees/Consultants' Fees represent costs billed through July 2007. Bovis Lend Lease, Inc. reserves the right to reuse this document to reflect additional attorneys' fees/consultants' fees incurred after July 31, 2007. 4 The Subcontractors and Sureties are responsible for the full amount of the Settlement of Homeowners' Resultant Damages Claims pursuant to Article 12 of the Subcontracts. 5 Bovis Lend Lease, Inc. reserves the right to seek recovery of an allowance for administrative burden equal to 15% of all repair-related costs pursuant to Article 26 of the Subcontracts. This document does not include the contractually mandated allowance for Bovis Lend Lease, Inc.'s administrative burden equal to 15% of all repair-related costs. 6 This document includes Bovis's cost of money on the amount spent to repair the Project, but does not include Bovis's other consequential damages recoverable under Article 26 of the Subcontracts, which Bovis reserves the right to seek against the Subcontractors and Sureties.													

BOVREP 30764

National Grange

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
BOVIS LEND LEASE, INC., a Florida
corporation,

Plaintiff,

V.

FERST PLASTERING, INC., et al.,
Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

David Mitchell,
Plaintiff,

vs.

RENAISSANCE ON CHARLESTON
HARBOR, LLC., et al.
Defendants.

BOVIS LEND LEASE, INC.,
Third-Party Plaintiff,

VS.

FERST PLASTERING, INC., et al.,
Third-Party Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JUSTINA LASLEY, et al.,
Plaintiffs,

VS.

THE RENAISSANCE ON CHARLESTON
HARBOR, LLC, et al.,
Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 07- CP-10-2177

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 07-CP-10-2597

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 07-CP-10-2598

BOVIS LEND LEASE, INC.,
 Third-Party Plaintiff,
 vs.
 FERST PLASTERING, INC., et al.,
 Third-Party Defendants.

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 WILBUR BURBAGE, et al.,
 Plaintiffs,
 vs.
 THE RENAISSANCE ON CHARLESTON
 HARBOR, LLC., et al.,
 Defendants.

BOVIS LEND LEASE, INC.
 Third-Party Plaintiffs,
 vs.
 FERST PLASTERING, INC., et al.
 Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2006-CP-10-4780

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS AGREEMENT is entered into this ____ day of January, 2008 by and between Bovis Lend Lease, Inc. ("Bovis") and National Grange Mutual Insurance Company ("National Grange"), collectively referred to herein as "Parties".

WHEREAS, Bovis constructed the condominium project known as The Renaissance on Charleston Harbor, Charleston, South Carolina ("Project"), which Project consists of two 8 story buildings;

WHEREAS, as part of the initial construction, Bovis subcontracted with Phoenix Contract Glass, LLC ("Phoenix") to supply and install windows and sliding glass doors, among other tasks, at the Project;

WHEREAS, National Grange issued a performance bond as Surety for Phoenix, naming Bovis as the Obligee under the bond;

WHEREAS, the Renaissance on Charleston Harbor Homeowners' Association ("HOA"), alleged that the Common Areas, the Limited Common Areas and the individual condominium units were experiencing moisture intrusion due to construction defects and design defects;

WHEREAS, Bovis, along with the architect and developer, was sued by the HOA in a suit captioned Renaissance on Charleston Harbor Homeowners' Association vs. The Renaissance on Charleston Harbor, LLC, et al., Case No. 05-CP-10-1741, ("First HOA Lawsuit") which alleged various damages resulting from claimed construction deficiencies in the original construction;

WHEREAS, on or about May 2005, the HOA and Bovis entered into a Settlement Agreement whereby Bovis agreed to perform repairs at the Project in accordance with plans and specifications prepared by Sutton-Kennerly & Associates, Inc. ("SKA", the repairs referred to as the "SKA Repairs");

WHEREAS, the Settlement Agreement entered between Bovis and the HOA desired to resolve the HOA's claims against Bovis for the construction defects described in the SKA Repairs and known by the HOA at the time of the settlement;

WHEREAS, nine (9) named individual homeowners (hereinafter "Litigant Homeowners") initiated claims against Bovis styled David Mitchell v. Renaissance on Charleston Harbor, et al., Case No. 07-CP-10-2597; Justina Lasley, et al. v. The Renaissance on Charleston Harbor, LLC, et al., Case No. 07-CP-10-2598; and Wilbur Burbage, II, et al. v. The Renaissance on Charleston Harbor, LLC, et al., Case No. 06-CP-10-4780 claiming damages to the interior of their units resulting from moisture intrusion at the Project;

WHEREAS, Bovis has reached a full and final settlement of the claims set forth by the Litigant Homeowners in the amount of \$803,000.00 collectively, which has been paid to resolve those claims;

WHEREAS, thirteen (13) individual condominium unit owners not named in above described lawsuits (hereinafter "Non-litigant Homeowners") have made claims against Bovis for damage to the interior of their units as a result of moisture intrusion at the Project. The Non-litigant Homeowners are as follows:

- (1) Roe Gabriel, Unit 176
- (2) Murray Duffin, Unit 135
- (3) Edmund and Marilyn Barron, Unit 262
- (4) Margaret Schultz, Unit 111
- (5) Sandra Hunsberger, Unit 152
- (6) R. Allen Young, Unit 257
- (7) Deborah Grosser, Unit 252
- (8) John and Clara Robertson, Unit 234
- (9) John Dolvan, Unit 281
- (10) Charles Brewer, Unit 225
- (11) John and Deborah Williams, Unit 241
- (12) M. Joel Bateman, Unit 272 and
- (13) Wendell L. Nixon, Unit 285

WHEREAS, Bovis has reached a full and final settlement to the claims set forth by the Non-litigant Homeowners in the amount of \$215,281.12, collectively, which has been paid to resolve those claims;

WHEREAS, Bovis initiated the matter captioned Bovis Lend Lease, Inc. v. Ferst Plastering, Inc., et. al., Case No. 07- CP-10-2177 ("the Lawsuit") against certain of the subcontractors and suppliers who performed worked and/or supplied materials on the Project and their sureties, including National Grange, and has filed Third-Party claims against those same subcontractors, suppliers, and sureties along with other subcontractors, suppliers, and sureties, including National Grange, in David Mitchell v. Renaissance on Charleston Harbor, et al., Case No. 07-CP-10-2597; Justina Lasley, et al. v. The Renaissance on Charleston Harbor, LLC, et al., Case No. 07-CP-10-2598; and Wilbur Burbage, II, et al. v. The Renaissance on Charleston Harbor, LLC, et al., Case No. 06-CP-10-4780 ("Third-Party Actions"), seeking actual, consequential and incidental damages related to the SKA Repairs performed at the Project by Bovis to remedy the construction deficiencies alleged by the HOA, and for reimbursement of monies paid by Bovis in settlement of the claims asserted by the Litigant Homeowners and Non-litigant Homeowners;

WHEREAS, the HOA has instituted a second lawsuit in Charleston County against Bovis and others captioned M. Joel Bateman, et al. v. The Renaissance on Charleston Harbor, LLC, et al., Case No. 07-CP-10-2758 ("Second HOA Lawsuit"), in which additional construction deficiencies are claimed to have allegedly caused additional damage to the Project;

WHEREAS, the Parties have investigated the facts and law relating to the matters set forth in these actions and have conducted extensive pretrial discovery on the claims and defenses asserted therein;

WHEREAS, National Grange has denied the allegations of wrongdoing and has asserted affirmative defenses to Bovis's claims;

WHEREAS, it is the express intent of the Parties to completely and forever settle any and all claims now existing or which could have existed in the Lawsuit, the Third-Party Actions,

the First HOA Lawsuit, the existing claims in the Second HOA Lawsuit, the nine (9) Litigant Homeowner claims, and the thirteen (13) Non-litigant Homeowner claims, relating to the materials supplied by Phoenix and bonded by National Grange during the original construction of the Project;

NOW, THEREFORE, in consideration of the mutual covenants contained in this Settlement Agreement and the consideration set forth below, the receipt and sufficiency of which hereby are acknowledged by the Parties, the Parties hereby agree as follows:

1. The recitals set forth above shall be incorporated and made part of the covenants of this Agreement. On or before thirty (30) days following the execution of this Settlement Agreement, National Grange shall cause to be paid the total sum of \$450,000.00 ("Settlement Amount") to Bovis. Payment of the Settlement Amount shall be sent to:

Bovis Lend Lease, Inc.
5909 Peachtree Dunwoody Road
Suite 500
Atlanta, GA 30328
ATTN: Lisa S. Mingoia, Esq.

2. In consideration for the payment of the Settlement Amount, and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Bovis on the one hand, and National Grange on the other hand, do for themselves, their successors, heirs, assigns, partners, agents, insurers, owners, officers, servants, employees, purchasers and assigns, and all other persons, firms, corporations, parent corporations, associations or partnerships, whether herein named or referred to or not, and who, together may be liable to each other, hereby remise, release, acquit, and forever discharge each other from any and all claims and liabilities of any nature or kind, including, but not limited to, contribution, indemnity, or similar type claims, now known or which reasonably could have been known, involving in any way, arising out of or relating to the Lawsuit, the Third-Party Actions, the First HOA Lawsuit, the existing claims in

the Second HOA Lawsuit, the nine (9) Litigant Homeowner claims, and the thirteen (13) Non-litigant Homeowner claims, relating to the labor or materials supplied by Phoenix and bonded by National Grange in the original construction of the Project. (collectively referred to hereinafter as the "Released Claims").

3. Other than the class action claims brought by the Litigant Homeowners solely against EFCO Corporation, Bovis represents that it is not aware of any other claims raised by any individual unit owner of a unit at the Project that Bovis has not settled as of the date of this Settlement Agreement, although the Parties acknowledge that there are unit owners at the Project who have not asserted or settled claims. Bovis also represents that it is not aware of any claims raised by the HOA in the Second Lawsuit or otherwise related to or arising from the work performed by Phoenix and bonded by National Grange on the Project.

4. National Grange, its successors, heirs, assigns, partners, agents, insurers, owners, officers, servants, employees, purchasers and assigns further represent and agree that they shall not seek reimbursement for any payments National Grange and/or its insurers are obligated to make under this Agreement for contribution, subrogation, indemnification or similar relief from any other person, except as set forth in Paragraph 5 pursuant to its General Agreement of Indemnity.

5. Notwithstanding any other provision of this Agreement, it is understood and agreed by all parties hereto that nothing herein shall reduce, eliminate, affect, or in any other manner relate to National Grange's rights under the general agreement of indemnity given in favor of National Grange by Phoenix and other indemnitors in connection with National Grange's issuance of payment and performance bonds on behalf of Phoenix.

6. For the consideration set forth in Paragraph 1 above, the Parties also agree to execute, or cause their counsel to execute, a stipulation, order, or other documents required to

dismiss all claims in the Lawsuit and Third Party Actions brought by Bovis against National Grange, with prejudice and without costs.

7. The Parties hereby acknowledge that this settlement is the compromise of disputed claims, and that the payment of the Settlement Amount is not to be construed as an admission of liability on the part of National Grange, but is entered into to avoid further litigation.

8. The Parties hereby acknowledge that this compromise and settlement is and shall be a complete bar to any subsequent action or proceeding to set aside or vacate this instrument because of a mistake in fact or otherwise.

9. The undersigned Parties declare and represent that they have read this Settlement Agreement and acknowledge that they have the advice of counsel and that no promise, inducement, or agreement not herein expressed has been made to them and that this instrument contains the entire agreement between the Parties hereto and that the terms of the instrument are contractual and not a mere recital, and further, that if any paragraph or part of this Settlement Agreement is found void or unenforceable, the remainder of this Settlement Agreement shall not be affected.

10. This Settlement Agreement shall be binding on all settling Parties, their affiliated entities, successors, subsidiary organizations, assigns, partners, agents, insurers, attorneys, servants, employees and all other persons, firms, corporations, associations or partnerships.

11. The undersigned parties and their attorneys expressly agree to keep strictly confidential and to disclose to no one, other than close family members, and law partners and associates within the representing firms, the terms and provisions of this Settlement Agreement. This Settlement Agreement is made a part and parcel of the receipt and release of the claims between the parties as set forth above and is expressly consented to by the undersigned parties and their attorneys.

12. This Settlement Agreement shall be construed in accordance with the laws of the state of South Carolina.

13. This Settlement Agreement may be executed in counterparts, each of which shall be an original and all of which together shall constitute one and the same document.

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement and Release to be executed by themselves and their duly authorized attorneys, as of the dates indicated, with the most recent date constituting the date of this Settlement Agreement and Release.

National Grange Mutual Insurance Company

By: _____
Print: _____
Its: _____

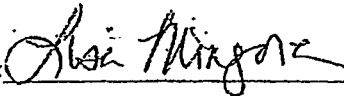
Witness: _____

Richardson Plowden

Francis M. Mack
1900 Barnwell St.
Post Office Drawer 7788
Columbia, SC 29202
Attorney for National Grange

Bovis Lend Lease, Inc.

By: 
Print: TERRY M. ROASTLEY
Its: EVP

Witness: 

Rosen, Rosen & Hagood, LLC.

H. Brewton Hagood, Esq.
James A. Bruorton IV, Esq.
P.O. Box 893
Charleston, SC 29402
Attorneys for Bovis Lend Lease, Inc.

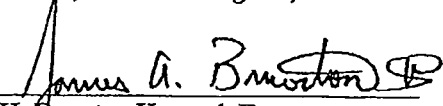
Stein, Ray & Harris LLP


Stephen E. Ray, Esq.
Peter J. Bedard, Esq.
222 West Adams Street, Suite 1800
Chicago, IL 60606
Attorneys for Bovis Lend Lease, Inc.

Bovis Lend Lease, Inc.

By: _____
Print: _____
Its: _____

Rosen, Rosen & Hagood, LLC.


H. Brewton Hagood, Esq.
James A. Bruorton IV, Esq.
P.O. Box 893
Charleston, SC 29402
Attorneys for Bovis Lend Lease, Inc.

Witness: _____

Stein, Ray & Harris LLP

Stephen E. Ray, Esq.
Peter J. Bedard, Esq.
222 West Adams Street, Suite 1800
Chicago, IL 60606
Attorneys for Bovis Lend Lease, Inc.

MEMORANDUM OF SETTLEMENT

Bovis Lend Lease v. National Grange Mutual Insurance, et. al.
Case No. 05-CP-10-2311
December 13, 2007

1. Bovis has agreed to accept, and the Defendant National Grange has agreed to pay, the sum of \$ 450,000 to settle Bovis' claim against National Grange's performance bond issued on behalf of Phoenix Contract Glass. National Grange shall pay the settlement sum within 30 days after the date of this memorandum. The parties have not yet reached an agreement on the specific terms to be included in any releases. This settlement is specifically conditioned upon the parties reaching an agreement on the terms of the release to be given and received by the parties.
2. If the parties do not reach an agreement on the terms of the release to be given and received, then this agreement will be null and void.

Bovis Lend Lease, Inc.

By: Peta Bealard

Its: Attorney

Peta Bealard
Attorney for Bovis

National Grange Mutual Insurance

By: S. M. Mack

Its: Attorney

S. M. Mack
Attorney for National Grange

J. B. Boney
Mediator

7
URANCE COMPANY
2015
NH 03431

BOVIS LEND LEASE, INC.
5909 PEACH TREE DUNWOODY RD
SUITE 500
ATLANTA GA 30328

AMOUNT: ****\$450,000.00

No.1220264

DATE 01/16/2008

INSURED (PHOENIX CONTRACT GLASS LLC)
AGENT 390670
CLAIM NO. S 617325 001 91
DATE OF LOSS 10/21/01

PAYMENT

\$450,000.00

N
01
L



THE
MAIN
STREET
AMERICA
GROUP

NGM INSURANCE COMPANY
PO BOX 2015
KEENE NH 03431

Bank of America Checks
Boston, MA
5144 / 119

No.1220264

S.617325 0000011001

DATE	AMOUNT
January 16, 2008	****\$450,000.00

PAY *Four hundred fifty thousand and 00/100 Dollars*

TO THE ORDER OF

BOVIS LEND LEASE, INC.
5909 PEACH TREE DUNWOODY RD
SUITE 500
ATLANTA GA 30328

Thomas M. Van Buren
Edward J. Kuhl

PAYMENT

1220264 0119004451970476

PLAINTIFF'S
EXHIBIT

Defendants.

C/A NO: 03-CP-10-3239

ORDER.

2008 MAR -6 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT

7

498

PLAINTIFF'S
EXHIBIT

6

FINDINGS OF FACT

1. The Plaintiff, EFCO Corporation, is a corporation with nationwide business interests. It is a sophisticated entity and is experienced in contractual matters.
2. National Grange Mutual Insurance Company ("National Grange") is a surety company dealing in contract surety bonds, such as payment and performance bonds on construction contracts.
3. Phoenix Contract Glass, LLC ("Phoenix") is a limited liability corporation specializing in the installation of glass and window systems on commercial buildings.
4. Bovis Lend Lease, Inc. ("Bovis") is a multinational general contracting firm that entered into a contract for construction of a project known as Renaissance on Charleston Harbor located in Charleston County, South Carolina.
5. Phoenix entered into a Subcontract with Bovis for the window systems on the Renaissance project ("the Subcontract"). These systems included glass products identified as bay windows, sliders or punch windows, and sliding glass doors. The Subcontract was dated September 30, 2000. The main body of the subcontract contains 16 pages. Exhibits A through H are attached to the Subcontract. (Plaintiff's Exhibit 5, Defendant's Exhibit 1)
6. The Subcontract provided for two phases on the project. Phase I was Building A, pool, clubhouse and the parking deck needed to accommodate Building A. Building A is eight stories in height and contains fifty condominium units. Phase II was Building B and the remainder of the parking deck. Building B is a duplicate of Building A and also contains fifty condominium units.
7. The Subcontract was "awarded on the basis of Phase I only." (Exhibit B to the Subcontract, paragraph 71)
8. The Phoenix subcontract price was \$914,835.00.

9. The face of the subcontract does not contain any information stating that the initial price of the subcontract refers only to Building A.

10. The only reference to Building B is found in paragraphs 71, 72 and 73 of Exhibit B to the subcontract. Neither Phoenix nor its agent, John Brownlee, provided a copy of these provisions to Ms. Day.

11. Phoenix and EFCO entered into an agreement for Phoenix to purchase materials for the window systems by an exchange of documents. Phoenix offered to purchase the materials for Building A by its letter of intent dated November 6, 2000 (Defendants Exhibit 17). EFCO accepted by its letter of December 1, 2000 (Defendants Exhibit 19). This agreement only covered Building A as confirmed by the amount of EFCO's sales agents "Price Summary and Commission Report." (Defendant's Exhibit 18).

12. Bovis required Phoenix to "furnish performance, and labor and material payment bonds each for one hundred percent (100%) of the price, said bonds to be on Contractors (Bovis') standard bond forms ***." (Defendant's Exhibit 1, Page 6, Article 10).

13. Phoenix made arrangements through its agent, John Brownlee to obtain the bonds from National Grange.

14. National Grange authorized John Brownlee to act as its attorney-in-fact to issue bonds, subject to the express limitation of a Power of Attorney that no one bond could exceed \$1,000,000.00. (Power of Attorney attached to Defendant's Exhibit 3).

15. National Grange issued payment and performance bonds at the request of Phoenix on the Bovis forms. The payment bond has a penal sum of \$914,835.00, which is the contract price for Phase I (Building A). The bonds are dated December 1, 2000. (Defendant's Exhibit 3).

16. Cynthia Day, a field underwriter for National Grange, met with Phoenix's agent, Mr. Brownlee, on October 11, 2000 to determine the risk of the surety and was advised that the job would be \$800,000.00. (Defendant's Exhibit 25).

17. Because Ms. Day was concerned that the largest contract that Phoenix had previously held was in the \$400,000 to \$450,000 range, Ms. Day met with Mr. Brownlee and the owners of Phoenix on October 16, 2000 to discuss the job. Phoenix provided Ms. Day a price breakdown at the meeting that showed a final contract price of \$914,835.00. Ms. Day was not informed by anyone at the meeting of the possibility that another building could be added to the contract, thereby doubling the scope of work. (Defendant's Exhibit 25, Defendant's Exhibit 29, testimony of Cynthia Day).

18. After the payment and performance bonds were issued, Phoenix began work on Building A.

19. While Phoenix was working on Building A, Bovis issued a change order to add Phase II – Building B. This change order was prepared on March 22, 2001. The value of the change order was \$719,920.00. (Plaintiff's Exhibit 6, Defendant's Exhibit 5).

20. Bovis issued this change order pursuant to Article B and Paragraphs 72 and 73 of Exhibit B to the Subcontract. Paragraph 72 provides that Bovis had until January 31, 2001 to award Phase II – Building B at a fixed price as set forth in Paragraph 73. Paragraph 73 further provides that Phase II – Building B may be awarded after January 31, 2001 only upon certain conditions. (Defendants Exhibit 1).

21. Bovis did not issue the change order by January 31, 2001, nor did it comply with the provisions that the amount set forth in Paragraph 73 would be increased by applicable material price increases.

22. Phoenix signed the change order under protest on August 9, 2001. (Plaintiff's Exhibit 5, Defendant's Exhibit 5).

23. The addition of Building B by change order increased the total of the Phoenix contract to \$1,634,755.00, which was 79% more than the original contract.

24. The increased contract price exceeded the \$1,000,000.00 limitation on John Brownlee's Power of Attorney.

25. Under the Subcontract, Bovis would pay Phoenix for materials when they were delivered to the job site. Phoenix in turn could pay EFCO before it began substantial work on Building A. (Subcontract, Article 3, Defendant's Exhibit 1).

26. The addition of a second building, doubling the scope of work, substantially increased the risk of Phoenix defaulting under the contract. (Testimony of Scott Gwinn, Credit Manager of EFCO).

27. The Subcontract between Bovis and Phoenix includes the following relevant provisions:

- "In the event that Subcontractor is obligated hereunder to provide a payment or a performance bond, or both, under this Subcontract, the penal sum of such bonds shall automatically be deemed to be increased by any increase in the Subcontract price." (Article 8).
- "Subcontractor shall furnish performance, and labor and material payment bonds each for one hundred percent (100%) of the price." (Article 10).
- "The premiums on such bonds shall be paid by Subcontractor, or paid directly by contractor to Subcontractor's surety." (Article 10).
- "Subcontractor agrees to notify its surety or sureties of increases in the price and to take such action as is required to have the penal amount of the bonds furnished pursuant to this paragraph increased accordingly." (Article 10).
- "Subcontractor shall provide the following: Performance Bond and a Labor and Material Payment Bond, written in the full contract amount.

- "Bonds must be accompanied by the following: Valid Power of Attorney with sufficient limits for the full contract amount." (Exhibit F – Bonding Requirements).
- "If the Subcontractor fails to obtain the surety bonds in accordance with the above, the contractor reserves the right to grant an exception to these requirements." (Exhibit F – Bonding Requirements).

28. Bovis never required Phoenix to provide a payment or performance bond with penal sum equal to 100% of the revised Subcontract price.

29. Phoenix never paid a premium to National Grange for Building B.

30. Bovis never paid a premium to National Grange pursuant to Article 10 for Building B.

32. EFCO's claim falls under the payment bond.

33. Phoenix didn't bill Bovis for a payment bond premium of Building B. (Schedule of Values, Defendant's Exhibit 15).

34. Phoenix never took any action to have the penal sum of the payment and performance bonds increased.

35. Neither Bovis nor Phoenix took any action to obtain a Power of Attorney issued by National Grange with sufficient limits for the new contract amount.

36. National Grange sent a general status inquiry to Bovis on November 1, 2001. Bovis noted that the contract price had changed, but it did not indicate that the bond penal sum had changed. (Attachment to Defendant's Exhibit 7).

37. The payment bond does not include any provisions allowing for changes to the underlying contract, while the performance included the following waiver provision:

- "The Surety agrees that no change, extension of time, alteration, addition, omission or other modification of the Contract Documents, as specified in the Contract, shall in any way affect its obligations under this Bond, and the Surety hereby waives notice of any such

changes, extensions of time, alterations, omissions or other modifications.”

The performance bond is not at issue in this lawsuit. It is critical to note that the payment bond that forms the basis for EFCO's claim does not include a waiver of notice provision. Bovis prepared these bond forms, and the absence of the above language in the payment bond was the conscious decision by a sophisticated contractor.

38. Prior to completion of Building A, Bovis expressed concerns about Phoenix's ability to complete the contract. National Grange retained a consultant to investigate these concerns. Phoenix completed its work on both buildings. Certificates of Occupancy were issued and the buildings were turned over to the Owners.

39. Shortly after the buildings were occupied, homeowners complained about defects in the windows. Spots and wrinkles appeared in the reflective film that was in the airspace of the EFCO windows.

40. In the years following completion, significant condensation occurred on and around the metal parts of the windows provided by EFCO.

41. In 2004, a tropical storm (Gaston) passed through the Charleston area. Significant leaks occurred at the buildings, including areas around windows.

42. The Homeowners filed suit against Bovis. Bovis began an investigation and agreed to make significant repairs to the buildings. Bovis repaired the building and settled claims with the Homeowners at a cost of \$13,764,014.00. (Defendant's Exhibit 30).

43. As part of the repairs, all of the metal framing for the bay windows, as supplied by EFCO, was removed and replaced because it did not comply with the project specifications. Bovis' cost to replace the bay windows was \$1,132,640.00. Repairs to the punch windows and transoms, as supplied by EFCO, cost an additional \$194,915.00. (Defendant's Exhibit 30).

44. EFCO filed a mechanics lien on the project for \$793,428.48 in 2002 and asserted a claim on the payment bond. The current amount claimed is broken down as follows:

Building A	\$120,489.72
Building B	\$615,565.88
Expedited Orders	<u>\$ 43,836.89</u>
	\$779,892.49

45. Bovis posted cash and filed a bond as security to release EFCO's lien. The cash and the mechanics lien bond covered both buildings and guaranteed payment for materials supplied by EFCO to the project

46. The buildings are not clearly differentiated on the expedited orders and these invoices were never provided to National Grange prior to trial. (Testimony of Eli Cinq-Mars).

47. National Grange retained a consultant to investigate EFCO's payment bond claim.

48. The mechanics lien and payment bond claim have a complicated procedural history, involving two appeals on the mechanics lien issue, consolidation into construction defects lawsuits filed by Bovis and the homeowners, and subsequent severance from the related defect lawsuits.

49. Bovis filed a claim under the Performance Bond. National Grange denied Bovis' claim. (Defendant's Exhibits 6, 7, 8, 9 and 10).

50. EFCO's insurer paid \$725,000.00 to settle product claims in the related construction defects lawsuits.

51. A class action suit is currently pending against EFCO and Phoenix alleging numerous defects in the Insulated Glass Units supplied by EFCO.

52. Bovis asserted claims against National Grange alleging that the performance bond covered both buildings. Bovis' total claim asserted against National Grange was \$11,707,033.00. (Defendant's Exhibit 30). National Grange denied that the performance bond covered Building B and asserted that that penal sum of the performance bond was limited to \$914,835.00, which was the contract amount for Building A. National Grange settled the Bovis claim for \$450,000.00.

53. As part of the overall settlement of Bovis' claims against Phoenix, EFCO and National Grange, Bovis retained monies owed under the Phoenix contract, which are at least \$500,000.00 but may be as much as \$750,000.00, because of the window defects and installation issues. These are funds that otherwise would have been paid to Phoenix and National Grange.

54. In addition to providing the window units, EFCO provided design and engineering services. This was done by means of engineered shop drawings and printed installation instructions. An EFCO representative visited the project site and provided instructions to Phoenix personnel on how to install the windows.

CONCLUSIONS OF LAW

EFCO is a "claimant" as defined in the payment bond at issue. As a claimant, it is a third party beneficiary of the surety contract (payment bond) entered into between Bovis and Phoenix, with National Grange as surety. If a third party beneficiary avails itself of a contract, it must bear the burdens and reap the benefits in accordance with the terms of the contract. Kingman v. Nationwide Mutual Insurance Company, 243 SC 405, 134 S.E. 2d 217 (1964).

The standards that apply to the interpretation of contracts generally apply to the interpretation of contracts creating secondary obligations, including payment and performance bonds. Rest. (Third) Suretyship & Guaranty § 14.

Accordingly, the Court must look to the rights and responsibilities of the contracting parties (Bovis, Phoenix and National Grange) in determining what rights EFCO may have. It can have no greater rights than Bovis may have had. Kingman.

The payment bond covered Building A when it was issued. John Brownlee was acting as the agent of Phoenix in procuring the bond from National Grange Mutual. Allstate Insurance Co. v. Smoak, 256 SC 382, 182 S.E. 2d 749 (1971). Under the Power of Attorney that was a part of the bond, John Brownlee could not issue a bond that exceeded \$1,000,000.00. Bovis was aware that the

payment bond could not exceed \$1,000,000.00 when it accepted the bond because of this express grant of authority. Powers of attorney are instruments that are strictly construed. Valk v. Gaillard, 25 S.C.L. 99 (1849). They are ordinarily subject to a strict interpretation, and the authority contained within is never extended beyond the terms stated therein. Valk.

The change order, executed under protest, is not effective to increase the penal sum of the bond to include Building B. This would put the penal sum significantly in excess of the express grant of authority by National Grange in both the bond and Power of Attorney. A surety's obligation is limited by the terms of the express authority granted and cannot be altered by parol evidence. Valk. See also SOCAR, Inc. v. St. Paul Fire & Marine Ins. Co., 288 S.C. 287 (1986) (surety's obligation pursuant to bond is contractual in nature and cannot extend beyond the terms of the bond); Nat'l Union Fire Ins. Co. v. Currie, 178 So. 1841 Miss. 1938 (sureties have the right to stand on the terms of their obligation and their liability must be bound within the terms of that consent).

Bovis (and therefore EFCO) argues that the provision in Article 8 allows it to make any changes it desired under the contract and that the penal sum of the payment bond would be increased accordingly. This ignores the express limitation of the Power of Attorney.

EFCO also ignores the remaining provisions of the contract. EFCO as third party beneficiary is bound by the actions of Bovis. Kingman.

- Bovis failed to require Phoenix to provide a payment bond for one hundred percent (100%) of the Subcontract price. (Article 10).
- National Grange was never paid a premium for Building B. Bovis could have paid this premium direct to National Grange to insure that a bond was in place. (Article 10).

- Bovis failed to require Phoenix to notify National Grange Mutual Insurance Company of the increase in the price and to take action to have the penal sum increased. (Article 10).
- Bovis failed to require Phoenix to provide a Power of Attorney with sufficient limits for the full contract amount. (Exhibit F).
- Bovis provided a response to National Grange to a general status inquiry showing that the contract price had been changed, but not the bond amount. (Defendant's Exhibit 7).

If Bovis had intended the payment bond to cover Building B, the contract required Phoenix to notify National Grange of the change, to take such action as was necessary to get a bond for 100% of the new contract amount, to get a new Power of Attorney with increased limits, and it required either Phoenix or Bovis to pay a premium for the increased risk undertaken by National Grange Mutual.

Neither Bovis nor Phoenix took any of the required actions.

While the performance bond contains a waiver of notice provision that the surety (National Grange) waived notice of changes, the payment bond does not include this waiver provision. A surety is only bound to the terms of its undertaking. A surety's obligations are not extended by implication or construction, and its liability is bound with the terms of its consent to an obligation.

Nat'l Fire.

EFCO was not left without a remedy. It was entitled to a mechanics lien on both Building A and B. Bovis had posted cash and other security to provide a source of funds to pay EFCO. EFCO failed to properly perfect its mechanics lien and did not receive payment from the funds being held by Bovis. National Grange should not be called upon to rescue EFCO by extending the payment

bond on Building A over to Building B. It is unfair to penalize National Grange for EFCO's own mistake.

Since Bovis did not take steps to include Building B under the bond, EFCO cannot make a claim for Building B as to National Grange. Its recourse for materials supplied to Building B was its mechanics lien rights and against the party with whom it contracted, Phoenix.

EFCO relies on Centex Construction v. Acstar Insurance, 448 F. Supp. 2d 697 (ED Va 2006) to support its claim that the payment bond extends to Building B. This reliance is misplaced. In Centex, the performance bond, the payment bond, and the subcontract all contained an escalation clause and a waiver of notice clause that allowed the Court to overcome the surety's "material change to the contract" defense. EFCO is now asking the Court to extend this reasoning to the case at hand where the performance bond contains only a waiver of notice clause and no escalation clause. More importantly, the payment bond, upon which the EFCO claim is based, contains neither an escalation clause nor a waiver of notice.

Additionally, in Centex, the general contractor never responded to a status inquiry. In the case at hand, Bovis responded to National Grange's status inquiry and confirmed that the bond amount had not changed, even though the contract amount had increased.

The Subcontractor also billed the general contractor, Centex, for increased premiums for increased volume of the bonds. Phoenix did not bill for additional payment bond premiums (Schedule of Values, Defendant's Exhibit 15), nor did Bovis.

Bovis is a sophisticated general contractor with worldwide experience. It wrote the bond forms and could have included the waiver of notice clause and escalation clause in the payment bond if it chose to do so.

In summary, the contract and bonds in Centex were in parity and contained identical provisions. In the case at hand, Bovis chose to limit the scope of the payment bond. In South Carolina, a surety's obligation cannot extend beyond the terms of the bond. SOCAR. EFCO's misplaced reliance on Centex is an attempt to overcome the basic facts that when Bovis added a second building to the Phoenix contract, it was a material change to the Subcontract and that the change was not covered under the payment bond. The surety should not be responsible for this additional risk.

National Grange raised the issue of discharge of the surety due to a material change in the contract in its Pre-Trial Brief and Memorandum in Support of its Motion to Dismiss pursuant to Rule 41(b), SCRCPP. While these arguments are persuasive and would result in denying EFCO's claims in their entirety, the Court finds that the more equitable approach is to hold that the payment bond covers Building A. National Grange issued a bond that covered Building A and was paid a premium for Building A.

EFCO argues that National Grange assumed the risk of paying \$914,835.00 if Phoenix defaulted. EFCO confuses "exposure" with "risk." A brief, but descriptive explanation of the difference is found in Carriage Town, Inc. v. Landco, Inc., 998 F. Supp 646 (D.S.C. 1998).

"[EFCO] seem to suggest that [National Grange Mutual's] total exposure is coterminous with the risk it assumed and, therefore, [National Grange Mutual] suffered no prejudice from the amended terms and should be made to honor the bond. The Court cannot agree. It may well be that [National Grange Mutual] would have willingly agreed to a large amount of exposure where the chances of paying out were very small, whereas it would not so readily agree to a smaller amount of exposure where it was more likely that payment would be mandatory." Carriage Town at 649, fn 2.

While National Grange had an "exposure" of \$914,835.00 on Building A, its "risk" was substantially less. Phoenix would be paid for materials when they were delivered to the jobsite and

could then immediately pay EFCO. The addition of a second building significantly increased the risk of default as testified to by EFCO's credit manager, Scott Gwinn.

National Grange issued a payment bond for Building A and assumed the risk that Phoenix would not be able to pay for the materials for that building. It would be inequitable to extend that risk to Building B. Otherwise, a Subcontractor could obtain a payment bond for one house in a subdivision and then have coverage for the next 100 houses it might build for the same contractor.

Accordingly, I find that EFCO would be entitled to \$120,489.72. There was insufficient evidence presented to aid this court in determining whether to allow a deduction for defective materials.

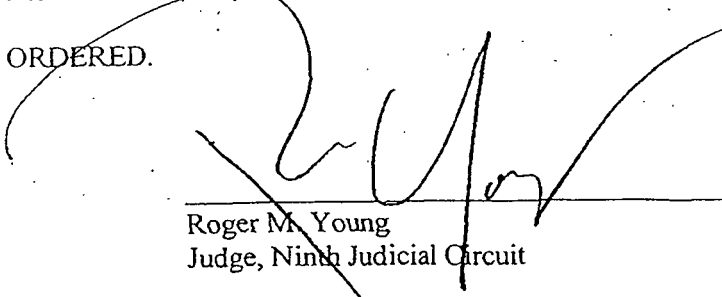
EFCO is entitled to pre-judgment interest at the legal rate of 8.75%. EFCO first provided a clear accounting of the amounts due on August 3, 2004. (Plaintiff's Exhibit 3). Accordingly, EFCO is entitled to interest of \$ 34,476.77.

Prior to commencement of trial, EFCO raised the issue of a claim pursuant to SC Code Ann § 27-1-15. National Grange objected on the grounds that this had not been pled and had not been an issue in the case previously. Since SC Code Ann § 27-1-15 was not pled, EFCO is not entitled to any relief under this section.

IT IS ORDERED that EFCO is entitled to recover ___\$154,966.49 from National Grange.

EFCO is entitled to recover \$1,175,283.80 from Phoenix.

AND IT IS SO ORDERED.



Roger M. Young
Judge, Ninth Judicial Circuit

Charleston, South Carolina
Dated: February 28, 2008

Phoenix Contract Glass

S-617325

				Payee	Check #	Notes
3/13/2002	417	LEGAL EXP	\$1,895.94	Richardson Plowden & Robinson	7304610	
3/20/2002	418	OTHER EXP	\$944.60	Richardson Plowden & Robinson	7311348	* see below
4/10/2002	418	OTHER EXP	\$324.60	Kerry D. Scott	7337744	
4/10/2002	418	OTHER EXP	\$3,460.53	Kerry D. Scott	7337745	
5/21/2002	417	LEGAL EXP	\$1,233.52	Richardson Plowden & Robinson	7384403	
4/16/2003	417	LEGAL EXP	\$1,094.84	Richardson Plowden & Robinson	7861900	
6/20/2003	417	LEGAL EXP	\$333.71	Richardson Plowden & Robinson	7949220	
7/17/2003	417	LEGAL EXP	\$1,716.20	Richardson Plowden & Robinson	7984700	
9/12/2003	417	LEGAL EXP	\$1,146.12	Richardson Plowden & Robinson	8058820	
11/17/2003	417	LEGAL EXP	\$447.91	Richardson Plowden & Robinson	8145069	
12/16/2003	417	LEGAL EXP	\$2,743.67	Richardson Plowden & Robinson	8181223	
3/23/2004	417	LEGAL EXP	\$1,776.31	Richardson Plowden & Robinson	8295776	
6/22/2004	417	LEGAL EXP	\$738.62	Richardson Plowden & Robinson	8399050	
8/16/2004	417	LEGAL EXP	\$1,132.32	Richardson Plowden & Robinson	8462421	
9/17/2004	417	LEGAL EXP	\$2,531.63	Richardson Plowden & Robinson	8496450	
10/26/2004	417	LEGAL EXP	\$1,173.68	Richardson Plowden & Robinson	8547016	
11/9/2004	418	OTHER EXP	\$3,070.65	Meridian Consulting	8568859	
12/1/2004	417	LEGAL EXP	\$697.20	Richardson Plowden & Robinson	8589980	
12/27/2004	434	PART SUB REC	\$944.60	Return - overpayment check #7311348		
1/21/2005	418	OTHER EXP	\$507.02	Meridian Consulting	8647987	
4/18/2005	417	LEGAL EXP	\$260.51	Richardson Plowden & Robinson	8737569	
9/9/2005	417	LEGAL EXP	\$428.64	Richardson Plowden & Robinson	8820852	
11/1/2005	418	OTHER EXP	\$1,562.50	Meridian Consulting	8843740	
8/12/2005	417	LEGAL EXP	\$890.93	Richardson Plowden & Robinson	8845075	
8/12/2005	417	LEGAL EXP	\$243.80	Richardson Plowden & Robinson	8845076	
11/10/2005	417	LEGAL EXP	\$870.24	Richardson Plowden & Robinson	8930528	
12/13/2005	417	LEGAL EXP	\$1,796.60	Richardson Plowden & Robinson	8959817	
1/18/2006	417	LEGAL EXP	\$1,389.19	Richardson Plowden & Robinson	8992197	
2/21/2006	417	LEGAL EXP	\$624.90	Richardson Plowden & Robinson	9022805	
2/21/2006	417	LEGAL EXP	\$1,652.63	Richardson Plowden & Robinson	9022806	
2/21/2006	417	LEGAL EXP	\$1,117.80	Richardson Plowden & Robinson	9022807	
3/14/2006	417	LEGAL EXP	\$419.10	Richardson Plowden & Robinson	9043489	
3/14/2006	417	LEGAL EXP	\$165.00	Richardson Plowden & Robinson	9043490	
3/22/2006	417	LEGAL EXP	\$543.10	Richardson Plowden & Robinson	9050433	
4/18/2006	417	LEGAL EXP	\$413.95	Richardson Plowden & Robinson	9077724	
4/18/2006	417	LEGAL EXP	\$585.40	Richardson Plowden & Robinson	9077725	
5/12/2006	417	LEGAL EXP	\$760.48	Richardson Plowden & Robinson	9100553	
6/12/2006	417	LEGAL EXP	\$1,117.50	Richardson Plowden & Robinson	9125202	
6/12/2006	417	LEGAL EXP	\$812.75	Richardson Plowden & Robinson	9125203	
6/12/2006	417	LEGAL EXP	\$2,355.29	Richardson Plowden & Robinson	9125204	
7/17/2006	417	LEGAL EXP	\$1,127.60	Richardson Plowden & Robinson	9154012	
7/17/2006	417	LEGAL EXP	\$2,085.70	Richardson Plowden & Robinson	9154013	
8/14/2006	417	LEGAL EXP	\$991.30	Richardson Plowden & Robinson	9179001	
8/14/2006	417	LEGAL EXP	\$2,301.64	Richardson Plowden & Robinson	9179002	
8/14/2006	417	LEGAL EXP	\$1,531.64	Richardson Plowden & Robinson	9179003	
9/19/2006	417	LEGAL EXP	\$2,192.19	Richardson Plowden & Robinson	9209741	

Phoenix Contract Glass

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				Payee	Check #	Notes
9/19/2006	417	LEGAL EXP	\$2,591.89	Richardson Plowden & Robinson	9209742	
9/19/2006	417	LEGAL EXP	\$3,708.51	Richardson Plowden & Robinson	9209743	
9/19/2006	417	LEGAL EXP	\$1,861.56	Richardson Plowden & Robinson	9209744	
10/10/2006	417	LEGAL EXP	\$1,122.50	Richardson Plowden & Robinson	9228686	
10/10/2006	417	LEGAL EXP	\$1,338.10	Richardson Plowden & Robinson	9228687	
10/10/2006	417	LEGAL EXP	\$2,093.30	Richardson Plowden & Robinson	9228688	
11/8/2006	418	OTHER EXP	\$1,195.91	NGM Insurance	9255157	
11/9/2006	418	OTHER EXP	\$1,000.00	Meridian Consulting	9256326	
11/28/2006	417	LEGAL EXP	\$6,395.84	Richardson Plowden & Robinson	9269970	
12/5/2006	418	OTHER EXP	\$1,031.96	Meridian Consulting	9276175	
12/22/2006	417	LEGAL EXP	\$12,851.23	Richardson Plowden & Robinson	9293287	
12/28/2006	418	OTHER EXP	\$1,483.36	NGM Insurance	9297012	
1/9/2007	418	OTHER EXP	\$6,484.88	Meridian Consulting	9306643	
1/15/2007	418	OTHER EXP	\$1,787.46	NGM Insurance	9311088	
1/24/2007	417	LEGAL EXP	\$7,639.10	Richardson Plowden & Robinson	9318622	
1/24/2007	417	LEGAL EXP	\$1,650.96	Richardson Plowden & Robinson	9318623	
1/24/2007	417	LEGAL EXP	\$14,865.05	Richardson Plowden & Robinson	9318624	
1/24/2007	417	LEGAL EXP	\$3,277.86	Richardson Plowden & Robinson	9318625	
2/6/2007	418	OTHER EXP	\$4,887.42	Meridian Consulting	9329192	
2/9/2007	417	LEGAL EXP	\$1,365.18	Richardson Plowden & Robinson	9333973	
2/9/2007	417	LEGAL EXP	\$204.38	Richardson Plowden & Robinson	9333974	
2/2007	417	LEGAL EXP	\$1,455.83	Richardson Plowden & Robinson	9335081	
2/2007	417	LEGAL EXP	\$2,077.19	Richardson Plowden & Robinson	9370416	
3/26/2007	417	LEGAL EXP	\$143.77	Richardson Plowden & Robinson	9370417	
3/26/2007	417	LEGAL EXP	\$908.02	Richardson Plowden & Robinson	9370418	
4/17/2007	417	LEGAL EXP	\$4,880.88	Richardson Plowden & Robinson	9392339	
5/7/2007	418	OTHER EXP	\$62.50	Meridian Consulting	1009289	
5/8/2007	418	OTHER EXP	\$1,292.27	NGM Insurance	101969	
5/15/2007	417	LEGAL EXP	\$12,888.51	Richardson Plowden & Robinson	1016742	
6/11/2007	417	LEGAL EXP	\$12,841.98	Richardson Plowden & Robinson	1038096	
7/16/2007	417	LEGAL EXP	\$15,159.43	Richardson Plowden & Robinson	1066589	
8/8/2007	417	LEGAL EXP	\$22,294.06	Richardson Plowden & Robinson	1088216	
8/8/2007	418	OTHER EXP	\$375.00	Meridian Consulting	1088215	
9/5/2007	418	OTHER EXP	\$1,027.46	Clark and Associates	1109122	
9/12/2007	418	OTHER EXP	\$1,842.64	HOV Services, LLC/Meridian Consulting	1116462	
9/24/2007	417	LEGAL EXP	\$19,434.73	Richardson Plowden & Robinson	1125156	
10/2/2007	418	OTHER EXP	\$400.00	Kerry D. Scott	1132083	
10/3/2007	418	OTHER EXP	\$1,455.05	NGM Insurance	1133504	
10/8/2007	418	OTHER EXP	\$7,860.00	HOV Services, LLC/Meridian Consulting	1138083	
10/9/2007	417	LEGAL EXP	\$18,709.63	Richardson Plowden & Robinson	1139397	
11/6/2007	417	LEGAL EXP	\$1,427.25	Clark and Associates	1162342	
11/12/2007	417	LEGAL EXP	\$8,848.04	HOV Services, LLC/Meridian Consulting	1168328	
11/12/2007	417	LEGAL EXP	\$12,405.69	Richardson Plowden & Robinson	1168329	
12/11/2007	417	LEGAL EXP	\$5,559.59	Richardson Plowden & Robinson	1191854	
12/11/2007	418	OTHER EXP	\$1,312.90	NGM Insurance	1191855	
12/12/2007	418	OTHER EXP	\$595.00	HOV Services, LLC/Meridian Consulting	1193090	

Phoenix Contract Glass

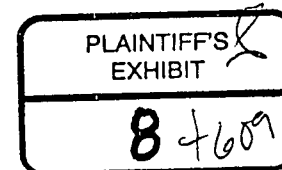
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				Payee	Check #	Notes
1/8/2008	417	LEGAL EXP	\$344.63	Richardson Plowden & Robinson	1212658	
1/8/2008	417	LEGAL EXP	\$3,974.35	Richardson Plowden & Robinson	1212659	
1/8/2008	417	LEGAL EXP	\$285.95	Richardson Plowden & Robinson	1212660	
1/9/2008			\$1,568.67	Bruner Powell Robbins Wall	1208199	
1/16/2008	413	PART PAYMT	\$450,000.00	Bovis Lend Lease	1220264	
1/17/2008	417	LEGAL EXP	\$1,610.00	Meridian Consulting	1221470	
1/29/2008	418	OTHER EXP	\$1,523.35	NGM Insurance	1230341	
2/8/2008	417	LEGAL EXP	\$11,807.39	Richardson Plowden & Robinson	1241090	
2/14/2008	417	LEGAL EXP	\$3,359.15	Richardson Plowden & Robinson	1246176	*see below
2/14/2008	417	LEGAL EXP	\$333.09	Richardson Plowden & Robinson	1246177	
2/14/2008	417	LEGAL EXP	\$118.49	Richardson Plowden & Robinson	1246178	
2/22/2008	418	OTHER EXP	\$6,885.00	Meridian Consulting	1252489	
3/17/2008	417	LEGAL EXP	\$543.70	Richardson Plowden & Robinson		
3/17/2008	417	LEGAL EXP	\$1,130.60	Richardson Plowden & Robinson		
3/18/2008	417	LEGAL EXP	-\$3,359.15	Richardson Plowden & Robinson	1246176	Void above check #1246176
3/18/2008	417	LEGAL EXP	\$1,260.59	Richardson Plowden & Robinson		
3/18/2008	417	LEGAL EXP	\$3,359.15	Richardson Plowden & Robinson	1272606	Reissue
3/19/2008	413	PART PAYMT	\$185.06	Cynthia Day	1273700	
4/7/2008	417	LEGAL EXP	\$872.29	Richardson Plowden & Robinson	1288978	
5/12/2008	417	LEGAL EXP	\$685.89	Richardson Plowden & Robinson	1316003	
9/2008	417	LEGAL EXP	\$1,071.15	Richardson Plowden & Robinson	1321189	
10/2008	417	LEGAL EXP	\$198.85	Richardson Plowden & Robinson	1322223	
6/20/2008	417	LEGAL EXP	\$376.06	Richardson Plowden & Robinson	1346924	
6/20/2008	417	LEGAL EXP	\$157.82	Richardson Plowden & Robinson	1346925	
6/24/2008	417	LEGAL EXP	\$101.72	Richardson Plowden & Robinson	1349091	
7/14/2008	417	LEGAL EXP	\$13.62	Richardson Plowden & Robinson	1364284	
7/22/2008	417	LEGAL EXP	\$3,223.23	Richardson Plowden & Robinson	1370238	
8/11/2008	417	LEGAL EXP	\$1,272.92	Richardson Plowden & Robinson	1386521	
9/11/2008	417	LEGAL EXP	\$245.02	Richardson Plowden & Robinson	1410875	
9/11/2008	417	LEGAL EXP	\$362.47	Richardson Plowden & Robinson	1410876	
9/15/2008	417	LEGAL EXP	\$41.84	Richardson Plowden & Robinson	1412933	
10/21/2008	417	LEGAL EXP	\$622.29	Richardson Plowden & Robinson	1446140	
10/21/2008	417	LEGAL EXP	\$1,144.00	Richardson Plowden & Robinson	1446141	
10/21/2008	417	LEGAL EXP	\$7,712.24	Richardson Plowden & Robinson	1446142	
11/17/2008	417	LEGAL EXP	\$198.00	Richardson Plowden & Robinson	1468160	
11/17/2008	417	LEGAL EXP	\$1,307.73	Richardson Plowden & Robinson	1468161	
12/19/2008	417	LEGAL EXP	\$4,105.18	Richardson Plowden & Robinson	1522382	
1/14/2009	417	LEGAL EXP	\$294.06	Richardson Plowden & Robinson	1540674	
1/16/2009	417	LEGAL EXP	\$131.42	Richardson Plowden & Robinson	1542958	
2/9/2009	417	LEGAL EXP	\$6,934.59	Richardson Plowden & Robinson	1562973	
2/17/2009	417	LEGAL EXP	\$6,108.57	Richardson Plowden & Robinson	1569119	
3/9/2009	417	LEGAL EXP	\$1,712.27	Richardson Plowden & Robinson	1587074	
3/16/2009	417	LEGAL EXP	\$1,184.44	Richardson Plowden & Robinson	1592488	

Payments Made or Monies Owed by National Grange as Related to Phoenix Contract Glass, LLC
Bond S-617325 as March 31, 2009

<u>Payment Made For:</u>	<u>Amount</u>
Legal Fees and Expenses	\$312,558.67
Consultant Fees	\$50,807.74
Settlement in Bovis suit	\$450,000
EFCO Order:	\$154,966.49

Total Monies Paid or Owed by National Grange as of March 31, 2009: \$968,332.29



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RECITALS

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and covenants contained herein, the sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

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1. DEFINITIONS

For purposes of this Agreement, the following defined terms shall have the meanings set forth below:

1.1. "Phoenix" means the Phoenix Contract Glass, LLC and each of its respective past, present, and future directors, officers, shareholders, members, employees, agents, partners, representatives, attorneys, parent and affiliated corporations, subsidiaries, divisions, joint venturers, predecessors, successors, beneficiaries, and assigns.

1.2. "Bovis" means Bovis Lend Lease, Inc. and its past, present, and future directors, officers, shareholders, employees, agents, partners, representatives, attorneys, parent and affiliated corporations, subsidiaries, divisions, joint venturers, predecessors, successors, beneficiaries, and assigns.

1.3. "Hartford Fire" means Hartford Fire Insurance Company.

1.4. "Hartford" means the companies comprising The Hartford Financial Services Group Inc., individually and collectively, including, but not limited to, Hartford Fire, and each of their respective past, present, and future directors, officers, shareholders, employees, agents, partners, representatives, attorneys, parent and affiliated corporations, subsidiaries, divisions, joint venturers, predecessors, successors, beneficiaries, and assigns.

1.5. "Person" means and include a natural person or persons, a group of natural persons acting as individuals, a group of natural individuals acting in collegial capacity (e.g., as a committee, board of directors, etc.), a corporation, partnership, limited liability company or partnership, joint venture, trust or any other unincorporated association, business organization or enterprise, any government entity and any successor in interest, heir, executor, administrator, trustee, trustee in bankruptcy, or receiver of any person or entity.

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1.6. "Policies" means:

- (a) The insurance policies listed on Schedule "A" attached; and
- (b) Any other insurance policies of any kind, known or unknown, issued or allegedly issued by Hartford under which Phoenix is or alleges to be entitled to insurance coverage.

Provided, however, the term "Policies" shall not include: (i) those parts of any workers compensation insurance policy which are required to be maintained pursuant to applicable statutory workers compensation laws or (ii) any life insurance policies.

1.7. "Effective Date Of This Agreement" means the date of the last signature placed hereon, and this Agreement shall be effective as of such date.

1.8. As used in this Agreement, the singular and masculine gender shall mean also the plural and feminine or neuter, as may be appropriate; "it" shall include "he" and "she"; and "each" and "all" includes "each" and "every."

2. PAYMENT

2.1. Payment to Bovis. In consideration for the releases hereinafter given, Hartford Fire shall pay \$1,495,000 to Bovis in accordance with a separate settlement agreement concerning the Construction Claims entered into among Phoenix, Bovis and Hartford Fire (the "Bovis Agreement"). Hartford Fire shall issue payment to Bovis by wire transfer as follows:

Bovis Lend Lease, Inc.
Bank: Wachovia
Location: Atlanta, GA
ABA No.: 061000227
Acct. Name: Bovis Lend Lease, Inc.
Acct. No.: 2000009441150
Project Name: Renaissance on Charleston Harbor

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2.2. Payment to Phoenix. In further consideration for the releases hereinafter given, Hartford Fire shall pay \$140,000 to Phoenix on or before five (5) business days from the first date on which: 1) this Agreement is executed by all signatories other than Hartford Fire Insurance Company; and 2) the Bovis Agreement is executed on behalf of Phoenix, but in no event prior to January 7, 2009. Hartford Fire shall issue payment to Phoenix by wire transfer as follows:

Acct. Name: Stanton Offices, P.A. Trust Account
Acct. No.: 0005122679677
Bank: BB&T
Location: Columbia, SC
ABA No. 053201607

3. RELEASE

3.1. Scope of Release. In consideration for payments set forth in Paragraph 2 above, Phoenix and the individuals signing this document in their capacities as Member in Charge of Winding Up, Member, and Dissociated Member, who also make this release in their individual capacities, hereby fully and forever release and discharge Hartford from any and all claims under the Policies whether actual or alleged, known or unknown, accrued or unaccrued, existing or potential, suspected or unsuspected, that Phoenix or those individuals have or may in the future have against Hartford in any way covered or alleged to be covered by or under the Policies, including but not limited to the Construction Claims. This release of Hartford shall include, but shall not be limited to, any and all claims under the Policies for property damage, bodily injury, personal injury, advertising injury, economic loss, or loss of use. In addition, Phoenix and the releasing individuals hereby withdraw any and all requests, demands, or tenders for defense or indemnity previously submitted to Hartford under the Policies and further surrender, relinquish, and release any further right to tender or present any claims whatsoever to Hartford under the Policies, including but not limited to the Construction Claims. Furthermore, by virtue of the

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foregoing releases. Hartford shall have no duty to defend or indemnify Phoenix or the releasing individuals, with respect to any past, present, or future claim, including but not limited to the defense and/or indemnification of Phoenix in:

1. EFCO Corporation vs. Renaissance on Charleston Harbor, LLC et al., Charleston County C/A Number: 03-CP-10-3239 and Richland County C/A Number: 03-CP-40-160;
2. Lasley et al. v. The Renaissance on Charleston Harbor, LLC et al., Charleston County C/A Number: 07-CP-10-2598; and
3. Longshoreman's Association Local No. 1422 v. Choate Construction Company (re: the ILA building in Charleston, South Carolina).

The release set forth in this Paragraph 3.1 shall include but not be limited to the release and discharge of Hartford from any and all obligations, actual or alleged, known or unknown, accrued or unaccrued, currently existing or which may under any circumstance arise in the future to the fullest extent permitted by law including without limitation, (a) any and all claims whether known or unknown, for improper conduct, bad faith, extra-contractual damages, violation of an alleged duty of good faith and fair dealing or comparable statutory claims, whether seeking compensatory damages, punitive damages, exemplary damages, statutory multiple damages, attorneys' fees, interest, costs, or any other type of relief, and (b) any claims with respect to, relating to, or in any way arising out of allegedly negligent or otherwise improper engineering and/or loss control services provided or allegedly not provided by Hartford to Phoenix.

3.2. Changes In Fact Or Law. The Parties acknowledge that there may be changes in the law with respect to interpretation of coverage under the Policies or otherwise and/or the Parties may hereafter discover facts different from, or in addition to, those which they now believe to be true with respect to any and all of the claims herein released. Nevertheless, the Parties hereby agree

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that the releases set forth above shall be and remain effective in all respects, notwithstanding any changes in the law and/or the discovery of such additional or different facts.

3.3. **Beneficiaries Of Release.** To the extent that the release set forth above runs to the favor of any Persons who are not signatories hereto, this Agreement is hereby declared to be made in and for their respective benefits and uses.

3.4. **No Assignment Of Claims.** Phoenix warrants and represents that none of the claims herein released has been, or will be, assigned or transferred, in whole or in part, to any Person. Phoenix agrees to fully defend, indemnify, protect, save and hold harmless Hartford from and against any such claims, (including, but not limited to, the payment of attorneys' fees and costs actually incurred, whether or not litigation is commenced) based on, in connection with, or arising out of such assignment or transfer, or purported or claimed assignment or transfer. Moreover, Phoenix itself represents, warrants, and agrees that it will not in any way assist any Person in the establishment of any Claim against Hartford that arises out of, results from, or in any way relates to, Hartford's investigation, handling, defense, or settlement by Hartford of Claims released under this Agreement.

4. **CONFIDENTIALITY**

4.1. **Restrictions On Disclosure Of Agreement.** It is a material inducement for the Parties to enter into this compromise and settlement of their disputes and differences that such disputes and differences, and the terms and provisions of this Agreement, shall be, and remain, strictly confidential. Accordingly, neither this Agreement, nor any of its terms, shall be disclosed to any Person, except that this Agreement and its terms may be disclosed: (a) as required by law or court order; (b) to any reinsurer of Hartford, if any, in connection with insurance or reinsurance obligations; (c) to counsel, accountants, and auditors of any of the Parties; (d) in any action or

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proceeding between the Parties where the existence or terms of the Agreement are at issue; or (e) by written agreement of the Parties. If this Agreement or its terms are disclosed pursuant to subparagraphs (a) or (d) above, the party disclosing such information shall give prior written notice thereof to each of the other Parties. If this Agreement or its terms are disclosed pursuant to subparagraphs (b) or (c), the party disclosing such information shall advise the recipient of the provisions of this paragraph.

5. MISCELLANEOUS PROVISIONS

5.1. Judgment Reduction. Phoenix agrees it will not seek to obtain payment from any other insurer of any amount or portion of any amount that may be attributable or allocable to Hartford. In the event any claim for coverage is brought by Phoenix against any insurer other than Hartford and results in an adjudication on the merits; whether in court or another tribunal with jurisdiction, that Phoenix would have been entitled to coverage from Hartford under the Policies, and the recovery Phoenix obtains against such insurer includes amounts allocable to Hartford, Phoenix agrees that it will not seek to obtain payments from such insurer, or to enforce any related judgment to the extent of any sum that represents Hartford's allocable share of any obligation owed to Phoenix.

In the event that any insurer obtains a judgment or binding arbitration award against Hartford as a result of a claim for contribution, subrogation, indemnification or other similar claim against Hartford for Hartford's alleged share or equitable share, or to enforce subrogation rights, if any, with respect to, relating to, or in any way arising out of the Policies, including without limitation, the Construction Claims, Phoenix shall voluntarily reduce its judgment or claim against, or settlement with, such other insurers to the extent necessary to eliminate such contribution, subrogation, indemnification or other similar claims against Hartford. To ensure that such a

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reduction is accomplished. Hartford shall be entitled to assert this paragraph as a defense in any claim against it for any such portion of the judgment or binding arbitration award, and shall be entitled to have the court or appropriate tribunal issue such orders as are necessary to effectuate the reduction to protect Hartford from any liability for the judgment, binding arbitration award, or claim.

5.2. **Amendments.** Neither this Agreement nor any term set forth herein may be changed, waived, discharged, or terminated except by a writing signed by the Parties.

5.3. **No Precedential Value.** The settlement reflected in this Agreement shall be without precedential value, and it is not intended to be, nor shall it be construed as, an interpretation of any insurance policies. It shall not be used as evidence, or in any other manner, in any court or other dispute resolution proceeding, to create, prove, or interpret the obligations of Hartford under any insurance policies issued to Phoenix or to any other Person.

5.4. **Agreement Voluntarily Entered Into By Each Of The Parties.** This Agreement is executed voluntarily by each of the Parties without any duress or undue influence on the part, or on behalf, of any of them. The Parties represent and warrant to each other that they have read and fully understand each of the provisions of this Agreement.

5.5. **Interpretation.** This Agreement has been negotiated at arm's length and between and among Persons sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, this Agreement was drafted by experienced and knowledgeable legal counsel for each of the Parties. Accordingly, none of the Parties shall be presumptively entitled to have any provisions of the Agreement construed against any of the other Parties in accordance with any rule of law, legal decision or doctrine.

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5.6. No Admission Of Liability/No Precedent Setting. The Parties agree that this Agreement is the result of a compromise of disputed claims, and that the execution and delivery of this Agreement by any of the Parties shall not constitute or be construed as an admission of any liability, a course of performance, or wrongdoing on the part of any of them, nor shall it be used as evidence of precedent with respect to claims for coverage under the Policies. The Parties acknowledge that this Agreement is not, and cannot be construed as, any admission by Hartford that any defense, indemnity, or other coverage obligation exists under the Policies, or that Hartford has any other obligation of any nature whatsoever with respect to the Policies. Except as expressly otherwise provided herein, the Parties reserve all their rights, positions and defenses.

5.7. Entire And Integrated Agreement. This Agreement is intended by the Parties as a final expression of their agreement and is intended to be a complete and exclusive statement of the agreement and understanding of the Parties with respect to the subject matters contained herein. This Agreement supersedes any and all prior promises, representations, warranties, agreements, understandings, and undertakings between or among the Parties with respect to such subject matters and there are no promises, representations, warranties, agreements, understandings, or undertakings with respect to such subject matters other than those set forth or referred to herein.

5.8. No Assignment. Neither this Agreement nor the rights and obligations set forth herein shall be assigned without the prior written consent of the Parties.

5.9. No Third Party Beneficiaries. Nothing in this Agreement is intended or shall be construed to give any Person, other than Hartford and Phoenix and their respective successors and permitted assigns, any legal or equitable right, remedy, or claim under or in respect to this Agreement or any provisions contained herein: this Agreement and any conditions and provisions

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hereof being and intended to be for the sole and exclusive benefit of Hartford and Phoenix as well as each of their respective successors and permitted assigns, and for the benefit of no other Person.

5.10. Severability. If any provisions of this Agreement, or the application thereof, shall for any reason or to any extent be construed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, and application of such provisions to other circumstances, shall remain in effect and be interpreted so as best to reasonably effect the intent of the Parties. Notwithstanding the foregoing, if either the payment (Paragraph 2.1), the release (Paragraph 3.1), the indemnification provision (Paragraph 5.1), or the judgment reduction provision (Paragraph 6.1) are found to be unenforceable or invalid by a court of competent jurisdiction, then such invalidity or unenforceability shall be cause for rescission of the entire Agreement at the election of the Party whose interests are injured by the finding of invalidity or unenforceability. In such case, the Settlement Sum paid hereunder shall be returned with 5% annual interest and the releases and indemnifications made null and void.

5.11 Notice. Any notice or request required or desired to be given pursuant to this Agreement shall be sufficient if made in writing and sent by first class mail, postage prepaid, addressed as follows or as the Parties subsequently may direct in writing:

a. As to Hartford:

Matthew J. Scott
Vice President
Complex Claim Group
The Hartford
Hartford Plaza
Hartford, CT 06115

b. As to Phoenix:

C. Brent Chitwood
131 Casco Bay Rd.

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Irmo, S.C., 29063

5.1-2. Headings. The section titles, captions, and headings contained in this Agreement are inserted as a matter of convenience and for reference, and shall in no way be construed to define, limit, or extend the scope of this Agreement or the effect of any of its provisions.

5.1-43. Recitals. The recitals set forth at the beginning of this Agreement shall not be admissible to prove the truth of the matters asserted therein in any action or proceeding involving any of the Parties (other than an action or proceeding brought to enforce the terms of this Agreement), nor do any of the Parties intend such recitals to constitute admissions of fact by any of them.

5.14. Additional Representations and Warranties. Each of the Parties represents and warrants that it is fully authorized to enter into this Agreement. In addition, each of the corporate parties that is still in existence as of the Effective Date Of This Agreement represents and warrants that (i) it is duly organized and existing in good standing under the laws of the United States, (ii) it has taken all necessary corporate and internal legal actions to duly approve the making and performance of this Agreement and that no further corporate or internal approval is necessary, and (iii) the making and performance of this Agreement will not violate any provision of law or the party's articles of incorporation, charter, or by-laws. In addition, each of the individuals signing this Agreement represents and warrants that they are authorized to enter into this Agreement on behalf of Hartford Fire and Phoenix, respectively, as those terms are defined in this Agreement.

5.15. Additional Necessary Documents. The Parties, and each of them, agree to execute such additional documents as may be reasonably required in order to carry out the purpose and intent of this Agreement, or to evidence anything contained herein.

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5.16. Execution In Counterparts. This Agreement may be signed in multiple counterparts and the separate signature pages executed by the Parties may be combined to create a document binding on all of the Parties and together shall constitute one and the same instrument. **IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the date set forth opposite the respective signatures below.

PHOENIX CONTRACT GLASS

Name: Brent Chitwood

Title: Member in Charge of Winding Up

PHOENIX CONTRACT GLASS

Name: Ronald L. Clark

Title:
Member

PHOENIX CONTRACT GLASS

Name: Henry H. Graham III

Title: Dissociated Member

**HARTFORD FIRE
INSURANCE COMPANY**

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Matthew J. Scott

Matthew J. Scott
Vice President

Environmental & Toxic Tort Clinic

1/08/07

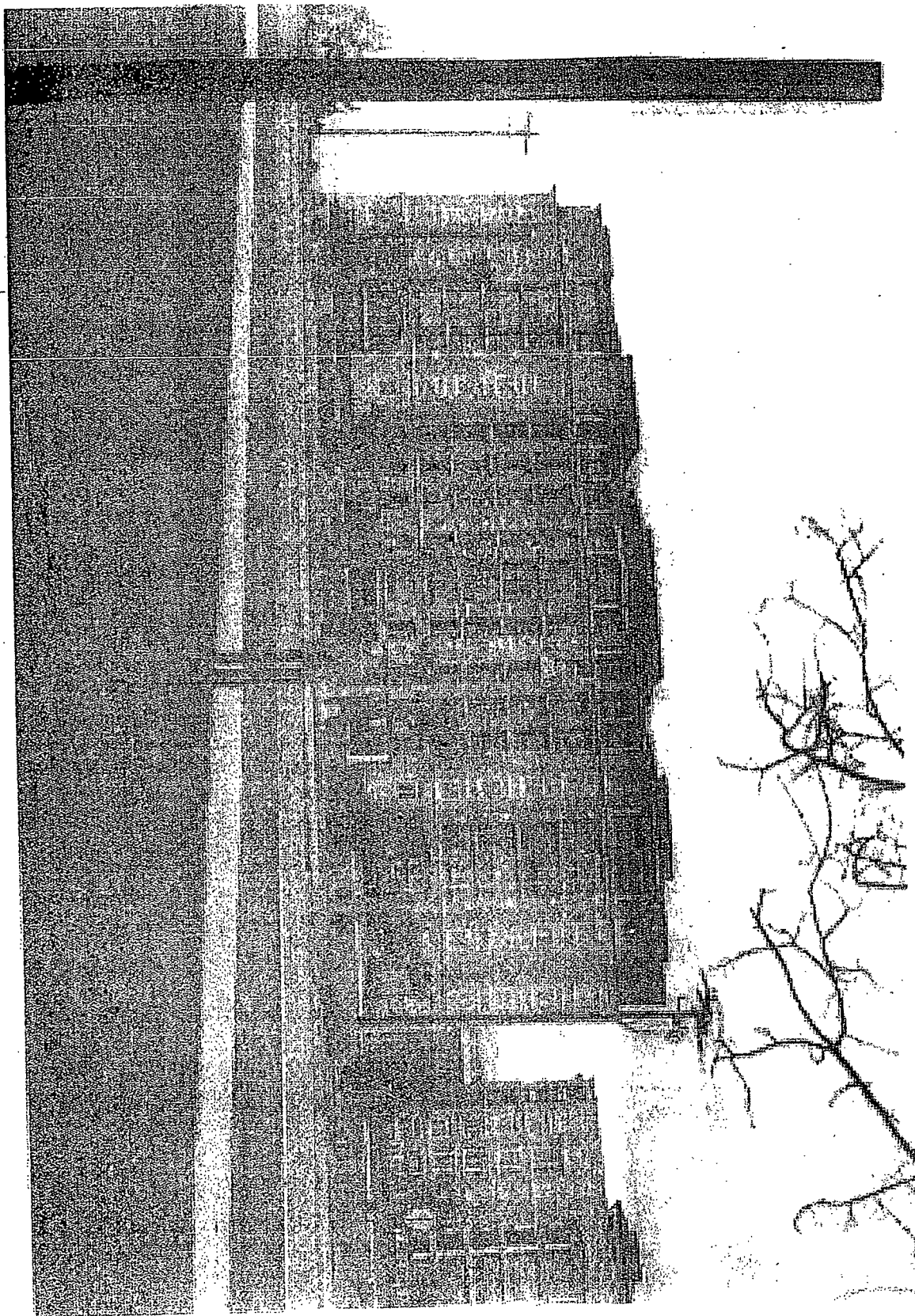
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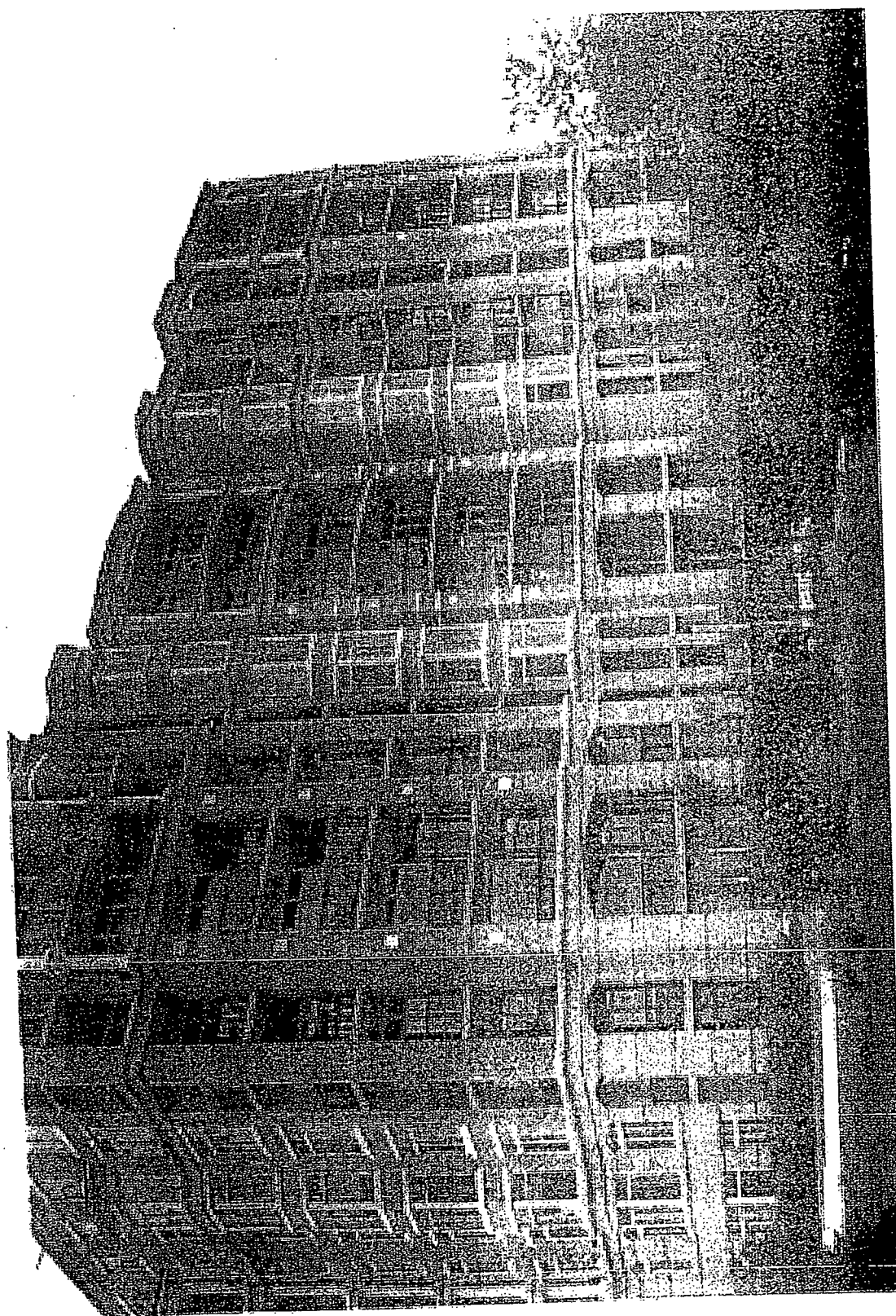
SCHEDULE A

22 SBA LT8152	(07/01/00 – 07/01/01)
22 SBA LT8152	(07/01/01 – 07/01/02)
22 SBA LT8152	(07/01/02 – 07/01/03)
22 SBA LT8152	(07/01/03 – 07/01/04)
22 SBA LT8152	<u>(07/01/04 – 08/12/04)</u>

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PLAINTIFFS EXHIBIT	11	2
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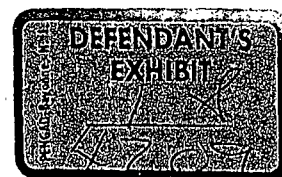
Defendants' exhibit 1

55 West Street
P. O. Box 2300
Keene, NH 03431
603-352-4000
603-358-1349

**National Grange
Mutual**

Fax

To: <u>Brent Ch. Wood</u>	From: <u>Eli Cinq-Mars</u>
Fax:	Pages: <u>5</u>
Phone:	Date: <u>2/12/2002</u>
Re:	CC:
☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle	



National
Grange
Mutual
Insurance
Company



55 West Street
P. O. Box 2300
Keene, NH 03431-7000
(603) 352-4000

Via Fax 843-881-8430

K. Allen Lindsey
Bovis Lend Lease
20 Bridgeside Blvd
Mount Pleasant, SC 29464

RE: Bond No.: S-617325
Principal: Phoenix Contract Glass
Obligee: Bovis Lend Lease
Project: Renaissance on Charleston Harbor

Dear Mr. Lindsey:

As you know, National Grange Mutual has initiated its investigation regarding the claim against National Grange Mutual and Phoenix Contract Glass. Thank you for taking the time to meet with Mr. Scott.

A brief review of this project may be in order. Our underwriter was notified regarding issuing a bond in the amount of \$914,835.00 to the obligee, Bovis Lend Lease, Inc., on the Renaissance on Charleston Harbor Project. ~~Although the project has more than one phase, our bond in the amount of \$914,835.00 covered Phase I.~~ The Performance & Payment Bond was issued with a Power of Attorney having a limit of \$1,000,000.00.

Subsequently, it is my understanding that a change order in the amount of \$719,920.00 was issued on or about August 9, 2001 adding phase II of the project to the contract. I understand that essentially, this phase covers building B. This change order was issued under protest by Phoenix Contract Glass along with a protest letter dated August 9, 2001. I understand the basis for issuing the change order was in the contract, however there was a January 31, 2001 deadline with which to issue the change order. Bovis exceeded the timeline stated.

More importantly, Bovis never formally requested increased bonding from National Grange Mutual for the second phase. Also, our principal did not make such a request nor tender any additional premium. At no time did the surety assent to any additional liability. Rather, it is my understanding that the only communication between the obligee and the surety was on a status request form issued by the surety to the obligee. The obligee hand wrote the new contract amount on the General Status Inquiry. Clearly, this cannot be construed as assent by the surety.

K. Allen Lindsey
Bovis Lend Lease
20 Bridgeside Blvd
Mount Pleasant, SC 29464

Page -2-

National Grange Mutual bonded the \$914,000.00 project at the Renaissance Charleston Harbor that was phase I or building A. A subsequent change order may have been incorporated into our principal's contract, however, no steps were taken to acquire the additional bonding. (Perhaps you anticipated getting the bonding from another surety.)

There is no line item for bonding on phase II in the pay request. This indicates that the bond premium is yet unpaid. Therefore, National Grange Mutual does not have any liability for work emanating from building B (or Phase II). The surety at this point is not entirely clear as to some of the distinctions between Phase I and Phase II, other than generally it is Building A and Building B.

If the obligee's (Bovis Lend Lease) position is our principal's subcontract automatically incorporates the change order into the underlying contract and its bond this is a material change to the contract.

Where there is a material change in the risk, the surety will be discharged as a matter of law. *Employers Ins. v. Construction Mgt. Eng.* 297 SC 354, 377 SE2d 119 (S.C. App. 1989). The addition of Phase II (Building B) was clearly a material change in the risk given the overall scope of the work and given that the power of attorney limited any bond to \$1 Million. This would only cover Phase I (Building A).

If you contend that the bond covers Building B, please advise immediately as this will discharge National Grange of all liability under the bond. National Grange will return the original bond premium since it is being discharged.

Bovis Lend Lease received a Notice of Lien from EFCO in excess of \$772,000.00. National Grange Mutual is currently trying to ascertain which part of the EFCO lien is based on building A and which part is based on building B. Once we are able to ascertain that information, we will be in a better position to address the lien. I previously suggested that Bovis Lend Lease acquire a Release of Lien Bond in order to mitigate its damage. You indicated by phone, that you did not wish to incur additional liability. I am not sure which additional liability you may incur as EFCO would still have a bond claim against Bovis Lend Lease's surety bond with the owner. Whatever liability Bovis Lend Lease would have under the Release of Lien Bond, it also has under its Payment Bond. National Grange Mutual will not issue a Release of Lien Bond for a project (phase II) it did not bond as then we would incur liability where we had none.

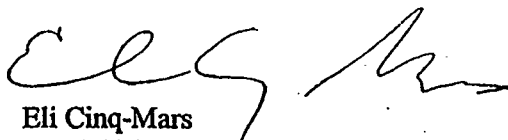
K. Allen Lindsey
Bovis Lend Lease
20 Bridgeside Blvd
Mount Pleasant, SC 29464

Page -3-

Lastly, I understand there is both warranty type issues at building A as well as completion aspects of phase I. We are continuing to investigate that matter and will advise you as soon as possible as to our position. We would ask that Bovis Lend Lease pledge contract balances, and retainage for phase I, to the completion of the work. Based on the last pay request, we understand those unpaid contract balances are \$41,577.75 and the retainage is \$85,973.83 as of 12/31/01. I understand that payment for pay request No.9 (thru 1/31/02) has not been issued. I understand the remaining work to be completed on phase I of the contract is approximately \$40,000.00. Based on these numbers, we anticipate our consultant, Kerry Scott, will be returning to Charleston to perform additional analysis. I am sure he will be contacting you regarding both the completion of phase I as well as requesting an itemization of the warranty items related to EFCO.

Thank you for your attention in this matter. Please do not construe this letter as a waiver of any of the rights that National Grange Mutual or any other party may have regarding this matter. If the facts, as I have outlined above are somehow incorrect, I would appreciate if you would correct them to the best of your knowledge. Please provide any additional supporting documentation you may have regarding the correction. I look forward to hearing from you.

Sincerely,



Eli Cinq-Mars
Bond Claims Attorney

Cc: Michael Utley
Francis Mack
C. Brent Chitwood

ECM/lis

National Grange's motion for directed verdict, JNOV, new trial, etc., dated April 14, 2009

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

v.

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

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

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

) NATIONAL GRANGE MUTUAL
) INSURANCE COMPANY'S POST-
) TRIAL MOTIONS

1. The Plaintiff, National Grange Mutual Insurance Company, renews its Motion for a directed verdict pursuant to Rule 50(a), South Carolina Rules of Civil Procedure and entry of Judgment in the amount of \$968,332.29 on the grounds that neither liability nor damages were disputed. The Indemnity Agreement provides that the Plaintiff is entitled to recover all monies expended or liabilities incurred, including attorneys fees. There was no evidence that payments were not made or liability incurred, nor was there any evidence that the amounts were unreasonable.

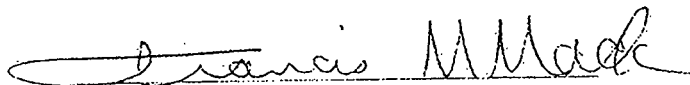
2. The Plaintiff, National Grange Mutual Insurance Company, moves for Judgment Not Withstanding the Verdict pursuant to Rule 50(b), South Carolina Rules of Civil Procedure, and for entry of Judgment in the amount of \$968,332.29 on the grounds that neither liability nor damages were disputed. The Indemnity Agreement provides that the Plaintiff is entitled to recover all monies expended or liabilities incurred, including attorneys fees. There was no evidence that payments were not made or liability incurred, nor was there any evidence that the amounts were unreasonable. The Jury's verdict was the result of passion, caprice, prejudice, or partiality in that it is unsupported by the evidence.

3. In the alternative, the Plaintiff, National Grange Mutual Insurance Company, moves for a new trial pursuant to Rule 50(b) and Rule 59, South Carolina Rules of Civil Procedure, on the issues of damages alone on the grounds that the Jury determined that the Defendants were liable under the Indemnity Agreement and that the Jury's verdict on damages was the result of passion, caprice, prejudice or partiality and is unsupported by the evidence.

4. In the alternative, the Plaintiff moves for a new trial nisi additur pursuant to Rule 50(c) and Rule 59 on the grounds that the Jury's verdict on damages was the result of passion, caprice, prejudice or partiality and is unsupported by the evidence.

5. The Plaintiff moves for the entry of Judgment in the amount of \$968,332.29 pursuant to the Thirteenth Juror Doctrine, Younans ex rel. Elmore v. South Carolina Department of Transportation, 380 S.C. 263, 670 S.E. 2nd 1, (S.C. App. 2008) and Rule 59, South Carolina Rules of Civil Procedure, or in the alternative, for a new trial on the grounds that the Jury's verdict was the result of passion, caprice, prejudice or partiality and is unsupported by the evidence.

Respectfully submitted,



Francis M. Mack, S.C. Bar #3505
Emily R. Gifford, S.C. Bar #72785
RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR THE PLAINTIFF,
NATIONAL GRANGE MUTUAL INSURANCE
COMPANY

Columbia, South Carolina
April 14, 2009

The Clarks' memorandum in opposition to National Grange's
post-trial motion, dated July 15, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

**DEFENDANTS' MEMORANDUM IN
OPPOSITION TO
NATIONAL GRANGE MUTUAL
INSURANCE COMPANY'S
POST-TRIAL MOTIONS**

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The defendants Clark oppose the motions of National Grange Mutual Insurance Company for directed verdict, JNOV, new trial, and new trial nisi additur. In those motions, National Grange asserts that "neither liability nor damages were disputed," and that, in the alternative, the jury's verdict was the result of passion, caprice or prejudice.

SHORT RESPONSE

National Grange's original directed verdict motion at the close of evidence stated grounds so limited and inspecific that it was ineffectual to present or preserve a directed verdict motion. It was therefore properly denied on its face as insufficient under Rule 50(a), SCRPC.

As an additional sustaining ground for denial of the motion, the motion, taken on its face in its general form, is incorrect. There was a jury question on both of the extremely general matters to which National Grange alluded. Namely, there was a jury question on "liability" and a jury question on "damages." National Grange presented no issue any more specific than this, and no further argument should be required of the defendants now than to show that liability was disputed and that damages were disputed. No more specific argument should be permitted from National Grange.

As an additional sustaining ground for denial of the motion, even if one were to consider grounds which were possible for National Grange to raise, but which it did not raise, the record would not support the motion. There was sufficient evidence on the numerous arguments and defenses available to the defendants at the time of National Grange's directed verdict motion. Additionally, much of National Grange's evidence lacked reliability. The directed verdict motion was therefore properly denied by the trial judge for these reasons as well.

The "renewed" motion for directed verdict cannot expand the original motion, and therefore also must also be denied. One cannot wait until after closing arguments, after jury

charges, and after verdict to develop and present grounds for directed verdict.

The renewed motion for directed verdict, in any event, is identically limited and inspecific in its grounds, and must be denied for that reason as well.

The motion for JNOV can only be based on the same grounds and be of the same scope as the motion for directed verdict, and must be denied for the same reasons. In any event, the motion for JNOV states the identical limited inspecific grounds as the motion for directed verdict, which cannot be amplified after the time for making the motion has passed.

Even if the motion for JNOV or the renewed motion for directed verdict were viewed as examining the sufficiency of the evidence only under the law and defenses argued and charged to the jury, the evidence was still sufficient to present a jury question under the law charged to the jury, and the motions must be denied.

The motions for new trial and new trial nisi additur must also be denied because the case was tried with a clean record virtually devoid of any preserved error affecting National Grange. The motions must also be denied because, having failed to effectively raise an issue as to sufficiency of evidence in a directed verdict motion, National Grange cannot raise sufficiency of evidence as a ground for new trial. The motions must also be denied because there is evidence supporting the verdict. The motions must also be denied because there is nothing to even suggest that the jury's verdict was the result of passion, caprice or prejudice.

NATURE OF CASE AND COURSE OF TRIAL

This was a suit brought by National Grange on an indemnity agreement given as part of a contract of surety in which Phoenix Contract Glass, LLC was the principal, and National Grange was the surety. Under this surety contract, National Grange issued payment and performance bonds covering Phoenix's glass and glazing work on a high-rise condominium project in Mt.

Pleasant, South Carolina.

The project had a number of disputes and problems, eventually involving numerous parties. Among others, claims were made on the bonds issued by National Grange. Various litigation occurred. Eventually, National Grange sued the defendants.

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

The case was tried to a jury of twelve, plus an alternate. National Grange was represented by an excellent and fairly large law firm in Columbia, and had two lawyers attending the trial throughout. The jury was allowed to take notes, and did so.

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

At the conclusion of evidence, none of the Clarks' defenses had been dismissed or withdrawn. All the Clarks' arguments as to the contractual or equitable claims of National Grange remained available. National Grange moved for directed verdict on the limited grounds that "there was no dispute as to liability or damages." The Clarks' counsel pointed out that they did dispute liability and damages and had been doing so before and during the last three days. The Clarks' counsel further speculated on other potential grounds for a motion and addressed any concerns of the court. The motion of National Grange was denied.

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

During the charge conference, the trial judge expressed concern with a proposed jury charge on bad faith which indicated that the presence of bad faith would require a denial of all recovery to the party seeking indemnification.² The trial judge was concerned that the charge should not explicitly prevent the jury from apportioning or allocating the bad faith rather than applying it, if at all, as a total bar. The charge was altered. The altered charge was given.

During the trial, National Grange took no exception at all to the charge delivered by the trial judge to the jury, requested no additional or curative charges on bad faith or breach of contract, and also took no exception to the form in which the verdict was to be delivered. The trial judge's standard charges also included a charge to the effect that corporations should be treated the same as people in the eyes of the law.

Among the instructions given by the trial judge to the jury in a comprehensive charge on the law of contracts and other matters was the following charge on the defense of bad faith:

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

Good faith means honesty in fact in the conduct of the concerned transaction. Good faith performance or enforcement of a

² This would not have been an incorrect charge. See, e.g., Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200 (1993)(bad faith as total bar if materially related to relief sought); Associated Indemnity Corporation v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1997) (good faith as condition precedent, absence of which bars all relief); Hartford v. Tanner, 910 P.2d 872 (Kan. App. 1996) (circumstances of case required conclusion that "nothing was recoverable"); PSE Consulting, Inc. v. Frank Mercede and Sons, Inc., 838 A.2d 135 (Conn. 2004) (affirming jury verdict for nominal damages for surety accompanied by jury finding that principal had not breached indemnity agreement); and Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 376-377 (2001) (implying use as bar and citing Associated Indemnity).

contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as bad faith because they violate community standards of decency, fairness or reasonableness.

A principal may assert a surety's bad faith as a defense to indemnification. A principal may use bad faith as a shield in contract against a surety seeking indemnification.³

There being no exception to this charge by National Grange nor any other exception to the charges, nor requests for additional charges, the law as charged to the jury is, as to National Grange, the "law of the case."

The jury deliberated for about three and a half hours (from approximately 2:55 p.m. to 6:30 p.m.) on Wednesday, April 8th, and, having been prodded gently by the trial judge around 6:00 p.m. with no objection, returned a verdict in favor of National Grange for \$10,000. The jury's verdict reflected under one reasonable view, a determination that about 99% of the actions of National Grange were affected by bad faith.

The court granted National Grange ten days – until Monday, April 20, 2009 – to file post-trial motions. National Grange filed post-trial motions dated April 14, 2009. The time for grounds for motions has now passed.

National Grange has "renewed" its motion for a directed verdict for a specific dollar amount of \$968,332.29. National Grange has moved for judgment notwithstanding the verdict

³ These charges were supported by the following authorities, among others: Restatement (Second) of Contracts § 205 and *id.*, cmt. a (1981); Masterclean, Inc. v. Star Insurance Co., 347 S.C. 405, 414, 556 S.E.2d 371, 377 (2001) (citing Bernard L. Balkin & Keith Witten, Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety, 28 Tort & Ins. L.J. 611, 623 (1993), Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276 (Tex. 1998), and American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998)).

for the same amount. National Grange has moved in the alternative for new trial. National Grange has moved for new trial nisi additur. National Grange has additionally moved for an increased money judgment or new trial under the 13th juror doctrine.

ARGUMENT AND DISCUSSION

A. Directed Verdict Improper

1. Lack of Specificity and Germaneness of Grounds Stated

In asking for a directed verdict, National Grange advances as its sole alleged grounds, that “neither liability nor damages were disputed.” (National Grange’s Motion, ¶1.) This statement is far too general and inspecific to be sufficient under Rule 50(a), SCRCP.

This statement does nothing to apprise the trial judge or the opposing party of the specific issues of law to be argued, leaving them to guess. The issues cannot be supplied later by memorandum, after the time for making the motion has passed. “A motion for directed verdict shall state the specific grounds therefor.” Rule 50(a), SCRCP; cf. Rule 7(b), SCRCP (a motion “shall state with particularity the grounds therefor”).

National Grange’s motion for directed verdict at trial was similarly limited.

If the motion were to be considered in its extremely general form, it would be sufficient for the defendants simply to point out in opposition, generally, that, to the contrary, both liability and damages were disputed.

The defendants raised defenses in their answers. There was a three-day trial.

Both Mr. Chitwood and Mr. Clark – amidst a presentation of their defenses -- testified at trial that they did not dispute signing the indemnity agreement, but that based upon the handling of the bond claims by National Grange, they did not agree that they were liable to indemnify National Grange at all and did not agree the expenditures were reasonable.

There was also a credibility problem causing National Grange to fail in its burden of proof as to the rationale for, and existence of, many of its alleged damages as well. National Grange introduced some very limited damages exhibits and adduced some very limited damages testimony, but the defendants did not admit the truth of all this limited evidence.

As an additional statement of the putative grounds of undisputed liability and damages, National Grange argues "there was no evidence that payments were not made or liability incurred, nor was there any evidence that the amounts were unreasonable." (NG Mot., ¶

1.) This statement does nothing to add specificity. This statement ignores liability completely. Again, this assertion is far too vague to provide grounds for a motion, and does not address -- at all -- the defenses raised by the defendants and tried to the jury.

National Grange raised no specific issue as to the Clarks' defenses in its motion for directed verdict. Therefore, National Grange did not preserve any such issues for argument now. Accordingly, argument by the defendants is unnecessary, and National Grange's motion for directed verdict was properly denied.

Rule 50(a), SCRPC requires a party moving for directed verdict to state specific grounds for the motion. Rule 50(a), SCRPC.

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

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

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

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

The directed verdict, JNOV, and, to an extent, new trial motions, may therefore be considered together on this point.

The instant motion is a totally ineffectual pro forma motion for directed verdict. National Grange's motion – directed only to “liability” and “damages” and not to any particular defenses pled or tried -- is so overly broad as to serve no purpose and preserve no issue.

A pro forma request for directed verdict is insufficient. Sierra v. Skelton, 307 S.C. 217, 169, 414 S.E.2d (Ct. App. 1991). National Grange never argued evidence as to any of the defenses in the answer, nor as to contractual defenses suggested by the evidence. Cf. Connolly v. People's Life Ins. Co., 299 S.C. 348, 384 S.E.2d 738 (1989) (motion not saved by being directed to lack of evidence on one of many particular potential material issues; court should not be left to “grope in the dark, searching the record to ascertain the issue being raised”).

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

The requirement of specificity of grounds and argument in a directed verdict motion was similarly explained in Thomas v. Olson, 220 S.W. 3d 627 (Ark. 2005):

We decline to address the merits of the denial of both motions because the motion for a directed verdict was not supported by any specific grounds. Rule 50(a) of the Arkansas Rules of Civil Procedure requires that a party moving for a directed verdict state specific grounds in order to bring the issue to the trial court's attention. See Ark. R. Civ. Pro. 50(a) (Repl. 2005); Wal-Mart Stores, Inc. v.

Tucker, 353 Ark. 730, 120 S.W.3d 61 (2003); Yam's Inc. v. Moore, 319 Ark. 111, 890 S.W.2d 246 (1994); Security Pacific Housing Services, Inc. v. Friddle, 315 Ark. 178, 866 S.W.2d 375 (1993).

Counsel for Ms. Thomas requested a directed verdict on two occasions. First, after defense counsel's final witness had been excused, plaintiff's counsel said, "I would move for directed verdict at this time" to which the trial judge responded, "[w]e will take that up in just a second. I'm going to send the jury out." Second, after excusing the jury, the following colloquy took place between the court and plaintiff's counsel:

THE COURT: Mr. Taylor, do you have a motion?

MR. TAYLOR: Yes, your Honor, on behalf of the plaintiff we move for directed verdict at this time.

THE COURT: The Court is going to deny the motion of Plaintiff for directed verdict. The Court believes this is a fact question for the jury on all counts that are raised, and for the same reasons that the Court denied the motion for directed verdict filed by the defense.

Unquestionably, neither of these requests for a directed verdict on Ms. Thomas' behalf were supported by specific grounds.

In her brief, Ms. Thomas cites to the record and states that "she made specific arguments as to the sufficiency of the proof that was made on her behalf." However, such arguments were made in response to defense counsel's request for a directed verdict on the contract claim. Again, Rule 50(a) requires the party moving for a directed verdict to state specific grounds for the motion. Therefore, a response to an opposing party's motion for a directed verdict is insufficient for purposes of satisfying Rule 50(a). Failure to comply with the requirements enumerated in Rule 50(a) is a sufficient basis for denial of a motion for directed verdict and for affirmance on appeal. See Friddle, 315 Ark. 178, 866 S.W.2d 375; Svestka v. First Nat'l Bank in Stuttgart, 269 Ark. 237, 602 S.W.2d 604 (1980). Requiring specific grounds in a motion for directed verdict is especially necessary when a case involves multiple issues, as does the instant case. *Id.* For these reasons, we conclude that this issue was not preserved for our review.

Similarly, we decline to address the merits of the denial of Ms. Thomas' motion for JNOV. We have observed that a motion for a directed verdict is a condition precedent to moving for JNOV. Friddle, 315 Ark. 178, 866 S.W.2d 375; Wheeler Motor Co. v. Roth, 315 Ark. 318, 867 S.W.2d 446 (1993); Willson Safety Prod. v. Eschenbrenner, 302 Ark. 228, 788 S.W.2d (1990). And, because a motion for JNOV is technically only a renewal of the motion for a directed verdict made at the close of the evidence, it cannot assert a ground not included in the

motion for a directed verdict. Friddle, 315 Ark. 178, 866 S.W.2d 375. We have already concluded that Ms. Thomas' motion for a directed verdict was not supported by specific grounds, and, thus, the merits of the denial were not preserved for our review. It follows that Ms. Thomas' motion for JNOV, which is essentially a renewal of the motion for a directed verdict, was also not preserved for our review.

Thomas v. Olson, 220 S.W. 3d at 631.

In the instant case, making a motion based on broad concepts like "liability" and "damages" is tantamount to stating that the motion is made on "all grounds." This is no more effective than stating, as in Thomas v. Olson, that the moving party seeks "a directed verdict." An overly broad motion of this nature does not "hold the door open" for grounds and arguments to be developed later. Connolly v. People's Life Ins. Co.

As further explained in Dejavue, Inc. v. U.S. Energy Corp., 1999 Ut. App. 355, 993 P.2d 222 (Ct. App. 1999), the requirement of specificity in a directed verdict motion is not excused when making the motion on the basis of challenging the sufficiency of the evidence:

When a party challenges the sufficiency of evidence underlying a trial court's denial of a motion for JNOV or a new trial, "we reverse only if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict." Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991). Furthermore, "the appealing party 'must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992) (quoting Crookston, 817 P.2d at 799).

Because U.S. Energy's challenge to the jury's punitive damages award amounts to an attack on the sufficiency of the evidence, it "must marshal all evidence supporting the verdict" and then show that the evidence cannot support the verdict. Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). "The burden on an appellant to establish that the evidence does not support the jury's verdict . . . is quite heavy." Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987).

In this case, U.S. Energy has failed to meet this burden. U.S. Energy has not marshaled the evidence upon which the jury could have based a finding of willful and malicious conduct, nor has it argued that this evidence was insufficient to support the jury's punitive damage award. U.S. Energy ignores evidence that it

forcibly removed Dejavue from the leased premises, as well as evidence that it failed to negotiate the motel management agreement in good faith. Finally, U.S. Energy overlooks evidence that it converted Dejavue's restaurant equipment and used it for two years without Dejavue's consent.

Instead, U.S. Energy merely states those facts most favorable to its position and ignores the contrary evidence. This is not adequate. See *Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997). We have shown no reluctance to affirm the jury's verdict when a party fails to meet its marshaling burden. See, e.g., *Wright v. Westside Nursery*, 787 P.2d 508, 514 (Utah Ct. App. 1990). Accordingly, we assume the record supports the jury's verdict and refuse to consider U.S. Energy's claim of insufficient evidence.

Dejavue, Inc., 993 P. 2d at 225-226. Just as in Dejavue, Inc., National Grange's motion ignored the issues and the contrary evidence, and should be denied.

Accordingly, National Grange's motion and argument were insufficient and the motion was properly denied.

2. Sufficient Evidence on Defenses

As explained above, the post-trial motions of National Grange are ineffectual for lack of specificity. They must be denied for that reason.

Nevertheless, guessing at potential grounds for National Grange's motion, the defendants would point out to the court that the record contains ample evidence on the defenses raised by the defendants.

There was evidence, for example, that the very first response of National Grange to a claim on the bond, was to threaten repudiation of the bond in its entirety, and that all actions and expenditures thereafter were affected by that repudiation and were unreasonable. There was evidence that National Grange's manner of handling the first claim from the beginning changed the course of action of other parties and resulted in expenditures which could have been avoided. There was evidence that Phoenix's ability to respond to these changes was also affected by

National Grange's course of action and inaction and that Phoenix and the other indemnitors were damaged in at least this amount as a result.

There is evidence in the record to support the defendants' defense of bad faith. Much of this evidence also supports other defenses available at the time of National Grange's original motion for directed verdict. These included: breach of fiduciary duty⁴; equitable estoppel; unclean hands; failure to mitigate damages; excuse of performance of contract due to prior repudiation by the opposing party⁵; and excuse of performance of contract due to prior fundamental material breach by the opposing party.⁶

Constitutional questions about the impingement of JNOV on the right to a jury trial are ordinarily avoided because Rule 50(b) treats the denial of a motion for directed verdict for any

⁴ See American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998)(relationship between a principal and his surety is a confidential or fiduciary relation and the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties)(cited with approval in Masterclean, Inc. V. Star Insurance Co., 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001)); Chapman v. the Citizens and Southern National Bank of South Carolina, 302 S.C. 469, 476, 395 S.E.2d 446, 451 (Ct. App. 1990).

⁵ Two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole. Café Assoc., Ltd. V. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991); Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994). Where one party to a contract repudiates it or refuses to perform it, the other party is not required to perform his promise. See 17A Am. Jur. 2d Contracts § 704 (1991); Black's Law Dictionary 1303 (6th ed. 1990). The purpose of the indemnity was to provide a bond. The bond was supposed to "firmly bind" National Grange to "promptly" pay thereunder. One view of the evidence is that the only thing National Grange did promptly was disaffirm the bond. This excused the defendants from any duty to indemnify.

⁶ When one party to a contract commits a breach so fundamental and substantial as to defeat the purpose of the contract, the other party may repudiate the contract. Ackerman v. McMillan, 314 S.C. 268, 442 S.E.2d 618 (Ct. App. 1994)(Bell, J.). The purpose of the indemnity was to provide a bond. The bond was supposed to "firmly bind" National Grange to "promptly" pay thereunder. One view of the evidence is that the only thing National Grange did promptly was disaffirm the bond. This allowed the defendants to repudiate the indemnity agreement.

reason as a reservation of the judge's right to make a later determination of the legal issues raised in the directed verdict motion. Henderson v. St. Francis Community Hospital, 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988); rev'd on other grounds, 303 S.C. 177, 399 S.E.2d. 767 (1990); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2522 (1995). A motion for JNOV is granted only if the motion for directed verdict could have been granted.

In ruling on a motion for directed verdict, the evidence and all reasonable inferences which are to be drawn from it must be viewed in the light most favorable to the nonmoving party.

Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc., 286 S.C. 261, 332 S.E.2d 781 (Ct. App. 1985). If there is any evidence tending to prove the matters in the nonmoving party's pleadings, or tending to prove other claims or defenses apparent from the issues tried by consent, these motions must be denied. See Olin Mathieson Chemical Corp. v. Planters Corp., 236 S.C. 318, 114 S.E.2d 321 (1960); Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984). It has been stated that all that is needed is a "scintilla of evidence." Sweatt v. Norman, 283 S.C. 443, 322 S.E.2d 478 (Ct. App. 1984).

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

a. When a bond claim was made, National Grange contended it had not been timely provided with a copy of the contract, which National Grange admitted contained an option for Bovis (the general contractor) to add an additional building ("Building B") to the scope of work. (See, e.g., Def. Exh. 1.) To the contrary, the contract was available to, and had been provided to, National Grange. (E.g., Testim. of Chitwood.) Regardless of any pretense as to timely possession of the contract, the entire contract was explicitly incorporated by reference by National Grange into the bond which National Grange signed and issued. (See, e.g., Pl. Exh. 2.)

In any event, the addition of Building B did not alter the stated penal sum of the bond. Yet, National Grange used the incorrect and untrue implication that it had lacked a copy of the contract, in order to argue that National Grange had no liability whatsoever under the bond, or that, if there was liability, it was limited to liability pertaining to Building A. (Testim. of Cinq-Mars; Def. Exh. 1.) During the trial, Mr. Chitwood and Mr. Brownlee explained how the contract and the prospect of including Building B were discussed at length with the National Grange field underwriter. (Testim. of Chitwood and Brownlee.) The field underwriter, implying that she did not have a full copy of the contract, was asked on cross examination approximately three times by Mr. Chitwood, if she did not have a copy of the contract, why did she not ask for it. She never answered the question. (Testim. of Day.)

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

\$1,000,000 limit on the power of attorney to evade any responsibility under the bond at all, or to, at a minimum, evade all responsibility relating to Building B. (Testim. of Cinq-Mars; Def. Exh. 1.)

c. National Grange, through its claims manager, and its letter to Bovis, simultaneously implied a lack of prior knowledge of the contract (and its inclusion of Building B), while exhibiting an acute awareness of a deadline in the contract for electing to proceed with Building B. (Def. Exh. 1.) Again, not only did the bond itself expressly incorporate the entire contract, but the pretense of lack of knowledge of the contract was never explained. (Pl. Exh. 2 and cf. Def. Exh. 1.) The denial of liability under an entire bond, based in part upon the alleged missing of a deadline under a contract, could also be viewed as “unfaithfulness to a common purpose,” or “inconsistency with the justified expectations of Phoenix,” or as “a violation of community standards of decency, fairness, or reasonableness.”

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

e. Mr. Chitwood testified that he received virtually no contact from National Grange with regard to the handling or defense of the bond claim, and that he could only find one letter in all of his records over the years that he received from National Grange. He testified that he could not find any mention of any offer to pay \$120,000 or any other sum during the several years after the first claim was made on the bond, and that the first time he heard National Grange claim it had offered \$120,000 was at this trial in 2009, some 7 years later. The jury could have

treated National Grange's claim to have made such an offer as a false statement or mischaracterization at trial, or could have concluded that if there truly was any discussion on the subject, it was without Phoenix and in total disregard for any information to, or input from Phoenix. Even the purported litigation settlement agreement entered into between National Grange and Bovis contained a confidentiality clause not allowing the agreement to be shown to Phoenix or the other indemnitors. (Pl. Exh. 4 at 9.)⁷

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

⁷ The purported agreement does not bear a signature on behalf of National Grange

g. Mr. Chitwood testified that the failure of National Grange to affirm the bond, or to pay or otherwise assist in good faith with the resolution of the initial payment bond claim by EFCO resulted in Phoenix not getting paid by Bovis, being unable to pay EFCO, and being shorted on operating funds. National Grange did nothing to mitigate the situation. There was further testimony that this lack of good faith resulted in Phoenix being unable to perform other bonded work, and ultimately going out of business. (Testim. of Chitwood.) This not only compromised Phoenix's ability to perform the job in question and protect its rights in the various controversies, but also prevented Phoenix from earning money on other jobs, and ultimately resulted in Phoenix going out of business. (Testim. of Chitwood.) Mr. Chitwood and Mr. Clark testified that there were repair and correction issues which could have been addressed before tropical storm Gaston, and might have mitigated or avoided the emergence of large water intrusion claims after that storm. National Grange's claims manager also testified that, even after tropical storm Gaston, there was a possibility of correcting alleged mistakes by Phoenix or defects in the product provided by Phoenix's supplier, but that, by then, Bovis decided to "go ahead on its own" with a wholesale stripping of the "skin" of the building. The record shows that the decision by Bovis to go ahead on its own came only after – and long after – National Grange had gone on record as threatening to repudiate any liability under the bond whatsoever. (Cf. Def. Exh. 1.)

h. The evidence in the record allows a reasonable inference that National Grange's actions and attitude were driven not simply by caution, but by improper motive or a dishonest purpose, with total and complete self interest, with little or no information to Phoenix, and with not one concern for the effects of National Grange's claims handling (or lack thereof) upon Phoenix. Under this view of the evidence, National Grange acted in bad faith, breached its

fiduciary duties to Phoenix⁸, failed to mitigate its damages, was estopped by its conduct from asserting the indemnity agreement, was estopped by its conduct from asserting a settlement payment to Bovis and other alleged expenditures, excused the indemnitors from performance by National Grange's repudiation of contract and prior substantial breach,⁹ failed to perform conditions precedent,¹⁰ and suffered questionable damages.

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

3. Lack of Credibility in National Grange's Evidence on Alleged Damages

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

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

Among the exhibits was one summary exhibit which claimed payments made "or monies owed" as a result of an order in other litigation. (Pl. Exh. 8.) It was later admitted on cross examination that National Grange was claiming the money was not owed -- that the order was still on appeal, that the opposing party in that litigation had not accepted a check, and that National Grange was contending on appeal that it did not owe any of the money in the order. (Testim. of Cinq-Mars.). If the jury did not trust any of the damages evidence presented by

⁸ See footnote 4, supra.

⁹ See footnotes 5 and 6, supra.

¹⁰ See footnote 2, supra.

National Grange, the distrust came from within the case and not from any outside caprice, passion, or prejudice. The jury learned -- through the evidence -- of the positions taken earlier by National Grange and learned -- through the evidence -- of the positions taken by National Grange in the trial.

Another exhibit simply listed in an elaborate spread-sheet fashion, damages allegedly sustained by the general contractor, Bovis, rather than National Grange. (Pl. Exh. 3.) That exhibit was actually prepared by Bovis. (Testim. of Cinq-Mars.) On direct examination, National Grange's witness indicated that the exhibit represented the potential liability faced by National Grange, as allocated by Bovis, but on cross, admitted some lack of credibility of the document, as it indicated no fault of Bovis in the allocations of fault it purported to make among those working on the crooked building. (Id.) On cross, National Grange's witness was unable to explain how the total purported exposure of National Grange could be as high as indicated in the exhibit and in his testimony, if the bond was limited to \$1,000,000. (Id.) Asked if the exposure was based upon National Grange's bad faith, the witness did not know the answer. (Id.)

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

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

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

Accordingly, even if there had not been such vigorous dispute of liability as there was, there still would have been an issue on the damages not being \$968,332.29. Directed verdict was properly denied for this reason as well.

B. JNOV Improper

Because directed verdict was properly denied, JNOV had to be denied. In the Matter of Care and Treatment of Donald Lee McCracken; Roland v. Palmetto Hills.

In any event, in moving for JNOV, National Grange asserts the exact same limited grounds as it asserted for directed verdict – solely that "neither liability nor damages were disputed." (NG Mot., ¶2.) National Grange raises no issue as to the Clarks' defenses in its

motion for JNOV and the time for making post-trial motions passed conclusively April 20, 2009.¹¹ Therefore, argument by the defendants is unnecessary, and National Grange's motion for JNOV must be denied.

Further, as discussed hereinabove, the jury was charged without objection by National Grange on bad faith, the charge is the "law of the case,"¹² and there was ample evidence in the record to support a jury finding pursuant to the charge. Accordingly, even aside from the fact that National Grange does not raise (or preserve) an issue regarding evidence on the defense of bad faith, JNOV would be inappropriate if National Grange did raise the issue.

C. New Trial Improper

When review is allowed, an appellate court will review the denial of a new trial motion only where the verdict is wholly unsupported by the evidence. Hyload, Inc. v. Pre-Engineered Products, Inc., 308 S.C. 227, 417 S.E.2d 622 (Ct. App. 1992). However, an objection to the sufficiency of evidence cannot be used as the basis for a motion for new trial, unless the objection has been first sufficiently raised in a motion for directed verdict. Peavy v. Ross. Denial of a motion for new trial nisi is within the sound discretion of the trial judge and will not be reversed on appeal absent abuse thereof. Neal v. Bowles, 314 S.C. 525, 431 S. E.2d 555 (1993).

Before he may grant additur, the trial judge must state compelling reasons as to why it is

¹¹ The ten day limit for post-trial motions with a Rule 50(a) specific statement of grounds may not be extended. Rule 6(b), SCRCP, and see Rules 50(e) and 59(b), SCRCP.

¹² See, e.g., Null v. City of Los Angeles, 254 Cal. Rptr. 492 (Cal. App. Dist. 3 1988) (where a party claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury).

necessary to invade the province of the jury. Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1993).

The new trial and new trial nisi additur motions of National Grange are all based on an assertion that the jury's verdict was unsupported by the evidence and was the result of passion, caprice, prejudice or partiality.

Firstly, as discussed above, National Grange did not sufficiently raise any objection to the sufficiency of evidence on the defenses of the Clarks. National Grange instead ignored the presence of the defenses, assumed liability, and focused on the evidence that National Grange spent money in amounts represented in various questionable exhibits. There being no issue sufficiently raised in National Grange's directed verdict motion, there is no issue to support a motion for new trial either. Peavy v. Ross. Further, contrary to the general assertions of National Grange, both liability and damages were disputed. Therefore, a jury verdict reflecting a dim view of liability or damages is supported by the evidence.

Further, National Grange does not assert any error of the trial judge as affecting the verdict or creating any passion, caprice, prejudice or partiality. National Grange does not identify with particularity, the alleged source or cause of any alleged passion, caprice, prejudice, or partiality, and only states that there is a lack of support by the evidence. As discussed above, not only did National Grange not preserve this sole ground as a basis for new trial, but this ground is without merit.

Further, the court will recall that the jury conscientiously not only paid attention, but sat, pencil in hand, and took notes for three days -- during the evidence, during closing arguments, and during the charge -- and then deliberated for approximately three hours, was prompted, and

rendered a verdict about a half an hour later, at 6:30 in the evening. The evidence supports the jury's verdict, and there is justice in the verdict. There is no basis for new trial, nor for additur.

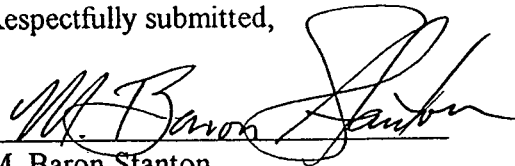
D. Thirteenth Juror Not Needed

National Grange essentially asks for JNOV and an increased money judgment under the 13th juror doctrine, and then asks, in the alternative, for a new trial under that doctrine. Both JNOV and new trial have been addressed herein, and both should be denied. It should also be noted, however, that the 13th juror doctrine cannot be used to change a verdict or change a verdict amount; the doctrine can only be used, in an appropriate case, to "hang" the jury, and nullify the entire trial. Such relief is not appropriate here, for the reasons set forth above.

CONCLUSION

Accordingly, National Grange's post-trial motions should be denied.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202

ATTORNEY FOR DEFENDANTS
RONALD AND SUSAN CLARK

Date: 7-15-09

Affidavit in opposition to post-trial motions, dated July 15, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

**AFFIDAVIT IN SUPPORT OF
DEFENDANTS' MEMORANDUM IN
OPPOSITION TO
NATIONAL GRANGE MUTUAL
INSURANCE COMPANY'S
POST-TRIAL MOTIONS**

Comes before me, M. Baron Stanton, who, being duly sworn, deposes and says:

1. I participated in the trial of this case in April, 2009 and the purpose of this affidavit is to preserve certain, likely uncontroverted, things about the trial which might or might not show up in a transcript.

2. The case was tried to a jury of twelve, plus an alternate. National Grange was represented by an excellent and fairly large law firm in Columbia, and had two lawyers attending the trial throughout. The jury was allowed to take notes, and did so.

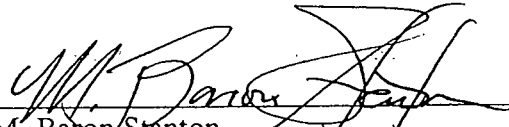
3. The case was tried for almost three days (April 6, 7 and 8, 2009), and involved 13 exhibits, the excerpts of 6 depositions, and the live testimony of 6 witnesses.

4. At the conclusion of evidence, none of the Clarks' defenses had been dismissed or withdrawn.

5. The jury deliberated for about three and a half hours (from approximately 2:55

p.m. to 6:30 p.m.) on Wednesday, April 8th, and, having been prodded gently by the trial judge around 6:00 p.m. with no objection, returned a verdict in favor of National Grange for \$10,000.

6. The jury not only paid attention, but sat, pencil or pen in hand, and took notes for three days, doing so during the evidence, during closing arguments, and during the charge.


M. Baron Stanton

STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202

ATTORNEY FOR DEFENDANTS
RONALD AND SUSAN CLARK

SWORN TO ME THIS 15th
day of July, 2009

Eileen Henry (L.S.)
Notary Public for S.C.
My comm'n exp. 11-15-2011

National Grange memorandum in support of post-trial motions

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

v.

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

Defendants.

**NATIONAL GRANGE MUTUAL
INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF
POST-TRIAL MOTIONS**

This case was tried to a Jury, which returned a verdict in favor of the Plaintiff, on April 8, 2009, for Ten Thousand and no/100 (\$10,000.00) dollars.

National Grange Mutual Insurance Company presented damages of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) dollars. This included a previous payment of Four Hundred Fifty Thousand (\$450,000.00) dollars to settle a Performance Bond claim, attorney and consultant fees of Three Hundred Seventy-two Thousand, Three Hundred Sixty-six and 41/100 (\$372,366.41) dollars incurred in investigating and defending Payment and Performance Bond claims and a payment of at least One Hundred Fifty-four Thousand, Nine Hundred Sixty-six and 49/100 (\$154,966.49) dollars to be paid on a Payment Bond claim. The total liability on the payment bond claim may be in excess of One Million and no/100 (\$1,000,000.00) dollars, depending on the outcome of an appeal filed by the payment bond claimant, EFCO Corporation.

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

The Defendants argued that bad faith may be a defense to a Surety's claim, pursuant to Master Clean, Inc., v. Star Insurance Company, 347 S.C. 405, 556 S.E.2d 371 (2001). The Defendants did not offer any evidence as to any bad faith by National Grange Mutual Insurance Company and the Jury rejected this argument by returning a verdict in favor of the Plaintiff.

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

1. The Plaintiff is entitled to a directed verdict, pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure. National Grange Mutual Insurance Company made the appropriate Motion at the close of the evidence and the Motion was not ruled upon. When upon a trial the case presents only questions of law, the Judge may direct a verdict. Rule 50(a), SCRPC. The Defendants acknowledged signing the Agreement of Indemnity and the amount of damages was not disputed. Judgment in the amount of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$986,332.29) dollars should be entered in favor of the Plaintiff. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) ("The trial court may direct a verdict in favor of a party where there are no material facts in dispute and the case presents only a question of law.");

2. Judgment notwithstanding the verdict, pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure, should be granted and judgment in the amount of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$986,332.29) dollars should be entered. The Jury's verdict was the result of passion, caprice, prejudice or partiality, in that it is unsupported by the evidence. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611

S.E.2d 485 (2005) (a trial court should grant judgment notwithstanding the verdict when the evidence is insufficient to support the verdict); Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 529 S.E.2d 758 (Ct.App. 2000) (the trial court must set aside a verdict when passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded);

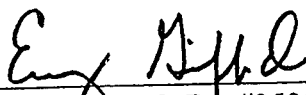
3. If the Court does not enter Judgment notwithstanding the verdict, National Grange Mutual Insurance Company should be granted a new trial pursuant to Rule 50(b) and Rule 59 of the South Carolina Rules of Civil Procedure on the issue of damages alone. The Defendants admitted execution of the Indemnity Agreement, and the Jury returned a verdict in favor of the Plaintiff. The Jury's verdict on the amount of damages was the result of passion, caprice, prejudice or partiality, in that it is unsupported by the evidence. Cartin v. Keller Building Products of Chas., 299 S.C. 152, 382 S.E.2d 922 (1989) (the law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability but the damages award is inadequate, a new trial may be ordered on the issue of damages alone); Dillon v. Frazer, --- S.E.2d ----, 2009 WL 982271 (S.C. 2009) (Shearouse Adv.Sh. No. 16 at 34) ("The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.");

4. In the event that the Court does not enter Judgment notwithstanding the verdict, or grant a new trial on damages alone, the Court should grant a new trial *nisi additur* in a reasonable amount as determined by the Court, pursuant to Rule 50(c) and Rule 59 of the South Carolina Rules of Civil Procedure, due to the Jury's inadequate verdict on damages. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997) ("When the jury's

verdict is inadequate or excessive, the trial judge has the power to grant a new trial nisi.”); Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App. 1996) (“The trial judge alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive.”);

5. The Court should enter Judgment in the amount of Nine Hundred Sixty-eight Thousand, Three Hundred Thirty-two and 29/100 (\$968,332.29) dollars pursuant to the Thirteenth Juror Doctrine, Youmans ex rel Elmore v. South Carolina Department of Transportation, 380 S.C. 263, 670 S.E.2d 1 (Ct.App. 2008) and Rule 59 of the South Carolina Rules of Civil Procedure, or in the alternative, grant a new trial on the grounds that the Jury’s verdict was the result of passion, caprice, prejudice or partiality and is unsupported by the evidence. Youmans, 670 S.E.2d at 5-6 (“The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict.”) Under thirteenth juror doctrine, a trial court may grant a new trial if the judge believes the verdict is unsupported by evidence. Similarly, a new trial may be granted if the verdict is inconsistent and reflects the jury’s confusion. Johnson v. Hoechst Celenese Corporation, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).

Respectfully submitted,



Francis M. Mack, S.C. Bar #3505

Emily R. Gifford, S.C. Bar #72785

RICHARDSON PLOWDEN & ROBINSON, P.A.

1900 Barnwell Street

Post Office Drawer 7788

Columbia, South Carolina 29202

(803) 771-4400

ATTORNEYS FOR THE PLAINTIFF,
NATIONAL GRANGE MUTUAL INSURANCE
COMPANY

Columbia, South Carolina

July 16, 2009

The Clarks' memorandum in reply on National Grange's
post-trial motions, dated July 17, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

**CLARKS' MEMORANDUM IN
RESPONSE TO
NATIONAL GRANGE MUTUAL
INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT
OF ITS POST-TRIAL MOTIONS**

The Clarks have already filed a memorandum in opposition to National Grange's motions. National Grange recently filed a memorandum.

The Clarks' previous memorandum should sufficiently address the matter. However, in response to National Grange's memorandum, the Clarks would point out the following.

National Grange's characterization of the jury verdict is incorrect.

The jury did not "reject" the Clarks' bad faith defense by returning a verdict in favor of National Grange. Rather, the jury agreed with the defense, and returned a verdict of only \$10,000 instead of the nearly \$1,000,000 sought by National Grange.

During the charge conference, the trial judge specifically had a question about a portion of the Clarks' proposed charge on bad faith, and was concerned with whether bad faith would operate as a total bar to relief, or whether the charge should be loosened up to allow the jury to award some damages to National Grange if it found that National Grange operated in bad faith,

but that not 100% of National Grange's actions were in bad faith.

The trial judge did not give the Clarks' requested charge verbatim, but rather, changed it. National Grange made no objection to the charge. National Grange also made no objection to the form of the verdict, and, apparently satisfied at the time with a general form of verdict, did not request any special form.

There is no room for an argument, now, of jury confusion or inconsistency of verdict, and there are none. If the trial judge had charged that bad faith was a total bar to relief, National Grange would likely have received nothing, rather than a \$10,000 verdict.

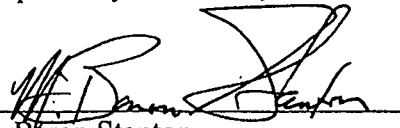
The question of directed verdict and JNOV has nothing to do with the foregoing. The question of directed verdict and JNOV is whether, at the time of the close of evidence (before the closing arguments, and before the charge), there was any question to go to the jury. There were many questions to go to the jury at that time, and the motions are properly denied.

As noted above, the question of new trial cannot proceed based upon a challenge to how the jury was charged when there was not only no objection to the charge, but a preceding specific discussion of the finer point of the charge involved.

The Clarks would also point out, in distinction to many cases on the subject of low verdicts and new trial, that this was not a wreck case, or any kind of negligence case. It was a breach of contract case where the jury could not trust the plaintiff's damages claims and agreed that the majority of the actions of the plaintiff were affected by bad faith. The jury's verdict was not the result of any error by the trial judge. There is no basis for new trial.

Accordingly, National Grange's motions should be denied.

Respectfully submitted,

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

M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202

ATTORNEY FOR DEFENDANTS
RONALD AND SUSAN CLARK

Date: July 17, 2009

The Chitwoods' memorandum regarding National Grange's
post-trial motions, dated July 21, 2009

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

)

)

)

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2

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Letter dated July 30, 2009 from Judge Cooper to counsel advising of decision

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

G. THOMAS COOPER, JR.
JUDGE

July 30, 2009

1701 MAIN STREET, ROOM 323
POST OFFICE BOX 192
COLUMBIA, SOUTH CAROLINA 29202-0192
TELEPHONE: (803) 576-1783
FAX: (803) 576-1741
E-MAIL: gcooperj@sccourts.org

Francis M. Mack, Esquire
Richardson Plowden & Robinson, PA
Post Office Drawer 7788
Columbia, South Carolina 29202

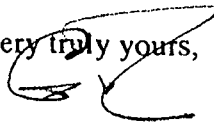
Re: National Grange Mutual Insurance Co. v. Phoenix Contract Glass, LLC, et al.
C/A No.: 2007-CP-40-8435

Dear Mr. Mack:

Having considered the submissions of counsel and arguments presented at the hearing on July 22, 2009, I am inclined to grant the Motion for New Trial on the grounds that the jury's verdict was the result of passion, caprice, prejudice, or some other improper motive. No plausible reason has been advanced for the jury to have returned a verdict for the Plaintiff in the amount of \$10,000, when the Plaintiff's indemnification claim was for more than \$900,000. I am convinced that similar to the verdict in Dillon v. Frazer, ___ S.C. ___, 678 S.E.2d 251, 253 (2009), the verdict in this case was irreconcilably inconsistent with the evidence presented at trial. Furthermore, I feel the verdict goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations. Therefore, I feel it proper to grant your Motion for a New Trial absolute.

Please prepare and submit to my office a proposed order granting your Motion for New Trial, with copies to Mr. Stanton and the Chitwoods.

Very truly yours,


G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

GTCJr:bcb

cc: M. Baron Stanton, Esquire
Mr. Brent C. Chitwood
Mrs. Linda Chitwood

The Clarks' motion to reconsider granting of new trial, dated November 2, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual Insurance
Company,

Plaintiff,

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

**CLARKS' MOTION TO RECONSIDER
ORDER GRANTING NEW TRIAL**

The Clarks hereby move the Court pursuant to Rule 59(e), SCRPC, Rule 52(b), and other applicable rules, statutes, and common law, for an order reconsidering, and denying, Plaintiff's motion for new trial.

Specifically, the Clarks move the Court to reconsider, vacate, alter, and amend the Court's order dated August 27, 2009. The Clarks received written notice of entry of the order on October 23, 2009.

The grounds for this motion are that the Court overlooked applicable law, may not have fully considered the arguments of the Clarks, and was guided in its decision by a misapprehension of the law and facts of the case.

The Clarks request that the Court reconsider all of the arguments in their brief dated July 15, 2009, their brief dated July 17, 2009, and in their argument at the hearing thereon, and further reconsider the analysis in the Court's order dated August 17, 2009. More particularly, but without limitation, the Clarks make the following points.

1. To the extent that the relief granted to Plaintiff was based upon Plaintiff

having made a directed verdict motion, it was error to grant the relief.

2. The Court incorrectly assumed or found that liability was not contested.

3. The Court erroneously weighed the evidence in reaching its decision.

4. The Court did not consider and did not address or discuss the evidence in reaching its decision, including specific evidence of disingenuous positions of Nation Grange concerning the validity of the bond in processing the claim, and evidence clearly evincing "unfaithfulness to a common purpose" and "inconsistency with the justified expectations of Phoenix," as charged to the jury.

5. The Court incorrectly and erroneously concluded that there was no credible evidence of bad faith on the part of Plaintiff.

6. The Court incorrectly concluded that the jury failed or refused to follow the law in reaching its decision. Instead, there is no indication other than that the jury followed every instruction given to it, took notes throughout all phases of the proceeding, duly deliberated, committed no misconduct, asked the Court no questions indicating any misapprehension of the law or any concern with matters not charged, and returned, as instructed, a general verdict, with no special answers and no special interrogatories.

7. The relief granted by the Court is the equivalent of granting a directed verdict against the Clarks on liability and granting a new trial to Plaintiff on damages; yet the Court properly denied a directed verdict at trial, and properly denied JNOV in post-trial proceedings.

8. Because, for lack of specificity of grounds, Plaintiff did not make an effective motion for directed verdict at trial, no directed verdict issues are preserved, and, additionally, a motion for new trial based upon sufficiency of the evidence is precluded.

9. The sole specification by Plaintiff or the Court of "passion, caprice, or prejudice" is "insufficiency of evidence." Neither Plaintiff nor the Court discussed any of the proffered evidence of bad faith in the record.

10. This was a three-day trial with a clean record, ending in a general verdict and there is no sound reason to repeat the time and expense of that process.

11. Plaintiff took no exception to the jury charge and the charge is the law of the case for the purpose of determining the sufficiency of evidence, and Plaintiff is estopped from, and otherwise precluded from, arguing any jury confusion or incorrect result as a result of the charge given.

12. Dillon v. Frazer, ____ S.C. ____, 678 S.E.2d 251 (2009), cited by the Court in its order at 4, is not properly applied in this case.

Dillon was a car wreck case. Liability was admitted. Liability was not admitted by the Clarks in the instant case. They raised a defense of bad faith on the part of National Grange. Directed verdict in favor of National Grange on liability was denied by the court in the instant case.

In Dillon, the jury sent a question to the trial judge. In the instant case, the jury took notes throughout all phases of trial, and did not send any notes to the trial judge.

In the instant case, the Court states that "no plausible reason is advanced" for the jury's verdict. In the instant case, the jury was not asked for a reason: in the instant case, the jury returned a general verdict, as instructed.

Dillon was an "excessiveness/inadequacy" case in which liability was admitted. Most inadequacy-of-verdict cases involve admitted or established liability. The verdict in the instant case reflects a decision in favor of the Clarks on a defense to liability which was raised, allowed, and properly charged – there was a dispute of liability.

In Dillon, the jury asked three ways about collateral sources of compensation for the plaintiff's damages that the jury was instructed not to consider. There was thus clear evidence of a clearly improper concern of the jury in reaching a verdict which was extraordinarily low in a case where any defense to liability had been removed from the decision. There were no such questions in the instant case, and liability was disputed, and there was no evidence whatsoever of any disregard by the jury of the court's instructions. Dillon has no applicability at all to the instant case.

In Dillon, liability was admitted and there was at least \$30,000 in damages that was free from any question. There was several hundred thousand dollars' more in damages that were highly credible. The jury gave less than the amount of undisputed damages in a case in which liability was admitted. The trial judge granted an additur (a new trial unless a specified increase is agreed to by the defendant) that only brought the damages to \$21,000 – still less than the undisputed damages in a case of undisputed liability. It is understandable that the trial judge was reversed and a new trial absolute was granted. And this occurred in a case where the jury, by

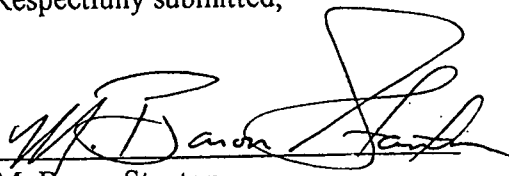
asking not one, but three, questions, clearly indicated its interest in disregarding the law of damages as the law had been charged.

In the instant case, liability was disputed. The evidence supported a defense of bad faith. The court so ruled. Directed verdict on liability was denied by the trial judge. The jury was charged on the law of bad faith. The jury asked no questions revealing its thinking on damages. No one asked the jury any questions to reveal its thinking on damages -- no special interrogatories, nor special form of verdict were requested.

Having been presented with instructions on the defense of bad faith and having considered evidence already deemed sufficient to support a verdict accepting that defense, the jury returned a general verdict for less than the amount sought by National Grange in a case in which both liability and damages were disputed. The plausible reason for the jury's verdict is that the jury quite simply considered the evidence and followed instructions.

The general verdict should not be disregarded and new trial should not be granted.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, South Carolina 29202

ATTORNEY FOR DEFENDANTS
THE CLARKS

Date: 11-2-09

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

National Grange Mutual Insurance)
Company,)

Plaintiff,)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

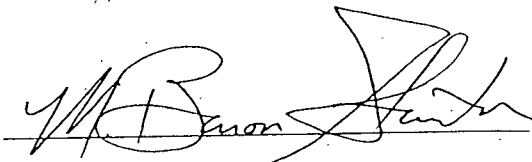
CERTIFICATE OF SERVICE

The undersigned does hereby certify that the undersigned caused a copy of the foregoing to be deposited in the United States mail, postage prepaid, on the date indicated below addressed as follows:

Francis M. Mack, Esquire and
Emily R. Gifford, Esquire
Richardson Plowden
1900 Barnwell Street (29201)
P. O. Drawer 7788
Columbia, SC 29202.

Mr. C. Brent Chitwood
131 Casco Bay Road
Irmo, SC 29063

Ms. Linda Chitwood
131 Casco Bay Road
Irmo, SC 29063



Date: 11-2-09

The Chitwoods' motion to reconsider granting of new trial, dated November 2, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual
Insurance Company,
Company,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

CHITWOODS' MOTION FOR
RECONSIDER OF ORDER GRANTING
NEW TRIAL

2009 NOV -2 PM 3:29
JENNIFER M. JOHNSON
CLERK

The Chitwoods move for reconsideration of the Court's order granting National Grange a new trial. The Chitwoods incorporate completely the motion of the Clarks on this subject.


C. Brent Chitwood
~~9 Olde Stream Court~~
Irmo, SC 29063
Phone: 803-781-1989
131 Casco Bay Rd
Date: 11/2/09


Linda N. Chitwood
~~9 Olde Stream Court~~
Irmo, SC 29063
Phone: 803-781-1989
131 Casco Bay Rd

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

National Grange Mutual
Insurance Company,
Company,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

CERTIFICATE OF SERVICE

2009 NOV -2 PM 3:29
JEANETTE W. MCKINNEY
C.C.P.A. & G.S.

The undersigned does hereby certify that the undersigned
caused a copy of the foregoing to be deposited in the United
States mail, postage prepaid, on the date indicated below
addressed as follows:

Francis M. Mack, Esquire and
Emily R. Gifford, Esquire
Richardson Plowden
1900 Barnwell Street (29201)
P. O. Drawer 7788
Columbia, SC 29202.

M. Baron Stanton, Esq.
Stanton Law Offices, P.A.
1728 Main Street (29201)
P. O. Box 425
Columbia, SC 29202

Date:

11/2/09

C. Brent Chitwood

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.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the undersigned has, on
March 16, 2011, served the **Record on Appeal** upon the other parties who have
served briefs by causing a copy either to be hand delivered to the following or to be mailed with
proper postage to the addresses indicated below:

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

Mason A. Summers, Esq.
Francis M. Mack, Esq.
Emily R. Gifford, Esq.
RICHARDSON PLOWDEN
& ROBINSON, PA
1900 Barnwell Street (20201)
P.O. Drawer 7788
Columbia, SC 29202


C. Brent Chitwood

Certificate of Party

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not subsequently changed by agreement, and no other material.

C. Brent Chitwood

Linda N. Chitwood

C. Brent Chitwood and

Linda N. Chitwood

131 Casco Bay Road

Irmo, SC 29063

803-429-4816

Date: March 16, 2012

APPENDIX DIVIDER

F

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

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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
the Appellants.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-270
Submitted March 1, 2012 – Filed May 2, 2012

AFFIRMED

M. Baron Stanton, of Columbia, and Brent Chitwood,
pro se, of Irmo, for Appellants.

Mason A. Summers, Francis M. Mack, and Emily R.
Gifford, all of Columbia, for Respondent.

PER CURIAM: Brent and Linda Chitwood and Ronald and Susan Clark appeal the trial court's order granting National Grange Mutual Insurance Company's motion for a new trial absolute. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: Dillon v. Frazer, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009) ("The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion. The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive." (internal citations and quotation marks omitted)); Lane v. Gilbert Constr. Co., 383 S.C. 590, 597-98, 681 S.E.2d 879, 883 (2009) ("Upon review, a trial [court]'s order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. This Court's review is limited to consideration of whether evidence exists to support the trial court's order. As long as there is conflicting evidence, this Court has held the trial [court]'s grant of a new trial will not be disturbed." (internal citations and quotation marks omitted)).

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

APPENDIX DIVIDER

G

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. 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 Appellants.

PETITION FOR REHEARING
(With Suggestion for Rehearing En Banc)

Appellants Ronald and Susan Clark move, pursuant to Rule 221(a), SCACR, that the court rehear¹ the case, grant oral argument, vacate the unpublished, per curiam, memorandum opinion (No. 2012-UP-270, filed May 2, 2012); and issue a full opinion reversing the Circuit Court's order granting Plaintiffs-Respondents a new trial absolute. The Clarks respectfully suggest rehearing en banc, pursuant to Rule 219, SCACR.

¹"Rehearing" is a misnomer for reconsideration, as the appeal was not actually "heard," but rather, decided on the briefs.

The grounds for this motion, respectfully submitted, are that the Court overlooked substantially all of the nine issues in the appeal. Consequently, the Court also overlooked all the applicable principles of law. The form of the opinion does not comply with the South Carolina Appellate Court Rules. It is possible that this is the reason why the issues and law were overlooked. There was no oral argument on the appeal, and the opinion is not by an assigned judge and does not recite the facts of the case, nor the nine issues presented and actually argued in the briefs.

MEMORANDUM OF ARGUMENT FOR REHEARING, WITH
CITATION OF AUTHORITY

This appeal presents an instance in which the defendants' affirmative defense of bad faith to the approximately \$1,000,000 claim of a surety was tried to an attentive jury for three days.

The Plaintiff surety had repudiated the bond it had issued. The Plaintiff surety had made specious excuses for failing to honor the bond, made no payments or offers to pay which might have allowed the principal under the bond to stay in business, never consulted the defendants as they were being financially ruined by the surety's actions and inactions, litigated for years, spent alleged sums of money trying to deny the validity of the bond it issued, finally settled the litigation in secret, and then attempted to be indemnified by the defendants, while presenting inaccurate figures.

The jury was allowed to take notes, and did. There was a clean record. Most considerations were given to the Plaintiff-Respondent. No error was made in favor of the defendants. If any such errors could have been contended, zero were preserved. The Circuit Judge charged the jury on the defense of bad faith.

There was a clean record, no jury misconduct and a general form of verdict perfectly

consistent with the unopposed charge given to the jury. Yet, the Circuit Court granted the Plaintiff-Respondent a "do-over" -- a new trial absolute -- after the jury found substantial merit in the bad faith defense as it was charged to the jury and Plaintiff got an unfavorable result.

Completely illogically, the Circuit Court based its decision on "inadequate damages" being awarded in a contested liability case involving an affirmative defense charged to the jury by the Circuit Judge.

This error results in a complete disregard of the defendants' constitutional right to the jury trial. The jury trial guaranteed to the defendants by the State constitution was the one they endured for three days and thousands of dollars. They had a constitutional and common law right for that jury trial not to be summarily disregarded.

The only thing preventing the Circuit Court's grant of new trial from being a violation of the South Carolina Constitution's right to jury trial, would be compliance with rules of law pertaining to grant of new trial.

These rules have provided consistently for decade after decade that, although the trial court has wide discretion in granting new trial, the discretion is not unfettered, and that a grant of new trial will be reversed if there is an abuse of discretion. "Abuse of discretion" includes instances in which the trial judge was guided in his decision by an error of law.

Much of the problem with the Circuit Court's soi-disant "exercise of discretion" on this important decision, was its failure to supply its reasoning on the bad faith defense or identify the facts on which it relied, and its citation of a case not applicable to the facts or procedural posture of this case.

Like the motion which begat the order, the order thus starts with a premise which has zero basis in the record (that the jury did not find bad faith) and then asserts the jury was wrong about the damages.

In its motion for new trial, as if no three-day trial of an affirmative defense had even occurred, National Grange had stated that the jury “determined that the defendants were liable under the agreement.” (R. p. 539.) National Grange moved for new trial nisi additur. National Grange additionally moved for an increased money judgment under the 13th juror doctrine, which is not possible. Bailey v. Peacock, 318 S.C. 13, 455 S.E. 2d 690 (1995); Youmans v. S.C. Dept. of Transportation, 380 S.C. 263, 670 S.E. 2d 1 (Ct. App. 2008).

National Grange had not even mentioned once in its entire motion, “bad faith,” “evidence of bad faith,” or the believability of any evidence presented by the defendants. (R. pp. 538-539.)

The order later signed by the Circuit Judge granted a new trial absolute on the grounds that the defendants “did not offer any credible evidence as to any bad faith by National Grange.” (R. p.4.) The order then illogically transmuted this unsupported assertion into something completely different – an assumption, with no basis at all in the record, that the jury did not find bad faith on the part of the Plaintiff.

The order signed by the Circuit Judge further stated that the verdict of only \$10,000 in the case was irreconcilably inconsistent with “the evidence [of damages] presented at trial.” The order thus viewed the verdict as a rejection of the bad faith defense, but a refusal to award full damages. (“The verdict goes beyond a merely conservative award and suggests the jurors were motivated by improper considerations.” (R. p. 3.)) The order was based on the assertion that the verdict of only \$10,000 suggested “that the jurors were motivated by improper considerations,” and that “the jury failed to follow the Court’s instructions in returning their verdict.” (8-17-09 Order, R. pp. 4-5.) The order signed by the Circuit Judge accordingly cited an opinion pertaining to new trial in cases in which no defense is raised, liability is admitted, and the jury fails to return enough damages. (R. p. 5.) The order signed by the Circuit Judge was thus controlled by an erroneous assertion of jury impropriety and failure to follow the law as charged. The order was

not based solely on a different view of the facts by the Circuit Judge. The Circuit Judge's order was not based on the Thirteenth Juror doctrine. It was an incongruent jumble controlled by error of law and lack of any support whatsoever in the record.

The Clarks' appellate briefs to this Court presented the background and procedural facts, and thirty-three cases and two treatises of relevant law, and discussed at length, in the form of eight issues presented on appeal, what an abuse of discretion is, and the multiple, independent instances in which the grant of new trial was an abuse of discretion. These issues, plus a ninth one concerning the constitutional implications of a wide-open ability to order new trial, were as follows:

1. Was it an abuse of discretion to grant National Grange a new trial based upon the jury only awarding National Grange a partial recovery, when the Circuit Judge intended for the jury to be able to only award a partial recovery, when the Circuit Judge charged the defense of bad faith, when the Circuit Judge intended for the jury not to perceive bad faith as necessarily a total bar to recovery, and the Circuit Judge specifically denied requests to charge which would have presented bad faith as a total bar?
2. Where the jury was specifically instructed that it could find bad faith to be a defense to the claims of National Grange, was it error to conclude that the jury's decision not to award a 100% recovery to National Grange was "a failure to follow the Court's instructions in returning their verdict"?
3. Was it error, and therefore an abuse of discretion, to grant National Grange a new trial based on law applicable to inadequate verdicts in cases in which liability is uncontested, when the instant case was one of contested liability and the jury was charged on the defense of bad faith?
4. Was it error for the Circuit Judge to state, in granting National Grange a new trial, that the evidence of National Grange's bad faith was not "credible" when the basis of National Grange's motion for new trial was not credibility, but, rather, that there was no dispute as to liability or damages?
5. Was it a failure to exercise discretion, and therefore an abuse of discretion, for the Circuit Judge to state that the evidence of National Grange's bad faith was not "credible" without identifying what was meant by bad faith, without identifying the evidence referred to, without stating what about it was believed to be not credible, and without discussing it in any way?
6. To the extent the trial Judge granted National Grange a new trial based on insufficiency of evidence rather than upon the reasons stated, was it error to do so when insufficiency of evidence of bad faith was not raised by National Grange as a ground for directed verdict or JNOV, and was it further error not to measure the sufficiency of the evidence against the law charged to the jury rather than as against some other unidentified standard or perception of the law?

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

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

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

(Appellant's Brief, "Statement of Issues on Appeal," at 1-2.)

"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220 (b), SCACR.²

The Clarks' thirty-three page Appellant's Brief and Reply Brief are respectfully incorporated herein, without re-briefing, as an argument on the nine points distinctly stated in the case and asked to be decided now on rehearing.

This court's one-paragraph, unpublished, per curiam³, memorandum decision correctly cites Dillon v. Frazer, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009) as a case standing for the proposition that the grant of new trial "will not be reversed absent an abuse of discretion," and

²Rules 220 (b)(1) and 220 (b)(2) provide exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a summary opinion. Rule 220 (b)(1) provides four exceptions, which are for use of the Supreme Court, rather than for the intermediate Court of Appeals and none of the four exceptions would apply in this case even if available to the Court of Appeals. Rule 220 (b)(2) provides an exception for "a point which is manifestly without merit." Rule 220 (b) (2), SCACR. None of the nine distinct points presented are manifestly without merit – they all present instances of clear and pertinent error by the Circuit Court. This Court's opinion did not skip one point, but nine.

³"Per curiam" means "by the court", i.e., by the court as a whole rather than under claim of authorship by a single justice and usually without extended discussion.

Lane v. Gilbert Constr. Co., 383 S.C. 590, 597-98, 681 S.E.2d 879, 883 (2009) as a case standing for the proposition that the grant of new trial “will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.” This was a given, and not an issue on appeal. ⁴

It is respectfully submitted that this Court somehow overlooked the fact that much of the appeal was identification of the multiple ways in which the Circuit Court’s decision was an abuse of discretion, including being controlled by error of law. This Court overlooked all of the law regarding what an abuse of discretion is, and all of the facts and arguments establishing that an abuse of discretion occurred.

This Court observes that its review is limited to “whether evidence exists to support the trial court’s order.” However, this is a standard without a standard and applies on in “Thirteenth Juror” cases where no other basis is given. In the instant case, the “evidence” has to be evidence that prevents the decision from being an abuse of discretion. This Court’s opinion does not discuss or identify any such evidence. The opinion does not discuss evidence or anything else in the context of any of the instances of abuse of discretion argued by the Clarks.

In essence, in this case presenting a profound issue concerning the defendants’ constitutional right to jury trial, the unpublished summary opinion issued on appeal does not discuss or decide the issues presented on appeal, skips straight to the result, does not reveal on the face of the decision, the issues which were presented to the Court, and leaves the basis of the opinion to conjecture.

⁴However, other aspects of Lane, and cases cited therein, e.g., Norton v. Norfolk Southern Railway Co., 350 S.C. 473, 567 S.E. 2d 851 (2002), do not apply. These cases deal with the trial judge’s exercise of “The Thirteenth Juror Doctrine,” which is supposed to be limited to instances in which the trial judge finds “the evidence does not justify the verdict” and grants a new trial solely “upon the facts.” Norton, 567 S.E. 2d at 854.

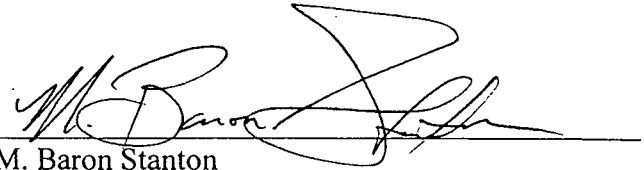
The Clarks also respectfully submit that further shielding such an opinion from examination by designating it unpublished and “without precedential effect” perpetuates the likelihood of similar mistakes, and should not be allowed to lessen the prospects of further judicial review.⁵ Such a procedure would allow likely or clearly erroneous appellate opinions to be obscured by lack of detail of what happened in the underlying trial and lack of detail of the issues that were actually presented on appeal, and yet prevent required reliance on these opinions in other cases, and thus avoid further public criticism, analysis and review. In the instant case, the summary form of the opinion and the designation of the opinion as “unpublished” would tend to prevent public criticism, analysis and review of what would be a profoundly low limit on the disregard for jury verdict in South Carolina.

Because the Court’s decision does not identify, rule upon, or discuss any of the nine (9) issues presented on appeal by the appellants, no further analysis of those issues or the Court’s opinion is possible here, and as stated above, the Clarks incorporate herein by reference, all of their thirty-three page Appellant’s Brief and their Reply Brief.

⁵This is reminiscent of the problems with and exceptions to the “mootness” doctrine, in which appellate courts are concerned with matters “capable of repetition, yet evading review.” Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).

Accordingly, the Clarks, request that the appeal be reheard and that the Circuit Court's order denying the defendants the results of their jury trial be reversed.

Respectfully submitted,

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

M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, SC 29202
803-929-1484

ATTORNEY FOR APPELLANTS
RONALD AND SUSAN CLARK

Date: 5-17-12

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. 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,

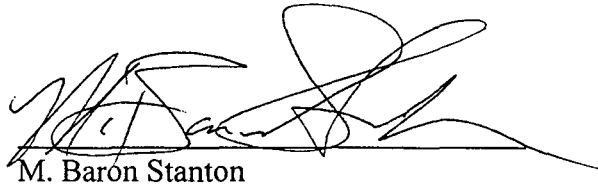
of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark,
Susan F. Clark are Appellants.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on 5-17, 2012, served the foregoing Petition for Rehearing with Suggestion for Rehearing En Banc upon Respondent or attorney(s) for the Respondent by causing a copy thereof to be mailed with proper postage to the address(es) indicated below:

Francis M. Mack, Esquire
Emily R. Gifford, Esquire and
Mason A. Summers, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street (29201)
P. O. Drawer 7788 (29202)
Columbia, SC

Mr. C. Brent Chitwood
Mrs. Linda N. Chitwood
131 Casco Bay Road
Irmo, SC 29063


M. Baron Stanton

Date: 5-17-12

APPENDIX DIVIDER

H

The South Carolina Court of Appeals

National Grange Mutual Insurance Company,
Respondent,

v.

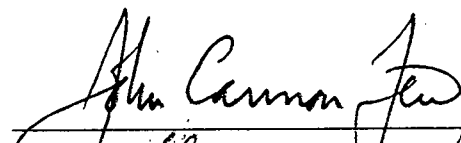
Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda
N. Chitwood, Ronald L. Clark, Susan F. Clark, Henry H.
Graham, I II, and Renee L. Graham, Defendants,

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

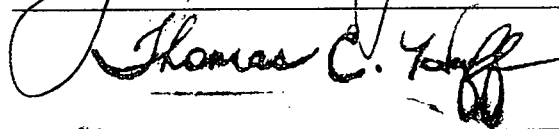
Appellate Case No. 2010-150106

ORDER

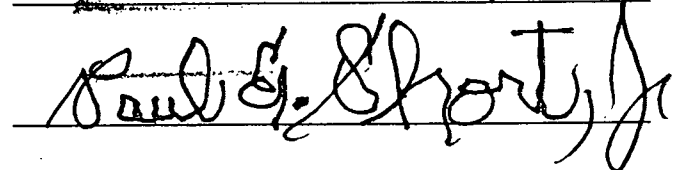
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Emily Ruth Gifford
Francis Marion Mack
Mason A. Summers
M. Baron Stanton
James R. Barber, III
C. Brent Chitwood & Linda N. Chitwood

FILED

July 26, 2012