

1 IN THE CHANCERY COURT OF WILLIAMSON COUNTY
2 STATE OF TENNESSEE

3 AMERICAN EXCAVATORS INC)
4)
5 Plaintiff.)
6)
7 vs) NO 27213
8)
9 RCR BUILDING CORPORATION)
10 AND FIREMAN'S FUND)
11 INSURANCE COMPANY.)
12)
13 Defendants.)

14 Deposition of:
15 HARLEY EZELL
16 Taken on behalf of the Defendants
17 August 29, 2001

18 APPEARANCES:

19 For the Plaintiffs: TODD E. PANTHER
20 Attorney at Law
21 Nashville, Tennessee
22 For the Defendants: GREGORY L. CASHION
23 Attorney at Law
24 Nashville, Tennessee
25 CHRISTINA F. GOODSON
Attorney at Law
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32 Vowell & Jennings Inc (615) 256-1935 1

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6 EXHIBITS

7 Exhibit No 84 19

1 The deposition of HARLEY EZELL was
2 taken by counsel for the Defendants at
3 Entekln. Tuna & White, 21st Floor AmSouth
4 Center, Nashville, Tennessee, on August 29
5 2001, for all purposes under the Tennessee
6 Rules of Civil Procedure.

7 The formalities as to notice,
8 caption, certificate, of colors, are waived
9 All objections, except as to the form of the
10 questions, are reserved to the hearing.

11 It is agreed that Jackie Wisinger,
12 being a Notary Public and Court Reporter for
13 the State of Tennessee, may swear the
14 witness and that the reading and signing of
15 the completed deposition by the witness are
16 waived

17 HARLEY EZELL
18 was called as a witness, and after
19 having been first duly sworn, testified as
20 follows:
21 Vowell & Jennings, Inc. (615) 256-1935 3

1 QUESTIONS BY MR. CASHION:
2 Q. Mr. Ezell, my name is Greg Cashion.
3 We were introduced. I am the attorney for
4 RCR. And today we're taking your deposition
5 in the case of American Excavators versus RCR
6 and Williamson County Community Center
7 project in Franklin.

8 First, have you ever given a
9 deposition before?

10 A. Yes.

11 Q. You know I'll be asking you a series
12 of questions, and I'd ask that each of your
13 answers be in response to my questions. If
14 for any reason you do not understand my
15 question, please ask that I repeat it or
16 rephrase it in order that your answers are
17 responsive.

18 Do you understand that process?

19 A. Right.

20 Q. Please try to keep your answers verbal
21 as far as saying yes and no and not uh-huh,
22 hu-huh. The court reporter will be taking
23 down everything that we say so we'll have a
24 written record of our conversation today.

25 I guess first, Mr. Ezell, what's your
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1 age?
2 A. Forty.
3 Q. And what's your educational
4 background?
5 A. Two years of college, four years of
6 high school, eight years of elementary
7 school.
8 Q. Where did you go to high school?
9 A. Cheatham County Central High.
10 Q. Where did you go to college?
11 A. Southwest Missouri State, Springfield,
12 Missouri.
13 Q. In what field of study did you take
14 there?
15 A. Engineering and surveying and the
16 basic courses. I didn't complete the second
17 year and moved back to Tennessee.
18 Q. What generally has been your work
19 experience or your job duties?
20 A. Land surveyor, utility company,
21 estimator.
22 Q. How long were you a land surveyor?
23 A. Twelve years, thirteen years.
24 Q. Who did you work for?
25 A. Worked for Barge, Waggoner; and worked
Vowell & Jennings, Inc. (615) 256-1935 5

1 for MCI, which MCI was an original company
2 involved in environmental ERC; Thomas &
3 Miller.
4 Q. And what did you do after you were a
5 land surveyor?
6 A. I went into the construction business
7 with Smith Excavating as an estimator and
8 project manager.
9 Q. What year did you go in with Smith
10 Excavating?
11 A. '89, '90.
12 Q. How long were you with them?
13 A. It was probably later than that.
14 Probably about '92 or '93, somewhere in
15 there. I was with them approximately four
16 years, five years.
17 Q. '95, '96, '97, something like that?
18 A. Let me get these dates here, because
19 when I went with Marvin, I went straight from
20 Smith. So whenever I started with Marvin
21 Parker -- I don't remember when the date was.
22 I'm thinking '98, '99.
23 So I was Smith five years. It's
24 easier for me to work backwards. Before that
25 I was with Smith, then I had my own surveying
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1 company for about a year and a half, then I
2 was with Smith again. That's when I came out
3 of surveying. The last one I worked for a
4 surveying company was Barge, Waggoner.
5 Q. So who were you working for when
6 you -- right after you -- before you started
7 with --
8 A. Marvin?
9 Q. Marvin?
10 A. Smith Excavating in Columbia,
11 Tennessee.
12 Q. And that was in '98?
13 A. Right in there somewhere. You have to
14 look up and see when I started with Parker.
15 Q. And why did you leave Smith
16 Excavating?
17 A. More money. Marvin made me a better
18 offer.
19 Q. What were your job duties with
20 American Excavators?
21 A. Estimator, surveyor, project manager.
22 Q. When did you leave?
23 A. I went in business for myself about
24 two and a half years ago, myself with some
25 partners. It will be two years in September
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1 when I left Marvin. I've been partners with
2 B&W for two years around September, October,
3 somewhere in there.
4 Q. So you left during this job, the
5 Williamson County Community Center?
6 A. Yes, that's correct.
7 Q. August, September of '99?
8 A. I know it will be two years in
9 September. This is 2001, so it would be '99.
10 Q. So you think about September of '99?
11 A. Yeah. That sounds close.
12 Q. Why did you leave?
13 A. I had a better opportunity to go in
14 partnership with some fellows in a utility
15 company.
16 Q. What's the name of the utility
17 company?
18 A. B&W Excavating out of Shelbyville.
19 Q. What kind of work do they do?
20 A. Utility installation, site prep.
21 Q. Is that the same type of stuff you
22 were doing for American Excavators?
23 A. Yes.
24 Q. What other projects did you work on
25 with American Excavators prior to this
Vowell & Jennings, Inc. (615) 256-1935 8

1 Williamson County project?
2 A. None.
3 Q. This was your first and only job with
4 American Excavators?
5 A. No. I didn't stay with Marvin long.
6 So we did a subdivision in Franklin, and I
7 think he had a Dickson County job going on
8 that I didn't mess with very much.
9 Q. Did you bid this job?
10 A. Yes, I did.
11 Q. Let me hand you a sheet that says
12 Harley's take-off, original bid take-off.
13 It's two sheets. The other one says Agtech,
14 Agtech take-off, but they look almost
15 identical.
16 I'm going to hand you that, and that
17 has been previously marked as Exhibit 21 in
18 this case.
19 A. (Reviewing document.) The only
20 difference is the date of the take-off. I
21 don't know what the other one is.
22 Q. Both the print dates are after the
23 project was well under way, correct?
24 A. On 9-7-99?
25 Q. Yes.
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1 A. Like I said, I don't know.
2 Q. Well, we've got the daily reports of
3 Mr. Tipper and they started like June 2nd,
4 '99.
5 A. I know there's a bid form somewhere
6 that's got the date, start time.
7 Q. And this is your take-off?
8 A. Correct, to the best of my knowledge.
9 Now, that says three years ago. Whether this
10 is exactly it, I don't know. I'm assuming it
11 is.
12 Q. Is this the way you made take-offs?
13 A. Yes.
14 Q. Describe for me the software, whatever
15 you're using to generate this.
16 A. It's an Agtech software. What it does
17 is generates a 3-D model, and it gives you
18 the average in there and method to calculate
19 cross sections in which you get your code of
20 volumes.
21 Q. Now, on you're stripping of topsoil,
22 do you see that?
23 A. Correct.
24 Q. And the depth says point five feet?
25 A. Uh-huh.
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1 Q. You need to say yes for her.
2 A. Yes. Caught me on that one.
3 Q. How did you determine you were going
4 to have six inches of topsoil on this job?
5 A. Per a boring report from GT&E, I
6 believe.
7 Q. Did it have any special conditions or
8 special area that you --
9 A. That was identified in the soil's
10 report?
11 Q. Yes, sir, or in the plan.
12 A. There was some special areas
13 identified in the soil's report pertaining to
14 garden area, potentially three foot undercut.
15 The soils were not compactable. There was a
16 potential area. I believe if you was looking
17 into the site, it would be -- obviously, it
18 would be the northeast side of the site
19 towards the entrance road, small area there.
20 Q. Let me spread out the plan, which is
21 Exhibit 42.
22 A. I'm thinking somewhere -- this is a
23 redesign of the original. There's another
24 design to where this entrance road was going
25 to come up through this area a little bit --
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1 one of these areas here, and there was maybe
2 a proposed gymnasium or something at one time
3 on the soils report, and there was some
4 stuff, material, may be in there.
5 Q. Where was the garden area?
6 A. Back along this section. (Indicating
7 to Exhibit 42.)
8 Q. You're pointing to what I'm going to
9 call the northwest leg of the community
10 center?
11 A. Uh-huh.
12 Q. Right?
13 A. Yes.
14 Q. In doing your take-off, did you figure
15 anything for the potential undercutting of
16 the garden area up to three feet?
17 A. Yes.
18 Q. How is that reflected?
19 A. It's not reflected. On this right
20 here, I did not do that. With the Agtech
21 system, I just take the square footage in the
22 area, and I think the soils report called for
23 approximately three feet. I came up with the
24 yardage. It always assumes there's
25 unsuitable material, worse case scenario.
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1 Q. And you realized if it was unsuitable
2 material, for that area you would not be paid
3 an undercut price?
4 A. No. Because when I did the project, I
5 made a statement that any unsuitable material
6 below the subgrade would be excavated in a
7 place to twelve fifty of cubic yards.
8 Q. How were you going to address the
9 garden area?
10 A. When I got to it.
11 Q. But you had it covered in your bid?
12 A. No, not in the total lump sum bid.
13 There was a claimer.
14 Q. Disclaimer?
15 A. Disclaimer, yes. Any unsuitable
16 material below subgrade would be billed at
17 twelve fifty cubic yards.
18 Q. Is that standard for you to put that
19 type of disclaimer for unsuitable material?
20 A. Yes. Unless the owner calls me
21 specifically and says this site is completely
22 unclassified, which has happened in the past.
23 It's all dependent upon the owner or who I'm
24 bidding to.
25 Q. You put a disclaimer in your proposal
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1 and that's what you're talking about?
2 A. Correct.
3 Q. How do you address when that twelve
4 fifty cubic yards kicks in?
5 A. At the point in time when I get to
6 subgrade and it's proof rolled and it's
7 deemed by the soil engineer, whoever is
8 inspecting the site, says no, that needs to
9 come out and bridge it back up.
10 Q. And so what you anticipated in a job
11 like this was that the soils engineer would
12 make the call as far as whether it was
13 unsuitable or not?
14 A. Yes, correct. He has total call on
15 the material.
16 Q. Now, on this particular job, what was
17 your role after you bid the job and submitted
18 the proposal?
19 A. More or less a project manager on it,
20 done the survey on it, the layout work on it.
21 Q. What was your role as project manager?
22 A. I had to make sure the materials were
23 there and the job -- he had the equipment he
24 needed and everything was going okay on this
25 job.
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1 Q. How often would you visit the job
2 site?
3 A. I was the first one on the job site,
4 because I had to go in and do the initial
5 boundary control, state the stripping limits,
6 and building corners, stuff like that. So
7 initially, I was there every day. And then
8 it kind of phrased out to where I probably
9 went once a day, once every two or three
10 days. Because at the same time, I was
11 bidding other jobs. I stayed mostly in the
12 office.
13 Q. After you did the initial layout,
14 would you come by and check on the job every
15 other day?
16 A. Yes, every once in a while.
17 Q. How far is the office, American, to
18 this job site?
19 A. Miles. It would be hard for me to
20 guess. The office is in Spring Hill and this
21 job is in Franklin. So whatever the mileage
22 is from Franklin to Spring Hill.
23 Q. How many other jobs did you have at
24 the time?
25 A. At the time I had one more, another
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1 subdivision in Spring Hill. I don't remember
2 the name of it.
3 Q. Pipkin Hills?
4 A. No. That's Marvin's personal
5 subdivision. That's where the office was.
6 Q. This is another subdivision?
7 A. Yes. Another one we had under
8 contract.
9 Q. Excuse me.
10 A. Another one we had under contract we
11 were grading.
12 Q. Now, looking at your take-off, how
13 much material did you believe that you'd have
14 to import for this job?
15 A. Well, if you take fifty-eight forty,
16 if you subtract twenty-nine eighty-nine from
17 fifty-eight forty.
18 Q. A little less than 3,000?
19 A. Put a little swell on that.
20 Q. What would be your swell factor?
21 A. Ten percent. If you're really going
22 to get down to do trucking, it depends on
23 what size trucks you use and the whole deal.
24 But that's what you anticipate bringing in.
25 Q. How did you bid your import?
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1 A. It was material that was provided free
2 from Williamson County. The first borrow
3 area was approximately a mile and a half from
4 the, job and the quarry that they used.

5 The other material came from where
6 they were making a cut through -- I'm just
7 saying the name of the roads. I don't know
8 for sure. The one that goes out of Franklin
9 towards Hillsboro. I guess Hillsboro Road
10 and the other road beside Cool Springs, they
11 were making a new road through there. So I
12 borrowed the rest of it from that.

13 Q. Moore's Lane, I think?

14 A. Yes, maybe.

15 Q. The extension of Moore's Lane.

16 How did you figure the import? Did
17 you do some calculations for trucks?

18 A. Uh-huh. You take about 12 yards
19 in-place material per truck, and you just
20 take that and divide it into what you need to
21 import.

22 Q. That would be a 15-yard truck?

23 A. Twelve yards is about what you get in
24 place. It may be an 18-yard truck, but you
25 have to figure your in place. What you've
Vowell & Jennings, Inc. (615) 256-1935 17

1 got in that truck is not going to compact
2 back.

3 If you're hauling 18 yards of dirt,
4 certain material, you're not going to get 18
5 yards in place. So if you calculate on 18
6 yards, most of the time you're going to come
7 out on the short end.

8 Q. Because it will expand when you take
9 it out?

10 A. And it compacts back when you put it
11 back.

12 Q. Now, on this job, how did you set up
13 your import as far as bidding it?

14 Did you go through and figure out how
15 many truckloads you would have to have for --

16 A. How many trucks I would have to have,
17 what my haul distance was from the quarry,
18 about how many loads I could get per day.

19 Q. Did you figure machinery at the borrow
20 pit?

21 A. Yes. Trackhoe at the borrow pit. I
22 figured I could haul five or six trucks. I
23 knew I had to hire them out at 40, \$45 an
24 hour.

25 Q. Now, had you worked with RCR before?
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1 A. On some different projects with
2 different companies. With Smith, I believe
3 we done some projects with RCR.

4 Q. Did you know anybody over there?

5 A. Know Fred McCord. He's the one I
6 always talked to in the estimating
7 department, who I called my quotes in to.
8 I've called him numerous times.

9 Q. Let me hand to you --

10 MR. CASHION: We'll make this the
11 next exhibit which is 84.

12 (The previously mentioned document was
13 marked as Exhibit No. 84.)

14 BY MR. CASHION:

15 Q. Do you recall this letter?

16 A. Yes, I do.

17 Q. As a result of the delay in the start
18 of the project, did you incur any extra
19 costs?

20 A. In the trucking rates.

21 Q. Right.

22 A. And in the -- I think I got the
23 structures in place at the same price. I
24 don't know about -- I wasn't there for the
25 close-out of the project, but my assumption
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1 is -- I don't know how much pipe material was
2 on that project. I can't remember. But pipe
3 fluctuates every month, week to week. You'll
4 get a different price on your pipe. The
5 trucking, yeah. It's supply demand. In the
6 springtime, trucking goes up. The less
7 trucks that are available, then the higher
8 price they are.

9 Q. Did you ever try to make a claim for
10 an escalation in cost as a result of a late
11 start by Williamson County?

12 A. No. I was trying to work with them
13 from the very beginning. That's the reason I
14 generated this letter saying somebody needs
15 to start this thing, because we are -- our
16 planning, due to what you told us the start
17 date is, this was going to be.

18 And I arranged a D8-55, Komatsu. It's
19 equivalent to a Cat D8. I leased it for the
20 entire length of that project.

21 Q. Now, when did you first become aware
22 that there was some unsuitable soils on the
23 project that needed to be undercut?

24 A. When I had gotten back -- I came to
25 the site after they had been stripping it,
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1 and I came to this area right in here and
2 they had stripped down approximately two, two
3 and a half feet of material. They had all
4 this area back here stripped except for this
5 entrance road, and there was a step-down of
6 about two and a half feet.

7 I said, Oh, there's something wrong
8 here. We got down looking. They were taking
9 out topsoil. But I said this project is only
10 bid for five-tenths of topsoil, six inches.
11 Everything in this area is a fill section
12 anyway. All we're supposed to do is go in
13 about six inches of topsoil. We're not
14 supposed to come in here and gouge out two
15 and a half feet.

16 Q. You're pointing to the plan which is
17 Exhibit 42. If we call this the northeast
18 end of the building which faces Folks, you're
19 talking about the area from that end of the
20 building out?

21 A. It was out from the building pad right
22 in this area, not far off the property line.

23 Q. Right around Catch Basin 8?

24 A. Right in this curve here.

25 Q. Curve of the entrance?

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1 A. Yes, in the radius.

2 Q. Now, when you came out there on that
3 date, was that the area that you noticed had
4 been undercut?

5 A. Yes.

6 Q. What did you do once you noticed that
7 area?

8 A. I got with Jeff Orange at RCR. I told
9 him somebody needs to come out because we've
10 got all this material.

11 Q. You mean Anthony Orange?

12 A. Anthony Orange, my mistake.

13 Q. You got with him. What happened?

14 A. I called him out and showed him. We
15 got in contact with Goodrich Engineering, I
16 believe. Scotty Goodrich is the owner of GTE
17 or GTK.

18 Q. GT&E.

19 A. They sent a soils guy out. Well, in
20 the meantime, before he came out, I shut
21 Ricky and them down and I took and excavated
22 out about three or four different areas along
23 this parking lot here, along this line here.
24 I staked out these islands.

25 Q. The second row of islands from the
Vowell & Jennings, Inc. (615) 256-1935 22

1 building?

2 A. Correct. I staked those out and took
3 the dozer and pushed up and tried to find
4 where we could get out of the topsoil and get
5 into some good dirt.

6 I left and went somewhere and then
7 they sent out a soils tech to talk to Ricky.
8 He told Ricky that that wasn't topsoil. That
9 was something in the nature, that that's
10 what Southerner boys called topsoil.

11 Well, when I came back, the soils guy
12 had left and that's when I called Scotty. I
13 said, Hey, this guy came out here. Somebody
14 needs to come look at this. I said I'll
15 build this thing however you want it built,
16 but this material needs to come out.

17 Q. What did Scotty do?

18 A. He came out and he looked at the
19 material. He was kind of if'y on his take of
20 it. I went over with him his boring logs on
21 his geotechnical report where he had
22 five-tenths of topsoil and asked him how he
23 could miss on every boring.

24 I've been around this quite a bit.

25 And he said he would get back to me. And I
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1 don't recall the exact sequence of what went
2 on at the time, but I finally got fed up with
3 Scotty and called in a friend of mine who
4 owns a consulting firm in Dickson, Southern
5 Consulting.

6 Q. And your friend's name is?

7 A. Trent -- I can't remember his last
8 name.

9 Q. Smith?

10 A. Trent Smith. Had him come out and
11 pulled some samples that tested for content,
12 because Scotty and them didn't want to test
13 it. They sent it to an environmental company
14 and they told him let's get it turned around
15 pretty quick. We got it back and they said,
16 Yeah, try to do this and we'll take this
17 material out.

18 Q. So the material you're talking
19 about --

20 A. See, the sequence wasn't quite
21 necessarily that. I met with the county
22 first on this section right here. As a
23 matter of fact, we had a meeting with the
24 county.

25 Q. And you're talking about the north --
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1 A. Before I ever got Southern Consulting
2 out.
3 Q. So you're first talking about the
4 northeast?
5 A. This area right in here where the
6 first two and a half foot was taken out.
7 (Indicating to Exhibit No. 42.)
8 Q. The reason I have to say that is
9 because she's taking down the words and if
10 somebody reads this --
11 A. It's upside down, so I'm thinking
12 southwest.
13 Q. It's to my advantage.
14 MR. PANTHER: Why don't we
15 identify it by the structure.
16 BY MR. CASHION:
17 Q. SCB No. 4?
18 A. Yes.
19 Q. Is that the area we're talking about?
20 A. Yes.
21 Q. Catch basin?
22 A. Yes.
23 Q. So you first talked about this?
24 A. Correct.
25 Q. What --
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1 A. Well, when I talked to him, I called
2 him out for this.
3 Q. This being --
4 A. SCB4. And before they came out, I
5 excavated these three pits here to see
6 exactly what else we had going on there.
7 Q. Now, you went with Southern
8 Consulting?
9 A. Yes.
10 Q. Trent Smith got the sample back?
11 A. Correct. These three pits, he took a
12 little bit out of each pit in a five-gallon
13 bucket.
14 Q. Let me follow up with the trail. Let
15 me show you Exhibit 2, which is the June 17,
16 '99 letter of Wade Canootsman of Southern
17 Consulting.
18 A. Yes.
19 Q. This is what they got back to you?
20 A. Yes.
21 Q. So they turned it around pretty quick?
22 A. Yes.
23 Q. Was it June 17 or June 16, was that
24 the first time that this undercutting had
25 come to your attention?
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1 A. Well, like I say, three years ago.
2 You can ask me all the dates you want, but I
3 don't have a daily advisor. I have to take
4 work back from these. The exact dates, I
5 can't give you. There's no way.
6 Q. But this was the first time you were
7 familiar with the undercutting for
8 unsuitable --
9 A. Sometime prior to June 17th. Now,
10 whether it was June 1st or June 5th, I don't
11 recall.
12 Q. But your knowledge first was
13 highlighted or --
14 A. Correct, when I pulled up on the site
15 and saw what had been cut out in that area.
16 Q. For SCB No. 4?
17 A. Correct.
18 Q. Once you presented this, Southern
19 Consulting sent it to you and it went on to
20 Al Thomas, the engineer and architect on the
21 job. What happened next?
22 A. We had a meeting at the old hospital,
23 if I ain't mistaken, with the county, Anthony
24 Orange, I believe Don Stover was there,
25 Thomas Miller was there, and I was there.
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1 And then we all went to the site that day.
2 Q. This was after this report had come
3 out?
4 A. Yes. I can't guarantee that. You
5 have to check one of their itineraries to see
6 when that meeting was. I don't keep those
7 type of notes.
8 Q. As far as your memory, you think it
9 was afterwards?
10 A. Yes, I would think so.
11 Q. What was discussed at the school and
12 then what was discussed on site?
13 A. It was discussed at the school about
14 the unsuitable material, what to do about it.
15 And then we went to the site and we actually
16 looked at it. And I'm not for sure Scotty
17 was there on the site. I don't know. Like I
18 said, I can't tell you for sure if this was
19 prior to -- how much in advance this was, the
20 meeting was, in advance of Southern
21 Consulting. I don't know if I had this in my
22 hand when I went to the meeting. I don't
23 know if we had gotten to this point yet.
24 Q. And who was at the meeting again? Run
25 those names by me.
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1 A. A guy representative, whoever he was.
2 Q. Is that Al Ritter?
3 A. I don't know. Good guess. I know he
4 was the county's representative. There was
5 maybe two or three of them.
6 Q. Who else?
7 A. If I ain't mistaken, I know Anthony
8 Orange was there, and if I ain't mistaken,
9 Don was there.
10 Q. Stover?
11 A. Stover. And I was there. And that's
12 to the best of my recollection.
13 Q. What was discussed when you went to
14 the site and looked at it?
15 A. The material.
16 MS. GOODSON: I'm sorry. Were
17 the architects there?
18 THE WITNESS: Thomas & Miller?
19 Yes, correct. They were at the site and at
20 the meeting we had with the county.
21 BY MR. CASHION:
22 Q. Who was the architect on that?
23 A. I think it was Mr. Thomas.
24 Q. Al Thomas?
25 A. I think so. And someone else was with
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1 him, someone else with him.
2 Q. Anybody else?
3 A. Don't know. Might pop to me in a
4 minute.
5 Q. When you went back to the site, what
6 was discussed as far as the way you recall
7 it?
8 A. What was discussed.
9 Q. You're back on the job site. You had
10 the meeting at the school. You reconvened on
11 the job site. Tell me what you remember
12 occurred.
13 A. The material being unsuitable to use,
14 to build on.
15 Q. Was that determination made that, yes,
16 we agree this material is unsuitable?
17 A. Yes.
18 Q. And who made that statement?
19 A. I can't tell you exactly. And I ain't
20 sure at that point in time if the final
21 determination had been made. I don't know if
22 this was prior to or after Southern
23 Consulting got me the test results back on
24 the material. I can't say for sure.
25 Q. Now, do you remember if Al Thomas said
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1 that?
2 A. No, I have no idea.
3 Q. Somebody said it's unsuitable?
4 A. Yes, this is topsoil. Now, whether
5 the word "unsuitable" came out, it was a
6 consensus, yes, this is topsoil.
7 Q. Did someone direct you on how to
8 proceed?
9 A. It was a statement made that this was
10 an old county fill site.
11 Q. What did they tell you to do? How did
12 you leave that meeting?
13 A. To be honest with you, I don't know.
14 I don't know if it was prior to this. I have
15 no idea how we left that final meeting.
16 Q. Were you ever instructed to remove
17 the topsoil?
18 A. Yes.
19 Q. Was that at that meeting or was it
20 later?
21 A. It was later during -- what's the
22 date -- I wrote them another letter prior to
23 that meeting --
24 Q. I've got the letter.
25 A. -- concerning the unsuitable material.
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1 I don't know who I wrote it to. I wrote it
2 to somebody, either the county or Thomas &
3 Miller or RCR.
4 Q. Let me hand you some documents.
5 That's dated June 17?
6 A. Uh-huh.
7 Q. This is my next document that I hand
8 to you, which is Exhibit No. 4, and that's
9 what I thought you were talking about on your
10 meeting.
11 A. And this may be it. This may be --
12 where was the meeting at? That Keith
13 Finestien rings a bell. Yes, it does.
14 Q. You've got two guys from PSI there.
15 A. I can't remember when PSI came into
16 the picture, because GT came into the picture
17 and I don't remember when PS -- who came
18 first, PSI or Trent Smith at Southern
19 Consulting. I don't have any idea.
20 But yes, I'm assuming this is the
21 meeting that we had at the school, out at the
22 old hospital and then came back to the site.
23 Q. And Mike Leonard prepared the meeting
24 minutes. Is that what you remember?
25 A. I'm reading it now.
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1 Q. Go ahead and take your time.
2 A. (Reviewing document.) I remember
3 this, that's correct, talking about item No.
4 3 -- item No. 2, yes. That's pretty well
5 what was covered.
6 Q. That's what you remember about the
7 job?
8 A. The material come up from the quarry,
9 because that's where I started at.
10 Q. Now, at this time do you recall the
11 PSI people being there after reviewing these
12 notes?
13 A. Yes. I met them either once or twice
14 on the site. At this point in time, I was
15 pretty well -- I forgot my last day with
16 Marvin, but I think I was pretty well gone
17 about that time, maybe within about a two- or
18 three-week period.
19 Q. But at the time of this meeting, did
20 you recognize that reading on No. 1 on these
21 notes that the removal of the unsuitable
22 material would be monitored by PSI?
23 A. Uh-huh.
24 Q. So you were expecting that?
25 A. Yes.

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1 Q. That if the situation requires
2 undercutting, PSI will document the
3 quantities removed and new fill will be put
4 in its place?
5 A. Yes.
6 Q. Had you been on a job where there had
7 been undercutting done before?
8 A. Yes.
9 Q. Is this typical, what happens?
10 A. It's not typical. It's a way that you
11 can go about doing it. It's either done from
12 the borrow pit, it's done by the load, it's
13 done by cross section. You can do it
14 numerous ways.
15 Q. But this is one way to do it?
16 A. Yes, this is one way to do it.
17 Q. Then they tell you where to waste the
18 material?
19 A. Yes.
20 Q. Do you know if you wasted the material
21 at the rock quarry?
22 A. I have no idea.
23 Q. That was after you were gone?
24 A. Well, it may have been, but I wasn't
25 there every day.

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1 Q. Here, No. 3, it says, "To the greatest
2 extent possible, soil material available on
3 site will be used for fill." Do you see
4 that?
5 A. Yes.
6 Q. How much of the on-site material that
7 was calculated, your calculations of the cut,
8 were you able to use on site?
9 A. I don't know exactly, because like I
10 said, I wasn't there. But I know the
11 majority of the material that was used that
12 was designed to be cut from the project,
13 namely speaking, the detention pond area and
14 the entrance road area, none of that
15 material, to my knowledge, could be used.
16 Q. So it's your opinion that the majority
17 of the material that was designated as cut
18 could not be used?
19 A. That's correct. I would say at least
20 95 to 100 percent could not be used as fill
21 material.
22 Q. What did you do?
23 A. It could be, but it should not have
24 been.
25 Q. Did you use it?

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1 A. I wasn't there when it was done.
2 Q. Now, let me hand you Exhibit No. 5,
3 which is your letter of July 1, '99. It
4 looks like the meeting was June 30 which you
5 say --
6 A. The meeting, then the letter.
7 Q. Take a minute to read that.
8 A. (Reviewing document.)
9 Q. Do you recall writing this letter?
10 A. Yes.
11 Q. And you say in the first paragraph,
12 "As of this date, I have removed
13 approximately 600 yards of unsuitable
14 material for which I did not seek a change
15 order saving the county approximately
16 \$7,500."
17 What did you base that statement on?
18 A. Just on a visual tape. If I ain't
19 mistaken, I taped this section here, this lip
20 he had cut out two foot. And I think I just
21 eyeballed ten feet or something like that and
22 come up with the 600 yards.
23 Q. You're talking about the area
24 around --
25 A. SCB4.

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1 Q. And had there been any other
2 undercutting of unsuitable material to your
3 knowledge?
4 A. Yes. Visually, you could see it.
5 They took too much off thinking it was
6 topsoil throughout the majority of the site.
7 Q. Did you calculate that?
8 A. No, I did not.
9 Q. Did you ever try to calculate that?
10 A. No, I did not. At the time I didn't
11 have any idea how much they had taken out
12 above the five-tenths that should have come
13 out.
14 Q. Now, you say here for that material
15 you did not seek a change order?
16 A. Correct. I thought that was the
17 extent of it. Wasn't going to worry about
18 it. I had been there and had been beating
19 this job, seems like, for four or five months
20 trying to get it going and get it finished
21 and I was ready to get out of there. So I
22 wasn't going to worry about that small -- dug
23 these pits here.
24 Q. You dug the pit in the parking lot?
25 A. I wasn't going to say anything about
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1 this area here. That would have been no
2 problem. But we came over and found this
3 other material. That's when all this stuff
4 started coming together.
5 Q. Prior to this had you ever discussed
6 with either Marvin Parker or Ricky Tipper
7 about submitting a change order for
8 unsuitable material that was performed prior
9 to July 1, '99?
10 A. Prior to which? Prior to this --
11 Q. July 1, '99, prior to this letter.
12 A. I had a talk with Marvin about
13 submitting a change order?
14 Q. Correct.
15 A. I would say so, because I've got it
16 here. I probably talked with Marvin, and
17 Ricky was probably involved, because I don't
18 do this on my own.
19 Q. That's what I'm asking. Did every one
20 agree that you would not seek a change order
21 for what had been done?
22 A. No. I did that on my own. The 600
23 yards, I did that on my own.
24 Because at that time when I saw the
25 wedge that Ricky had cut out, I said stop.
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1 We can't take this out. I thought that was
2 the extent of it. I think I even went to the
3 site that day. I can't recall for sure. I
4 don't know if we dug these pits that day or
5 the next morning. I don't know.
6 But then I shut him down from
7 stripping at that point.
8 Q. Did you recognize that if you were
9 going to make a change order for unsuitable
10 material and undercutting that you would have
11 to get someone out there to document it?
12 A. I think that's what it says here.
13 Q. Right.
14 A. I requested someone, for one of them
15 to be there.
16 Q. I guess what I'm saying is: Did you
17 recognize when you shut him down around the
18 SCB No. 4 area that if you wanted to get paid
19 for undercutting unsuitable material, you had
20 to give notice to get someone out there to
21 verify --
22 A. At that time, no, because we hadn't
23 been through all these steps yet. On this
24 date, then when PSI came in, that's when I
25 knew I had to get someone out there to
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1 document it.
2 Because we hadn't -- we had done
3 taken -- we stopped it. We didn't take any
4 more out. It was at a standstill out there.
5 Q. The reason you're at a standstill is
6 because you knew from your experience that
7 someone, in this case, PSI, would have to
8 come out there and verify it?
9 A. Uh-huh.
10 Q. Is that a yes?
11 A. Yes, that's correct.
12 Q. And that's what you're trying to do
13 here is set up a procedure for getting paid?
14 A. Correct.
15 Q. And you came up with an estimate in
16 the second paragraph. You say, "I feel
17 there's anywhere from 1,000 to 1,700 cubic
18 yards."
19 And you're talking about unsuitable
20 material?
21 A. Yes.
22 Q. How did you go about making that
23 estimate?
24 A. Estimating that there's a foot over an
25 acre. That parking lot, I don't know what
Vowell & Jennings, Inc. (615) 256-1935 40

1 the actual acreage is. I could look on the
2 Agtech if I had it, but I would assume an
3 acre a foot deep is 1,600 yards.
4 Q. You say, "Since PSI will be taking
5 over as the testing agency, and I had this in
6 my contract, I will issue RCR a credit from
7 the unused portion."
8 A. Uh-huh.
9 Q. Explain to me what you were talking
10 about there.
11 A. Whatever Scotty Goodrich had billed me
12 for these previous trips out, I would deduct
13 that from pay out and whatever my schedule of
14 values, and then I would credit him back the
15 remainder of it beings PSI was under their
16 contract now.
17 And I was going to deduct out whatever
18 Southern Consultant's bill was from the
19 schedule of values, then the remainder would
20 be credited back to RCR.
21 Q. Do you know if that was done?
22 A. No.
23 Q. Were you in charge of billing this
24 job?
25 A. No.
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1 Q. Who did that?
2 A. I was in charge of getting percentages
3 complete. Barbara Powers is the one that did
4 billing, I guess. I wasn't in the office as
5 far as the accounting end of it. But I would
6 tell Barbara 35 percent of the grade,
7 topsoil, schedule values should be somewhere,
8 and I'd break the job down. And I'd say
9 stripping topsoil, 100 percent of the
10 grading, 35 percent of the sewer.
11 Q. On this job did you bill the change
12 order or did the office do it?
13 A. I didn't bill anything.
14 Q. Did you ever tell the office what to
15 bill as change orders?
16 A. No. That was Ricky's -- the quantity?
17 Q. Yes.
18 A. No. That was Ricky.
19 Q. And Ricky would communicate with the
20 office?
21 A. Correct.
22 Q. Now, on the third paragraph, you say,
23 "Per the contract approximately twelve fifty
24 of cubic yards unsuitable material."
25 That was your disclaimer that you had
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1 in your proposal?
2 A. Correct.
3 Q. That was also part of your contract?
4 A. Correct.
5 Q. What does the twelve fifty -- what
6 work are you getting for that?
7 A. Excavate waste and replace unsuitable
8 material.
9 Q. If you just excavated the waste and
10 didn't replace it, would that be a deduction
11 of 50 percent of the unit price or would that
12 be more?
13 A. There's a lot of factors you've got to
14 weigh in to where you're going to waste it
15 to.
16 Q. If you wasted it on site?
17 A. If you wasted it on site, it would be
18 more than 50 percent deduction.
19 Q. Because the bulk of it is bringing
20 material in and compacting it?
21 A. Correct.
22 Q. You're just going to undercut a piece
23 of material and waste it on site in a
24 stockpile or something, what would be the per
25 cubic yard price of that?
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1 A. It depends on if I got to haul it
2 1,500 feet or I got to haul it 40 feet.
3 Q. In this case if you were just hauling
4 it to this area from the parking lot, I think
5 where the stockpile was --
6 A. How much would I cut and waste out of
7 there if I was already on site with my
8 equipment and just cut it and waste it right
9 there? Two fifty a yard, three fifty a yard.
10 Q. And the bulk of that twelve fifty per
11 cubic yard is bringing trucking material back
12 in to replace it and build it up?
13 A. Correct.
14 Q. Now, this is July 1st. Do you know
15 how much longer you were on this job?
16 A. Like I said, I can't give you a date.
17 I know it was sometime, I'm thinking, in
18 September. September, October, something
19 like that. May have been August. I don't
20 know.
21 Q. Did you come to the job site when PSI
22 was there and they were recording and marking
23 the undercut?
24 A. On a couple of sections.
25 Q. Were they doing that accurately?
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1 A. I measured one section with them, so I
2 would say we did one accurately. I would
3 hope we did, anyway.
4 Q. Did you notice while you were there
5 that they missed any areas of undercutting
6 that you should have been paid for that was
7 not measured?
8 A. Evidently so or we wouldn't be sitting
9 here.
10 Q. Well, I understand that part of it.
11 Trust me. I'm trying to find out if you
12 have.
13 A. No. Do I have any personal knowledge?
14 Q. Right.
15 A. I know the areas that should have been
16 measured. Now, whether they got measured or
17 not and how the arrangements were made, I
18 have no knowledge of that. But was there
19 more areas than the areas that I actually
20 measured? Yes.
21 Q. Do you know where those areas would
22 have been?
23 A. If you'll refer back to Southern
24 Consulting, there were approximately nine
25 pits excavated. And these areas, if I ain't
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1 mistaken, these areas here were the worst
2 that had the three to four feet seen of
3 disputable dirt, put it that way.
4 Q. And you're talking about an area --
5 A. In the middle portion of the parking
6 lot.
7 Q. Let me show you Exhibit No. 10 which
8 has a diagram that someone drew of the areas
9 of unsuitable soil.
10 And I think area No. 3 is what you're
11 describing, in the middle of that parking lot
12 close to that building?
13 A. Well, encompassing more close to the
14 middle, a whole lot bigger area than what's
15 on the back right here.
16 Q. Does this represent the areas that you
17 saw was unsuitable?
18 A. Yes. These plus more. These
19 represent just a small fraction of the
20 parking area that was unsuitable.
21 Q. How much more --
22 A. And this actually ought to go across
23 the building here, because that was what my
24 major concern was at this time that got me on
25 the ball of getting after PSI and Southern
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1 Consulting. Because I was under a time frame
2 to get this building pad up and I had gotten
3 to this juncture here and we still had no
4 resolution on the unsuitable for this area
5 No. 1 here.
6 Q. Right. That was pushing you --
7 A. And my building pad coming up to this
8 point here, I didn't want to have to straight
9 face, and that's what got everything going to
10 begin with as far as these meetings and
11 getting these people in here.
12 Q. With respect to any other areas, did
13 you have any role in making sure that PSI
14 accurately measured the undercutting that was
15 made?
16 A. No.
17 Q. Who would have done that?
18 A. It would have been Ricky. Ricky or --
19 it would either have been PSI that measured
20 it or it would have been RCR. It would
21 either be Anthony or PSI. One of them would
22 have been in charge of that.
23 Q. Would there be any reason why PSI
24 would have missed an area that was undercut?
25 A. If they wasn't called out or if
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1 Jeff -- I don't know why I call him Jeff --
2 Anthony and Ricky got done on their own.
3 That would be the only reason PSI wouldn't
4 have been involved in it.
5 Q. Did you --
6 A. To my knowledge. I can't speak for
7 them.
8 Q. I understand. That's speculation.
9 A. Right. I was not there when this
10 actually went off.
11 Q. Did you ever witness where Anthony
12 Orange directed any undercutting when PSI
13 wasn't there to measure it occur?
14 A. On several occasions.
15 Q. Tell me about that.
16 A. Now, as far as the measurement of it?
17 Q. Right.
18 A. As far as directing us to take it out,
19 yes, numerous occasions in this area here.
20 Q. You're pointing to the parking lot?
21 A. Yes. The same area I was talking
22 about when we had the original -- where it
23 runs down through this.
24 Q. When did that occur?
25 A. Date-wise, I couldn't tell you, but
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1 somewhere around this point after -- it would
2 have to have been after July 1st.

3 Q. And what did Anthony Orange say in
4 your presence as far as when they were
5 undercutting in the parking lot area?

6 A. He agreed with me the whole time from
7 the very beginning that it was topsoil.

8 Q. I guess what I'm getting at is: How
9 do you know PSI didn't measure that portion?

10 A. I have no idea. Because what you've
11 given me -- according to this sketch here --

12 Q. Exhibit 10.

13 A. -- PSI didn't measure all the undercut.

14 Q. If that's to scale?

15 A. Correct. If that's to scale and this
16 is provided by them, they didn't measure all
17 the undercut, or it's not shown in the
18 drawing.

19 Q. If the amount of undercut was in the
20 range between 1,000 and 1,700 cubic yards as
21 you had estimated, would you think that would
22 catch most of it?

23 MR. PANTHER: Object to the form.

24 THE WITNESS: No.

25 BY MR. CASHION:

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1 Q. When did you change your mind?

2 A. When we went back in here and this
3 material was sitting there two and a half to
4 three foot deep. And then when you take it
5 out -- if you get down deep enough, sometimes
6 you can bridge it up. When PSI would come
7 out -- and I was there on a couple of
8 occasions -- and we proof rolled the
9 subgrade, the proof roll would not work.

10 They would continue to cut the material out.

11 Q. When they were proof rolling and
12 cutting material out, was PSI on the job?

13 A. On the proof rolling part of it, yes,
14 on times that I know. It may have been proof
15 rolled more.

16 What Ricky should have done -- like I
17 say, I don't know how it was done -- he
18 should have proof rolled as he was taking it
19 down so he could find some stable material
20 just for his own knowledge before he called
21 PSI out and said it's ready to be proof
22 rolled. He should have pre-proof rolled it
23 before he called them, which he may have done
24 since I was not there yet.

25 Because I don't believe either one,
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1 RCR or American, had any other contracts for
2 a ten-hour day service tech on site.

3 Q. At this point Williamson County was
4 paying the service tech?

5 A. I don't know who was paying it.

6 Q. It wasn't in your contract?

7 A. No, sir, was not.

8 Q. Did you ever make any calculations
9 about how much area was undercut?

10 A. No. At the end of the project?

11 Q. Right.

12 A. No, I did not. I believe I was gone
13 at that time.

14 Q. And preparing the change order was not
15 part of your job?

16 A. No.

17 Q. Do you know why PSI would not have
18 measured all of the undercut?

19 A. No, I don't know why.

20 Q. Do you believe they didn't measure all
21 the undercut?

22 A. If this is provided by PSI, then I do
23 more than believe. I know they didn't.

24 Q. Have you ever been told what the total
25 amount of undercut that American Excavators
Vowell & Jennings, Inc. (615) 256-1935 51

1 is claiming on this job?

2 A. Yes.

3 Q. How much?

4 A. Eight thousand yards, thirteen
5 thousand yards, around there somewhere.

6 Q. Thirteen thousand five hundred?

7 A. I don't know the exact number.

8 Q. I can show you the change order.

9 A. Marvin said something to me like a
10 year ago that he was having trouble getting
11 his money.

12 Q. Does that seem reasonable to you that
13 you would have 13,500 cubic yards?

14 A. Yes, sure does.

15 Q. If you look at your Agtech report --

16 A. Uh-huh.

17 Q. -- over the whole area, if you've got
18 six inches, that's 3,000?

19 A. Correct.

20 Q. So to get to 13, you would have to cut
21 over 4 feet off this entire site to get
22 13,000 cubic yards of undercut?

23 A. Have you done the math on it?

24 Q. I think I messed up the math. Over
25 two feet of the whole site?

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1 A. Yeah. And I would say you're probably
2 on the light side.
3 Q. Actually close to three?
4 A. Yes. There's no doubt in my mind.
5 Q. That you cut three feet off the whole
6 site?
7 A. Yes. There's not a doubt in my mind.
8 Q. What do you base that on?
9 A. Visual observation and I'm the one
10 that staked it.
11 Q. When you came out there on July 1st,
12 the whole building pad had been cut, right?
13 A. On July 1st.
14 Q. Go back to your July 1st letter.
15 A. Unsuitable material caught on 600
16 yards here, that was -- I had not staked any
17 cuts or fills on the building pad, which is
18 all these fill stakes. Okay?
19 I used the Agtech system and I trigged
20 these building corners with the cut or fill,
21 stake these building corners, stake the
22 building line on the five-foot offset so they
23 can come in and bring the building pad up.
24 You can take and calculate a grade per
25 this drawing as to what it should be and
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1 determine your fill. Well, when I went
2 out -- when I got them stopped here and they
3 had done stripped this area, when I got out
4 here and staked the stakes, there was an
5 additional foot and a half of fill. My stake
6 should have been filled three point five.
7 Instead, it's filled five on this back corner
8 back here.
9 Q. You're talking about the north --
10 A. Correct.
11 Q. -- west corner?
12 A. Correct. I had no idea the extent
13 that they had undercut this until I got a
14 stake, and I didn't stake it until they
15 stripped it. I staked it. I didn't put any
16 cut or fills on it. And I staked the
17 construction limit, this silk finish,
18 stripped everything inside the stripping
19 limits.
20 And by the time I came back out and
21 saw this and shut them down, within two or
22 three days -- I don't know when we started
23 hauling fill in. We proof rolled this area
24 first. And then when I staked it with the
25 fill stakes, there was about -- I know there
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1 was a five-foot fill. Like I say, I could be
2 completely wrong. I'm thinking there was
3 a -- I know it was two foot of extra fill
4 here that was not designed.
5 Q. On the corner?
6 A. Correct. On the Agtech, I can take
7 and lay out a grid every sixteenth of an inch
8 with the cut and fill and tell you the exact
9 design cut and fill. And when you stake the
10 fill, it ought to be pretty close, because a
11 lot of times in the estimating process the
12 topography that the survey gives you is
13 incorrect.
14 Q. Did you check the topography on this?
15 A. Not until they done had it stripped.
16 Q. So you don't know what it was?
17 A. No, sure don't. I have to take his
18 word here.
19 Q. Do you normally check it?
20 A. It depends. It depends. On a flat
21 site, normally I don't. If it's flat and
22 open, most of them will go out and do their
23 job. If it's heavily wooded and briers, it
24 may get a shot here and it may get a shot 50
25 foot. There may be a swell in the middle 8
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1 foot deep. He never went in and looked. So
2 it depends upon the topography of the site.
3 Q. Do you know --
4 A. If I had done an aerial on it, the
5 aerial is plus or minus two feet, yeah, I'd
6 go in and check the original ground versus
7 his drawings.
8 Q. You say you went in here and checked
9 all this after you --
10 A. No. I went in and set the building
11 corners with the fill stakes.
12 Q. When you did that, you had to realize
13 that it was undercut a lot?
14 A. Uh-huh.
15 Q. You need to say yes.
16 A. Yes, yes, yes.
17 Q. And when you made that realization,
18 did you know that no one had given any
19 notice of this undercut when it occurred?
20 A. They didn't realize it. The crew that
21 was out there cutting, I told them to go
22 strip the topsoil. Assuming per GT&E's
23 boring logs, if you take a pan through there,
24 it's easy to delineate the topsoil from clay,
25 chert, whatever your material is.
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1 I figured they'd go out there and cut
2 five or six inches and be done. And I was
3 probably off the site completely through the
4 whole stripping process. And I don't know
5 how long it took them to strip it. I really
6 don't. Maybe a week.
7 Q. When you went out there and you
8 realized on this back --
9 A. I saw this first and shut them down.
10 Q. You went back to stake your building
11 pad?
12 A. Yes.
13 Q. You went back to stake your building
14 pad and then you realized you had stripped
15 considerably more than six inches?
16 A. Correct.
17 Q. At that time did you run a survey so
18 you could qualify the amount that you had
19 stripped?
20 A. No, did not.
21 Q. Why not?
22 A. I had a discussion with Anthony at the
23 time and I was -- still, there was a lot
24 going on. I had all this going on. I just
25 couldn't do it. Should I have done it? Yes,
Vowell & Jennings, Inc. (615) 256-1935 57

1 I probably should have right then and shut
2 the thing completely down and do a complete
3 topo and determine what material had been
4 moved at that point.
5 Q. Did anybody tell you not to do that?
6 A. Not to do what?
7 Q. Make a survey --
8 A. No.
9 Q. -- and quantify the amount of
10 undercut?
11 A. No, they did not.
12 Q. Did you talk to Marvin Parker about
13 that?
14 A. I don't recall.
15 Q. Did you talk to Ricky about that?
16 A. I know me and Ricky and Anthony had
17 conversations concerning that.
18 Q. Did Anthony Orange tell you not to do
19 it?
20 A. It was already done.
21 Q. I mean to do the survey.
22 A. No.
23 Q. To quantify it?
24 A. No. No one told me to or not to.
25 Q. What did Anthony Orange tell you?
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1 A. I can't remember the exact discussion.
2 We were talking about -- this whole thing was
3 going on in a kind of a rush type situation,
4 and this is when we were doing the
5 investigation of all the material. That's
6 when everything came to a head, at that
7 point.
8 Q. At that point you realized your
9 600-yard estimate was probably an error, is
10 that accurate, when you staked this back
11 corner back here and realized you were about
12 a foot and a half more?
13 A. Yes, correct.
14 Q. Was there any reason you didn't at
15 that time write a letter to RCR and say --
16 A. I believe I may have already generated
17 this.
18 Q. You're saying it's after July 1st?
19 A. Well, I don't know. It's been too
20 long ago. I don't know exactly the sequence.
21 Q. I guess my question really is: When
22 you realized that, did you not feel the need
23 to at least generate a letter to explain your
24 feeling at that time that there had been more
25 undercut than what you had estimated --
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1 A. The original 600 yards -- no, I did
2 not.
3 Q. Why not?
4 A. I have no idea.
5 Q. Did you have conversations with PSI
6 while you were out there?
7 A. Yes.
8 Q. Who did you talk to, do you remember?
9 A. I call Anthony Jeff.
10 Q. You talked to him a lot more than you
11 did PSI?
12 A. That's right.
13 Q. Did you ever tell PSI that you had
14 undercut more area under the building pad?
15 A. Yes.
16 Q. What did they tell you?
17 A. I don't remember what they told me.
18 We had discussions, because it was concerning
19 the garden area.
20 Q. And that was the area that you had
21 anticipated?
22 A. Yes. The discussions were pertaining
23 to -- the undercut issue at that time, I
24 think, had done gotten where it couldn't get
25 resolved and we were talking about, Well,
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1 they're lucky the three foot didn't have to
2 come out under the building pad area.
3 Q. Was the county anticipating that they
4 would have to pay an undercutting price for
5 that three foot in garden area?
6 A. You have to talk to RCR. They had the
7 contract with the county.
8 Q. Not that you're aware of?
9 A. I have no knowledge of that, no.
10 Q. Did you ever have a conversation with
11 PSI about measuring other parts that you had
12 already undercut for payment?
13 A. No, I don't believe I did.
14 Q. Did you realize that you were going to
15 be paid for what PSI measured out there?
16 A. At some point, yes.
17 Q. At that point did you feel it
18 necessary to discuss further with PSI any
19 areas that they may not measure or that they
20 had overlooked in the undercut?
21 A. No. The only area that I actually
22 measured with PSI was area No. 1, which
23 located on your drawing is not correct. But
24 in that vicinity is the only area that I
25 personally measured with PSI.
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1 Q. And you knew whatever quantities they
2 came up with, you were going to get your
3 twelve fifty of cubic yards?
4 MR. PANTHER: Object to the form.
5 BY MR. CASHION:
6 Q. Or did you know that?
7 MR. PANTHER: Object.
8 BY MR. CASHION:
9 Q. When you and PSI was out there
10 measuring, that was going to be how -- it
11 would be the basis of how you got paid?
12 A. Correct.
13 MR. PANTHER: Object to the form.
14 BY MR. CASHION:
15 Q. Did you ever have any discussions with
16 them about any inaccuracy in their measuring
17 or not measuring it out?
18 A. No. Like I said, I measured the one
19 with them.
20 Q. Do you know when you were no longer
21 the project manager on this job for American?
22 A. When I quit?
23 Q. Do you think that was in September of
24 '99?
25 A. Like I said, I don't know. I'm sure
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1 Marvin could tell you. But I'm thinking
2 September, October, August, around there
3 somewhere.
4 MR. CASHION: Let's take a quick
5 break.
6 (Brief recess was taken.)
7 BY MR. CASHION:
8 Q. If I understood you correctly on your
9 load counts, if you were having an 18-yard
10 truck, you would figure 12 yards in place?
11 A. There's no absolute there.
12 Q. Is that what you figure as an
13 estimator?
14 A. There's no absolute there. It depends
15 on the material. It depends on what I'm
16 working with. It varies.
17 Q. On this job most of the material being
18 hauled in is the chert. Is that an 18-yard
19 truck, 12 yards in place?
20 A. Your definition of your chert now is
21 you're told there's different kinds of chert.
22 The material that we were hauling in, the
23 particle size was so great. The chert was in
24 place. It was right on the verge of having
25 to be blasted instead of dug.
Vowell & Jennings, Inc. (615) 256-1935 63

1 We were getting large chunks of -- 12
2 yards is a pretty good estimate on that.
3 Would I live with that? Yeah, I probably
4 could.
5 Q. Now, on this northwest corner, this is
6 where you made the realization that you had
7 at least a foot and a half of undercut in
8 that area?
9 A. Already in place.
10 Q. Already in place?
11 A. Correct.
12 Q. When you went out there to stake or
13 put your fill stakes for the pad?
14 A. Correct.
15 Q. Is this area in what was called the
16 garden area?
17 A. It's on the -- it's outside the garden
18 area. I had to clear this area here. This
19 drawing is no more near depictive of what the
20 site was. This tree line is complete solid
21 tree line. This is -- like I said, the trees
22 came all the way out to this area here. The
23 garden area was more or less up in this area
24 here.
25 Q. The garden area was more of the
Vowell & Jennings, Inc. (615) 256-1935 64

1 building -- side of the building facing the
2 parking lot?
3 A. Correct.
4 Q. Do you recall any other dimensions
5 other than the one you talked about in the
6 northwest corner there?
7 A. No, I don't.
8 Q. Now, as the project manager, did you
9 have the responsibility for establishing the
10 claim for the undercut?
11 A. No. That would have been Ricky Tipper
12 and Anthony Orange. Run that by me one more
13 time.
14 Q. As the project manager, did you have
15 the responsibility for establishing how
16 American Excavators was going to be get paid
17 for undercutting this material?
18 A. No. That was RCR and PSI. Whatever
19 methods they determined you'd get paid by was
20 determined by them two.
21 Q. Did you read the specifications for
22 this job?
23 A. Yes, I did. Did I read the whole
24 thing? I don't remember. If you're familiar
25 with spec books, they're just generic and
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1 they just put a new title in there. You need
2 to scan them pretty good.
3 Q. Did you read your subcontract with
4 RCR?
5 A. I believe I did. I don't remember.
6 Q. Did you --
7 A. I know when it came in, I know I read
8 it.
9 Q. Did you realize the notice provision
10 for giving a claim in either the general
11 conditions or subcontract?
12 A. In the general conditions of the
13 specifications, I normally just scan those.
14 No, I didn't.
15 Q. Did you look at the notice provision
16 between you and RCR for giving a claim?
17 A. No. I don't believe I did.
18 Q. And did Anthony Orange or Don Stover
19 ever tell you, anyway, that they were going
20 to calculate how much undercut you would be
21 paid for?
22 A. Me? No, they didn't. They didn't
23 tell me personally. I heard that they told
24 Ricky, but not me.
25 Q. But not you personally?
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1 A. No.
2 BY MR. CASHION: That's all the
3 questions I have.
4 MS. GOODSON: I have none.
5
6 QUESTIONS BY MR. PANTHER:
7 Q. Was it your understanding that you
8 were only going to get paid extra for
9 undercut if PSI measured it?
10 A. If PSI actually measured it?
11 Q. Yes. Was it your understanding you'd
12 only get paid extra if PSI measured the
13 undercut?
14 A. That I would only -- I'd get paid
15 extra if whoever determined it, RCR or PSI,
16 whoever -- because it came up at a point to
17 where -- and that's the reason I made the
18 statement earlier about keeping the soils guy
19 here.
20 They wasn't going to keep PSI on site
21 the whole time. We were lucky to get them
22 out. We needed them to come out to begin
23 with. I don't think PSI wanted the contract,
24 as a matter of fact, because of their
25 workload.
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1 Q. From your knowledge, if RCR was
2 notified of undercut by someone for American
3 Excavators and RCR directed the removal and
4 replacement of that undercut, would that be a
5 condition that would trigger extra payment?
6 A. Yes. Now, whose responsibility it was
7 to calculate the volumes at that point, Ricky
8 or Jeff or PSI. I don't know where it went
9 from there. Anthony is the one that directed
10 on numerous occasions that the undercut would
11 come out.
12 Q. From your knowledge, if PSI was called
13 out to the site, whose responsibility was
14 that?
15 A. RCR.
16 MR. PANTHER: That's all I have.
17 THE WITNESS: It was us to notify
18 RCR and they would contact PSI.
19 MR. PANTHER: Thank you.
20
21 FURTHER QUESTIONS BY MR. CASHION:
22 Q. Let me ask you one follow-up question
23 that Mr. Panther asked you.
24 Did you ever hear Anthony Orange
25 direct American Excavators to undercut an
Vowell & Jennings, Inc. (615) 256-1935 68

1 area that was not involved in the PSI
2 calculations or observation?
3 A. Yes.
4 Q. Where was that?
5 A. The same route we've been talking
6 about. This area right in here.
7 Q. You're looking at Exhibit 10?
8 A. This is from PSI.
9 Q. Right.
10 A. There's numerous areas that we
11 excavated per Anthony outside of what they've
12 got drawn on this schematic here.
13 Q. What you're saying is, you know there
14 were other areas than what is shown on
15 Exhibit 10?
16 A. Yes.
17 Q. Did you hear Anthony direct American
18 Excavators or Ricky Tipper or anybody to
19 remove or undercut soil when PSI was not on
20 site?
21 A. Yes.
22 Q. And that's the area in the parking
23 lot?
24 A. Yes.
25 Q. Tell me the circumstances of that
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1 conversation.
2 A. It was all -- like I say, I don't know
3 the exact circumstances behind that
4 conversation. It was a time frame type of
5 deal, either shut down or PSI couldn't come
6 out or something. Anthony, need to take this
7 out. We'd take out a foot here. I stood
8 there for a day or two in this area here.
9 Q. You're pointing to the parking lot?
10 A. Correct. Trying to find a bottom to
11 that. And I think at one point we even
12 decided we would deepen up where we could
13 bridge over it.
14 Q. With the material?
15 A. With Anthony standing right there.
16 Q. Was that ever reported to PSI?
17 A. I don't have that knowledge.
18 Q. Was that at the same time you were
19 excavating in the areas shown on Exhibit 10?
20 A. It was after.
21 Q. After that?
22 A. It should have been after that, or,
23 you know, the same. It was a small site.
24 You can't work just one place. It was in the
25 same process time.
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1 Q. And that's the only time you heard
2 Anthony giving direction out there?
3 A. No. Pretty much every day.
4 Q. For undercutting?
5 A. Yes. And a couple of other times
6 during the course of this right here, because
7 this wasn't a one-day situation.
8 Q. You're talking about the parking lot?
9 A. I was trying to get down to some
10 suitable material and it was not a short
11 process.
12 Q. And you're referencing the parking
13 lot?
14 A. Correct.
15 MR. CASHION: I don't have
16 anything else.
17 FURTHER DEPONENT SAITH NOT.
18
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1 SWORN to before me when taken,
2 August 29, 2001
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6 Jackie Wisinger, Notary Public
7 State of Tennessee At Large
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9 My Commission Expires: 10/21/2001
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