THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0067

101 Ocean Boulevard, LLC

v.

Foy Insurance Group, Inc.

Brief of the Appellant, Foy Insurance Group, Inc.

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Whether the trial court erroneously denied Foy's motions for directed verdict and judgment notwithstanding the verdict, as no rational trier of fact could have found a "special relationship," or that any additional law and ordinance coverage was actually available. App., Vol. I at 47.

Whether the trial court erroneously denied Foy's motion for new trial, as the instructions and verdict form were confusing, prejudicial, and included erroneous legal standards. *Id.*

Whether 101 Ocean's counsel's statements in closing argument were so prejudicial as to constitute plain error warranting a new trial. *Id.*

Whether the admission of a previously undisclosed "checklist" from another agency was error warranting a new trial. *Id.*

CODE PROVISIONS

The following code provisions are attached:

STATEMENT OF THE CASE

101 Ocean sued Foy, alleging that Foy was negligent in obtaining insurance. Specifically, 101 Ocean alleged it had a "special relationship" with Foy, and Foy had a heightened duty to inform 101 Ocean regarding the sufficiency of its law and ordinance coverage. Foy denied any such "special relationship," and further denied that 101 Ocean's alleged damages were caused by any error or omission of Foy. App., Vol I. at 7.

A jury returned a verdict in favor of 101 Ocean. Numerous procedural and evidentiary issues were raised at trial, and in Foy's post-trial motion for judgment notwithstanding the verdict, or alternatively, to set aside the jury verdict.

Notably, at the close of 101 Ocean's case, and as renewed at the close of evidence, Foy moved for a directed verdict arguing (1) the record contained insufficient evidence for a jury to find a special relationship under *Sintros v. Hamon*, 148 N.H. 478 (2002), and (2) 101 Ocean failed to prove that it would have obtained additional law and ordinance coverage, and Foy's actions were the legal cause of its alleged damages. T. at 394-395, 600. The trial court denied Foy's motions. T. at 397-398, 601. In addition, prior to submission to the jury, Foy raised numerous legal and prejudicial arguments with respect to the trial court's jury instructions and verdict form. T. at 617-644.

Foy timely moved for judgment notwithstanding the verdict, or alternatively, to aside the verdict. App., Vol. I at 47. In its motion, Foy re-asserted the arguments previously raised in its motions for directed verdict, and at the charge conference regarding the trial court's rulings on the jury

instructions and verdict form. Foy further asserted the inappropriateness of 101 Ocean's counsel's prejudicial and inaccurate remarks during closing argument as a basis for relief. Following an objection and reply, App., Vol. I, at 64, 84, the trial court issued an order stating, "After review of the parties pleadings, Motion Denied." App., Vol. I, at 128. This appeal followed.

STATEMENT OF FACTS

The Parties.

Foy Insurance Group is a family owned insurance agency that procures property and casualty insurance policies for both personal and commercial lines. T. at 556-557. 101 Ocean Boulevard, LLC is owned and managed by Albert ("Chuck") Bellemore, who has owned and managed commercial and residential properties since 1976. T. at 50-51. He has also bought and sold many different businesses. T. at 51. In the early 2000s, Mr. Bellemore began purchasing and renovating residential properties in Hampton Beach. T. at 52. In 2006, he purchased a hotel located at 101 Ocean Boulevard. T. at 56-57.

101 Ocean Boulevard.

The structure was built in the 1920s, and prior to purchasing it, Mr. Bellemore knew it needed work. T. at 56. At the time of purchase, there was a hotel and convenience store. T. at 56-57. Mr. Bellemore immediately took over the hotel operation, and later, in 2013, also took over operation of the convenience store. T. at 128-29. Upon purchasing 101 Ocean, Mr. Bellemore sought insurance coverage for the property from Foy. T. at 58. He did not specifically request any special coverages. T. at 58-59.

Relationship with Foy.

Mr. Bellemore first began working with Foy in the early 2000s in connection with his Royal Hampton Hotel project. T. at 52-53. Since then, Mr. Bellemore has secured insurance through Foy for some of his properties and businesses, but also had insurance through other agencies for

many of his businesses. T. at 95. He has never used Foy exclusively for his insurance needs. T. at 101-104. In fact, at times, Mr. Bellemore asked Foy to compete for coverage with other agencies. T. at 97. For example, in 2014, he asked Foy employee Heidi SanSouci to quote a garage policy, but did not accept her quote, instead purchasing the policy through another agency. T. at 97-98.

In 2007, Mr. Bellemore began working with Ms. SanSouci as his main contact at Foy, usually communicating by telephone. T. at 61-62. He liked working with her, and listened to her comments and suggestions regarding his coverages. T. at 64-65. However, although he valued her thoughts regarding his coverages, there are many examples over the years of his rejections of her suggestions. T. at 230.

For example, in 2011 Ms. SanSouci suggested that Mr. Bellemore increase his building coverage on 101 Ocean to approximately $2,000,000. T. at 63, 172. He chose not to do so then, and instead, waited years to increase the coverage. T. at 63-64.

In 2012, Mr. Bellemore informed Ms. SanSouci he planned to take over the convenience store at the 101 Ocean property. T. at 221. She told him that he did not have coverage for liability that might result from the sale of liquor and wine, and offered to provide a quote. T. at 221-22. Again, Mr. Bellemore chose not to do so. T. at 222. Instead, he conducted his own research, and determined that liquor liability coverage was not needed. T. at 131. He never discussed his research and results with Ms. SanSouci. T. at 131.

In 2013, Ms. SanSouci suggested Mr. Bellemore purchase flood insurance coverage for the 101 Ocean property. Again, he conducted his

own investigation, determined that his mortgagee bank did not require flood insurance, and did not purchase flood insurance. T. at 85.

Other than premiums, Mr. Bellemore never paid consulting fees or any other compensation to Ms. SanSouci or Foy, and there was no consulting services agreement. T. at 230.

As with all of her clients, Ms. SanSouci tried to provide good customer service for Mr. Bellemore. T. at 231. It is part of her job to discuss and review coverages and limitations. T. at 234. However, there was nothing special about Mr. Bellemore or 101 Ocean; he was similar to all of Ms. SanSouci and Foy's commercial and business clients. T. at 231, 236, 579.[1] Ms. SanSouci did not understand Mr. Bellemore to be relying on her suggestions or recommendations any more than any other client, particularly since he had, on multiple occasions, rejected them. T. at 230-31.

101 Ocean Surplus Lines Coverage History.

Given the nature of the property, 101 Ocean did not qualify for insurance through the standard market, but had to resort to the "surplus lines" market—one for hard-to-place risks. T. at 286-88.[2] Factors such as

[1] Beyond professional conversations, Mr. Bellemore and Ms. SanSouci occasionally discussed their children and other personal information. T. at 65-66, 199. Ms. SanSouci's friendly exchanges with Mr. Bellemore were no different than her conversations with many of her customers. T. at 199. Friendly conversation does not create a special relationship.

[2] Insurance companies use a "C.O.P.E." rating to determine if a property qualifies for the standard market. C.O.P.E stands for "construction, occupancy, protections, and exposure." If a property rates well under

the proximity to the ocean, wind, flooding hazards, age of the building, and loss history contributed to 101 Ocean being a difficult property to insure. T. at 292.

Surplus lines underwriters need not comply with state insurance department rules, rates, and forms. A surplus lines policy can provide less coverage, charge higher deductibles, and write shorter-term policies. T. at 318-19, 177.

Following non-renewal by one insurance company, Ms. SanSouci was able to obtain a $2,000,000 surplus lines policy for 101 Ocean through Lloyd's of London. T. at 175. However, in 2013, Lloyd's gave notice of non-renewal due to loss history. T. at 108. Mr. Bellemore asked Ms. SanSouci to look for alternate coverage, and she reached out to Andrea Roux, a surplus lines broker. T. at 177.[3] Ms. Roux ultimately was able to find a new policy through AIX (a subsidiary of The Hanover Group). Mr. Bellemore accepted the new coverage, and it went into effect in May 2014. T. at 228-29.

Surplus Lines Law & Ordinance Coverage.

Law and ordinance insurance is designed to cover increased costs associated with mandatory code and ordinance upgrades when repairing a

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C.O.P.E., it likely will qualify for a standard market policy; if not, the building owner must resort to the surplus market. T. at 559.

[3] A surplus lines broker operates as a wholesaler that provides access to surplus lines markets. T. at 228. A retail insurance agency, such as Foy, cannot access and shop surplus lines markets without involving a surplus lines broker. T. at 228.

building after a loss. In general, in the surplus market, law and ordinance coverage is difficult, if not impossible, to obtain. T. at 550, 288.

Here, the AIX policy provided $10,000 in law and ordinance coverage, T. at 74, consistent with most surplus lines policies. T. at 561. In some rare cases, additional law and ordinance coverage beyond the standard limit of $10,000 can be obtained if an insurance company is willing to write it, and an insured is willing to pay significant premium increases for it. T. at 333-34, 484. In these rare situations, the additional coverage is approximately 10% of the building's insured value. T. at 295.

Specific to 101 Ocean's AIX policy, the undisputed testimony established that no additional law and ordinance coverage was available. App. Vol. I at 144-145; T. at 484, 561-62. Notably, according to Mark Boland, president of the Hanover division for difficult business, AIX "would not" "have provided any more law and ordinance coverage for this particular [101 Ocean] hotel in Hampton Beach."[4] *Id.*

The Fire and the Damage.

101 Ocean's AIX policy was renewed in May 2015. T. at 229. On October 8, 2015, the 101 Ocean property sustained damage from a fire. T.

[4] Contrary to 101 Ocean's factual assertions raised during post-trial pleadings, the record contains no evidence that additional law and ordinance coverage was, in fact, available in 101 Ocean's specific case. 101 Ocean's expert, Frank Siegel, never testified he contacted Risk Replacement Services, and that additional law and ordinance coverage was actually available for 101 Ocean. Rather, Mr. Siegel expressly stated that his testimony about increased law and ordinance coverage was only an example, and the "example that I gave" "doesn't bear any relevance to [101 Ocean's] case." T. at 359, 356-60.

at 229, 242. As part of the Town of Hampton's investigation, the fire chief walked through 101 Ocean with Mr. Bellemore, and explained Mr. Bellemore needed to safely secure the property. T. at 251. Mr. Bellemore did what the town requested he do. T. at 251.

After the fire, neither the fire chief, code enforcement officer, nor any town official ever had any conversation with Mr. Bellemore regarding ordinance compliance. T. at 252-53, 263. Structurally, 101 Ocean was safe and secure, and the town never issued a condemnation order, or order to raze the building. T. at 253, 263. Rather, town officials explained to Mr. Bellemore that the building was secure, and it was his option to either raze the building and rebuild new, or repair the existing building. T. at 259.

In Hampton, like all towns in New Hampshire, when a building owner decides to restore an existing building, the town participates in the process in relation to the town's ordinance and state laws. T. at 255. As part of that process, the town follows the adopted state building code. T. at 260. If a property owner is restoring an existing building, not building a new structure from the ground up, the town works with the owner to reach an agreement, and has authority to modify provisions of the code. T. at 264. It is not a black and white situation, and the town can work with property owners. T. at 264. The code enforcement officer has discretion, along with the fire chief, to work with the applicant to meet the spirit of the code. T. at 265.

Here, no town employee ever spoke with Mr. Bellemore about what requirements and steps he would need to take if he were to repair the existing building rather than raze and build a new structure. T. at 265-66. Mr. Bellemore made the unilateral decision to demolish 101 Ocean before

any conversation with the town regarding repairs to the existing building. T. at 79, 143-44.

Loss Adjustment and Demolition of Building.

After the fire, AIX, through the appraisal award process, ultimately paid Mr. Bellemore approximately $1,000,000 in accordance with the terms of the policy. T. at 140; 101 Ocean's Trial Exhibit 7 (appraisal award). In preparation for the appraisal process, Mr. Bellemore hired a contractor, who was working on one of Mr. Bellemore's other Hampton projects, to provide an estimate of repair costs. T. at 377-78. Under 101 Ocean's AIX policy, the insurer agreed to pay "the increased costs incurred to comply with the minimum standards of an ordinance or law in the course of repair, rebuilding, or replacement" up to $10,000. App., Vol. III at 40 ¶6. Accordingly, when first speaking with the contractor, Mr. Bellemore specifically requested a quote of the law and ordinance costs. T. at 379.

After speaking with Mr. Bellemore, the contractor prepared an estimate, breaking down the cost of law and ordinance upgrades to repair the building. T. at 379. However, the contractor prepared the estimate without discussing any specific code requirements mandated by town officials. T. at 254-55, 266, 383-84. Furthermore, the contractor did not speak with the town to determine whether the town would be willing to modify the strict provisions of the code if Mr. Bellemore were to repair, rather than fully rebuild, the property. T. at 383-84.[5]

[5] The neutral umpire cut the contractor's estimate significantly in issuing its appraisal award. T. at 381.

In addition to the appraisal process, after the fire, Mr. Bellemore spoke to Ms. SanSouci about obtaining insurance for the existing 101 Ocean building while he decided to repair or raze the building. As part of that process, Mr. Bellemore provided a value, based on his contractor's estimate, of $1,000,000 for the remaining portion of the building. Ms. SanSouci was successful in locating coverage for the building, and provided Mr. Bellemore a quote for $1,000,000 in building coverage. T. at 135-36. Mr. Bellemore decided against purchasing the policy and, instead, tore down the building. No actual law and ordinance costs were ever "incurred" by Mr. Bellemore. T. at 143-44.[6]

[6] Accordingly, AIX did not pay the $10,000 of coverage described on the preceding page. App., Vol. I at 196 (testimony of John Johnson).

SUMMARY OF ARGUMENT

This case is the first to reach this Court since the *Sintros* decision, and raises the question as to whether, as a matter of law, there was sufficient evidence to find a special relationship between the plaintiff and its insurance agency. The agency, Foy, respectfully submits that there was not, nor was there sufficient evidence, as a matter of law, regarding the availability of additional law and ordinance insurance, the coverage at issue here, to sustain a verdict in favor of the plaintiff.

The evidence did not sustain a finding as to any of the *Sintros* factors establishing such a special relationship, and in addition, the trial court's instructions to the jury permitted it to find against Foy even though none of those factors had been adequately proven.

In addition, the trial court erroneously admitted a previously undisclosed insurance checklist that prejudicially suggested a standard of care as to which there was no competent evidence; 101 Ocean's counsel made improper comments in closing; and there were substantial errors in the charge and verdict form.

Foy is entitled to a judgment in its favor, or alternatively, a new trial.

ARGUMENT

I. Standard of Review.

A party is entitled to JNOV based upon the sufficiency of the evidence when the sole reasonable inference that may be drawn from the evidence is overwhelmingly in favor of the moving party so that no contrary verdict could stand. *MacKenzie v. Linehan*, 158 N.H. 476, 479-80 (2009). In reviewing the trial court's decision, this Court "objectively reviews the record to determine whether any rational trier of fact could have found the essential elements of the plaintiff's claims," and will grant the motion if "no rational trier of fact could have ruled in the plaintiff's favor, considering the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff." *Id*. When "a motion JNOV presents a question of law, [this Court's] review is *de novo*." *Halifax-American Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 576 (2018).

Similarly, a motion to set aside the jury verdict shall be granted if a "jury verdict is against the weight of the evidence or is the product of plain mistake, passion, partiality or corruption." *Johnston v. Lynch*, 133 N.H. 79, 85 (1990). Against the weight of the evidence is interpreted to mean that the verdict was one no reasonable jury could return. *Quinn Bros. v. Whitehouse*, 144 N.H. 186, 190 (1999).

A mistake will set aside a jury verdict when it is "against the law"—that is the trial judge made an error of law or the jury has applied the wrong legal standard in its deliberations. 5 Civil Practice and Procedure § 54.02 (citing *Goddard v. Hazelton*, 96 N.H. 231, 232 (1950)); *see also Molburg v. Hunter Hosiery*, 102 N.H. 422 (1960) (granting defendant's motion to set

aside the verdict on grounds that it was against the law); *Croteau v. John Hancock Mutual Life Ins. Co.*, 123 N.H. 317, 320 (1983) (motion to set aside the verdict granted based on misstatements of law by counsel and court). Further, statements made by counsel during closing argument will set aside a jury verdict when the arguments of counsel "encourage the jury to make a decision based on bias rather than reason" and were so prejudicial as to require a new trial. *LeBlanc v. American Honda Motor Co.*, 141 N.H. 579, 584 (1997).

II. No Rational Trier of Fact Could Find That 101 Ocean and Foy Maintained a "Special Relationship" Establishing Something More Than a Standard Insurer-insured Relationship.

The legal contours of this dispute arise from this Court's holding in *Sintros v. Hamon*, 148 N.H. 478, 480 (2002):

> [A]n insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage.

Accordingly, unless a "special relationship" existed, Foy did not owe 101 Ocean an obligation to inform or advise regarding the availability or sufficiency of 101 Ocean's law and ordinance coverage. Without a "special relationship" between 101 Ocean and Foy, Foy breached no duty to 101 Ocean.

To establish a "special relationship," a plaintiff must prove "that there exists something more than the standard insurer-insured relationship." *Id*. at 481. Here, there is no evidence (1) of what constitutes a standard

agency relationship in the context of this case, and (2) that any special relationship factors have been established.

A. No Evidence of the Contours of a Standard Agency Relationship.

Although witnesses testified regarding the duties owed in the context of a standard relationship, *i.e.,* no duty to inform or advise regarding sufficiency of coverage, there is no evidence in the record as to the contours of a standard relationship between an insurance agency and a commercial property enterprise similar to 101 Ocean. Mr. Siegel, 101 Ocean's expert, testified that a special relationship existed. T. at 329. However, he never testified as to what the contours of a standard relationship (rather than a special relationship) between an insurance agency and a commercial property enterprise actually are. In order to impose a heightened duty via a special relationship, *Sintros* expressly requires a plaintiff prove "that there exists something more than the standard insurer-insured relationship." *Sintros*, 148 N.H. at 481. Without baseline evidence as to the nature of a standard relationship between an insurance agency and a commercial property enterprise, no rational trier of fact could find "something more than the standard insurer-insured relationship."

Moreover, to the extent 101 Ocean relies on the testimony of Ms. SanSouci, Mr. Milnes (Foy's expert), or Mr. Foy for support, all three witnesses unequivocally testified the relationship between 101 Ocean and Foy did not rise to the level of a special relationship.[7] However, the record

[7] To the extent their testimony is construed as evidence of the contours of standard relationship, each testified that 101 Ocean and Foy's relationship

lacks any evidence regarding what constitutes a "standard relationship" in the context of this case. Mr. Siegel's testimony that a special relationship exists is not evidence of the specific contours of standard relationship.[8] *Sintros* requires a plaintiff to affirmatively prove "something more than the standard insurer-insured relationship." No rational trier of fact could have found "something more" than a standard relationship if no evidence of the contours of a standard relationship was in the record before them (even if Mr. Siegel testified, in his opinion, a special relationship existed).

B. *Sintros* Requires Proof of at Least One Special Relationship Factor.

The central question in the parties' "special relationship" dispute is whether *Sintros* requires a plaintiff to prove at least one of the factors listed by this Court, or whether a special relationship can be established without proof of any of the special relationship factors. Throughout this case, Foy has consistently maintained 101 Ocean is required to prove at least one of the *Sintros* factors to succeed on its negligence claim. 101 Ocean maintains that a special relationship can be established regardless of whether any of the *Sintros* factors have been established.

In *Sintros*, this Court examined the contours of a "special relationship" as a matter of first impression. *Id.* at 482. In reviewing

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was a "standard relationship." Such testimony cannot be the basis of a "special relationship" finding.

[8] As an example, Mr. Siegel was never asked (and never provided an answer) to a question along the lines of "what would a standard relationship between an insurance agency and a commercial property similar to 101 Ocean look like?" *See generally* T. at 316-360.

persuasive authority from other jurisdictions regarding the "special relationship" factors, the *Sintros* court listed examples of the factors other states have relied on in determining whether a "special relationship" existed. *Id.* (stating "examples include," and then listing special relationship factor examples from other jurisdictions). The Court then applied the factors to the case, establishing the "special relationship" factors as the law in New Hampshire. *Id*. at 483. However, *Sintros* does not hold or suggest that a "special relationship" can be established without proving at least one of the factors.

As other jurisdictions have noted, a plaintiff is required to prove at least one of the "special relationship" factors. *See, e.g., Harts v. Farmers Ins. Exch.,* 597 N.W.2d 47*,* 51-52 (Mich. 1999) (stating "we do not subscribe to the possible reading of [case law] that holds reliance on the length of the relationship between the agent and insured is the dispositive factor," and "[w]e thus modify the 'special relationship' test" to require an additional factor other than a long term relationship); *Pressey Enters. v. Barnett-France Ins. Agency*, 724 N.W.2d 503, 505 (Mich. App. 2006) (citing *Harts*: "There are four exceptions to the general rule that there is no affirmative duty for a licensed insurance agent to advise or counsel an insured about the adequacy or availability of coverage.").

Similarly, the Wisconsin Supreme Court has noted "something more than the standard insured-insurer relationship is required to establish a special relationship," and "[s]ome courts *require* an express agreement, or a long established relationship of entrustment from which it clearly appears the agent appreciated the duty of giving advice, and compensation for consultation and advice was received apart from the premiums paid by the

insured." *Nelson v. Davidson*, 456 N.W.2d 343, 347 (Wis. 1990) (emphasis added); *see also Voss v. Netherlands Ins. Co.*, 8 N.E.3d 823, 828-829 (N.Y. 2014) (stating "special relationships in the insurance brokerage context are the exception, not the norm" and identifying the "three exceptional situations that may give rise to a special relationship").

To create a "special relationship" without proof of at least one enumerated factor is not only contrary to *Sintros,* but is not good policy. 101 Ocean's interpretation of *Sintros* would leave insurance agents without any guidance as to what is or is not a special relationship, triggering a heightened duty to advise, and its concomitant liability. Agents would be unable to determine whether a good faith, arm's-length relationship with a client has triggered a special relationship creating a duty to advise, transforming the agent into a guarantor of coverage. *See Buelow v. Madlock*, 206 S.W.3d 890, 893 (Ark. App. 2005) (remanding trial court's finding that a special relationship existed, and citing *Sintros* for the proposition that imposing a heightened duty "would convert agents into 'risk managers with guarantor status' . . . which would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear.").

Undoubtedly, such an interpretation of *Sintros* would embolden a slew of "special" insureds to sue the agents that obtained their policies anytime there is an uncovered loss. As other jurisdictions have noted, such an expansive application of the special relationship analysis is misplaced. *See Nelson,* 456 N.W.2d at 347 (explaining an expectation of "timely information and counseling" cannot create a special relationship because "[t]he mere allegation that a client relied upon an agent and had great

confidence in him is insufficient to imply the existence of a duty to advise. The principal-agent relationship cannot be so drastically expanded unilaterally.").

Notably, in describing the legal requirements for a special relationship in New Hampshire, 101 Ocean's expert, Mr. Siegel, himself testified that, although a plaintiff need not prove all the factors, he must prove at least one, stating, "a special relationship [] can be judged by five or six factors [] and it is not necessarily all inclusive. It can be *any one of the six,* or a combination of these five or six …" T. at 328 (emphasis added).

For these reasons, in order for a plaintiff to recover under *Sintros*, it must establish at least one of the special relationship factors articulated in *Sintros*.

C. No Evidence of Any *Sintros* Special Relationship Factor.

In *Sintros*, this Court articulated the following special relationship factors:

1. an express agreement;

2. a long established relationship of entrustment in which the agent clearly appreciates the duty of giving advice;

3. additional compensation apart from premiums paid;

4. an agent holding themselves out as a highly-skilled expert coupled with reliance by the insured;

5. an agency holding itself out as an expert regarding specific coverages; or

6. a course of dealing over time where an agency was on notice that its advice was being sought and relied upon.

148 N.H. at 482. Here, even when viewed in a light most favorable to 101 Ocean, the evidence does not establish any of them.

Regarding factors 1 and 3, there was no evidence of an express agreement or additional compensation apart from premium payments.

Regarding factors 2 and 6, even if, in a light most favorable to 101 Ocean, there is evidence of a "long established relationship of entrustment" and "a course of dealing over time," the record is devoid of any evidence that Foy "clearly appreciated" the duty of giving advice or that Foy "was on notice its advice was being sought and relied upon."

To the contrary, the only evidence presented at trial on this point established that Foy did not "clearly appreciate" it had any special duty or that 101 Ocean relied on Foy's advice. Foy treated 101 Ocean similarly to any other commercial client, knew it was one of many agencies Mr. Bellemore utilized, and relied on 101 Ocean to signal when it wanted to make coverage changes. Foy was acutely aware Mr. Bellemore obtained insurance from other agencies for many other entities and properties (including his largest property in Goffstown), requested Foy quote against other agencies, and, on many occasions, did not follow Ms. SanSouci's suggestions regarding coverage. Simply put, Foy could not have been on notice that its advice was "sought and relied" on when Mr. Bellemore repeatedly ignored it. The fact Foy has worked with Mr. Bellemore for a number of years, and communicated about coverages, cannot put Foy on notice that its advice was sought and relied upon, establishing a "special

relationship." *Hefty v. Paul Seymour Ins. Agency*, 163 A.D.3d 1376, 1378 (N.Y. App. 2018) (citing *Voss* and affirming lower court's decision that no special relationship existed even though "defendants handled nearly all of plaintiffs' insurance needs for over a decade, [because] this alone is insufficient to raise an issue of fact as to a special relationship, especially given plaintiffs' history of rejecting defendants' professional recommendations and managing the specifics of their own insurance policies.")

Regarding factors 4 and 5, there is no evidence in the record that Foy or Ms. SanSouci held themselves out as "highly-skilled experts" regarding specific coverages, such as law and ordinance coverage. To the contrary, both testified they provided 101 Ocean a service to help obtain the best policy based on the information provided. Foy did not hold itself out to 101 Ocean as an expert risk management consultant, and insureds are responsible for reviewing their own policies if they have coverage concerns. T. at 563-564. Moreover, the fact Ms. SanSouci has an AAI designation does not transform her into a highly-skilled expert regarding all insurance coverages. *See Buelow*, 206 S.W.3d at 894 (stating designation of "C.I.C." (Certified Insurance Counselor) is only evidence of completing educational requirements, and does not create a "highly skilled expert" when the agent has not held himself out as an expert in insurance coverages and there is no evidence the plaintiff relied on, or even knew of, the designation).

For these reasons, because there is no evidence establishing at least one of the *Sintros* factors, no rational trier of fact could have found in favor of 101 Ocean, and the trial court should have directed a verdict for Foy.

III. No Rational Trier of Fact Could Find That Additional Law and Ordinance Coverage was Actually Available.

The causation prong of negligence analysis requires "both cause-in-fact and legal cause." *Carignan v. N.H. Int'l Speedway*, 151 N.H. 409, 414 (2004). "Legal cause requires the plaintiff to establish that the negligent conduct was a *substantial factor* in bringing about the harm." *Id*. (emphasis added). "Cause-in-fact requires the plaintiff to show that the injury would not have occurred *but for* the negligent conduct." *Id*. (emphasis added). Here, no rational trier of fact could find that Foy's failure to advise 101 Ocean regarding the sufficiency of law and ordinance coverage was both the "legal cause" and "cause-in-fact" of 101 Ocean's injury.

There was no evidence establishing that 101 Ocean, in fact, could have purchased additional law and ordinance coverage. To the contrary, Mr. Boland specifically testified there was no law and ordinance coverage in fact available beyond $10,000. Ms. Roux testified, in general, law and ordinance coverage, in rare situations, can be obtained for approximately 10% of the value. She did not testify additional coverage was actually, in fact, available for 101 Ocean. Mr. Siegel testified he contacted an unidentified carrier and was told, as an example, that total replacement cost coverage could be lowered by an amount to offset the cost of additional law and ordinance coverage. He clarified his example "doesn't bear any relevance" to 101 Ocean's specific case. T. at 359, 356-60.

Thus, even if a breach occurred, it was not the legal or factual cause of 101 Ocean's alleged damages. Assuming a breach occurred, there is no evidence in the record that Foy's actions were both the "legal cause" and "cause-in-fact" of 101 Ocean's alleged damages. Without evidence that 101

Ocean would actually, as a matter of fact, been able to obtain additional coverage, Mr. Bellemore would have suffered his damages regardless of whether Foy breached its duty. It is 101 Ocean's burden to prove, through admissible evidence, that its claimed damages were legally and factually caused by Foy's breach.

For these reasons, no rational trier of fact could have found that Foy's breach was the "legal cause" and "cause-in-fact" of 101 Ocean's damages.

IV. The Jury Instructions and Verdict Form were Confusing, Prejudicial, and Articulated the Wrong Legal Standard to the Jury, Warranting a New Trial.

It is well settled that "it is the duty of the trial court to fully and correctly instruct the jury as to the law applicable to the case." *Anglin v. Kleeman*, 140 N.H. 257, 263 (1995). An incorrect jury instruction or verdict form is reversible error when "the jury *could* have been misled into basing its verdict on a misperception of the law." *Id*. (emphasis added); *see Jackson v. Morse*, 152 N.H. 48, 51 (2005); *Croteau,* 123 N.H. at 320 (stating misstatements of law by counsel and court may warrant a new trial). The same is true for the verdict form. *See Demetracopoulos v. Wilson*, 138 N.H. 371, 374 (1994) (holding a new trial was warranted when the "verdict form *may* have misled the jury by suggesting that it could hold the defendant liable . . . without finding" all underlying requirements of the cause of action) (emphasis added).

Here, multiple errors in the jury instructions and verdict form warrant a new trial.

A. The Instructions Incorrectly Stated a Special Relationship Could be Established Without Proof of at Least One of the *Sintros* Factors.

As explained above, *Sintros* does not hold a special relationship can exist without establishing at least one of the factors articulated by this Court. As written, the instruction stated "examples [of a "special relationship"] include. . ." without explaining 101 Ocean was required to prove at least one of the factors listed. The trial court's instruction, which was based on a modification of New Hampshire Civil Jury Instruction 33.2 as presented by 101 Ocean's counsel, incorrectly suggested a special relationship could be established without proof of at least one of the *Sintros* factors, and thus misstated the law to the jury. T. at 610-611, 638-640, 723. For these reasons, during the charge conference, Foy objected to the phrase "examples include" as part of the *Sintros* special relationship analysis. T. at 638-639. As argued by Foy at the charge conference, *Sintros* does not hold a "special relationship" can exist without finding at least one of the "special relationship" factors articulated in *Sintros,* and inclusion of the phrase "examples include" permitted the jury to find a special relationship even if it found none of those "special relationship" factors. T. at 638-639.

In overruling Foy, the trial court finalized the special relationship instruction with the "examples include" language. T. at 640, 723. 101 Ocean's counsel relied heavily on this instruction during his closing argument, highlighting that, based on the trial court's instruction, a special relationship could be found regardless of whether any of the *Sintros* factors were satisfied. T. at 699. Because the instruction could have misled the

jury into basing its verdict on a misperception of the law, a new trial is warranted. *Anglin*, 140 at 263.

B. Question 3 of the Verdict Form Incorrectly Instructed the Jury to Find in Favor of 101 Ocean on Causation if 101 Ocean Only Satisfied the "Substantial Factor" Prong of the Causation Element.

Legal causation requires "both cause-in-fact and legal cause." *Carignan*, 151 N.H. at 414. Therefore, in addition to establishing the "substantial factor" prong, 101 Ocean had to prove its damages would not have occurred "but for" Foy's breach. *Id*. Question 3 of the verdict form directed the jury to find in favor of 101 Ocean on the causation element of its negligence claim if Foy's conduct was a "substantial factor" in bringing about 101 Ocean's damages, regardless of whether Foy's conduct was the "cause-in-fact" or "but for" cause of 101 Ocean's damages. T. at 617-622.

This Court is clear, when a verdict form "*may* have misled the jury" as to the correct legal standard, a new trial is warranted. *Demetracopoulos*, 138 N.H. at 374 (1994). In *Demetracopoulos*, in order to prove his intentional interference with an employment relationship claim, the plaintiff needed to prove, as an essential element, that defendant's interference was both "intentional" and knowingly "improper." *Id*. The verdict form, as written, indicated that the jury could find in favor of plaintiff without satisfying the second prong of an essential element of the plaintiff's claim because "the form did not ask if the jury found that the defendant improperly included any information found to be false." *Id*. This Court rejected the plaintiff's argument that the verdict form accurately incorporated the "improper" prong of the essential element because, as this

Court held, "the jury might have interpreted the form to mean that the defendant could be found liable if he intentionally prepared a report that contained false information, regardless of whether the plaintiff established that the defendant knew of the report's inaccuracies." *Id*. at 375.

Here, the verdict form created a situation strikingly similar to *Demetracopoulos.* Question 3 of the verdict form references an essential element of 101 Ocean's negligence claim (causation), but incorrectly states Foy can be held liable if 101 Ocean satisfies only one prong (substantial factor) of the causation element. As in *Demetracopoulos,* question 3 of the verdict form may have misled the jury because "the jury might have interpreted the form to mean that the defendant could be found liable if [its breach was a "substantial factor" in bringing about 101 Ocean's damages], regardless of whether the plaintiff established that [its damages would not have occurred without Foy's conduct]." *Id*.

For these reasons, Foy objected to question 3 as written because the question did not accurately present the element of negligence causation to the jury. As written, question 3 of the verdict form directed the jury to find in favor of 101 Ocean on the causation element of its negligence claim if:

> "Defendant Foy Insurance Group's breach of the applicable standard of reasonable care was *a substantial factor* in bringing about Plaintiff 101 Ocean Blvd's alleged damages." App., Vol. I. at 46. (emphasis added).

As Foy argued, legal causation in a negligence claim requires proof that the conduct was both a "substantial factor" in bringing about the harm, *and* that the harm would not have occurred without the conduct. *See also Carignan,* 151 N.H. at 414.

The *Carignan* causation standard was accurately reflected in the trial court's instructions, and therefore, Foy suggested the trial court remove the reference to "substantial factor" in the verdict form and simply reference back to the instructions by stating:

> "Defendant Foy Insurance Group's breach of the applicable standard of reasonable care was *the legal cause, as explained in the instructions*, in bringing about Plaintiff 101 Ocean Blvd's alleged damages." T. at 617, 621-22 (emphasis added).

As Foy highlighted during the charge conference, leaving question 3 of the verdict form as written was contrary to New Hampshire law, as it directed the jury to find in favor of 101 Ocean on the causation element even if 101 Ocean only satisfied the "substantial factor" prong of the causation analysis, without any determination that 101 Ocean also satisfied the "but-for/cause-in-fact" prong. However, the trial court left question 3 of the verdict form as written, allowing the jury to find in favor of 101 Ocean on causation regardless of whether 101 Ocean satisfied the "but-for/cause-in-fact" prong of negligence causation. T. at 622.

A key component of this case from the beginning has been whether, regardless of Foy's duty and actions, 101 Ocean could have obtained additional law and ordinance coverage it claims it would have sought. This dispute goes to the heart of the "cause-in-fact" prong of the causation element, and the decision to allow the jury to find in favor of 101 Ocean on causation without deciding if 101 Ocean's "damages would not have occurred without Foy's conduct" was prejudicial to Foy.

Accordingly, because question 3 of the verdict form could have misled the jury, a new trial is warranted.

C. The Law and Ordinance Instruction was a Misstatement of the Law, Confusing, Misleading, and Prejudicial.

The Town of Hampton has incorporated the State Building Code pursuant to RSA Chapter 155-A. The State Building Code expressly incorporates "the International *Existing* Building Code 2009," RSA 155-A:1, IV, which applies to the "*repair*, alteration, change of occupancy, addition and relocation of *existing buildings* . . ." *International Existing Building Code, § 101.2* (emphasis added). *See, infra* at 53. The Code further states:

> code official shall have the authority to render interpretations of this code and to adopt policies and procedures in order to clarify the application of its provisions . . . [and]
>
> Wherever there are practical difficulties involved in carrying out the provisions of this code, the code official shall have the authority to grant modifications for individual cases . . . provided that the code official shall first find that special individual reason makes the strict letter of the this code impractical, the modification is in compliance with the intent and purpose of this code and such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

Sect. 104.1 and 104.10. *See, infra* at 54 and 55. Accordingly, the International Existing Building Code allows a municipal official to exercise discretion in waiving provisions of the code. Town officials specifically testified to this point at trial. Had Mr. Bellemore approached the town to discuss code compliance regarding repairs to the existing building, they would have explained there is discretion within the state building code to provide flexibility and modifications to work with the property owner to

repair an existing building. Of course, Mr. Bellemore tore down 101 Ocean before any conversation regarding modifications and flexibility occurred. Therefore, to what extent provisions of the code could have been modified or waived consistent with the International Existing Building Code is unknown.

Despite the testimony and availability of discretion under the code, the instructions given to the jury stated repairs "must meet and conform to existing State Codes and local and federal laws." T. at 719. As Foy argued during the charge conference, the instruction, as written, was an incorrect statement of the law because the applicable codes allow municipal officials discretion to modify strict provisions of the code, and a local official's discretionary authority was not properly reflected in the instruction. T. at 633-634.

Moreover, even if considered legally accurate, including the instruction at all was improper because it suggested 101 Ocean was required, as a matter of fact, to comply with all building codes (and the Americans with Disabilities Act). As Foy argued at trial, the jury was not tasked with deciding whether the code does or does not require full compliance, and whether the town actually enforces the code or whether 101 Ocean may have violated the code is irrelevant. T. at 630-631, 636-637. Rather, the jury was required to determine what costs 101 Ocean actually incurred as a result of law and ordinance compliance. Neither the code nor the relevant testimony support the notion that 101 Ocean was required to comply with all provisions of the code if it were to repair the building. Courts have noted "a legally accurate but irrelevant jury instruction may be error to the extent it misleads the jury." *United States v.*

Benton, 890 F.3d 697, 714 (8th Cir. 2018); *Davis v. Commonwealth*, 204 S.E.2d 272, 273 (Va. 1974) ("an irrelevant instruction, though abstractly right, ought not to be given").

Including these provisions as an instruction misled the jury by focusing its analysis on whether 101 Ocean's repair did or did not have to comply with these provisions. It was improper for the jury to analyze that question, and the inclusion of the misleading instruction was prejudicial to Foy.

For these reasons, this instruction misstated the law, misled the jury, and was highly prejudicial.

D. The Damages Instructions Misstated the Law by Failing to Provide any Elements of the Measure of Damages for the Jury to Consider.

Failure to articulate the appropriate measure of damages in a negligence action can warrant a new trial. *Elwood v. Bolte*, 119 N.H. 508, 511 (1979) (stating a new trial on damages in a negligence action was appropriate because the finder of fact "did not indicate the measure of damages used"). Although the amount of damages is a fact question, "the choice of the proper measure of damages is a question of law to be decided by the court." *Jackson*, 152 N.H. at 51.

Here, the damages instruction did not reference or include a measure of damages for the jury to consider. Rather, the instruction simply stated 101 Ocean had the burden of proving damages and that damages must be full, fair, and adequate. T. at 723-24. As Foy argued during the charge conference, the jury instruction should have referenced the specific damage

elements that the jury was permitted to consider within the context of 101 Ocean's negligence claim. T. at 641-643. As Foy reiterated to the trial court, it had previously submitted a proposed instruction, based on a modified version of New Hampshire Civil Jury Instruction 9.6 that properly captured the damage element for the jury. T. at 642. In its proposed instruction, Foy requested the following in regards to the measure of damages:

> **Damages Elements**
> If you find the Defendant Foy Insurance Group is legally at fault, in awarding damages, the following may be considered in the context of this case:
>
> 1. The reasonable value of the actual costs incurred by plaintiff to comply with the minimum standards of an ordinance or law in course of a repair to the property.

App., Vol. I at 42. *See also* App., Vol. III at 40 (under 101 Ocean's policy, 101 Ocean can only recover "the increased costs *incurred* to comply with the minimum standards of an ordinance or law in the course of repair, rebuilding, or replacement") (emphasis added).

Based on the nature of 101 Ocean's claim, the jury should have been instructed that the measure of damages to consider was the "reasonable value of the actual costs incurred by plaintiff to comply with the minimum standards of an ordinance or law in the course of a repair to the property," as defined in 101 Ocean's policy.

For these reasons, failure to explain the elements and/or items of loss or damages the jury should have considered in reviewing the measure of damages was error, and warrants a new trial.

V. 101 Ocean's Counsel's Statements During Closing Arguments, Cumulatively, were Inaccurate and Prejudicial, Contributed to the Verdict Being Against the Weight of the Evidence, Constituted Plain Error, and Warrant a New Trial.[9]

Statements made by counsel during closing argument will set aside a jury verdict when the arguments of counsel "encourage the jury to make a decision based on bias rather than reason," and were prejudicial as to require a new trial. *LeBlanc v. American Honda Motor Co.*, 141 N.H. 579, 584 (1997). Notably, comments made during closing arguments telling a jury to "send a message" to insurance companies are "highly prejudicial and warrant [a new trial because] it was not the jury's function to send a message, but solely to decide the factual issues raised based on the proofs presented during trial." *Liberty Mut. Ins. Co. v. Rose Land*, 2005 N.J. Super. Unpub. LEXIS 828, *12-13 (N.J. App. Div. Feb. 23, 2005); *see also Atencio v. City of Albuquerque*, 911 F.Supp. 1433, 1448 (D. N.M. 1995) (plain error for plaintiff's counsel to argue in closing that "this is your opportunity to send a message" because statement was "highly likely to mislead the jury into believing that its award would need to be high enough to make the bureaucracies and government agencies listen.").

[9] Even if an objection is not made "to a claim of error" regarding a closing argument, it "does not preclude all appellate review, but rather confines review to plain error." *State v. Drown*, 170 N.H. 788, 792 (2018); *see also Laramie v. Stone*, 160 N.H. 419, 432 (2010) ("plain error rule allows [appellate court] to exercise [court's] discretion to correct errors not raised in the trial court"); *see also* Rule 16-A ("a plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court"). Here, Foy raised these issues in its post-trial motion.

During closing arguments, counsel for 101 Ocean made the following factually inaccurate and prejudicial statements to the jury:

1. ". . . this case presents a rare and unusual opportunity. The numbers are large enough in this case that people will pay attention. All New Hampshire insurance agents will pay attention. Insurance companies will pay attention." T. at 674.

2. "As a jury, your voice, through your verdict, is very loud and will be certainly heard. As a jury, you have awesome power to change behavior. You, as a jury, not Chuck, not Judge Brown, can change the way insurance policies are sold. You likely don't know it, but you could be participants in a record-setting case." T. at 675.

3. "Use your voice and tell the insurance industry not to sell these policies under the name of replacement costs if they have co-insurance in them. Tell them not to sell them as replacement costs if they don't provide adequate coverage for law and ordinance." T. at 687.

4. "We heard it from Team Insurance, Ms. SanSouci, and Mr. Foy and Mr. Milnes, all together in the insurance industry. They all did the same thing." T. at 699.

5. "Mr. Boland, another man from Team Insurance . . ." T. at 699.

6. "Mr. Fraser . . . part of Team Insurance, an insurance adjuster." T. at 702.

7. "Mr. Seigel, president surplus line company, he made a call to that RPS, the surplus company in Boston. One call, "would you write this" Yeah, I would write it. They even suggested ways to get creative to move the limits around." T. at 700.

8. ". . . after 9-11 some people probably had substantial property damage through terrorism in New York City that was not

covered, and the government said when you sell these—sell these coverages because the policies aren't available, you ought to have the customer sign and acknowledge that there is no terrorism coverage . . ." T. at 686.

9. ". . . when the building was first covered for 1.3 [million], that came through the recommendation of the Foy Insurance. They did a cost calculator and said 1.3 [million], that's the number. . ." T. at 688.

As a whole, 101 Ocean's counsel's argument improperly suggested that this case was the jury's opportunity to send a message to the insurance industry via the jury's power to change behavior by issuing a record setting verdict and changing the way insurance policies are sold. This argument was highly prejudicial, based on bias against insurance companies, and constituted plain error.

Likewise, 101 Ocean's counsel's argument that Foy was just "part of team insurance" was highly prejudicial. During closing argument, counsel "may not appeal to passion, prejudice or sympathy in a way not supported by the evidence." *Walton v. City of Manchester*, 140 N.H. 403, 407 (1995). To this end, it is well settled "that the unnecessary mention of insurance is reversible error." *Id*. (citing *Angelowitz v. Nolet*, 103 N.H. 347, 349 (1961)). 101 Ocean's counsel's characterization of Foy as part of "team insurance" and subsequent statement this is a "rare and unusual opportunity" for the jury to use its "very loud voice" to "tell the insurance industry" was highly prejudicial, appealed to the passion, prejudice, and sympathy of the jury, and constituted plain error warranting a new trial.

Further, misstatements warrant a new trial when they "appeal to the emotions or prejudices of jurors" and are "calculated to inflame the jury."

Walton, 140 N.H. at 407; *see also Schoon v. Looby*, 670 N.W. 2d 885, 888 (S.D. 2003) (new trial warranted when misstatement of fact "was an attempt to persuade by improper means."). Misstatements of fact and/or law made to the jury during closing argument may warrant a new trial when the statements are prejudicial. *See Walton*, 140 N.H. at 407 ("it is well settled that counsel may not argue facts that have not been introduced into evidence."). 101 Ocean's counsel's statements regarding Mr. Siegel's conversation with RPS insurance agency, terrorism exclusion form, a 1.3 million dollar valuation cost estimator prepared by Foy,[10] mandatory code compliance, and non-exclusive *Sintros* "special relationship" factors were based on facts not in the record and incorrect statements of the law, likewise warranting a new trial.

VI. Exhibit 27, Admitted Into Evidence Over Foy's Objection, was Irrelevant, Improper Hearsay, Unduly Prejudicial, and Warrants a New Trial.

This Court is clear, "jurors alone . . . are to determine the weight of the evidence . . . [and] when improper evidence was received, and a verdict for the party adducing it, the court will grant a new trial." *Ellingwood v. Bragg*, 52 N.H. 488, 491 (1872). Accordingly, when "improper evidence should have been but was not excluded from the jury's consideration," the "erroneous admission of prejudicial evidence is a proper ground for setting aside the verdict and awarding a new trial." *Amabello v. Colonial Motors*, 117 N.H. 556, 560-61 (1977).

[10] Foy never prepared a $1,300,000 cost calculator. T. at 180.

Towards the close of trial, 101 Ocean's counsel began questioning Foy's expert witness, Peter Milnes, with a document that had not been disclosed. Upon discussion with the trial court, 101 Ocean's counsel represented that the document, marked as Exhibit 27, was a checklist from the Cross Insurance Agency regarding his (counsel's) own insurance that he received in the mail over the previous weekend. Specifically, Exhibit 27 is titled a "Cross Agency Commercial Lines Checklist" issued to "Cronin, Bisson, & Zalinsky, PC." App., Vol. IV at 101. Foy objected to 101 Ocean's use of Exhibit 27, as the checklist was irrelevant, prejudicial, improper hearsay, and lacks foundation. Exhibit 27 was admitted over Foy's objection. T. at 538-45.

The checklist had nothing to do with Foy, or 101 Ocean and Mr. Bellemore, and no testimony suggested its use was required to comply with the applicable standard of care. *Id.* The checklist also included a notation of "higher limits available" for "building ordinance or law" and "increased cost of construction," the very coverages at issue.[11] Further, this checklist was not used for a "surplus lines" policy, was not a representation of complete coverage, and made no assurance or guarantees regarding the adequacy of law and ordinance coverage. Finally, Exhibit 27 was improper hearsay as it was effectively an out-of-court statement (by the Cross Insurance Agency) admitted for the truth of the matter asserted (*i.e.,* that

[11] After conducting post-trial discovery as approved by the trial court, Foy further learned that Exhibit 27 was an incomplete version of the document sent to 101 Ocean's counsel from the Cross Agency. These issues remain pending before the trial court. *See* Order issued April 26, 2019 (partial remand).

additional law and ordinance coverage was available.). *See* Evidence Rule 801(c).

Whether a different agency, with a different client, discussing a different kind of policy, used a checklist was immaterial to the jury's consideration, and inclusion of the checklist was irrelevant, improper hearsay, and highly prejudicial.

CONCLUSION

The evidence in this negligence case was not sufficient to create a triable issue as to the existence of a special relationship, or the availability of the coverage 101 Ocean claimed it should have had. Accordingly, the trial court should have directed a verdict in favor of Foy.

Alternatively, given the erroneous admission of a prejudicial checklist, the improper statements of 101 Ocean's counsel in argument, and the defects in the instructions and verdict form, the trial court should have granted a new trial.

REQUEST FOR ORAL ARGUMENT

Foy Insurance Group requests the opportunity for oral argument, through its undersigned counsel, before the full Court.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 9,395 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

Foy Insurance Group, Inc.,

By its Counsel,

UPTON & HATFIELD, LLP

Date: June 21, 2019

By: /s/ Russell F. Hilliard

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to John G. Cronin, Esq., opposing counsel of record.

/s/ Russell F. Hilliard
Russell F. Hilliard

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November 26, 2018

FILE COPY

Case Name: **101 Ocean Blvd., LLC v The Hanover Insurance Company, et al**
Case Number: **216-2016-CV-00708**

You are hereby notified that on November 20, 2018, the following order was entered:

RE: JURY VERDICT

See copy attached.

W. Michael Scanlon
Clerk of Court

(923)

C: John Gerard Cronin, ESQ; Russell F. Hilliard, ESQ; Brooke Lois Lovett Shilo, ESQ; Nathan Costantino Midolo, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY **SUPERIOR COURT**
NORTHERN DISTRICT

#216-2016-CV-00708

101 Ocean Blvd., LLC

v.

Foy Insurance Group, Inc.

SPECIAL VERDICT FORM

1. Do you find that Defendant Foy Insurance Group had a "special relationship" with Plaintiff 101 Ocean Blvd., as defined in the Court's Jury Instructions?

   Yes: X ; or

   No: _____

If your answer to Question 1 is "No," skip the remaining questions and have the foreperson sign and date the special verdict form.

If your answer to Question 1 is "Yes," proceed to Question 2.

2. If you answered "Yes" to Question 1, do you find that Defendant Foy Insurance Group breached its duty owed to Plaintiff 101 Ocean Blvd. by failing to act according to the applicable standard of reasonable care applied to insurance agencies in the same or similar circumstance?

   Yes: X ; or

   No: _____

If your answer to Question 2 is "No," skip the remaining questions and have the foreperson sign and date the special verdict form.

If your answer to Question 2 is "Yes," proceed to Question 3.

3. If you answered "Yes" to Questions 1 AND 2, do you find that Defendant Foy Insurance Group's breach of the applicable standard of reasonable care was a substantial factor in bringing about Plaintiff 101 Ocean Blvd.'s alleged damages?

   Yes: X ; or

   No: _____

If your answer to Question 3 is "No," skip the remaining questions and have the foreperson sign and date the special verdict form.

If your answer to Question 3 is "Yes," proceed to Question 4.

4. If you answered "Yes" to Questions 3 please state the full amount (in words and numbers), which you find, on the evidence and in accordance with the instructions provided to you, to be Plaintiff 101 Ocean Blvd.'s damages, if any?

   Word: Eight hundred & twelve thousand, five hondred & nineteen dollars.

   Number: $812,519.00

5. Using 100% to represent total fault for this case, please state the percentage of fault, if any, that you attribute to each of the parties:

   A. 101 Ocean Blvd 25 %

   B. Foy Insurance Group 75 %

Total (A + B) must equal 100% **100%**

Date 11/20/18

Samantha Davis

Foreperson

THE STATE OF NEW HAMPSHIRE
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January 03, 2019

FILE COPY

Case Name: **101 Ocean Blvd., LLC v The Hanover Insurance Company, et al**
Case Number: **216-2016-CV-00708**

You are hereby notified that on December 24, 2018, the following order was entered:

RE: MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR ALTERNATIVELY TO SET ASIDE THE JURY VERDICT:

"After review of the parties pleadings, Motion Denied." (Brown, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: John Gerard Cronin, ESQ; Doreen F. Connor, ESQ; Russell F. Hilliard, ESQ; Brooke Lois Lovett Shilo, ESQ; Nathan Costantino Midolo, ESQ

CHAPTER 1
SCOPE AND ADMINISTRATION

PART 1—SCOPE AND APPLICATION

SECTION 101
GENERAL

101.1 Title. These regulations shall be known as the *Existing Building Code* of [NAME OF JURISDICTION], hereinafter referred to as "this code."

101.2 Scope. The provisions of the *International Existing Building Code* shall apply to the *repair*, *alteration*, *change of occupancy*, *addition* and relocation of *existing buildings*.

101.3 Intent. The intent of this code is to provide flexibility to permit the use of alternative approaches to achieve compliance with minimum requirements to safeguard the public health, safety and welfare insofar as they are affected by the *repair*, *alteration*, *change of occupancy*, *addition* and relocation of *existing buildings*.

101.4 Applicability. This code shall apply to the *repair*, *alteration*, *change of occupancy*, *addition* and relocation of all *existing buildings*, regardless of occupancy, subject to the criteria of Sections 101.4.1 and 101.4.2.

101.4.1 Buildings not previously occupied. A building or portion of a building that has not been previously occupied or used for its intended purpose in accordance with the laws in existence at the time of its completion shall comply with the provisions of the *International Building Code* or *International Residential Code*, as applicable, for new construction or with any current permit for such occupancy.

101.4.2 Buildings previously occupied. The legal occupancy of any building existing on the date of adoption of this code shall be permitted to continue without change, except as is specifically covered in this code, the *International Fire Code*, or the *International Property Maintenance Code*, or as is deemed necessary by the *code official* for the general safety and welfare of the occupants and the public.

101.5 Compliance methods. The *repair*, *alteration*, *change of occupancy*, *addition* or relocation of all *existing buildings* shall comply with one of the methods listed in Sections 101.5.1 through 101.5.3 as selected by the applicant. Application of a method shall be the sole basis for assessing the compliance of work performed under a single permit unless otherwise approved by the *code official*. Sections 101.5.1 through 101.5.3 shall not be applied in combination with each other. Where this code requires consideration of the seismic-force-resisting system of an *existing building* subject to *repair*, *alteration*, *change of occupancy*, *addition* or relocation of *existing buildings*, the seismic evaluation and design shall be based on Section 101.5.4 regardless of which compliance method is used.

Exception: Subject to the approval of the *code official*, *alterations* complying with the laws in existence at the time the building or the affected portion of the building was built shall be considered in compliance with the provisions of this code unless the building is undergoing more than a limited structural *alteration* as defined in Section 807.4.3. New structural members added as part of the *alteration* shall comply with the *International Building Code*. *Alterations* of *existing buildings* in *flood hazard areas* shall comply with Section 601.3.

101.5.1 Prescriptive compliance method. *Repairs*, *alterations*, *additions* and changes of occupancy complying with Chapter 3 of this code in buildings complying with the *International Fire Code* shall be considered in compliance with the provisions of this code.

101.5.2 Work area compliance method. *Repairs*, *alterations*, *additions*, changes in occupancy and relocated buildings complying with the applicable requirements of Chapters 4 through 12 of this code shall be considered in compliance with the provisions of this code.

101.5.3 Performance compliance method. *Repairs*, *alterations*, *additions*, changes in occupancy and relocated buildings complying with Chapter 13 of this code shall be considered in compliance with the provisions of this code.

101.5.4 Evaluation and design procedures. The seismic evaluation and design shall be based on the procedures specified in the *International Building Code*, ASCE 31 or ASCE 41. The procedures contained in Appendix A of this code shall be permitted to be used as specified in Section 101.5.4.2.

101.5.4.1 Compliance with IBC level seismic forces. Where compliance with the seismic design provisions of the *International Building Code* is required, the procedures shall be in accordance with one of the following:

1. The *International Building Code* using 100 percent of the prescribed forces. The values of R, Ω_0 and C_d used for analysis in accordance with Chapter 16 of the *International Building Code* shall be those specified for structural systems classified as "Ordinary" in accordance with Table 12.2-1 of ASCE 7, unless it can be demonstrated that the structural system satisfies the proportioning and detailing requirements for systems classified as "Detailed," "Intermediate" or "Special."
2. Compliance with ASCE 41 using both the BSE-1 and BSE-2 earthquake hazard levels and the corresponding performance levels shown in Table 101.5.4.1.

102.2 Other laws. The provisions of this code shall not be deemed to nullify any provisions of local, state, or federal law.

102.3 Application of references. References to chapter or section numbers or to provisions not specifically identified by number shall be construed to refer to such chapter, section, or provision of this code.

102.4 Referenced codes and standards. The codes and standards referenced in this code shall be considered part of the requirements of this code to the prescribed extent of each such reference. Where differences occur between provisions of this code and referenced codes and standards, the provisions of this code shall govern.

Exception: Where enforcement of a code provision would violate the conditions of the listing of the equipment or appliance, the conditions of the listing shall govern.

102.5 Partial invalidity. In the event that any part or provision of this code is held to be illegal or void, this shall not have the effect of making void or illegal any of the other parts or provisions.

PART 2—ADMINISTRATION AND ENFORCEMENT

SECTION 103
DEPARTMENT OF BUILDING SAFETY

103.1 Creation of enforcement agency. The Department of Building Safety is hereby created, and the official in charge thereof shall be known as the *code official*.

103.2 Appointment. The *code official* shall be appointed by the chief appointing authority of the jurisdiction.

103.3 Deputies. In accordance with the prescribed procedures of this jurisdiction and with the concurrence of the appointing authority, the *code official* shall have the authority to appoint a deputy *code official*, the related technical officers, inspectors, plan examiners, and other employees. Such employees shall have powers as delegated by the *code official*.

SECTION 104
DUTIES AND POWERS OF CODE OFFICIAL

104.1 General. The *code official* is hereby authorized and directed to enforce the provisions of this code. The *code official* shall have the authority to render interpretations of this code and to adopt policies and procedures in order to clarify the application of its provisions. Such interpretations, policies, and procedures shall be in compliance with the intent and purpose of this code. Such policies and procedures shall not have the effect of waiving requirements specifically provided for in this code.

104.2 Applications and permits. The *code official* shall receive applications, review construction documents, and issue permits for the *repair*, *alteration*, *addition*, demolition, *change of occupancy*, and relocation of buildings; inspect the premises for which such permits have been issued; and enforce compliance with the provisions of this code.

104.2.1 Preliminary meeting. When requested by the permit applicant or the *code official*, the *code official* shall meet with the permit applicant prior to the application for a construction permit to discuss plans for the proposed work or *change of occupancy* in order to establish the specific applicability of the provisions of this code.

Exception: *Repairs* and Level 1 *alterations*.

104.2.1.1 Building evaluation. The *code official* is authorized to require an *existing building* to be investigated and evaluated by a registered design professional based on the circumstances agreed upon at the preliminary meeting. The design professional shall notify the *code official* if any potential nonconformance with the provisions of this code is identified.

104.3 Notices and orders. The *code official* shall issue all necessary notices or orders to ensure compliance with this code.

104.4 Inspections. The *code official* shall make all of the required inspections, or the *code official* shall have the authority to accept reports of inspection by approved agencies or individuals. Reports of such inspections shall be in writing and be certified by a responsible officer of such approved agency or by the responsible individual. The *code official* is authorized to engage such expert opinion as deemed necessary to report upon unusual technical issues that arise, subject to the approval of the appointing authority.

104.5 Identification. The *code official* shall carry proper identification when inspecting structures or premises in the performance of duties under this code.

104.6 Right of entry. Where it is necessary to make an inspection to enforce the provisions of this code, or where the *code official* has reasonable cause to believe that there exists in a structure or upon a premises a condition which is contrary to or in violation of this code which makes the structure or premises unsafe, *dangerous*, or hazardous, the *code official* is authorized to enter the structure or premises at reasonable times to inspect or to perform the duties imposed by this code, provided that if such structure or premises be occupied that credentials be presented to the occupant and entry requested. If such structure or premises be unoccupied, the *code official* shall first make a reasonable effort to locate the owner or other person having charge or control of the structure or premises and request entry. If entry is refused, the *code official* shall have recourse to the remedies provided by law to secure entry.

104.7 Department records. The *code official* shall keep official records of applications received, permits and certificates issued, fees collected, reports of inspections, and notices and orders issued. Such records shall be retained in the official records for the period required for retention of public records.

104.8 Liability. The *code official*, member of the Board of Appeals, or employee charged with the enforcement of this code, while acting for the jurisdiction in good faith and without malice in the discharge of the duties required by this code or other pertinent law or ordinance, shall not thereby be rendered liable personally and is hereby relieved from personal liability for any damage accruing to persons or property as a result of any act or by reason of an act or omission in the discharge of official duties. Any suit instituted against an officer or

employee because of an act performed by that officer or employee in the lawful discharge of duties and under the provisions of this code shall be defended by legal representative of the jurisdiction until the final termination of the proceedings. The *code official* or any subordinate shall not be liable for cost in any action, suit, or proceeding that is instituted in pursuance of the provisions of this code.

104.9 Approved materials and equipment. Materials, equipment, and devices approved by the *code official* shall be constructed and installed in accordance with such approval.

104.9.1 Used materials and equipment. The use of used materials that meet the requirements of this code for new materials is permitted. Used equipment and devices shall be permitted to be reused subject to the approval of the *code official*.

104.10 Modifications. Wherever there are practical difficulties involved in carrying out the provisions of this code, the code official shall have the authority to grant modifications for individual cases upon application of the owner or owner's representative, provided the code official shall first find that special individual reason makes the strict letter of this code impractical and the modification is in compliance with the intent and purpose of this code, and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the Department of Building Safety.

104.10.1 Flood hazard areas. For *existing buildings* located in *flood hazard areas* for which *repairs*, *alterations* and *additions* constitute *substantial improvement*, the code official shall not grant modifications to provisions related to flood resistance unless a determination is made that:

1. The applicant has presented good and sufficient cause that the unique characteristics of the size, configuration or topography of the site render compliance with the flood-resistant construction provisions inappropriate.
2. Failure to grant the modification would result in exceptional hardship.
3. The granting of the modification will not result in increased flood heights, additional threats to public safety, extraordinary public expense nor create nuisances, cause fraud on or victimization of the public or conflict with existing laws or ordinances.
4. The modification is the minimum necessary to afford relief, considering the flood hazard.
5. A written notice will be provided to the applicant specifying, if applicable, the difference between the design flood elevation and the elevation to which the building is to be built, stating that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced floor elevation and that construction below the design flood elevation increases risks to life and property.

104.11 Alternative materials, design and methods of construction, and equipment. The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code, provided that any such alternative has been approved. An alternative material, design, or method of construction shall be approved where the code official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method, or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability, and safety.

104.11.1 Research reports. Supporting data, where necessary to assist in the approval of materials or assemblies not specifically provided for in this code, shall consist of valid research reports from approved sources.

SECTION 105
PERMITS

105.1 Required. Any owner or authorized agent who intends to *repair*, add to, alter, relocate, demolish, or change the occupancy of a building or to *repair*, install, add, alter, remove, convert, or replace any electrical, gas, mechanical, or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the *code official* and obtain the required permit.

105.1.1 Annual permit. In lieu of an individual permit for each *alteration* to an already approved electrical, gas, mechanical, or plumbing installation, the *code official* is authorized to issue an annual permit upon application therefor to any person, firm, or corporation regularly employing one or more qualified trade persons in the building, structure, or on the premises owned or operated by the applicant for the permit.

105.1.2 Annual permit records. The person to whom an annual permit is issued shall keep a detailed record of *alterations* made under such annual permit. The *code official* shall have access to such records at all times, or such records shall be filed with the *code official* as designated.

105.2 Work exempt from permit. Exemptions from permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this code or any other laws or ordinances of this jurisdiction. Permits shall not be required for the following:

Building:

1. Sidewalks and driveways not more than 30 inches (762 mm) above grade and not over any basement or story below and that are not part of an accessible route.
2. Painting, papering, tiling, carpeting, cabinets, counter tops, and similar finish work.
3. Temporary motion picture, television, and theater stage sets and scenery.
4. Shade cloth structures constructed for nursery or agricultural purposes, and not including service systems.
5. Window awnings supported by an exterior wall of Group R-3 or Group U occupancies.