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

Civil Action 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.

RESPONDENT NATIONAL GRANGE MUTUAL INSURANCE COMPANY'S RETURN IN OPPOSITION TO THE PETITION FOR REHEARING OF APPELLANTS RONALD L. CLARK AND SUSAN F. CLARK

Respondent National Grange Mutual Insurance Company (National Grange) respectfully submits its Return in Opposition to the Petition for Rehearing filed by the Appellants, Ronald and Susan Clark. The Clarks' Petition for Rehearing fails to present any issue which was overlooked or misapprehended by the Court, and accordingly, National Grange requests that the Petition be

denied.

INTRODUCTION

This appeal arises from the trial court's decision to grant National Grange's motion for a new trial. The basis for the trial court's decision was that the jury's damages award of $10,000 to National Grange was irreconcilably inconsistent with the evidence presented at trial. [Order (Post Trial Motions), R. pp. 1-5.] The trial judge found that the Clarks and other defendants had admitted executing an Indemnity Agreement in favor of National Grange and further found that they had not offered any evidence at trial in opposition to the damages established by National Grange in the amount of $968,332.29. The court also concluded that the defendants had not offered credible evidence to support their asserted defense of bad faith.

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Brinkley v. South Carolina Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009); see also Boozer v. Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct.App.1988) (Court of Appeals has no power to review trial court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law).

ARGUMENT

The trial court's decision to grant a new trial was a proper exercise of its discretion.

The trial court's decision to grant a new trial was well within its discretion. The Court of Appeals has stated, "When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order." Vinson

v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722 (Ct.App. 1996). In the present matter, evidence indeed exists that strongly supports the trial court's decision to grant a new trial.

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

National Grange presented uncontroverted evidence that each of the defendants had executed a written Agreement of Indemnity in favor of National Grange in connection with obtaining the surety bonds at issue.[1] None of the defendants disputed signing the indemnity agreement. National Grange also presented damages of $968,332 in the form of settlements of underlying lawsuits and expenses incurred in defending lawsuits brought by claimants after the defendants defaulted on their obligations. Eli Cinq-Mars, who is employed in National Grange's surety bonds department, testified that National Grange had paid $450,000 to settle the Bovis claim. [R. p. 92, lines 6-9.] He further testified that a minimum of $154,966.49 would be paid to EFCO as a result of the judgment entered by Judge Young in the lawsuit brought by EFCO. [R. p. 83, lines 8-25.] Mr. Cinq-Mars also stated that expenses totaling $363,366.34 had been

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

incurred for such items as consultant's fees, attorneys fees and travel expenses. [R. p. 109, lines 7-15.]

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

The Clarks have suggested that because they asserted bad faith as a defense at trial, the jury was free to reduce the award of damages to National Grange from $968,332 to $10,000. However, none of the defendants put forth any competent evidence that National Grange acted in bad faith in its handling and settlement of claims brought under the bonds. In addition, the defendants put forth no evidence of damages they supposedly sustained as a result of the alleged bad faith of National Grange. The defendants did not introduce any evidence whatsoever to substantiate the setoff of over $958,000 that the jury apparently awarded.

The defendants offered only vague, speculative allegations of being injured by National Grange's handling of the bond claims, and they never offered any specifics as to any damages they actually sustained. Without such evidence, there is no basis that could reasonably support

the jury's decision to award an offset of damages to reduce National Grange's recovery from $968,332 to $10,000. It is black letter law that the amount of damages awarded cannot be left to conjecture, guess, or speculation. Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981) (in order for damages to be recoverable, the evidence should enable the court or jury to determine the amount thereof with reasonable certainty and cannot be left to conjecture, guess, and speculation). Where a party fails to introduce evidence regarding the amount of their alleged damages, any award or setoff of damages by a jury can only be based upon improper speculation and conjecture.

The Supreme Court has held that a party seeking a setoff carries the burden of demonstrating with reasonable certainty the amount of the damages sustained. Diamond's Swimming Pool Company, Inc. v. Broome, 252 S.C. 379, 386, 166 S.E.2d 308 (1969). Here, the defendants offered no evidence that could possibly justify a setoff. There was no evidentiary basis upon which the jury could have properly reduced its award downward from the uncontested damages of $968,332 that National Grange sustained and documented at trial. The defendants failed to even state a specific dollar figure range for their supposed damages or to present evidence to substantiate the award of a setoff.

While it is true that proof of damages does not require mathematical certainty, the mere speculation by the defendants that they may have been harmed by National Grange's handling of the bond claims and third party lawsuits does not pass muster. Such a generalized accusation, unsupported by any competent proof, is not an appropriate basis for a jury to award a setoff. Because the defendants presented no credible evidence that National Grange made any payments in bad faith and because the defendants similarly presented no evidence of damages, there was no evidentiary basis upon which the jury could have rationally reduced National Grange's award from over $968,332.29 to $10,000.

CONCLUSION

The trial court's decision to grant National Grange's motion for a new trial was a proper exercise of its discretion, and its ruling is supported by ample evidence in the record. This Court correctly affirmed the trial court's decision. The Clarks' Petition for Rehearing fails to present any issue which was overlooked or misapprehended by the Court of Appeals, and for the reasons stated, National Grange requests that the Petition be denied.

Respectfully submitted,

Mason A. Summers
Francis M. Mack
Emily R. Gifford
RICHARDSON PLOWDEN
& ROBINSON, P.A.
1900 Barnwell Street [29201]
P.O. Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
Fax: (803) 779-0016

ATTORNEYS FOR RESPONDENT NATIONAL GRANGE MUTUAL INSURANCE COMPANY

Columbia, South Carolina
May 21, 2012

CERTIFICATE OF SERVICE

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

M. Baron Stanton, Esq.
P.O. Box 245
Columbia, SC 29202
Attorney for Appellants
Ronald and Susan Clark

Mr. Brent Chitwood
Mrs. Linda Chitwood
131 Casco Bay Road
Irmo, SC 29063

Vonja Huff

Dated: May 22, 2012

RICHARDSON PLOWDEN
RICHARDSON PLOWDEN ROBINSON, P.A.
ATTORNEYS AT LAW

COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202
1900 Barnwell St., Columbia, SC 29201 P 803.771.4400 F 803.779.0016

MYRTLE BEACH P.O. Box 3646 • Myrtle Beach, SC 29578
2103 Farlow St., Myrtle Beach, SC 29577 P 843.448.1008 F 843.448.1533

www.RichardsonPlowden.com
Reply to: Columbia
Direct Dial: (803) 576-3718
msummers@RichardsonPlowden.com

May 21, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: National Grange v. Phoenix Contr. Glass Co., et al
S.C. Court of Appeals Case Tracking # 2010150106

Our File No.: 154-83

Dear Ms. Kitchings:

As counsel for the Respondent National Grange Mutual Insurance Company in the above-referenced case, I am enclosing the original and seven (7) copies of our Return in Opposition to the Appellants' Petition for Rehearing, along with our Certificate of Service. Please return a stamped copy to us in with the enclosed envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Mason A. Summers

Enclosures

cc: M. Baron Stanton, Esq.
C. Brent Chitwood & Linda N. Chitwood