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IN THE

# Supreme Court of Virginia

AT RICHMOND

RECORD NO. 8122

FIVE LAKES, INC.,

*Appellant,*

v.

RANDALL, INC.,

*Appellee.*

**APPENDIX**

JAMES R. SCOTT, JR.
White, Cabell, Paris & Lowenstein
721 East Main Street
Richmond, Virginia 23219
*Counsel for Appellant*

W. KENDALL LIPSCOMB, JR.
Taylor, Hazen, Bryant & Kauffman
Suite 1104, 700 E. Main Street
Richmond, Virginia 23219
*Counsel for Appellee*

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FIVE LAKES, INC.,

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---

**APPENDIX**

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**MOTION FOR JUDGMENT**

The plaintiff moves the court for judgment against the defendant for the sum of Eighty-seven Thousand Six Hundred Twenty-three Dollars and Thirty-eight Cents ($87,623.38) for damages by virtue of the following:

1. On or about March 5, 1970, the defendant entered into a contract with the plaintiff for the construction by the plaintiff of an eighteen hole golf course for the Five Lakes Subdivision located at Bottoms Bridge, in Quinton, Virginia, New Kent County, Virginia, to be known as Brookwood Golf Course, for a total contract price in the amount of $270,000.00.

2. Pursuant to the terms of the aforementioned contract the defendant was to receive a credit on the contract price for work on the golf course previously completed and invoiced in the amount of $89,290.00, leaving the balance to be billed for the remaining work in

the amount of $181,310.00 and the defendant agreed to pay the plaintiff the sum of $10,384.16 for the work previously invoiced and not then paid.

3. The defendant subsequent to the aforementioned contract paid the plaintiff or on behalf of the plaintiff the sum of $7,160.78 from this amount invoiced but not paid prior to the contract dated March 5, 1971, leaving a balance due on this work in the amount of $3,233.38.

4. On or about March 16, 1970, the contract dated March 5, 1970, was amended by a Supplemental Agreement wherein the defendant agreed to pay the plaintiff the sum of $1,600.00 per week beginning March 16, 1970 through July 1, 1970 and the defendant agreed to furnish and pay for all materials to be used in the construction of the golf course.

5. On or about June 10, 1970, the defendant agreed with the plaintiff to continue under the terms of the Supplemental Agreement until December 30, 1970.

6. During the period from March 16, 1970 through December 30, 1970 the defendant paid to the plaintiff under the Supplemental Agreement the sum of $42,800.00 leaving a balance due to the plaintiff in the sum of $24,400.00.

7. The defendant refused and failed to provide the materials when necessary for the work as called for in the contract dated March 5, 1970 as it had agreed to do in the Supplemental Agreement dated March 16, 1970.

8. The defendant has breached the terms of the contract dated March 5, 1970, and the Supplemental Agreement dated March 16, 1970 by its failure to make the payments and furnish the materials called for therein.

9. As a result of the defendant's breach of contract, the plaintiff has suffered damages as aforesaid and has also suffered damages in the amount of $60,000.00 as its reasonable profits from the work performed under the contract.

WHEREFORE, the plaintiff asks judgment against the defendant in the sum of Eighty-seven Thousand Six Hundred Twenty-three Dol-

lars and Thirty-eight Cents ($87,623.38), with interest from October 1, 1971, and the costs of this proceeding.

* * *

**GROUNDS OF DEFENSE**

This day comes the defendant, Five Lakes, Inc., by Counsel, and as and for its Grounds of Defense, respectfully represents, the following:

1. That the allegations contained in paragraphs numbered 1, 3 and 4 are admitted;

2. That the allegations contained in paragraph numbered 2 are admitted except to the extent that the sum of $10,384.16 is alleged to be a separate item of payment, which is denied. Defendant avers that the $10,384.16 was included in the $89,290.00 invoice for work previously completed by the Plaintiff;

3. That the allegations contained in paragraph numbered 5 are neither admitted nor denied but the Defendant admits that the terms of the Supplemental Agreement remained in effect beyond July 1, 1970, with the understanding that work was to continue on the project;

4. That the allegations contained in paragraph numbered 6 are denied in that the Defendant paid to the Plaintiff the sum of $44,-200.00 and there is no balance due and owing to the Plaintiff;

5. That the allegations contained in paragraphs numbered 7, 8 and 9 are denied and the Defendant calls for strict proof thereof;

6. That the Defendant is not indebted to the Plaintiff in the amount of Eighty-Seven Thousand Six Hundred Twenty-Three Dollars and Thirty-Eight ($87,623.38) Cents or in any amounts whatsoever inclusive or exclusive of interest from any time, for any reason.

WHEREFORE, Defendant, Five Lakes, Inc., by counsel, prays that the Motion for Judgment filed herein be dismissed with Defendant's costs expended herein.

Five Lakes, Inc.
By J. R. Scott, Jr.
Counsel

**COUNTERCLAIM**

This day comes the Defendant herein, Five Lakes, Inc., by counsel and moves the Court for judgment against the Plaintiff, Randall, Inc., in the amount and on the grounds hereinafter set forth;

1. That on or about March 5, 1970, Defendant entered into a contract with Plaintiff, a copy of which is attached hereto made a part hereof and is marked "Defendant's exhibit "A";

2. That the Plaintiff, Randall, Inc., subsequent to the execution of the contract, submitted a cash flow payment schedule which was objected to by the Defendant, Five Lakes, Inc., and that a Supplemental Agreement bearing date of March 16, 1970, a copy of which is attached hereto, made a part hereof, and marked "Defendant's exhibit "B"; was entered into with the understanding that the Plaintiff would proceed with the work in accordance with its contractual obligations;

3. That the $1,600.00 per week paid pursuant to the Supplemental Agreement was to be credited against properly invoiced billing submitted to the Defendant by the Plaintiff and that the Plaintiff submitted no invoice until November 27, 1970;

4. That on or about July 1, 1970, it became apparent that the Plaintiff was not meeting the project completion schedule as called for in the aforementioned contract and the payments made pursuant to the Supplemental Agreement were allowed to continue beyond July 1, 1970, to avoid a total default on the part of the Plaintiff;

5. That during the effective period of the Supplemental Agreement, the Defendant paid to the Plaintiff the total sum of Forty-Four Thousand Two Hundred and 00/100 ($44,200.00) Dollars and purchased all materials requested by the Plaintiff;

6. That the Plaintiff ordered virtually all materials himself and that the Defendant paid for or was extended credit for same;

7. That from the inception of the contract aforesaid, the Plaintiff's performance has been sporadic and that finally on or about December 30, 1970, plaintiff abandoned his contractural obligations altogether;

8. That the Defendant has paid the Plaintiff for all work performed up to December 30, 1970, and has supplied; caused to be sup-

plied; paid for or undertaken payment for all materials requested by the Plaintiff, Randall, Inc., whether supplied directly by request of the Plaintiff to a supplier or indirectly through requests to the Defendant;

9. That since the execution of the aforesaid contract, the Defendant has paid Eighty-Six Thousand, Sixty-Six and 62/100 ($86,066.62) Dollars to Del-Val Co., Inc., Forty-Four Thousand, Two Hundred and no/100 ($44,200.00) Dollars in cash to Plaintiff; Thirty-Three Thousand, Two Hundred and Twenty and no/100 ($33,220) Dollars to suppliers, Eighteen Thousand Two Hundred and no/100 ($18,200) Dollars to suppliers; and assumed an obligation of the Plaintiff in the amount of Two Thousand Forty-Eight Dollars ($2,048.00) and no/100; that the total amount spent by Defendant to date is One Hundred Eighty-Three Thousand, Seven Hundred Thirty-Four and 62/100 ($183,-734.62) Dollars; that the estimated cost to complete the contract is One Hundred Seventy-Five Thousand and no/100 ($175,000.00) Dollars; that the total cost to the Defendant will be Three Hundred Fifty-Eight Thousand, Seven Hundred Thirty-Four and 62/100 ($358,-734.62) Dollars; that the contract price undertaken by the Plaintiff was Two Hundred Seventy Thousand, and no /100 ($270,000.00) Dollars; that the difference is Eighty-Eight Thousand, Seven Hundred Thirty-Four and 62/100 ($88,734.62) Dollars.

10. That by reason of the failure of the Plaintiff to honor its contractural obligations, the Defendant has been required to seek other contractors to complete the project to the contract and that the Defendant has been damaged as set out above to the extent of Eighty-Eight Thousand, Seven Hundred Thirty-Four and 62/100 ($88,734.62) Dollars by reason of the Plaintiff Randall's breach of aforesaid contract.

WHEREFORE, Defendant, Five Lakes, Inc., demands judgment against the Plaintiff, Randall, Inc. in the amount of Eighty-Eight Thousand, Seven Hundred Thirty-Four and 62/100 ($88,734.62) Dollars with interest thereon, together with the costs of this action.

**GROUNDS OF DEFENSE**

Comes now the plaintiff and for its grounds of defense to the defendant's Counter Claim answers as follows:

1. That it admits that the contract in question was entered into and admits that the supplemental agreement was entered into.

2. That it denies that it was paid $1,600 per week as required by the Supplemental Agreement.

3. That it denies that it failed to meet project completion schedules.

4. That it did not meet some completion schedules due to the failure of the defendant to make the agreed payments and to supply the required materials under the Contract and Supplemental Agreement.

5. That it was not guilty of any default under either the contract or the Supplemental Agreement.

6. That it intends to rely on all other proper provable defenses to the counter claim.

RANDALL, INC.
By Wendall Lipscomb, Jr.
*Counsel*

Filed in open court this 22nd day of March, 1972.

.....

**PLAINTIFF'S EXHIBITS NO. 5**

**(Check ($1,000.00)—not capable of being printed.**

**PLAINTIFF'S EXHIBIT NO. 8**

**Cost Sheets**

**PLAINTIFF'S EXHIBIT NO. 9**

**Expense Summary Sheet**

WARREN W. RANDALL, INC.

*Expenses—5 Lakes project*

| | |
|---|---|
| 1970 W2 Pay Roll Expense | $25,701.88 |
| Contract Expense | 8,775.00 |
| Owned Equipment Expense | 16,575.50 |
| Materials | 148.00 |
| Equipment Rental | 8,617.00 |

| | |
|---|---|
| Equipment Expense | 5,629.65 |
| Travel Expenses | 480.00 |
| Job Expense | 7,625.33 |
| Gas and oil | 4,948.26 |
| Total Expense | $78,500.62 |

**PLAINTIFF'S EXHIBIT NO. 11**

**Graph—not capable of being printed**

**PLAINTIFF'S EXHIBIT NO. 12**

**Graph—not capable of being printed**

**PLAINTIFF'S EXHIBIT NO. 14**

**Check ($75,000.00) not capable of being printed**

**PLAINTIFF'S EXHIBIT NO. 15**

**Deposit Slip ($20,000.00) not capable of being printed**

**DEFENDANT'S INSTRUCTION C**

Instruction No. C

The court instructs the jury that the burden is on the plaintiff, to prove by a preponderance of the evidence any profits claimed by it to be due;

**DEFENDANT'S INSTRUCTION D**

Instruction No. D

The court instructs the jury that if the jury believe from the evidence that the plaintiff, Randall, Inc., would not or could not complete performance of its contract and if the jury further believe that the defendant Five Lakes, Inc. did nothing to prevent the plaintiff from completing its contract, then the jury shall find its verdict in favor of the defendant, Five Lakes, Inc.

**DEFENDANT'S INSTRUCTION E**

Instruction No. E

The court instructs the jury that any amount claimed by the plaintiff, Randall, Inc., must be proven with reasonable certainty and may not be the subject of speculation or conjecture.

**DEFENDANT'S INSTRUCTION F**

Instruction No. F

The court instructs the jury that the plaintiff, Randall, Inc., cannot recover anything of the defendant, Five Lakes, Inc., in this case unless the plaintiff first proves by a preponderance of the evidence that the defendant, Five Lakes, Inc. on its part violated the contract and agreement and that such breach prevented its performance sued on; and if the plaintiff has failed to prove by a preponderance of the evidence that the defendant, Five Lakes, Inc. did break the contract on their part and that such breach prevented its performance then the jury must find its verdict in favor of the defendant, Five Lakes, Inc.

**INSTRUCTION WRITTEN AND GRANTED BY THE TRIAL COURT JUDGE**

**(unnumbered and not otherwise marked)**

The Court instructs the jury that if they believe from the evidence that the plaintiff was unable to complete the contract because of the failure of the defendant to make the weekly payments or pay for the needed materials as provided in the addendum of March 16, 1970 then the plaintiff is entitled to recover a reasonable sum for the work which he performed under the contract.

In arriving at this sum you may consider amount of work done on the contract, the expenses incurred by him for labor, the machinery and efforts provided by him and a reasonable sum for overhead and profit. From this should be deducted the payments received by him so that the balance would fairly compensate him for the reasonable value of his services.

If you find that the contract was not completed because of the fault of the plaintiff in failing to do the work or order materials then you shall find for the defendant.

**DEFENDANT'S INSTRUCTION A (REFUSED)**

Instruction No. A, Refused, read as follows:

The Court instructs the jury that if you believe from the evidence that the plaintiff, Randall, Inc., requested payment of money under the contract as supplemented, and you further believe that the plaintiff, Randall, Inc., was not at the time of such request entitled to receive such payment from the defendant, Five Lakes, Inc., either because of the plaintiff's non-performance of the contract or because the plaintiff had been paid all sums due him as of the time of the request, then plaintiff, Randall, Inc.'s refusal thereafter to further perform its contract constituted a breach thereof, and the jury must find its verdict in favor of the defendant, Five Lakes, Inc.

**DEFENDANT'S INSTRUCTION B (REFUSED)**

Instruction No. B, Refused, read as follows:

The Court instructs the jury that if the jury believe from the evidence that the plaintiff undertook to build a golf course for the defendant at a fixed price, the work to be performed in accordance with a written agreement between them which specified the manner and time for performance of such work and if you further believe that the plaintiff, without justification, failed or refused to perform the work in accordance with its undertaking or abandoned its undertaking, then the plaintiff was guilty of a breach of its contract and the jury shall find its verdict in favor of the defendant, Five Lakes, Inc., on its counterclaim and assess its damages in an amount equal to the difference between the cost to complete the golf course and the original contract price.

**PLAINTIFF'S EXHIBIT NO. 1**

**Agreement (contract of March 5, 1970)**

## AGREEMENT TO BUILD AN 18-HOLE CHAMPIONSHIP GOLF COURSE FOR FIVE LAKES, INC., QUINTON, VIRGINIA

Warren W. Randall, Inc., a Virginia corporation, agrees to furnish all labor, equipment and material to build the above mentioned golf course for Five Lakes, Inc., a Virginia corporation, of Quinton, Virginia, as follows:

Golf course to be 18-hole, par 72, championship class, fully irrigated with manual irrigation to all greens, tees, and fairways.

GREENS—Greens shall have a minimum putting surface of 7000 square feet. They shall be well contoured with a minimum of three way drainage. Greens shall have stone or gravel drainage system built in except where, in the opinion of the Golf Course Builder, such drainage may be detrimental (due to the sandy soil). They shall have a topping of 12″ of blended mixed material in proper proportions of sand, native top soil and peat, pine bark or sterile sawdust. They shall be properly trapped and shall be seeded to Penncross Bent grass.

TEES—Tees shall have 4000 square feet of teeing surface and shall be so placed as to give a red, white and blue characteristic to the course. Tees will also be seeded to Bent grass.

FAIRWAYS AND ROUGHS—Fairways shall be full 50 yards wide at impact areas with a 40 foot rough on either side and with properly placed bunkers where required. Fairways shall be properly graded for drainage and shall have surface drainage pipes installed wherever necessary. They shall also have field tile drainage, if and where required. This work will be part of this contract, an obligation of the Golf Course Builder to install, and shall be included in Item 9 covering fairway drainage pipe and fairway tile drain.

IRRIGATION—Irrigation shall be to all greens and tees. Pipes shall be sized from 6″ cement asbestos or 6″ P.V.C., Class 160, the largest size, to 1½″ P.V.C. plastic, Class 160, which shall be the smallest

size. This system shall have a pump capable of supplying 500 GPM of water. The system shall be so designed as to use all Nelson Reinbird 808 sprinkler heads or the equivalent. It shall be manually operated and shall have no less than four heads per green. Fairway heads shall be placed on 90′ centers for proper water coverage. Teeing areas shall have heads so spaced that all tee surfaces and slopes shall have full water coverage. Pump house will be located either at proposed lake to be built at the 13th hole or at a lake to be built at the 9th hole. It will be the responsibilty of Five Lakes, Inc. to build the pump house, and to supply electric current to same. Golf Course Builder will be responsible for all work within the pump house. The size of the pump house shall be 8′ x 8′ inside.

Golf Course Builder agrees to do all of the aforementioned work in a good and workmanlike manner, consistent with good golf course construction practices and to follow the following construction schedule, except that Golf Course Builder will not be responsible for any damage or delay caused by strikes, riots, or acts of God.

## SCHEDULE OF WORK

| *Item* | *Begin* | *Completed* |
|---|---|---|
| 1. Relocation of golf course. Locating golf course property boundaries. Planning & fitting development to golf course. | 6/68 | 11/68 |
| 2. Fairway and rough clearing and burning. | 11/68 | 5/15/70 |
| 3. Lakes at #7, 9, 13 | 3/15/70 | 5/1/70 |
| 4. Tees & greens roughed in (1st phase) | | 6/1/70 |
| 5. Irrigation system | 6/5/70 | 8/1/70 |
| 6. Mixing, topping and finish grading of greens (2nd phase) | 6/10/70 | 8/1/70 |
| 7. Fertilizing & seeding of greens | 8/1/70 | 9/15/70 |
| 8. All rough grading of fairways | 5/15/70 | 7/1/70 |
| 9. All tile drainage & all drainage pipe installed on fairways | 5/15/70 | 7/1/70 |
| 10. All fairways disced & harrowed and readied for seeding | | 8/10/70 |
| 11. All fairways seeded | | 9/15/70 |
| 12. Liming—10 days before seeding | | |

| *Item* | *Begin* | *Completed* |
|---|---|---|
| 13. Fertilizing—Immediately before seeding | | |
| 14. Driving range, completely seeded | 8/15/70 | 9/20/70 |
| 15. Practice putting green, seeded | 9/1/70 after | 9/15/70 before |
| 16. Placing of sand in traps (at option of builder) | 12/1/70 | 5/1/71 |
| 17. All bridges agreed to in contract (at discretion of builder) | winter 1970-1971 | |
| Completely finished & usable | | 5/1/71 |
| 18. Maintenance shall continue with first cutting of grass in Oct., 1970 thru winter of 1970-1971 & shall consist of all work necessary on the golf course which is commonly termed "bringing the golf course in" so as to have the golf course in excellent condition for opening day. | | |

The cost of the aforementioned work will be Two Hundred Seventy Thousand, Six Hundred Dollars ($270,600.00) based on the following construction schedule:

| *Item* | *Amount* |
|---|---|
| 1. Relocation of golf course. Locating golf course property boundaries. Planning and fitting development to golf course | $ 7,500.00 |
| 2. Fairway & rough clearing & burning | 42,000.00 |
| 3. Lakes at #7, 9, 13 | 16,000.00 |
| 4. Tees & greens roughed in (1st phase) | 53,000.00 |
| 5. Irrigation system | 46,000.00 |
| 6. Mixing, topping & finish grading of greens (2nd phase) | 17,000.00 |
| 7. Fertilizing & seeding of greens | 15,000.00 |
| 8. All rough grading of fairways | 7,000.00 |
| 9. All tile drainage & all drainage pipe installed on fairways | 8,000.00 |
| 10. All fairways disced & harrowed & readied for seeding | 3,000.00 |

| *Item* | *Amount* |
|---|---|
| 11. All fairways seeded | 10,000.00 |
| 12. Liming | 3,600.00 |
| 13. Fertilizing | 6,500.00 |
| 14. Driving range, completely seeded | 7,000.00 |
| 15. Practice putting green, seeded | 6,000.00 |
| 16. Placing of sand in traps | 8,000.00 |
| 17. Bridges as per contract | 8,000.00 |
| 18. Maintenance | 7,000.00 |
| | *$270,600.00 |

*This $270,600.00 figure represents the Complete Price for the golf course; however, since various phases of the work were done on the course for the previous owners, invoicing will be based on the balance of work to be completed as follows:

Complete Price ..... $270,600.00

Less: Work completed and invoiced at time of signing of this contract:

| *Item* | *%* | *Amount* | |
|---|---|---|---|
| 1 | 100 | $ 7,500.00 | |
| 2 | 90 | 37,800.00 | |
| *4 | 83 | 43,990.00 | 89,290.00 |
| Total balance to be invoiced for remaining work | | | $181,310.00 |

NOTE:

Of this $89,290.00 previously invoiced, $78,905.84 has been paid leaving a balance due of $10,384.16 on the old contract. It is understood that Five Lakes, Inc. will assume the responsibility of making the payment of the $10,384.16 to Del-Val Co., Inc. Future invoicing will show the complete price, less credits, in order to show a complete breakdown.

*PAYMENT SCHEDULE*

Payment for the aforementioned work shall be made in the following manner:

On the first and fifteenth day of every month an invoice will be submitted by the Golf Course Builder to Five Lakes, Inc. for the amount of work done in the previous semi-monthly period. This invoice will be due and payable within one week after being submitted. Five Lakes, Inc. shall be entitled to retain ten percent (10%) of all invoices submitted for work done on the golf course. This retainage shall be paid thirty (30) days after opening day of the golf course.

*Item 4 above was Item 3 in previous contract.

Estimated Cash Flow Requirement for Golf Course

| *Date* | *Items* | *Amount* |
|---|---|---|
| 4/ 1/70 | 2, 3, 4 | $ 8,185.00 |
| 4/15/70 | 2, 3, 4 | 8,185.00 |
| 5/ 1/70 | 2, 3, 4 | 8,186.00 |
| 5/15/70 | 2, 4 | 2,852.00 |
| 6/ 1/70 | 4, 8, 9 | 6,801.00 |
| 6/15/70 | 5, 8, 9 | 16,500.00 |
| 7/ 1/70 | 5, 6, 8, 9 | 22,167.00 |
| 7/15/70 | 5, 6 | 17,167.00 |
| 8/ 1/70 | 5, 6 | 17,167.00 |
| 8/15/70 | 7, 10 | 8,000.00 |
| 9/ 1/70 | 7, 14 | 7,333.00 |
| 9/15/70 | 7, 11, 12, 13, 14, 15 | 30,433.00 |
| 10/ 1/70 | 14, 15 | 5,334.00 |
| 1/15/71 | 16 | 8,000.00 |
| 2/15/71 | 17 | 8,000.00 |
| 6/ 1/71 | 18 | 7,000.00 |
| | | $181,310.00 |
| 6/15/71 | Retainer | |

WITNESS the following signatures and seals:

ATTEST:

/s/ Ruth A. Frazer
Secretary

WARREN W. RANDALL, INC.
A Virginia Corporation

By: /s/ Warren W. Randall
Warren W. Randall, President

ATTEST:

/s/ Warren W. Randall
Secretary

FIVE LAKES, INC.
A Virginia Corporation

By: /s/ .....
President

**PLAINTIFF'S EXHIBIT NO. 2**

**Supplemental Agreement of March 16, 1970**

RANDALL, INCORPORATED

Quinton, Virginia

Trevose, Pennsylvania
215-357-3550
March 16, 1970

Five Lakes, Incorporated
Quinton, Virginia

Subject: Golf Course Construction Contract

Gentlemen:

Pursuant to our conversation at the March 5, 1970 Board of Director's meeting at which time you requested me to accept payment of ..... per week until July 1 ,1970 as opposed to my billing you as per the contract schedule, I hereby agree to the following:

Randall, Inc. will accept ..... per week in lieu of Schedule payments until July 1, 1970 providing Five Lakes agrees to pay for any and all materials used in the work on the golf course and providing such payment be made on Wednesday of each week starting with the week of March 16, 1970.

Credit shall be given Five Lakes on July 1, 1970 for any monies they paid either in labor or material, such labor and material to apply

to golf course only, against the accumulated invoice billing by Randall, Inc. If in the event Five Lakes is unable to meet the obligation of paying the total amount of money accumulated through the invoicing of work completed at this time then Randall, Inc. agrees to negotiate this amount in a way that is mutually beneficial to all parties concerned.

AGREED:

RANDALL, INCORPORATED

By: /s/ Warren W. Randall
President

AGREED:

FIVE LAKES, INC.
By: /s/ .....
President

**PLAINTIFF'S EXHIBIT NO. 3**

**Minutes of Defendant's Meeting**

FIVE LAKES, INC.
MEETING OF BOARD OF DIRECTORS

Meeting of the Board of Directors of Five Lakes, Inc. was held in the office of George F. Smith at 495 Haddon Avenue, Collingswood, New Jersey, March 5, 1970 at 8:00 p.m.

There were present William Sikora, Raymond W. Bopp, George F. Smith, Warren W. Randall, being a full quorum for the transaction of business.

George F. Smith, President presided and Warren W. Randall recorded.

Warren Randall made a motion that William Sikora be permitted to sign checks on behalf of the corporation. Motion was carried unanimously.

A motion was made by George Smith; it was moved and seconded, that the contract to complete the golf course presented to the Board by Randall, Incorporated of Trevose, Pa. be adopted. A copy is hereby attached spelling out terms and conditions. It was further agreed that a payment schedule be established of approximately $1,600.00 per week based on the above contract and based on the time schedule for performance of the work by the contract. Motion was carried unani-

mously. Upon motion duly seconded the following resolution is to be adopted:

RESOLVED: That the President of this corporation be and he is hereby authorized, empowered and directed in the name of and on behalf of this corporation, to execute, acknowledge, and deliver deeds of trust in accordance with any agreements with lenders, where such deeds of trust are required and were made part of the negotiations and conditions under which the funds were so loaned to the corporation.

It was brought to the attention of the Board that Thomas Brooks and the President had negotiated to have Thomas Brooks approach Branscome in an effort to make a settlement to remove the mechanics lien from the property. It was agreed that any sum less than $56,500.00 due Branscome would be agreeable. The President is hereby authorized to borrow this sum from Thomas Brooks and execute such notes as necessary.

There being no further business, the meeting was adjourned.

Dated: March 5, 1970

.....

Secretary

**PLAINTIFF'S EXHIBIT NO. 10**

**Summary of Check Payments Received**

PAYMENTS AS AGREED UPON
AND AS RECEIVED BY SUPPLEMENT AGREEMENT

| *Date Due* | *Amount Due* | *Date Received* | *Amount Received* | *Balance Due* |
|---|---|---|---|---|
| 3/18/70 | $1,600.00 | 3/18/70 | $1,000.00 | $ 600.00 |
| 3/25/70 | 1,600.00 | — | — | 2,200.00 |
| — | — | 3/31/70 | 2,200.00 | — |
| 4/1/70 | 1,600.00 | — | — | 1,600.00 |
| 4/8/70 | 1,600.00 | 4/8/70 | 1,600.00 | 1,600.00 |
| — | — | 4/10/70 | 1,600.00 | — |
| 4/15/70 | 1,600.00 | — | — | 1,600.00 |
| — | — | 4/21/70 | 1,600.00 | — |
| 4/22/70 | 1,600.00 | — | — | 1,600.00 |
| 4/29/70 | 1,600.00 | — | — | 3,200.00 |
| 5/6/70 | 1,600.00 | — | — | 4,800.00 |
| 5/13/70 | 1,600.00 | — | — | 6,400.00 |
| 5/20/70 | 1,600.00 | — | — | 8,000.00 |
| 5/27/70 | 1,600.00 | — | — | 9,600.00 |
| 6/3/70 | 1,600.00 | — | — | 11,200.00 |
| 6/10/70 | 1,600.00 | — | — | 12,800.00 |
| — | — | 6/15/70 | 3,000.00 | 9,800.00 |
| 6/17/70 | 1,600.00 | — | — | 11,400.00 |
| — | — | 6/23/70 | 1,600.00 | 9,800.00 |
| 6/24/70 | 1,600.00 | — | — | 11,400.00 |
| 7/1/70 | 1,600.00 | — | — | 13,000.00 |
| — | — | 7/2/70 | 1,600.00 | 11,400.00 |
| — | — | 7/7/70 | 1,600.00 | 9,800.00 |
| 7/8/70 | 1,600.00 | — | — | 11,400.00 |
| 7/15/70 | 1,600.00 | — | — | 13,000.00 |
| — | — | 7/20/70 | 1,600.00 | 11,400.00 |
| 7/22/70 | 1,600.00 | — | — | 13,000.00 |

| *Date Due* | *Amount Due* | *Date Received* | *Amount Received* | *Balance Due* |
|---|---|---|---|---|
| 7/29/70 | 1,600.00 | — | — | 14,600.00 |
| — | — | 7/31/70 | 1,600.00 | 13,000.00 |
| — | — | 8/3/70 | 1,600.00 | 11,400.00 |
| 8/5/70 | 1,600.00 | — | — | 13,000.00 |
| 8/12/70 | 1,600.00 | 8/12/70 | 1,600.00 | 13,000.00 |
| 8/19/70 | 1,600.00 | — | — | 14,600.00 |
| 8/26/70 | 1,600.00 | — | — | 16,200.00 |
| — | — | 8/31/70 | 3,500.00 | 12,700.00 |
| 9/2/70 | 1,600.00 | — | — | 14,300.00 |
| 9/9/70 | 1,600.00 | — | — | 15,900.00 |
| 9/16/70 | 1,600.00 | — | — | 17,500.00 |
| — | — | 9/21/70 | 3,200.00 | 14,300.00 |
| 9/23/70 | 1,600.00 | — | — | 15,900.00 |
| 9/30/70 | 1,600.00 | — | — | 17,500.00 |
| — | — | 10/2/70 | 3,200.00 | 14,300.00 |
| 10/7/70 | 1,600.00 | — | — | 15,900.00 |
| 10/14/70 | 1,600.00 | — | — | 17,500.00 |
| — | — | 10/16/70 | 5,000.00 | 12,500.00 |
| 10/21/70 | 1,600.00 | — | — | 14,100.00 |
| — | — | 10/26/70 | 1,600.00 | 12,500.00 |
| 10/28/70 | 1,600.00 | — | — | 14,100.00 |
| 11/4/70 | 1,600.00 | — | — | 15,700.00 |
| — | — | 11/9/70 | 1,600.00 | 14,100.00 |
| 11/11/70 | 1,600.00 | — | — | 15,700.00 |
| 11/18/70 | 1,600.00 | — | — | 17,300.00 |
| 11/25/70 | 1,600.00 | — | — | 18,900.00 |
| 12/2/70 | 1,600.00 | — | — | 20,500.00 |
| 12/9//70 | 1,600.00 | — | — | 22,100.00 |
| — | — | 12/15/70 | 1,500.00 | 20,600.00 |
| 12/16/70 | 1,600.00 | — | — | 22,200.00 |
| 12/23/70 | 1,600.00 | — | — | 23,800.00 |
| 12/30/70 | 1,600.00 | — | — | 25,400.00 |
| — | — | 12/31/70 | 1,000.00 | 24,400.00 |
| Total Amounts | $67,200.00 | | $42,800.00 | $24,400.00 |

**DEFENDANT'S EXHIBIT NO. 1**

**Invoice of November 27, 1970**

RANDALL, INC.

*Serving the Golf Industry*

Design Construction Repairs

655 Sterner Mill Road
Trevose, Pennsylvania
November 27, 1970

Invoice No. 06
Authorized by Contract

Five Lakes, Inc.
Quinton, Virginia

Re: *Brookwood Golf Course*

Estimate of work completed to November 27 ,1970
Amount of base bid $270,600.00

| *Item* | *Description* | *Contract Price* | *Work Completed to date* *%* | *Work Completed to date* *Amount* | *Previously Completed* | *Due this Invoice* |
|---|---|---|---|---|---|---|
| 1 | Relocating of golf course. Locating golf course property boundaries. Planning and fitting development to golf course. | $ 7,500.00 | 100 | $ 7,500.00 | $ 7,500.00 | |
| 2 | Fairway & rough clearing & burning | $42,000.00 | 100 | 42,000.00 | 37,800.00 | $ 4,200.00 |
| 3 | Lakes at 7, 9, 13 | $16,000.00 | #13/95<br>#7/40 | 7,199.99 | | 7,199.99 |
| 4 | Tees & greens roughed in (1st phase) | $53,000.00 | 100 | 53,000.00 | 43,990.00 | 9,010.00 |
| 5 | Irrigation System | $46,000.00 | 92 | 42,320.00 | | 42,320.00 |

| Item | Description | Contract Price | Work Completed to date % | Work Completed to date Amount | Previously Completed | Due this Invoice |
|---|---|---|---|---|---|---|
| 6 | Mixing, topping & finish grading of greens (2nd phase) (top soil spread on all collars & slopes) | $17,000.00 | 50 | 8,500.00 | | 8,500.00 |
| 7 | Fertilizing & seeding of greens | $15,000.00 | 1/6 | 2,500.00 | | 2,500.00 |
| 8 | All rough grading of fairways | $ 7,000.00 | 100 | 7,000.00 | | 7,000.00 |
| 10 | All fairways disced & harrowed & readied for seeding | $ 3,000.00 | 100 | 3,000.00 | | 3,000.00 |
| 11 | All fairways seeded | $10,000.00 | 1/6 | 1,666.66 | | 1,666.66 |
| 12 | Liming | $ 3,600.00 | 80 | 2,880.00 | | 2,880.00 |
| 13 | Fertilizing | $ 6,500.00 | 1/6 | 1,083.33 | | 1,083.33 |
| 14 | Driving Range | $ 7,000.00 | 50 | 3,500.00 | | 3,500.00 |
| | | | | $182,149.98 | $89,290.00 | $92,859.98 |
| | Less Payments to date (old contract) | | | 81,805.84 | | |
| | | | | 100,344.14 | | |
| | Less Balance due (old contract) | | | 7,484.16 | | |
| | | | | 92,859.98 | | |
| | Less Material (paid by Five Lakes) | | | 36,000.00 | | 36,000.00 |
| | | | | 56,859.98 | | 56,859.98 |
| | Less 10# Retainer | | | 5,685.99 | | 5,685.99 |
| | | | | 51,173.99 | | 51,173.99 |
| | Less Payments to date (new contract) | | | 40,300.00 | | 40,300.00 |
| | BALANCE DUE THIS INVOICE | | | $ 10,873.99 | | $10,873.99 |

**DEFENDANT'S EXHIBIT NO. 2**

**Invoice of January 1, 1971**

RANDALL, INC.

*Serving the Golf Industry*

Design Construction Repairs

655 Sterner Mill Road
Trevose, Pennsylvania
January 1, 1971

Invoice No. 10
Authorized by Contract

Five Lakes, Inc.
Quinton, Virginia

Re: *Brookwood Golf Course*

Estimate of work completed to January 1, 1971
Amount of base bid $181,310.00

| *Item* | *Description* | *Contract Price* | *Work Completed to date* *%* | *Amount* | *Previously Completed* | *Due this Invoice* |
|---|---|---|---|---|---|---|
| 2 | Fairway & rough clearing & burning | $ 4,200.00 | 100 | $ 4,200.00 | $ 4,200.00 | |
| 3 | Lakes at 7, 9, 13 | 16,000.00 | #7/95 #9/50 #13/95 | 11,733.34 | 7,199.99 | $ 4,533.35 |
| 4* | Tees & greens roughed in (1st phase) | 9,010.00 | 100 | 9,010.00 | 9,010.00 | |
| 5 | Irrigation System | 46,000.00 | 92 | 42,320.00 | 42,320.00 | |
| 6 | Mixing, topping & finish grading of greens (2nd phase) (top soil spread on all collars & slopes) | 17,000.00 | 50 | 8,500.00 | 8,500.00 | |
| 7 | Fertilizing & seeding of greens | 15,000.00 | 1/6 | 2,500.00 | 2,500.00 | |
| 8 | All rough grading of fairways | 7,000.00 | 100 | 7,000.00 | 7,000.00 | |

| Item | Description | Contract Price | % | Work Completed to date Amount | Previously Completed | Due this Invoice |
|---|---|---|---|---|---|---|
| 10 | All fairways disced & harrowed & readied for seeding | 3,000.00 | 100 | 3,000.00 | 3,000.00 | |
| 11 | All fairways seeded | 10,000.00 | 1/6 | 1,666.66 | 1,666.66 | |
| 12 | Liming | 3,600.00 | 80 | 2,880.00 | 2,880.00 | |
| 13 | Fertilizing | $ 6,500.00 | 1/6 | 1,083.33 | 1,083.33 | |
| 14 | Driving Range | 7,000.00 | 79 | 5,530.00 | 3,500.00 | 2,030.00 |
| | Total amount of work *completed* to date | | | $99,423.33 | $92,859.98 | $ 6,563.35 |
| | Less material purchased directly by 5-L | | | 36,000.00 | | |
| | Total amount invoiced to date | | | 63,423.33 | | |
| | Less: 10% retainer | | | 6,342.33 | | 656.34 |
| | | | | 57,081.00 | | 5,907.01 |
| | Plus: Balance due Invoice #6 | | | | | 8,373.99 |
| | | | | 57,081.00 | | 14,281.00 |
| | Less: Payments to date | | | 43,200.00 | | |
| | BALANCE DUE THIS INVOICE | | | $14,281.00 | | $14,281.00 |

Item 4 was Item 3 on Del Val Contract

The following work was completed under the contract between Del-Val Co., Inc. and the original Five Lakes owners. The new Five Lakes group assumes the responsibility for payment of the balance due Del-Val Co., Inc. as per the new contract.

| Item | Work Completed by Del-Val Co. |
|---|---|
| 1 | $ 7,500.00 |
| 2 | 37,800.00 |
| 4* | 43,990.00 |
| | $89,290.00 |
| Less payments received | 86,066.62 |
| BALANCE DUE DEL-VAL on old contract | $ 3,223.38 |

*Item 4 was Item 3 on old contract

**JUDGMENT ORDER**

**Entered March 22, 1972**

This day came the plaintiff, by its attorney, and came also the defendant, by its attorney, and thereupon came a jury, to-wit: C. C. Potter, Fleming P. Dixon, Magnus Einarsson, Julius A. Scott, John C. Peace, Jr., E. V. Marston, Jr. and J. W. Adams, who were sworn well and truly to try the issues joined in this case, and having fully heard the evidence and argument of counsel, the Court sustained the plaintiff's motion to strike the defendant's evidence as to the claim for $3,223.38 that had been assigned from Del-Val-Co., Inc. to the plaintiff and entered Summary Judgment for the plaintiff as to that amount and the Court further sustained the plaintiff's motion to strike the defendant's evidence as to the counterclaim and enter Summary Judgment for the plaintiff thereupon to which action the defendants objected and excepted and the jury were sent out of Court to consult of a verdict with regard to the rest of the plaintiff's claim and after some time returned into Court with a verdict in the words and figures following, to-wit: "We the Jury, on the issue Joined Find for the plaintiff and assess the Damages at $43,300.00."

Thereupon the defendant, by its attorney, moved the Court to set aside the verdict of the jury and award a new trial on all issues on the ground the verdict was contrary to the law and the evidence, which motion the Court doth overrule.

Therefore, it is considered by the Court that the plaintiff recover of the defendant the amount of $46,523.38 with interest thereon to be computed at the rate of six per cent (6%) per annum from the 2nd day of March, 1972, until paid, and its costs by it expended in its behalf.

To which action of the Court the defendant, by its attorney, objected and excepted.

**Defendant's Notice of Appeal and Assignments of Error filed with the Circuit Court of New Kent County.**

**NOTICE OF APPEAL**
**ASSIGNMENT OF ERROR**

TO: CLERK OF THE CIRCUIT COURT OF THE COUNTY OF NEW KENT

This day comes the defendant, Five Lakes, Inc., defendant in the above-captioned case, by counsel, and hereby gives Notice of Appeal from the judgment entered herein on Wednesday, March 2, 1972, and sets forth the following Assignments of Error:

1. That the Court erred in denying defendant's motion for default judgment on defendant's counterclaim filed herein.

2. That the Court erred in ruling as a matter of law that the jury was not entitled to consider defendant's counterclaim.

3. That the Court erred in refusing to grant defendant's instructions "A" and "B".

4. That the Court erred in granting its own handwritten instruction. (unnumbered and not otherwise marked.)

5. That the Court erred in refusing to set aside the verdict of the jury as being contrary to the law and the evidence.

A transcript of the trial of this case will be filed with the Clerk of this Court on or before Friday, May 19, 1972.

[5] * * *

Mr. Scott: If Your Honor please, the defendant would move that the Court enter a default judgment on the counterclaim. The counterclaim has been claimed and has been filed to it. The defendants in Instructions 7 [6] and 8 indicate receipt of it. It has been aware of the contents of that counterclaim. We ask the Court to enter default judgment in it.

The Court: Any objection?

Mr. Lipscomb: Yes, sir, Your Honor. All the matters referred to in the counterclaim were specifically denied by the motion for judgment. We are at issue on all points. We are at issue on all points.

The Court: The judgment covers the fact that the plaintiff failed to honor his contractual obligations and failed to make necessary payments that had been agreed upon. The payment was really to complete the completion schedule.

I see nothing in the motion for judgment that denies that.

Mr. Lipscomb: If Your Honor please, it states that the work was done under the contract.

The Court: I understand that, but I have a question which I direct to you. Is there anything in there which denies this statement in these counterclaims that you failed to keep up with the production schedule —completion schedule? I think it is being alleged that your performance was sporadic and that you abandoned the contract. [7] Is there anything that denies that?

Mr. Lipscomb: Paragraphs 6 and 8 in the motion for judgment state that during the period, they refused to pay the sum and refused to provide the materials.

The Court: I understand that. It was not the question that I addressed to you. Is there anything in the contract that denies these allegations?

Mr. Lipscomb: Not specifically, Your Honor. It is just by implication that the contract was performed by—

The Court: Why was no grounds of defense filed to the counterclaim?

Mr. Lipscomb: I think technically it was an oversight.

The Court: Well, I agree with you. You have not complied with the rules.

Mr. Lipscomb: If Your Honor please, I think all of the matters would be denied under the motion for judgment.

The Court: I cannot agree, though, that it is. The easiest thing for you you to do is to admit that you made a mistake and not try to explain it. It seems obvious you should have denied it. I would hesitate to [8] give judgment for that amount because of a mistake on the part of counsel.

I will permit them to file an answer to it. It is not an answer, but grounds of defense.

Now, if you will sit down and write one up and you can put it in the file now.

Now, let us go ahead and proceed with the selection of the jury while you are doing that.

I note your exception to my ruling.

[10] * * *

**Warren Randall,**

after being first duly sworn, testified as follows:

Direct Examination

By Mr. Lipscomb:

[14] * * *

Now, in this contract I had a payment schedule and a completion schedule. Now, immediately, one of the stockholders in Five Lakes objected to the fact that I would be getting paid something like $50,000 around the first of July for fulfilling the contract. They asked me if I would work on a per week basis to kind of help them out. They could not afford that kind of money.

We discussed it. I said I thought I could do something like that. I came back a few days later with a supplement agreement. Now, whereby, if Five Lakes would pay me $1,600 a week and purchase all materials, I [15] would continue to work. Now, on July 1—

[16] * * *

By Mr. Lipscomb:

Q Now, after the discussion and the final contract was entered into and the amount set, what did you do? A We went to work.

Q What work did you perform? A We began to work on the golf course. We started in there some time around the middle of March or the early part of March. We went right to work to fulfill our contract.

Q All right, sir. How did the work [17] progress? A The work progressed nicely. There was a lot of work that had to be done due

to the fact that the golf course sat through the winter. We proceeded on very fine.

Q Now, what occurred as far as the progress of the work in the latter part of April? A Well, in April we slowed down. We didn't slow down—we kept on going, but Five Lakes was out of money. They didn't have any money. It was time to bring materials in and get our material in for the portion that was coming. We have to put in material on the job as the men are getting ready to use it. We had to get sand in and the proper way to put sand in is to put all the sand in at one time when the weather is good. It has to be there when you need it. We could not do this because we had no money.

Q You say, "We" had no money. Would you clarify that? A I mean Five Lakes had no money. I was a stockholder in Five Lakes.

Q When was it that you first had a requirement for materials from Five Lakes? A I discussed it with Mr. Smith the latter [18] part of April. We discussed it in May.

Q When was it that you first had a requirement that they furnish you certain materials? A Well, I discussed material with Mr. Smith. I told him I could be using it in May or the middle of May. I would be needing the material in the middle of May. I told him that I would like to have the pipe on the job if I was going to meet my irrigation schedule. I told him I should have the pipe on the job the early part of June.

Q Now, refer to Plaintiff's Exhibit No. 1, the original contract, and I will ask you to look at page 3 of that. What does that purport to be? A This is a schedule of work. This is when we were to start.

Q What is the significance of that completion schedule of work to the whole contract? A Well, the whole contract simply means this. In one year—there are only certain seasons in which you can plant grass. There are only certain seasons when you can plant grass on a golf course. Basically, you are after a crop and the crop is grass. You work everything to the end that you are going to get grass. You have to do certain things in order to get it.

If you miss this particular time of doing [19] the thing, it just cripples and loads you up for the remaining time that you have on the job. You have got to have the material. You have got to have the wherewithal ready and available to complete the schedule.

For instance, you work down, you get the greens ready. You get the topping on. You get the other work. You get the irrigation and suddenly now it is September. Now, if you have the water ready, you are ready to plant. You cannot plant if you do not have water.

Q How long was it that you went from the middle of April until you got things going again?

[20] * * *

A We set up a date for the following Saturday. We set the date around the 12th or 13th. I went to George Smith's office. I went to his office. He told me that Mr. Secora would furnish all the money to finish Five Lakes. He would furnish all the financing. Mr. Secora wanted my stock. I had $2,000 of stock that he wanted. He wanted my stock.

Well, it didn't seem very attractive to me at that particular time, but Mr. Smith took me down to Mr. Secora's office—at his plant. We went over the thing down there. Mr. Secora told me instead of the $2,000 shares, he asked me for $1,500. He told me to give him $1,500 of my stock and I would have $500 left. He told me that he would furnish all the money to carry this thing to a completion.

He said, "Plus you had a desire to lease and operate the golf course." I had this desire. I had expressed it. We had discussed it. I would go along with them if I could lease the golf course when it is done. It seemed reasonable to me. It would carry the situation along helping everything and I agreed to it.

At the time they owed me $12,800. I asked Mr. Secora about the money that was already owed to me. I was in pretty bad shape. I didn't have any money. He [21] told me that he would give me $3,000 today and that he would arrange for this money. He told me he would catch it up. He told me that he would carry on from here on it.

Q All right. After that meeting, what progress did you make?

* * *

A Mr. Secora only came down once a week. [22] He only spent an hour or so and went on back. I know the first time he came down he had people with him. He had people with him from some insurance company or some bank. There was not too much time to talk to him.

Q During August were you able to do any work on the course? A Yes, we moved along as much as we could in August. We needed sand. I had asked them about sand and Mr. Secora asked me to get it on credit. He told me to find it and to get it on credit. We had no credit. We had no credit whatsoever.

Q When did you first have a requirement for the sand? A Oh, it would be—I talked to Mr. Smith about sand. I talked to him about sand in May before the shutdown. In June I talked to him about pipes and the material that we needed.

He asked me if I needed it now and I told him that I needed it pretty quick. We talked about it at Mr. Secora's office that day. We talked about it on the job.

Q When did you first have a need for pipe?

[23] * * *

Q In relation to your irrigation system, what part does this play in the dikes or the dams that you just spoke of? A I could not complete the irrigation system until I completed the lakes because the breast of each lake was the way of the irrigation system to cross over that [24] particular area. I could not move. I could only go so far with the irrigation system and then I would have to stop. I have a breast here—for instance, like at 13 that washed the creek down there. Now, that creek down there is eight to ten feet deep that has to be diked up. We have to have the pipe before we do anything. We have to put the pipe in and bring the breast in and bring the irrigation across the breast. We have the lake at number 7 and we have the same condition at number 9.

Q Did you ever get pipe for that requirement? A Never.

Q For the lake? A Never.

Q When did you first get the sand? A It would be around September. I got sand—I got $1,000 worth in September.

Q What do you use the sand for? A To mix with the topsoil to blend in the top ten or twelve inches for the greens.

Q When did you say that should have been done? A We should have started on that in June.

Q All right. Now, what occurred after [25] you got into September? A Well, we just kept on working to the best of our ability. We got sand and what sand we got we used. We had to wait before we got another check. Then we got some more sand and we used it.

Q Now, getting to the sand, what arrangements did you finally make on the sand? When did you make it? A It was made with Mr. Carter at the sand plant. The sand would be paid for—it was a prepaid check. The check would be put there. Then I would draw the sand for the amount of what the check would be.

Q Do you know when this was agreed to? A Oh, I guess around the latter part of August or something like that. We were down to—it was around the latter part of August or the early part of September.

The Court: You said, "We." Who is "We"?

The Witness: Mr. Secora was with me.

[27] * * *

A I believe the check was given to the sand plant maybe around the first or the eighth or the tenth of September. It was somewhere in there.

Q Now, how much in dollar amounts did you have of sand that you actually got from Mr. Parker? A Well, the first check was for $1,000. The price was $2 a ton. Now, that would give us 500 tons, which gave us enough for a little over two greens, or two and a half greens.

Q All right. When was this second—was there a second check given? A There was a second check. Now, that did [28] not come until somewhere around the first of October. It was somewhere around the first of October.

Q All right. A That was for another $1,000.

[29] * * *

Q Did you buy any sand on your own during this period? A What I had done to finish out the work that I was doing, I did pay out of my own pocket for sand and some gravel for the greens. Now, that

was just to finish what I had started. I couldn't leave it go for the sake of probably $100 to $200 or whatever the amount would be.

Q When did you first use up the allowance of sand for the second check that you had? A I guess towards the middle of October or the latter part of October. We got a spell—we got some rain. I could not use it. We could not get the trucks in. But as soon as the weather clear up I called for some sand.

Q What did you do after that second $1,000 check ran out? A Well, before November we got another check. It was around the first week of November that we got another check.

Q I hand you this document and ask you if you can identify it. A Yes, that is the check that came down to us.

The Court: I will mark it Plaintiff's [30] Exhibit No. 5.

Note: Plaintiff's Exhibit No. 5 was marked in evidence by the Court.

By Mr. Lipscomb:

Q Tell the jury under what circumstances you received this check? A Well, I got this check and we got a rainy period. I could not use that check. We could not get the trucks in. We just couldn't. There was no sense of having to go after the sand because we just could not get it on the job. I carried the check with me for about two weeks. I had a discussion one day with Mr. Secora. He asked me if I had used the sand check. I told him that I had not. He asked me if he could have it back. I told him that I did not have it with me. He told me not to spend it because they were real short in the bank. He told me to just hold the check back. Now, I kept the check and nobody ever asked me for it.

Q Were any instructions given to you concerning the check when it was first sent to you? A Nothing. It was going to be used for the sand.

[31] Q Did you ever get any more sand after that second $1,000? A Never.

Q Did you ever have any discussion with the officers of Five Lakes concerning it? A Well, it was a little bit too late to discuss sand

at this time. There were other things to discuss. The season was lost. I had missed it. I just could not use it.

Q All right. Now, what occurred as far as the progress after the use of the sand and all in October going into November and the first part of December? A Well, we were going along and our paychecks were not coming very well. We were running behind again.

Q When you speak of paychecks—A $1,600 a week, that was not being paid. I was $12,500—I was $12,800 behind when I made the deal to give him three-quarters of my stock in June. He was going to catch up. He didn't pay but $3,000. Now, as time went on not only did he not catch up for the money he owed me, or they owed me, or whoever it was, but they did not keep current with the agreement with the work that we were doing and paying us as they were going to in the supplemental agreement.

In June he had asked me to carry that [32] supplemental agreement right through and leave it right until the end of the year, which I had agreed to do.

Now, by this time they were running pretty far behind. Now, I would say in October they were probably $17,000 or $18,000 behind.

* * *

When he got the stock, that would be in October, things began to slow down considerably as far as the money was concerned. I think they paid me between—if I remember correctly—between the end of October and the end of December—it was something like $2,500.

Q Were you doing any work during that particular time? A Yes, I stayed right there. I was doing everything that I could possibly do to get the greens seeded and the fairways seeded.

I discussed this lateness with Mr. Secora. [33] He didn't seem to be concerned. He said if I could get some greens around the clubhouse by Christmas he would be happy. Now, this is what we were shooting for.

Q All right. When did you terminate your work there? A Well, we left there for the holidays. We left roughly around the 20th of December or the 21st of December. I went over to Mr. Smith's office. I went over there New Year's Eve of 1970. I needed some money. I had sent him an invoice earlier to sort of let them know how things were

standing with me. We had a discussion. Mr. Smith gave me a statement showing I owed them money. He put a contract on the table to prove it. I looked at it and it was not my contract.

I tried to explain to them they were wrong. They made a mistake. Mr. Secora was in the meeting at that time. He kept looking at his watch. He had to run somewhere in a hurry. This discussion went on for ten or fifteen minutes. I was ridiculed quite badly.

Mr. Smith said that the best thing they could have done was to hire a contractor with money. He could then have financed the job for them. They finally gave me $1,000 because I had the pipe man in my office and I was trying to pay him.

[34] I didn't have any money to pay the poor fellow. I took the $1,000 over and gave it to him.

The Court: To who?

The Witness: The pipe man. I had a pipe contractor on the job, sir.

[42] * * *

Q Now, I hand you some ledger sheets here and I will ask you if you can identify those. A This is my cost sheet on that job.

Q How was that set up? A Well, it is set up on the time basis. It takes care of everything that we spend on the job. It tells us what each item costs us. It has the total cost of the job and the expenses and the payroll and the gas and oil for the equipment and the rental for certain equipment—you can see how it is broken down all the way through here from—(indicating).

It shows the dates and each day who gets the money and where it went and what it went for right down the line. It is a very accurate report. Everything that we do is reported. Every penny we take in and every penny we put out.

This was the only job that Randall had at that particular time. It was the only job that I had ever done with this new corporation.

Mr. Lipscomb: I would now like to introduce this.

[43] The Court: This will be marked Plaintiff's Exhibit No. 8.

Note: Plaintiff's Exhibit No. 8 was marked in evidence by the Court.

By Mr. Lipscomb:

Q Here is a sheet of paper and I will ask you if you know what these figures are on that particular page? A Yes, I do.

Q What is that? A This is the net result of that. It is condensed from that and this is our total expenses on this particular job. These figures are just taken as the final total from this cast sheet and this is what it was costing. It was $78,500 to date on that job. This is what it went for.

Mr. Lipscomb: I would like to introduce this as Plaintiff's Exhibit No. 9.

The Court: It will be marked Plaintiff's Exhibit No. 9. It is a summary sheet of Plaintiff's Exhibit No. 8.

[44] Note: Plaintiff's Exhibit No. 9 was marked in evidence by the Court.

By Mr. Lipscomb:

Q Going back to your pay record, this would indicate those weeks in June you did not have any money? What were the circumstances of that? A Well, I was not being paid. I was not being paid. I was not paid through May. I was not paid through April. I was behind $12,800.

[45] * * *

By Mr. Lipscomb:

Q Mr. Randall, looking at the totals on there, how much under the supplemental agreement were you entitled to according to your counting? A I was entitled to $67,200.

Q How much had you received? A The amount received under—$42,800. The balance due us is $24,400. This covers every week that the supplemental agreement was in effect.

[48] * * *

Q All right, sir. Would you tell the jury what each line portrays and which record that was taken from that we have previously introduced? A We have a code here—the cost expended by Randall, Inc.,

is in red. The payment received by Randall, Inc., is in blue. The amount earned by the supplemental [49] agreement is in orange. We take our cost first.

We start up and then we go—we come into the peak—this is where I was catching up on the payroll for the weeks prior to that. I didn't have any money.

Then we got that straightened out and our costs came back down to normal. Then this started to climb again in October. They climbed in November. Then we tapered off down here into December.

The payment received at $1,600 per week would be the blue line—they started out this way and they dropped down here and this emphasizes it by a zero right here (indicating). This means we were getting nothing. We started back up in June a little bit.

Now, over here (indicating) is the period that I said that there was no money in Five Lakes to pay me. They had no money. This was the latter part of April, May, and June. I didn't get any money.

Now, we get back into July. We start to come up a little bit and then we dropped down again. We get up here a little bit towards the tail end of the year (indicating). We drop right down (indicating).

Then going back up with the receipt of this $2,500 here (indicating). Now, we have this graph. We got the amount earned at $1,600 per week and in this orange [50] line the amount paid at $1,600 per week in blue. The payroll expenses is in green, and the hours worked is in red. So the amount earned, you can see, where it goes here (indicating) and it dropped back a little bit. Then it leveled off and goes back—

Q All the way through to the point that the amount earned and the amount actually received are the same as on the previous graph; is that right? A That's right.

Q All right. Now, explain to the jury the other two lines. A The green—the green is my payroll expenses. It goes up in the beginning of the job. It starts out and goes right up. Then in May and June that dormant period starts. It starts the latter part of April. My expenses dropped down and everything else drops down accordingly. Then as we come back into July with this new agreement, it begins to level off again.

Now, we get to the hours worked and we will find that the same—

our peak was just like it was in the beginning. Then we drop off into May and June.

While were were not dormant then, we come back and we start to taper off and level off and run along our normal schedule.

[51] Q So your expenses in the payroll and hours worked and all dropped at the same time as your payments were not received according to these graphs? A That's right. They work together.

Q Now, there were certain requirements in the original contract, is this correct, for periodic invoices? A That's right.

Q What was the situation concerning invoices under this supplemental agreement? A The supplemental agreement waives the invoices until July of 1970. That was the original extent of the supplemental agreement period to run.

Q What would be the reason for waiving invoices during this period under this supplemental agreement? A Well, it was a practical thing. It is quite hard to take and live to the terms of the contract as far as retaining the percent of the contract when you are working on a budget with people and you are only getting so much money.

Now, if I had made invoices, I would have to account for retainer number one and number two. When you don't get any money, it is kind of hard or foolish to make up an invoice to show that nothing is coming in against what. So we did not make up any invoices for that period until July 1.

[52] Q All right. Now, was that agreed to as part of the supplemental agreement? A Yes, it was agreed to.

Q All right. Now, what occurred prior—did you furnish an invoice at the end of that July period, or July 1? A No, because I was asked in June to continue this arrangement right on through until the end of the year. I was to continue with the terms of the supplemental agreement.

Q That means that you—did you intend to present an invoice under that agreement? A Well, I would like to have it so we could have a balance. I would like to have seen what we were doing in November or December, paywise. I later made one up in November and I made one up in December. I made one up just as a guide. We had

difficulties because we did not know what was being spent for materials. I had no idea what they paid for pipe. The sand I did know because there were two checks that were honored. I got $2,000 worth of sand, but I had no way of knowing how to make an invoice of spelling out the items that I would be working on because I did not have the pipe. I never could get the price from Mr. Smith.

[58] * *

Q What is your rule of thumb in making estimates on golf courses for your construction work as to the expenses and profits and so forth? A I use a quick rule. This is a difficult business to analyze. We have so many intangibles in this business. I use a quick rule. It works out very well. I have used it all through my business life.

Mr. Lowenstein: If Your Honor please, I would like to ask the intent of the particular question.

The Court: I cannot see what you are getting at.

Mr. Lipscomb: Your Honor, one of the items of damage called for in the motion of judgment is profit. Now, this line of testimony is going to—he is going to estimate the profit in his business on this particular job.

Mr. Lowenstein: If Your Honor please, I can see the relevancy of some figures which might tend to throw light on prospective profits on this particular job, but I don't see the relevancy or the materiality of any general rule of thumb for estimating golf courses. I object to the question.

Mr. Lipscomb: This is what he used on other jobs. This is how he estimates his expenses on other [59] jobs to make an estimate on this.

The Court: I was thinking in the beginning perhaps this is not a good measure. He would be entitled to receive $181,310 if the job had been completed.

The Witness: That is right.

The Court: I am just wondering if some estimate of what one would expect to receive is the proper measure of damage. This is the thing that concerns me. I presume his position is that it is impossible to ever figure a job. He was never able to do it as he had planned.

Mr. Lipscomb: That is true, and also certain figures as to cost had never been made available to him so—

The Court: I am wondering if the proper measure of damage is if his version is accepted as being true, if the proper measure of damage would not be whatever he actually expended plus some allowance for time and overhead.

Mr. Lipscomb: Well, that was what he was going into.

The Court: What is your position?

Mr. Lowenstein: My position is that the extent of the profits have got to be limited. He has to ask his question about the profits on a particular job.

The Court: I understand what he is [60] saying. He is saying that it is impossible to do on this job because the pipe was never brought in and material was never brought it. He is saying that the whole season was lost. It seems if we accept his version as being true, it seems obvious that the figures on the contract are rather meaningless. We cannot compute any profits on that.

Mr. Lowenstein: This all happened before any alleged breach of contract. I guess the question of profits flies out the window. What I am saying is that if Randall, Inc., is going to claim any profits at all as an element of damage on this thing, Randall, Inc., has to show what it profits on that job would have been, absent a breach of contract to look at that.

The Court: I think probably that is the proper measure of damages. What the contract would have cost if the money had been provided properly and if he had been able to go ahead.

Mr. Lipscomb: If Your Honor please, this is technically what we are getting into. He used his knowledge and—

The Court: Ask him that question as to what he had computed the cost of this to be.

Mr. Lipscomb: All right, Your Honor.

[61] By Mr. Lipscomb:

Q In arriving at your estimate and preparing this contract, what

did you figure in that estimate your cost to be—your wages to be and what would be left over as a gross profit? A I would answer it this way. On a normal job—

The Court: I cannot let you do it on a normal job. I have to have you do it on this particular job. Do you have any figures showing what your cost would have been and what your profits would have been had you been able to have completed this job promptly?

The Witness: Yes, sir. I divide this up into three parts. The first part is material at $60,000, labor and equipment at $60,000, and $60,000 for gross profit. Now, out of the gross profit comes my overhead and comes the net profit, if any.

By Mr. Lipscomb:

Q All right. Now, what, on this particular job, had you estimated your overhead expenses to be? A I would still use just the same factor of $60,000, take it out of the $60,000, the one-third, I divide in material and labor, which includes equipment and the rest is gross profit.

[62] Whatever is left is gross profit. We like to run on 15 to 18 percent overhead. We cannot today. The rest would be profit.

Q Fifteen to eighteen percent overhead would have been on the total contract price? A That's right. This is how it breaks down in the formula every time.

Mr. Lowenstein: If Your Honor please, I am going to renew the objection and ask that the answer be stricken because it is speculative. What Mr. Randell is saying is that is what he generally does. Now, he is saying that is the percentage he generally uses.

The Court: I tried to follow this very carefully. Mr. Randall, is this what you used at arriving at the $180,000? You take one-third of that and that would be your labor?

The Witness: That's right.

The Court: And you take one-third of it and it would be for material and another one-third would be for overhead and profit, if there is any?

The Witness: That's right, sir.

The Court: This is what he did in this particular case.

[63] By Mr. Lipscomb:

Q Have you ever been furnished any figures by Five Lakes, Incorporated, as to what they spent on materials? A No, I have not.

[64] * * *

Q All right. The supplemental agreement provided that Five Lakes, Inc., paid for the materials and whose responsibility was it to order those materials? A Well, I will tell you. I talked to Mr. [65] Smith and I talked to Mr. Secora about material. I talked to them about sand. They would give me a check and I would make contact. I made the contact with the irrigation people. I did this after the period in June. I did this when I gave my stock to Mr. Secora. Mr. Secora was going to arrange a loan. There was going to be money to spend. I put the irrigation people in contact with Mr. Secora and Mr. Smith. Now, this would be somewhere in the latter part of June or early July.

Q Whose responsibility was it to order the material? A I just told you. This is how I done it.

Q Whenever you wanted material you would go to who? A I would go to Mr. Smith or Mr. Secora because they had to pay cash for everything.

Q When did you go to Mr. Secora for the pipe? A I discussed it at the meeting.

Q What meetings? A The day I gave him the $1,500 shares of my stock. We discussed the pipe. We discussed bringing me up to date with the money, that they owed for the back money. They were going to get the material.

Q When was that meeting? [66] A It was on a Saturday. I got a check from him for $3,000, dated the 15th, but I believe the Saturday was the 13th.

Q What month? A June. It was June the 13th.

Q When was the pipe ordered? A I sent the pipe man to them as soon as I got the green signal from Secora. He was going to put money in it. I got the pipe man to go and see them. Their home office

was in the same area that Smith and Secora lived. It was probably two or three miles away. I put neighbor together with neighbor.

Q When was the pipe ordered, do you know? A If you considered that I ordered it, I had nothing to do with the ordering of it directly. They arranged to get the pipe.

Q When did the pipe arrive? A August 16.

Q Under the terms of the supplemental agreement, I believe you would be paid $42,800? Now, under the supplemental agreement you were supposed to be paid $1,600 per week? A Yes.

Q All right. And against that money paid [67] you by Five Lakes there was to have been a credit given to Five Lakes, Inc., against invoices supplied by you? A That's right.

Q All right, sir. Did you, at any time, submit an invoice to Five Lakes before November 27, 1970? A No, I did not.

[68] * * *

By Mr. Scott:

Q Would you tell the jury the dollar amount of work completed to date? A Work completed to date? As we have it here, it is $170,019.99.

Q Would you tell the jury what you have left as less payment to date on the whole contract? A $81,805.84.

Q Would you tell the jury what you have on this invoice as less material paid by Five Lakes? A Less material paid by Five Lakes is [69] $36.000.

Q All right, sir. In this particular invoice you had figured a 10 percent retainage based on what figure? A I can't quite hear you, sir.

Q You have figured in this particular invoice ten percent retainage which was based on what figure in your invoice? A It would be based on the fifty-six and ten percent of 865—now, I would have to figure this out as to what that balance was due.

Q To you, as of your November 27, 1970, invoice? A It is around ten thousand some odd dollars.

[70] * * *

Q Did you make any request or any specific request for any specific materials of either Mr. Secora or Mr. Smith that were not supplied to you shortly after request was made? A Yes, sir. Oh, yes.

Q All right, sir. Can you tell me what [71] materials were specifically requested that were not given to you upon your request? A The irrigation pipe and the requested sand.

Q When did you request the first irrigation pipe? A I requested irrigation pipe for the—the ACCM Construction to complete the dam. I requested the material for the drainage on the fairways. I requested this on the 10th of April. I requested it several times in May. I requested it in June. There was no money to pay for it. I requested it again immediately after the meeting that we had in Secora's office. I requested it when he said he was going to take care and bring my backpay up and get some material that we needed. We talked about it several times on the job. Now, the pipe—I arranged to have the pipe people go to make contact with Mr. Smith.

[74] * * *

The Court: As I understand Defendant's Exhibits No. 1 and No. 2, they are an effort to compute what would have been due at that particular time had the original contract been adhered to; is that correct?

The Witness: Well, it would not be truly that—had the original contract been adhered to, we have a payment schedule here and at any particular time a cash flow would be furnished with the job. There was an estimated cash flow requirement for the golf course. Now, 4-1-70, Item 234, they were to pay me $8,185. Now, 4-15-70, is the same thing again.

The Court: I was not talking about cash flow. I want to make certain that I understand Plaintiff's Exhibits No. 1 and 2. You took your contract price, the [75] initial contract price figure, as your percentage of completion?

The Witness: That's right, sir.

The Court: And then you attempted to estimate what material that had paid for to arrive at some figure?

The Witness: That's right, sir.

The Court: Let me ask you this, gentlemen. You say that this agreement that was made on March 16 was supposed to continue through until June, and I believe you said that it was agreed to that it would keep on under this agreement; is that correct?

The Witness: Yes.

The Court: When was this arrangement made?

The Witness: At the meeting in June. It would be June 13.

The Court: That Saturday?

The Witness: That's right.

The Court: Now, you say that you sent the pipe man to see them. How was the cost of this pipe to be determined?

The Witness: I know basically what an 18-hole golf course will cost, sir. This yardage—the [76] figure that I always figure is around $30,000, give or take $500 one way or the other. When the man came to see me, the salesman wanted the job of supplying the pipe. I gave him the layout of the course. I drew the routing of the course. I told him that we wanted a pump to have 550 gallons per unit and sufficient voltage that comes with it. We needed heads every 90 feet, that is, the sprinkler heads. We needed them every 90 feet. We needed a minimum of four around each green and for the tees also. Now, we needed the brace to go on top of the 808 sprinklers. We got eight or ten of those or whatever seemed would take as a complete package. It included the electric switches. I sent him to these people.

[77] * * *

**J. Russell Parker, Jr.,**

after being first duly sworn, testified as follows:

Direct Examination

By Mr. Lipscomb:

* * *

Q Did you, at some time in the fall of 1970, [78] have discussions with representatives of Five Lakes concerning furnishing sand for the golf course? A Yes, sir, I did.

Q Do you recall approximately what date that was? A It was on or about September—close to September 17.

Q Do you recall who came to see you? A The only thing that I can go on is the name that I have on a sheet of paper that was taken down at the time. I have on the sheet a Mr. Secora and I think a man doing the job was with him. I don't recall his name.

Q All right, sir. What was the proposition they made to purchase sand? A I recall they were to get somewhere in about the neighborhood of $7,000 worth of material and that $1,000 would be put up and when that was used up, another $1,000 would be sent. They would keep putting up the money in advance. They did not establish credit.

Q Did they request credit of you? A Not really, no.

Q Now, pursuant to that arrangement, what sand did you furnish them? A Well, I think it was possibly sand and [79] gravel, but by the first part of October I think they had used up the first $1,000. On October 15, we got another $1,000 and someone made up the difference of $46.18 to balance the account out. Now, this was as of October 31.

Q Was there any period between the first $1,000 deposit and receipt of the second $1,000 payment? That is, was there any lapse between there that you did not have funds available to furnish sand? A Yes. Now, we were called around the first part of October because here is a c.o.d. ticket that was delivered for $39.05 delivered on October 8, 1970, that was paid for c.o.d.

Q What did the deposit that you were holding against sand run out as to the second $1,000? A It would be some time between October 24 and 31. Now, on October 29, it looked like $46.18 was

paid by someone to even out the order. In other words, we could not get it to come out to exactly $1,000.

Q Did you, after that particular time, receive any more money from anyone concerning that project? A No.

[81]

**Edmund B. Ault,**

after being first duly sworn, testified as follows:

Direct Examination

By Mr. Lipscomb:

[82] * * *

Q In the position of him being contractor under your plans and specifications, did you ever inspect his work either by yourself or with representatives of the firm? Have you ever reviewed the contract which Randall, Inc., had with Five Lakes, Incorporated, concerning the construction of the course? [83] A I reviewed it briefly.

Q Is that contract in the general terms with contracts for golf course contracts? A It is. I have seen more voluminous contracts and I have seen less involved.

Q In the work schedule set up in that contract on page 3, is that a realistic work schedule? A In my opinion, it was a good schedule for this section of the country.

Q Now, he has testified that certain things had to be done to the course at a certain time. Would you tell the jury what the importance that is in building a golf course? A Well, the first thing in my end of the business, we definitely outline the construction schedule to conform to the seasons of the year. It is important that they are accomplished at that time because of weather and things of that nature.

Q Now, what importance does sand have in building greens and the total construction of the golf course? A Sand on a golf course as related to construction, it is that part of the percentage of sand which is used in the modification of the top 12 inches that goes on the cutting greens. If the job is properly done there would [84] have been and should have been specific indications as to the quality and the amount

of sand needed. As I have heard stated it is mixed and put on the top of the green. It must be placed some six weeks in advance of seeding.

Q What type of work should be done at what period of time in the year? A The sand goes on the green approximately six weeks in advance of seeding. The seeding of the greens in this area should take place in mid-September or first of October.

Q How much sand would it take to just roughly complete a course of that nature? A Well, an average 6,000 square foot putting green, between 6,000 and 7,000, runs approximately 200 tons of sand per green.

Q You heard Mr. Randall testify concerning special pipe that was required in the construction of the lake. In your opinion, what was the proper construction of the downfall on the lake? A Well, as we prepare plans in various counties and out of state, we work with soil conservation services and normally they will prescribe seal-on corrugated pipe for such mixtures to the lake that is a ACCM, which Mr. Randall gave. It is a trade name. I don't like to mention [85] trade names. Other types of pipe have been successfully or normally used.

Q In your opinion, is the use for the pipe of this type in the construction of the large prominence where you may have a watershed behind the lake of maybe 3,000 acres— A I have seen precased pipe maybe four to six to eight to ten feet in diameter.

Q Mr. Randall testified that he received sand from the middle of September on through October. He receive about $2,000 worth. Would that be anywhere near sufficient to complete a job of this character? A Well, it takes about 200 tons, plus or minus, per green.

Q Well, Mr. Randall testified he received about a thousand tons of sand. A It would be—it would do about five greens.

Q What about the time of the year that he received it? He received it in the latter part of September and October and is that the normal time to be mixing your green? A Well, you are getting a little late. You should be seeding in September and October, not mixing.

[86] * * *

Q In the normal construction of a golf course, when is the irrigation system supposed to be put in? A Well, it should be completely installed at least a month in advance of the first seeding of the greens. On a normal 18-hole golf course, it requires a good irrigation contractor to come in maybe six to two months ahead to install such a system. The installation should start at least two months in advance of a September seeding date.

Q You heard Mr. Randall testify that he received the pipe for the irrigation on August 16. In your opinion, would that be too late in the year to actually begin construction of the irrigation system for a golf course? A It would be too late to begin the construction of the irrigation system.

Q Would it be too late to begin it in order to have your proper seeding? A You could not complete the whole system and still be in line for complete seeding because if you do [87] not get the seed in and get it before the dormancy, you could possibly lose that grass that you have seeded without water.

[92]

* * *

**George H. Smith,**

after being first duly sworn, testified as follows:

Direct Examination

[100] * * *

By Mr. Scott:

A As the contractor performed these tasks, he should send some kind of invoice to the owner demanding payment. Mr. Randall's contract, as he originally presented it to us, had an inconsistency in this one page that he had included with it. It was the so-called estimated cash flow, where he said that he would get this much money and that much money, this $8,000 and this $16,000, and so forth—well, that was inconsistent.

We had no progress billings and it was not indicated that we were going to get any progress billings. We, as the owners, were entitled to know how much percentage of that work was done so we could pay him.

Instead, we entered into this supplemental agreement which we had called—we had hammered it out. When I say "we," I mean the four stockholders and the principal people there.

[102] * * *

We will, however, do this. We said we would pay $1,600 a week to Mr. Randall. We told him to go ahead and to order the materials and get us the bills. We would pay the bills.

As a method of payment, in the meanwhile, after July 1, he would then give us a progress billing, which tells us where we were on the golf course. We would know how much work he had done on it. We would then go and look at the course, which we were entitled to do as the owners. We would go and see how the work was going. We would bring an expert who could tell us if there was a differential. We would go out there and that is the extent of what this contract said.

Q After the supplemental agreement of March 16, how soon was work started on the golf course? A I would say reasonably within a week or two weeks.

Q Did you come to Virginia at all during the existence of that contract, or the supplemental agreement? A Yes, very definitely.

Q Can you estimate how many times? A Well, first, I was down when he [103] originally signed the contract with Mr. Brooks around January 15. It was my first visit. Then we came down and hired a salesman. We hired a salesman for our lots. We then set up a sales program to sell lots beginning in April. I was down almost every two weeks for either a day or two days or three days. I even sometimes spent a weekend down here in Virginia. I was down here many, many times.

Q During the period of time that you were here, did you physically observe the golf course in progress? A Yes, Mr. Randall and I rode around together. I rode in my own car myself. I witnesses the progress. As a matter of fact, I would ride around there with Mr. Brooks. I would say we were here no less than 10 or 15 times in the course of the building of the golf course. We were knowledgeable of it as a result of having maps and so forth. I became knowledgeable as far as the various holes and so forth.

Q At what point, if any, did it appear that the work was not going according to schedule? A Well, there were a lot of reasons why we knew the work was not being done according to schedule. For example, in that contract there are dates when work was supposed to be done. In other words, it says that this was supposed to be finished at such and such a date. Now, these [104] were calendar dates. This work was not done on those calendar dates and we were in trouble and we were behind. However, because we did feel that Mr. Randall was part of our group, we felt that for whatever reason, you know, whatever reason he might have for being slow—we did know he, financially, was not very—he didn't have much money of his own. In fact, I loaned him $5,000 on a percentage basis so we had many reasons for not—in addition to that, material was not being ordered.

Q Were you paying—was Five Lakes paying Mr. Randall $1,600 per week on the supplemental agreement? A Yes, $1,600 a week. There were questions at the time as to how much work was really being performed. On occasions we did have discussions between Mr. Secora and myself, and between Mr. Randall and myself about this. There were times where because Mr. Secora had to sign checks, there were periods of time—we admit that there were weeks where we did not pay him, but we paid him $3,200 the following week, or so much on another payment to keep him in.

[105] * * *

A Mr. Randall took his men off the job for two weeks in the month of June. He then told me that he did not know whether he would get paid any more money or not. Now, this source of knowledge was from the checkbook and the records of Five Lakes, Incorporated. He had access to them. He discussed with me the money situation. We [106] did have money in the bank, but Mr. Randall, through inside knowledge of the corporation, knew that we had an interest payment due of approximately $25,000 on our first mortgage. He knew that the interest payment was due on July 1. The amount of money that was in Five Lakes' bank account did not cover that interest payment. Therefore, if we had to pay the interest out, that money—you see, we would not theoretically have enough in our bank account to pay Mr. Randall $1,600 a week.

[107] * * *

Q From March 16 of 1970, what requests, if any, were made of you by Mr. Randall for materials? A Well, Mr. Randall kept talking to us about materials. As far as a specific request is concerned, Mr. Scott, and gentlemen of the jury, it does not do any good to request material from a CPA to build a golf course. Nor does it do any good to request material from Mr. Secora, who is a manufacturer.

Now, for us to go out and buy materials to build a golf course—we know nothing about building a golf course. We are not golf course contractors. We don't know the first thing about buying materials. We always went back to Mr. Randall and told him to buy the materials and to give us the bills. We would pay for it.

[108] When Mr. Randall was ready—when he felt he was ready to put in the pipe, he contacted the irrigation people. He knew who to contact in the irrigation field. He knew which company in Richmond to contact. It was a division of Barton Pipe in Cherry Hill. He did, in fact, give them his set of plans and they did a takeoff. He knew approximately how much it would cost because he told us.

We sat down and hammered out the agreement with them. We borrowed money from Colonial National Bank in the sum of $30,000—in the sum of $24,000. We paid $6,000 down in cash. They then delivered the pipe.

Q The delivery of the pipe was not your responsibility? A The delivery of the pipe is between the bending company, or the suppliers and the contractors. We signed and did sign notes and they discounted our notes and we paid the $30,000—$32,000 for that pipe. Mr. Randall knew what it cost because he gave them a takeoff. He gave them a list. He told them that he needed four heads per green and four heads per tee.

He told them what he needed and they gave him back his feedback. It was not until—we sat down with the main office in Cherry Hill—they told us that they did our takeoff. They had done the takeoff with Mr. Randall. [109] The price was going to be $30,000. They asked us how we were going to pay for it.

I told them that we would pay for it in cash and borrow the money. Now, that is the first time we had anything to do with the pipe.

Now, how would I have any knowledge, even today, of how much sand, how much pipe to order. It is the same thing with the seed.

Q Was the seed ordered? A It was stored on our grounds. It was never put down. The fertilizer was spread wherever it was able to be spread. It was spread on whatever holes were finished.

Q Were there any invoices—were there any discussions about there being no invoice billing subsequent to the date of the supplemental agreement? A Yes, we discussed it. We discussed it informally, Mr. Scott. We never discussed it at a Board meeting, but I would say this, that Mr. Randall was asked on many occasions, particularly by me, I cannot speak for anyone else—he was asked by me how things were going and how we were progressing. He would tell me that they were doing fine, but he would never tell me anything specific.

[113] * * *

A Mr. Secora and Mr. Bopp and myself, who were directors of the corporation—when we received the January invoice, we immediately said we were not going to consider the January invoice until we settled the November 27 invoice. As a matter of fact, it has not been brought out, [114] but the January invoice, which is the second invoice, and the November 27 invoice, which was the first invoice, are not the same.

On this one it says that on the 1st he estimates the work completed to November 27. Now, that makes a progress billing estimate of work completed. It says, "Amount of base bid, $270,600."

Now, Mr. Randall gave us these invoices—this invoice. It was my job as president of the corporation to protect the corporation wherever I can. I am obligated to check this out before I make a decision as to whether I am going to pay it.

The first thing that I determined was that I didn't know and I had no knowledge of and I did not know enough to be able to agree that this work completed to date was accurate. I represented another—I could not make a decision based on this fact that this information—this payment was entitled to be paid so as owner I had a right to dispute this invoice. I had to determine whether it was right or if it was not right.

Now, this is the November 27 invoice. We got this in the middle of December. It was the first time we had an opportunity to talk about it —it was on December 31.

[115] Randall, Incorporated, had already sent its men home for Christmas vacation. He had not brought them back. Therefore, they wanted to be paid this invoice or nothing. We did not have an opportunity to check out these percentages and see whether we owed this money or not. Now, that is item number one. We were entitled to do that. When you are dealing with a contract, you have to determine what the bounds of completion is, and how much do we really owe on the contract. We had to determine how much we didn't owe.

The other item, and this is falling back on my memory of the contract, this contract said, Base Bid, $270,600. The contract—I think its been read before in this Court—this particular paragraph. It reads that we were entitled to retain ten percent of the invoices—ten percent of the invoices. I believe the contract does not make any stipulation as far as how the invoices—what the invoices or any other invoices we were entitled to retain ten percent of the invoice amount until the contract is finished, which would have been approximately in June of 1971.

We would then turn over this money to the contractor. He is entitled to it. But the ten percent is a standard term used. We used it in our contract. Mr. Randall recognized it because he drew up the contract. [116] This is a standard contract. You keep this retainage until all work is finished and then you release this money.

Now, gentlemen, the work completed to date, according to Mr. Randall, figures the amount is $182,149.96. Now, that is the sum total of all items starting with item number one to item eight on the first page, to item fourteen on the second page with a line drawn under the sum total of $182,000.

Q The contract strictly says that ten percent of the invoices—ten percent of this figure— A Yes—

Mr. Kauffman: I am going to object because he is adding in there the $89,000 under the prior contract and that is not an issue. He is adding these two figures together and getting the $89,000 that we have already discussed that was owed to Del-Val.

The Court: That could not obviously be right. The contract was fully completed. The retainage would only be $18,000.

The Witness: The contract would have been $27,000.

The Court: Well, let us get straight right now.

The Witness: The balance should be [117] invoiced for the retainage.

The Court: The $181,000?

The Witness: Yes, sir.

The Court: All right. So if he had fully completed the entire contract, the most you could have withheld was $18,100; is that right?

The Witness: That is not the way the Board of Directors looked at it.

The Court: I am asking you what that says.

The Witness: Well, Your Honor, this one paragraph follows a previous paragraph.

The Court: Well, my ruling is going to be that the most the retainage could be on the completion would be $18,100.

Mr. Kauffman: Thank you, Your Honor.

The Witness: It states, Your Honor, the Board of Directors, in viewing this invoice, did not agree with that.

The Court: I rule that it was improper.

The Witness: One of the reasons we did not pay it was—I want to list the second reason over and above the fact that we did not know whether the work was done or not. It was our opinion that the total contract was [118] $270,000 and the retainage, as stated on that invoice—may I have it back?

The amount of the retainage, as stated on that invoice, was $5,685. We felt it should be $18,000—but both parts of the contract, the upper or the bottom part of these billings—the upper part and the lower part were enough in themselves to have the Board of Directors say, let us sit down and talk about it. Let us find out where we are. Let us find out what we really do owe you. The invoices say we owe you $10,875. Let us discuss it.

We further disagreed because the very next invoice, which was on the first of January, stated something entirely—Base Bid, $181,310, which we did not understand. We had not settled invoice number one. We had knocked that down to talk to the contractor.

[119] * * *

Q With respect to materials, do you recall, Mr. Smith, when a request was made for the pipe? A Not before July, Mr. Scott. I did not get involved in that request for pipe until—

The Court: That was not the question he asked you. Would you respond to the question?

The Witness: In July of 1970—the precise time, I don't know—we had discussions on, you know, on the materials, but not specific materials.

The Court: There was no request for pipe until July?

The Witness: Not to me, Your Honor, not to any meeting or anything that I was involved in. There were discussions on the need for and the eventuality of—there was no specific request.

[123] * * *

Q That original contract bears yours signature; does it not? A Yes.

Q Just as the supplemental agreement represents your signature? A Yes, sir.

Q And in both of these capacities you were acting as president of Five Lakes, Inc., is that correct? A Yes, sir.

Q So that you signed that contract which called for certain payments to be made as a representative of Five Lakes, Incorporated, and fully authorized to do so? A No, sir.

Q You didn't— A To the extent that I can answer your question, yes, because I signed the supplemental agreement based on the $1,600 a week, which the Board of Directors approved. I signed this contract without that cash flow statement in it.

Q Do the minutes of the March 5 meeting reflect that Randall, Inc., is to be paid $1,600 per week? A Yes, sir.

[124] Q Is there any exception in there as to any weeks they are not to be paid? A The only weeks that they were not paid were the—

Q Well, was there any exception in the minutes as to any weeks they were not to be paid? A Nothing in the minutes.

Q In the supplemental agreement which you signed as president of Five Lakes, Inc., is there any exception as to any weeks that Randall is not to be paid $1,600. A Not in this agreement, sir.

Q All right, sir. Now, I will hand you Plaintiff's Exhibit No. 10. I will ask you if that reflects the period from April 21 to June 15, which is a period of eight weeks. No payments were made by Five Lakes to Randall, Inc.? A I can't make that statement, sir, because I don't have the books of record. I can't—I hesitate—

The Court: You are not disputing this, are you?

The Witness: I don't know.

By Mr. Kauffman:

Q You don't know? [125] A I don't know. I do not have the books of record here with me.

Q Where are your books, Mr. Smith? Where are the books of Five Lakes that reflect the payments that were made? A I believe that we handed in the cancelled checks to you. I believe you have the cancelled checks for our regular account.

Q Do you have a ledger book? Do you have a ledger book? A I think so.

Q Where is that? A It should be in the office of Five Lakes. The general ledger for March 5, 1970, to December 31—it is not there, Judge.

The Court: Were they not subpoenaed, Mr. Smith?

The Witness: (No response.)

By Mr. Kauffman:

Q The checks were delivered to Court pursuant to our proceedings beginning on July 16— A Yes.

Q Is that correct? A That probably could be true, yes, sir.

[126] Q All right. I am asking you about the period of time from April 21, 1970, through June 15, when Mr. Randall alleges that he received no payments. A May I see that again, sir?

Q Yes, sir. A My records which I have a listing of the cash payments indicates that Mr. Randall did not receive anything in the month of May. He did not receive any payments in May. My records do indicate he received $4,800 in the month of April. He did receive $4,600 in the month of June.

Q All right, sir. If you would look at this sheet, it shows three payments in April of $1,600 each. Is that $4,800? A $4,800.

Q How much in June? I believe your records show $4,600 in a payment here on June 15—how about June 23? A $1,600.

Q So, what Mr. Randall has described in his exhibit is correct? And that leaves a period of eight weeks in between here in which no payments were received; is that correct? A You can—

The Court: It is a matter of [127] mathematics.

The Witness: That is correct.

By Mr. Kauffman:

Q That's correct. In the supplemental agreement made, there were no provisions for missing any weeks at $1,600? A That is correct.

Q Do your records show that so much money was paid to Mr. Randall at the rate of $1,600 a week? A Yes, they do.

Q And the total that you show that has been paid, including December 31, 1970, was $44,200. Mr. Randall's records show that you paid him $42,800, and that is a difference of one week, or $1,600? A That could be correct.

Q Well, is $42,800 and $44,200—that is $1,600? A That is a difference—

Q Of one week? A $1,400.

Q $1,400, which is approximately one week, that if you add the total weeks in that period, don't you come up with $67,000? A With the exception that Mr. Randall [128] didn't work on the week of the 30th. He pulled his men off on the 22nd.

Q So take off that $1,600, and that gives you approximately $66,000 or $65,000? A On a weekly basis—

Q On a weekly basis, that supplemental agreement calls for $1,600 a week?

The Court: There is no need to repeat that.

By Mr. Kauffman:

Q Now, you stated that you had a just objection to this contract. When it was discussed with the Board—you stated that it was discussed with the Board and the Board had a just objection to the original prepared contract, which is that contract minus the cash flow, and you signed it anyway? A We did not sign the contract with the cash flow.

Q You signed the contract anyway; is that your signature? A That contract, without the cash flow.

The Court: Let me ask you this. Was there any part of it that was eliminated?

The Witness: Yes, sir.

[129] The Court: How was this eliminated from the contract?

The Witness: These pages—we got there—we took the pages out.

The Court: The one you signed did not have this page out?

The Witness: We—this was presented—this contract, Your Honor, was presented to the Board. This page was presented as an addendum of an additional page.

The Court: It was removed?

The Witness: The estimated cash flow—right, for the golf course. We looked at it. Mr. Randall was going to build the golf course and we told him to stop trying to be a financial expert. We told him that we did not want to accept this payment schedule. This was an estimate of the cash flow—we left it out.

The Court: Are you telling me that this page was removed from the contract when you signed it?

The Witness: Yes, sir.

By Mr. Kauffman:

Q You signed that contract minus that page exactly as it read, and signed the supplemental agreement? A Yes, sir.

Q Did you, or did the new group, or you on [130] behalf of the new group, did you hire an architect to review the plans of the golf course, to look over it? Did you ever hire an architect to review them? A No, we had not.

Q Now, you stated that you agreed with Mr. Randall that he was to give you a progress billing as of July 1? A Yes, sir.

Q And you did not receive that progress billing? A No, we did not.

Q Did you hire an expert or an architect at that time to go down and see how much of the work was completed? A No, sir, we relied on Mr. Randall's integrity.

Q You relied on Mr. Randall's integrity? A Yes, sir.

Q At that time you were approximately $12,000 behind in your weekly payments, were you not? A If that is what the figures come out to, sir.

Q At that time—this July 1 invoice was—you all were way behind in your weekly payments, were you [131] not? A That is predicated on the fact that we had not received a progress billing. We didn't know if we were behind or not because the supplemental agreement says on July 1 we were supposed to get a progress billing.

Q Based on the $1,600 a week, you were about $12,000 in arrears as of July 1; is that not correct? A If that is what the schedule shows.

[132] * * *

Q Now, what is the first completion date on there which pertains to Randall, Inc., after they took over the contract? A All right. Looking down here, the first completion date happens to be May 1. It was May 1 of 1970.

Q What is that for, sir? A For the outline of the lakes. They were lakes number seven, eight, and thirteen.

Q Those refer to the various lakes that were located around the course? A Yes.

[133] Q Your records on the weekly statement show that they were not paid in April? A We paid $4,800 in April.

Q What months did you miss? A May—

Q You missed the month of May—what is the next completion date on there? A The next completion date is May 15, 1970.

[134] * * *

By Mr. Kauffman:

Q All right. Now, you testified also that you had money in the bank? A Yes, sir.

Q When I asked you why, if you had money in the bank, you did not make these payments sir— A We did make the payments. The problem we ran into, of course, that the amount of work being done on the—we had a signatory problem. We had a problem of getting the signatures on the check and getting them to Mr. Randall.

Q Well, you could sign the checks? [135] A I could and Mr. Secora could sign them.

Q Well, you knew the check was supposed to be a weekly check, and you said you had trouble getting the signatures and you could not get these checks to him once a week? A It could be very possible, yes, sir. As a matter of fact, we doubled upon the checks. I gave him $3,200 in July—I gave him $3,200 in the month of July. We paid him $7,800 and doubled up on other months to make up the difference.

The Court: You did make up the difference?

The Witness: In an attempt to make up the difference.

By Mr. Kauffman:

Q At what point did you make up the difference? At what point was the running account of $1,600 a week ever brought to zero? When were you up to date? A It was never brought to zero.

[136] * * *

A We paid him in April also.

Q You paid him three weeks in April? I believe you testified there were four weeks in April and—A The last week in April we missed.

Q And you missed the whole month of May? A Yes, sir.

[139] * * *

Q Now, according to that original contract, the amount of work completed by Del-Val was $89,000; is that correct? A What original contract?

Q The contract you signed as president of Five Lakes, that was the amount stipulated that was done? You testified earlier that $86,000 had been paid to Del-Val? A That's correct.

Q Which leaves a difference of $3,000 owing on that contract, does it not? A That's right, provided, of course, the work was finished.

Q Well, under the contract that you signed, the original contract, it said $89,000 had been completed, and does that not state that in the contract? A That's right.

Q And you only had paid $86,000 on it and you owed the additional $3,000 on the old contract? A We owed whatever the work —the extent of work that was finished and you are right, the Del-Val work that was done—it is—

The Court: There is no need to argue about it.

Mr. Kauffman: He is not responding to [140] my question.

The Witness: Yes, we owed it, provided the work was finished.

The Court: He keeps putting in the addendum.

Mr. Kauffman. But the contract says no—

The Court: No need to argue the contract. I will rule as a matter of law on that.

[141] * * *

Q Did you ever come down to go over the course with Mr. Randall? A Mr. Randall would not sit down and talk to us.

Q May I complete my question, Mr. Smith? From November on, when you began to be dubious about the invoice, did you attempt to come down here and go over this golf course with Mr. Randall? Did you attempt to go over each green and fairway to determine how much

he had done? Did you come down to determine what percentage of the work had been completed? A We could not get Mr. Randall to sit down and talk to us to reach this kind of agreement.

Q Did Mr. Randall agree to see you December 31? A Yes, sir.

Q Up at your home ground in New Jersey? A He came to my office. He came—

[142] Q He came after money, did he not? A Yes, sir.

Q And you gave him $1,000? A We gave him $1,000, yes, sir.

Q But you claimed that you had overpaid him all along? A Yes, sir.

[144] * * *

Q Now, Mr. Smith, let us go back to this June meeting when you and Mr. Secora and Mr. Randall all got together. Let us go back to this meeting when you were up in Mr. Secora's office and Mr. Secora told Mr. Randall to continue under the $1,600 a week arrangement. Were you present during that meeting? A Yes, I was present in the July meeting in Mr. Secora's office.

Q The meeting took place on June 13? A June 13.

The Court: The second Saturday in June?

Mr. Kauffman: It was the second Saturday in June?

The Witness: Yes, sir. I was there. It was determined that Mr. Secora would raise the additional financing necessary for the job to pay for the materials and to complete the work. This means that we already had money in the Five Lakes account at the First and Merchants National Bank. Mr. Secora paid the interest. He would arrange to finance the rest of the project for whatever time it took to [145] do it.

By Mr. Kauffman:

Q Did Mr. Secora, in fact, borrow $100,000 at that time. A $100,000 at that time, yes.

Q May I ask you, who is World Institute of Translation? A It is one of Mr. Secora's companies.

Q One of Mr. Secora's companies? A Yes.

Q Does it have anything to do with Five Lakes? A No.

Q Well, can you tell us why Five Lakes paid it $75,000 on July 6 of 1970, two weeks after this meeting there in Mr. Secora's office when he said he was going to raise the money one week after he borrowed the $100,000 in the name of Five Lakes? A Well, Mr. Secora happens to be involved in approximately five or six different corporations. Mr. Secora raises the money by borrowing from Continental National Bank in the City of Philadelphia. That account in which he put into the account you are looking at is not a corporation. It happens to be his personal account. It happens to be one [146] of his personal accounts. It happens to be one of his personal accounts from which he pays various bills, predominantly the Five Lakes bills. Mr. Secora raised $100,000 because he had general business dealings—

The Court: It was not for this project alone?

The Witness: Not for this project alone. The $25,000 was—

By Mr. Kauffman:

Q Was the loan made in the name of Five Lakes? A The loan was made in the name of William and Lillian Secora.

Q Well, then, $25,000 of the $100,000 went into Five Lakes? A Whatever was necessary to pay those bills, which at that time was —we still had money to pay Mr. Randall.

Q You didn't pay Mr. Randall off, though, that is the point. A Mr. Randall didn't have—we didn't pay off the balance of the $1,600 that we were behind. We did not know the amount.

Mr. Kauffman: I will introduce in evidence the $75,000 check that was written on the Five Lakes [147] account to W.I.T.

The Court: I cannot see the significance of it now. He said that he has changed the $100,000 to $25,000—

Mr. Kauffman: I don't think that is what he testified to on direct examination, Judge. I think the jury is to reach their own conclusion—

The Court: He has testified that to all of this in front of the jury and they can make such an evaluation as they think is proper.

By Mr. Kauffman:

Q Now, at the time that this check—the same date as this check and the same time as this loan of $100,000, is it not true that a $20,000 savings certificate was issued on this account to Mr. Secora personally?
A No, the savings certificate, the method of doing business in various banks is very odd. Mr. Secora borrowed money on an open line of credit with his own personal signature and his wife's own personal signature. He does this on many, many occasions. This particular occasion was not different. It is not unusual for him to borrow $100,000. He has sufficient assets and credit in our area and in many other areas to be able to do this. The part and parcel of the lending situation as it is today with interest rates [148] being what they are today, the banks can only charge an individual a certain limited amount of interest. They can charge a corporation a greater amount of interest.

The bank require that $20,000 of the $100,000 to be left on deposit in the form of a savings certificate to offset the borrowing. In other words, he had used only $80,000, but he borrowed $100,000, and that was the bank's way of jumping the interest rate. Now, that was the reason for the $20,000 savings certificate.

Q Out of the $100,000, you mean to say that $20,000 was retained in the bank as a certificate of deposit?

The Court: We have $80,000 instead of $100,000? He wrote a check to W.I.T. of $75,000, which is an affiliate corporation that you just testified to, that had no interest with this venture whatsoever?

The Witness: Yes.

The Court: He only had $5,000 left?

Mr. Kauffman: I will now introduce both of these exhibits in evidence.

The Court: I will change my ruling. I will permit Plaintiff's Exhibit No. 14, and Plaintiff's Exhibit No. 15 in.

[149] * * *

The Court: Let me ask you a question. This addendum, dated March 16, says that this was to continue until July 1. Was there any agreement later on that it was to continue indefinitely?

The Witness: No, Your Honor.

[150] The Court: It never continued past July 1; is that right?

The Witness: This agreement was to go to July 1 to see how the progress was because of the—

The Court: I don't want you to give the reason. There was no agreement to continue after July 1?

The Witness: We would continue—no, there was no agreement to continue this except to the extent to keep working and we would keep giving him the $1,600, that he would keep on the job.

The Court: You did agree to continue with the $1,600? Did you or did you not?

The Witness: I don't know how to answer that. I really don't know.

The Court: Did I understand you to say you expected to—you would go out and buy the materials and you would pay for it?

The Witness: All he had to do was go and order it. In other words, he should go out and order it and we would arrange to pay for it.

The Court: Did you understand that he had no credit and he could not buy it? Did you understand that he had no credit to buy the sand?

[151] The Witness: Randall, Inc., we understood had no credit.

[152] * * *

The Court: When you inspected the course some fifteen or so odd times, did you notice that the lakes were not completed?

The Witness: Yes, sir.

The Court: Did you notice there was no pipe there to complete the lakes?

The Witness: Yes, sir.

The Court: Did you ever discuss this?

The Witness: We discussed this constantly. As a matter of fact, I asked Mr. Randall—he kept talking about this all the time. I asked him when he was going to order it.

The Court: He never asked you for the pipe?

The Witness: He never asked me for the pipe, no, sir.

The Court: You never asked him why he didn't get the—

The Witness: I never got a concrete answer.

The Court: He never would answer you?

The Witness: That is correct, sir.

[153] * * *

**William Secora,**

after being first duly sworn, testified as follows:

Direct Examination

By Mr. Scott:

[156] * * *

A No. We talked—one time I talked to Mr. Randall about some more piping that he needed. I told him what are you going to do about that. He told me that he knew where he could get some piping where the ends were damaged a little bit. He said that the State Highway could not use it. He told me that we could use it on the property. He told me that we could save some money. He told me it would not affect anything. So I told him when you are ready, I will come down and we will order it.

Q Was anything further ever said to you about the pipe? A Never.

[169] * * *

**W. Russell Roberts,**

after being first duly sworn, testified as follows:

Direct Examination

[172] * * *

By Mr. Scott:

The Witness: When I went over the golf course I found two tees seeded, seventeen topsoiled, one not built, period. Greens, I found two seeded, ten topsoiled, seventeen roughly in or subgraded, and one partially subgraded. I found fairways, four seeded, fourteen topsoiled, four fairways [173] basically were only partially constructed. In other words, they required extensive earthmoving on these four fairways. Now, five fairways were completed but required considerable drainage work on them. None of the lakes had any dam construction or spillway construction completed.

When I look at these two invoices—let me take them item by item. Item thirteen—95 percent completed. I would question that. The greens were rough. I would call them subgraded—100 percent—I would question that, too. Irrigation, 92 percent, I would question that. I would not question the next item or the next or the next.

In Exhibit No. 2, the invoice dated January 1, 1971, I find the work on lake number seven, 95 percent completed. I find on number thirteen, it would be 95 percent completed. I would question the 75 percent on the lake at number seven.

[174] * * *

Q At the time you looked at the golf course, what was your estimate of the cost? A The estimate of the cost to complete at that time?

Q Yes, sir. A I estimated that it would cost to engage a golf course contractor at this time, this is the date of April, 1971, I estimated it would require $150,000 to complete this course as it was originally designed and to complete it at about the same quality as what had gone previously—or the things that had been completed with the same specifications that the original contract was for.

[175] * * *

Q Based on your estimate in March of 1971, have you engaged in the building of golf courses since that time? A Yes.

Q Have you taken into account the increase in costs that would have to be done to complete this golf course today? A This would have to be—I would like to make a statement before I answer this. I don't know how much the course had dilapidated in the past year. However, given the same conditions that I saw last March, I would estimate today probably in the neighborhood of $200,000, or very close to that.

Q Mr. Roberts, again, on this invoice and the completion percentages contained therein, you have given generally what you found as far as the course was concerned. Can you say on each hole what you found as far as fairway, rough clearing and burning?

[176] * * *

The Witness: I will do that, Your Honor.

Number one hole, the tee and fairway was seeded with a fair to poor stand of grass. The green had been topsoiled. It was unseeded.

The second hole, the tee was topsoiled, the fairway only partially constructed. It needed considerable earthmoving work and culvert pipe or drainage and et cetera. The green was subgraded.

Hole number three, the tee had been topsoiled, the fairway was topsoiled. The green was topsoiled. There was no seeding.

Hole number four, the fairway was topsoiled, the green was subgraded and the tee was topsoiled.

Hole number five, the tee had been topsoiled, the fairway topsoiled and the green subgraded.

Hole number six had been subgraded and [177] the tee had been subgraded.

Hole number seven had been topsoiled and there was quite a good deal of debris in the fairway and in the lake itself. The dam had not been built for the lake. This dam was also part of the fairway. This particular hole lays across the dam to get to the green and the dam was an integral part of the fairway. The fairway had not been completed. The green was only partially subgraded.

Hole number eight had been topsoiled, and the green had been subgraded. The fairway had been topsoiled but it needed drainage.

Hole number nine had a poor stand of grass but the fairway had been seeded. The tee had been topsoiled. The fairway also needed drainage. The tee at the upper end of the lake, in front of the tee,

needed to be filled and to be cleaned up because there was debris there. The green had been seeded but there was a poor stand of grass there.

Hole number ten, the green was topsoiled, the fairway had been seeded, and there was a pretty fair stand of grass there. Now, sir, the tee had been seeded and there was a poor stand of grass.

Hole number eleven, the fairway and green had been topsoiled.

[178] Hole number twelve had been topsoiled, the fairway was only partially graded and needed considerable work and the green had been subgraded.

Hole number thirteen, this had not been built. The lake in the fairway had not been completed. There was no dam there. The green had been subgraded but there was no irrigation on this hole.

Hole number fourteen, the tee had been topsoiled and the fairway was wet and needed considerable drainage. The green had been topsoiled.

Hole number fifteen, the tee was topsoiled, the fairway was wet and needed considerable drainage and the green had been topsoiled.

Hole number sixteen, the tee had been topsoiled, and the fairway was wet and needed considerable drainage and the green had not been topsoiled.

Hole number seventeen, the tee and green and fairway were all topsoiled.

Hole number eighteen, the tee was not seeded, the fairway and green had been seeded and there was a poor stand of grass.

I would like to point out that when I state that the fairway or green or tee had been topsoiled, that means that the basic grading on the hole has been done. [179] The topsoil has been placed back on the hole.

By Mr. Scott:

Q Mr. Roberts, in the construction of a golf course, what is the prime building season in the course of one year? A Well, the major portion of work would be accomplished in May, June, July and August. Your seeding would be done in September.

[180] * * *

Q Now, you talked about the drainage problems on several of these fairways. The only way to rectify the drainage problem is by putting in the pipe to run the water off? A Yes.

Q If you don't have the pipe you can't run the water off, can you? A Absolutely.

Q Until you run the pipe, you cannot remedy this? A Right.

Q You said there was dam work—part of that dam work was for a spillway and you need pipe— [181] A Absolutely.

Q You cannot complete the dam until you get the pipe on the spillway; isn't that correct? A That's right.

Q And I believe you also said that a lot of the culverts or tile pipe was needed. This is part of the drainage; isn't that correct? When you speak of drainage—when you speak of drainage you are speaking of culverts as well as tile? All of this is essential to get the material on the job before you can do the work; isn't that correct? You cannot do the work without the materials? A Right.

Q Now, I believe you heard the estimate on the sand of about two and a half greens per 500 tons of sand; is that correct? Would you agree with that? A It is on the low side. Now, that is a little on the low side.

Q So if there was a thousand tons of sand delivered to this job, how many greens could you do with it? A Well, I would say five greens would be maximum.

Q Maximum. So that would leave you with thirteen greens left to put sand on; is that correct? A Correct.

[182] Q And here again you cannot do your green until you get your sand? A Correct.

Q Now, you gave your price of completion of this job. I believe you said as of April 1971, that was based on the condition that you saw at that particular time if you were going to do the job; isn't that right? A That was the condition I saw at that time, if I or any repuable golf course builder was going to complete the job.

Q You didn't take into consideration what had transpired from September to the deterioration of the work, did you? A No, I did not.

Q So if you had been standing there looking at it in November or December, you could very well have arrived at a different conclusion,

depending on how much deterioration occurred from November to December to April because of the elements and being left abandoned? A I cannot suppose what was there in November.

Q You do not have any idea what was there in November? A No, I do not.

[183] Q You are testifying only as to April of 1971? A That's right. Absolutely.

Q When you talk about your cost, it is based as a cost at that time and not at the time this contract was signed back in March of 1970; is that correct? A True. This contract was based on cost back in March of 1970. I was advising the owner what it would cost him to get his golf course completed.

Q That was merely your opinion and your price? A Correct. I would like to preface my answer. It was not my price. I would not do it for that figure.

Q It was your opinion that was a reasonable price? A Right.

Q It also costs more to come in and clean up someone else's job, more than it would if you had started from scratch? A Yes, that is a true statement.

Q It would also cost more to come in and pick up in the middle of someone else's job? A Absolutely.

[198] * * *

The Court: It seems obvious to me that the defendant did not comply with the agreement to pay the money. How could he cover under the contract?

Mr. Lowenstein: Your Honor, we are talking now about the $1,600 a week. I think the law would have to apply to that agreement and under that the contractor has to pursue the work. For example, if Mr. Randall stayed up in Baltimore and did not have a crew or a reasonable crew working down here, it is inconceivable to pay him $1,600 a week for some unlimited period of time. What these folks did with a supplemental agreement was set up a method of [199] paying them. They would get their invoices in July. They would see where they stood. In July they decided they would go on with this arrangement.

Now, in November they finally got an invoice. The Five Lakes people looked at it and told Mr. Randall to hold on. It looked to them like they had overpaid him.

I don't think Mr. Randall can have it both ways on this. When he gave them that November invoice, it seems like he was attempting to justify the billing that he has gotten. My people told him to hold it. When they had this November invoice, they told him to hold it. They wanted to look it over. They wanted a little more time.

The Court: Well, don't you agree that they failed to comply with the contract in paying the $1,600 a week?

Mr. Lowenstein: No, sir. I would answer the question no. I don't think so.

The Court: Well, I will rule as a matter of law that they did.

* * *

The Court: He agrees with you. He [200] says he was not working because he did not have money to pay his men. He stopped paying them in May. They worked a week or two without pay. Finally, he tried to work without pay and he had to quit.

Mr. Lowenstein: I think the jury is entitled to know that he did not have people out there on that job. I think the jury is entitled to have to decide whether he brought the work along to the point where he was entitled to his money.

The Court: Well, let us talk about his side of the claim. How could I permit you to recover when obviously from your own testimony you contributed to bring about this condition?

Mr. Lowenstein: I think the answer to that is I am hoping that the evidence could be interpreted that we did not contribute. Mr. Randall was out there. He was not justified in abandoning the job and walking off of it. Now, if the breach occurred—

The Court: As far as I am concerned, his walking off the job in April cannot be held against him. I am going to rule there is no recovery under the counterclaim.

Mr. Lowenstein: I would like to make a motion for the default judgment. I point out to the Court [201] respectively, sir, Rule 311, which deals with pleas and motions and one other category of legal

procedure where Rule 310 specifically deals with counterclaims. Now, their error to respond to Rule—

The Court: In any event, as a matter of law, you are not entitled to recover anything on the counterclaim.

The only difference I see here is the controversy on the material. It is obvious that they failed to pay him. It is obvious that that is why the job fell behind. It is obvious that the job fell behind schedule because of this. He had to quit.

Mr. Lowenstein: I don't wish to belabor the point. Note my exception.

* * *

Mr. Lowenstein: I don't see how Mr. Randall is entitled to recover on a sum which was assigned to him—what I am saying, again, if the amount of work completed by Randall is less than what he had already been paid, Randall ought not to be allowed to recover anything.

The Court: Ordinarily, I would be inclined to agree with this except for the fact that he said, and no one has disputed this, that he got way behind basically because he did not get any money. The men quit. He could [202] not pay them. He missed a season for two reasons. One, that he had to stop work because of lack of money, and the other reason he could not get the materials.

Now, there is no dispute about the fact that the sand was not provided.

Mr. Lowenstein: Your Honor, I do not think that is so. The evidence of the sand people was that when he got paid, they sent the sand. Mr. Secora testified that whenever Mr. Randall requested him to get sand, he got the sand for him.

The Court: My recollection is that he really didn't remember.

Mr. Lowenstein: He certainly positively testified that at no time did Randall, Inc., request materials which was not forthcoming.

Mr. Kauffman: Judge, I hate to belabor this point. They went to the pipe people in May or in June to order the pipe. The evidence was that this pipe did not arrive on the job until August. Then we had Mr. Ault testify. Mr. Ault testified that you have to lay the pipe at least 60 days prior to the time that you spread your seed.

Now, that was to be done in September, so if you backtrack, you see from August that if he is going to spread his seed in September he has to have the pipe in by [203] the first of July. It was ordered by Mr. Secora's testimony in May, but it did not arrive until August. Now, I think you can see they did not get their materials on time.

There is no question that Mr. Secora went to Mr. Parker. Mr. Parker's testimony is that Mr. Secora went to see him to make arrangements about the sand. Then you heard the testimony about the checks. He did not recall whether the third check was to be used.

Even when you ask their expert as to the amount of sand that was needed to be used for this, they could not do more than five holes with this amount of sand that was purchased.

I think the material is quite critical. It is disputed that they were never on the job. By their own evidence Mr. Smith admitted they talked about sand in May, but he says that he did not know anything about it. He left it up to Secora. Mr. Secora testified that he did not know anything about it and he left it up to Smith.

Now, Your Honor, there are only two people who could write checks. The two people were Mr. Secora and Mr. Smith. Mr. Secora made the credit arrangements to order the pipe. He went up to the pipe factory. He went over to the sand company. He talked to the people for the seed and fertilizer. There is no dispute that Mr. Secora [204] was the one that was handling it.

Mr. Lowenstein: There is no dispute that Mr. Secora handled the money on the seed. However, the Scott man came to see Mr. Randall. Mr. Randall talked to the Scott man. Now, since Mr. Secora was going to come to town the next day, he asked the Scott man to come back. The only thing that Mr. Secora did was make arrangements to pay for it.

Now, Mr. Randall got in touch with Mr. Parker. He sent Secora to him.

Now, as to the factual dispute as to why the materials could not get there, I believe—

The Court: It is a factual dispute about the materials. There is a factual dispute about some of it.

Mr. Lowenstein: The reason that the materials did not get there was because Randall, Inc., did not do what it was supposed to do.

The Court: I will leave that question to the jury.

Mr. Lowenstein: If there is a question of a breach on Randall, Inc., then I think we have to get to the question of how much work they did. We have to get to the question of how much they have been paid.

[205] The Court: I am not going to consider the counterclaim part. They admitted breach.

Mr. Kauffman: Your Honor, we have numbered our instructions in pencil.

The Court: I don't see how you are going to properly recover on the contract itself. It looks to me like any recovery is going to be on a quantum meruit basis. There is no real way that you can waive the contract on a percentage of completion because the plaintiff himself says this thing was all fouled up because of the fact he did not get the money. He could not get anything. He lost the season.

The only way he could recover—the only way we could submit it to the jury would be on a quantum meruit basis.

Mr. Lipscomb: Would that include profit?

The Court: Yes. It would include gross profit.

Mr. Kauffman: What we are trying to get at is this profit. Profit is the motive of this contract. It was the motive originally.

The Court: My feelings about this $3,023.38, is that I will withdraw it from the consideration [206] of the jury. I feel that as a matter of law that is not due under the disputed testimony. Now, so far as the contract itself is concerned, the only way that I see that can possibly be submitted to the jury would be on the question of quantum meruit basis.

Now, this is what I have proposed. I will read it to you.

"The Court instructs the jury that if they believe from the evidence that the plaintiff was unable to complete the contract because of the failure of the defendant to make the weekly payments or pay for the needed materials as provided in the addendum of March 16, 1970 then the plaintiff is entitled to recover a reasonable sum for the work which he performed under the contract.

"In arriving at the sum you may consider the amount of work done on the contract, the expenses incurred by him for labor, the machinery

and efforts provided by him and a reasonable sum for overhead and profit. From this should be deducted the payments received by him so that the balance would fairly compensate him for the reasonable value of his services.

"If you find that the contract was not completed because of the fault of the plaintiff in failing to do the work or order materials then you shall find for [207] the defendant."

Of course, I withdraw the consideration of the $3,000.

Mr. Lowenstein: About the $1,600 a week, can the jury find—

The Court: I will let you argue that. I don't think that is the value of his recovery.

Mr. Kauffman: Let me ask you one other question.

The Court: He was not entitled to $1,600 a week. It was supposed to have been paid him $1,600 a week at the end of the time and there is going to be an accounting.

Mr. Kauffman: Yes, sir.

The Court: The $1,600 is not his measure of damages. I will permit you to argue that they did not pay it.

Mr. Kauffman: It does not show the breach.

Mr. Lowenstein: There is one thing that concerns me. It is in the last paragraph.

One of the things that I understand Mr. Smith to say was that he could not get together on this last invoice when the thing came in with regard to the percentage [208] of the completion. Maybe it can be held under the argument.

The Court: I tried to put that in the amount of work done by him.

Mr. Lowenstein: Well, that shows up on the plaintiff's side of the case, but I am wondering if the subject might not be misunderstood or overrated to the percentage of completion that ought not to be mentioned as one of relief to the defendant for the determination of who is at fault.

The Court: I don't think that is the conclusion for recovery. It is really just some effort to justify what he had done anyway. I will let you argue this. The recovery is whatever amount he actually did.

[211] * * *

Mr. Lowenstein: The defendant, Five Lakes, excepts to the instructions there granted by the Court [212] because it is primarily a quantum meruit instruction which is a claim not made out by the pleadings.

Mr. Kauffman: As I understand your ruling, Your Honor, you have withdrawn some of the consideration, the $3,000 that was the balance due on the old contract from the Del-Val Company and also withdrawn from their consideration the counterclaim so that the only thing they are to consider is what amounts, if any, is due the plaintiff?

Mr. Lowenstein: Add to my exceptions that the last instruction—there is no evidence as to the value of the work that has been done by Randall, Inc., on this job.

[220] * * *

The Court: Gentlemen of the jury, have you agreed on a verdict?

A Juror: Yes, sir.

The Clerk: (Reading) "We the jury find for the plaintiff and fix the amount due him at $43,300."

The Court: Is that the verdict of all of you?

The Jury: Yes.

The Clerk: You are now excused. Thank you for your service.

Note: The jury was excused.

The Court: Are there any motions, gentlemen?

[221] Mr. Lowenstein: If the Court please, the defendant moves that the verdict be set aside because it is contrary to the law and evidence.

The law, I think, we have argued is a matter of record.

The evidence I particularly want to comment on is that of the plaintiff's own invoice. I want to comment about his last invoice. It indicates by his figures that the difference between the value of the work which he had performed and the amount which he had been paid plus the retainage had been—it came out to about $20,000, and that the evidence was further that he had been paid an additional $1,000 after

submitting that particular invoice. So that on the plaintiff's evidence, based on the instructions of the Court as to damages, that the most the should be enitled to recover would be $19,000.

I further urge that there is really no credible evidence as to damages which the plaintiff had, and in particular, I say, if we go by the Court's instructions as to the value of the work which a man has done which is the nature of this particular instruction, I don't see how he can rise higher than his own invoice.

The Court: He said because of the shortage of pipe and because of the shortage of materials, [222] a crucial time went by and the work could not have been done as efficiently and as properly as it should have been done. He is the first one to concede that.

The question, though, is who is to bear this loss. It is true that his estimate showed that at that time under his estimate after the percentage of completion that he would have only been entitled to approximately $20,000, but I don't know that is all that he was entitled to under the contract.

I think he then had a claim for damages which he has suffered as a result of failing to be able to go ahead and to work properly.

I feel, really, that the jury's verdict is a very fair one as to the amount.

I will enter judgment for the total of $46,500.

I will overrule your motion and you can note your exception.

Perhaps you better prepare the order because I withdrew from the jury's consideration the counterclaim and also the amount that was due Del-Val Company. Now, that was $3,223.38. I rule that he would be entitled to a total of $46,523.38.

**CERTIFICATE TO APPENDIX**

I certify that three (3) copies of the foregoing Appendix was delivered to:

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