

1
2 IN THE CHANCERY COURT FOR WEAKLEY COUNTY, TENNESSEE

3 AT DRESDEN

4
5 NORTHWEST TENNESSEE)
6 MOTORSPORTS PARK, LLC,)

7 plaintiff,)

8 VS.)

Case No. 20074

9 TENNESSEE ASPHALT COMPANY,)

10 defendant.)

11
12 THE DEPOSITION OF AUSTIN BATEMAN

13 July 23, 2008

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23 CHRISTINA K. SHUPERT, RPR
24 Court Reporter
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Jackson, Tennessee 38308

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A P P E A R A N C E S

For the Plaintiff: MR. LEWIS L. COBB, JR.
Spragins, Barnett & Cobb
312 East Lafayette Street
Jackson, Tennessee 38301

For the Defendants: MR. GREGORY L. CASHION
AND
MS. MEGHANN E. MCCONNELL
Smith, Cashion & Orr
231 Third Avenue North
Nashville, Tennessee 37201

ALSO PRESENT: COREY EDWARD TODD
CANDACE TODD
MONTE PAUL SMITH
STEPHANIE ANN SMITH

The deposition of AUSTIN BATEMAN was taken at the instance of the plaintiff pursuant to agreement, on the 23rd day of July, 2008, beginning at approximately 2:00 p.m. at the law offices of Spragins, Barnett & Cobb, Jackson, Tennessee, for use pursuant to the Tennessee Rules of Civil Procedure before Christina K. Shupert, Notary Public at Large in and for the State of Tennessee.

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1 AUSTIN BATEMAN,
2 after having been first duly sworn, was examined and
3 testified as follows:

4
5 DIRECT EXAMINATION

6 BY MR. COBB:

7 Q We introduced ourselves before the
8 deposition started, but I'm Lewis Cobb. I'm going
9 to take your deposition today. And I'm assuming
10 you've done this before.

11 A No, sir.

12 Q You watched it yesterday?

13 A Yes, sir.

14 Q That's almost as good. The rules are
15 pretty simple. I want to know what you know. I
16 want to hear what you say at court if we have to go
17 that far for the second time and not the first time.
18 To do that I'm going to need your cooperation. Will
19 you do that?

20 A Yes, sir.

21 Q I'm going to try to ask clear questions.
22 If I don't, make me do it right. I'm going to
23 expect you to give me your best effort at an answer.
24 Will you do that?

25 A Yes, sir.

1 Q And you understand that this is -- we're
2 all here because of a dispute that exists about a
3 paving job TAC contracted to do at the Northwest
4 Motorsports Park, LLC, near Gleason, right?

5 A Yes, sir.

6 Q But before I talk to you about that, I'd
7 like to get to know a little bit more about you.
8 Tell me your full name.

9 A Austin, A-U-S-T-I-N, Kendrick,
10 K-E-N-D-R-I-C-K, Bateman, B-A-T-E-M-A-N.

11 Q What's your date of birth?

12 A 6-13-75.

13 Q And where did you grow up?

14 A Fairview, Tennessee, in Williamson County.

15 Q Went to high school where?

16 A Fairview High School.

17 Q And graduated?

18 A 1993.

19 Q And what did you do after high school?

20 A Went to college at Tennessee Tech in
21 Cookeville.

22 Q And graduated?

23 A In '97 with a Bachelor of Science in civil
24 engineering.

25 Q After that, what did you do?

1 A Went to work for Apac-Tennessee
2 Incorporated. It was a paving contractor in
3 Nashville. Worked for them from May of '97 to
4 October of '98. And then October of '98 I went to
5 work for Highways Incorporated in Cookeville,
6 Tennessee, which is also a paving contractor, and
7 worked for them from October of '98 till August of
8 2005.

9 Q All right.

10 A And then returned to school at UT in
11 Knoxville and was working on a master's degree in
12 civil engineering. And then the position in Paris
13 came open with Tennessee Asphalt, and I went to work
14 for Bill in August of '06.

15 Q Bill Ratliff?

16 A Yes.

17 Q Did you start working there in Knoxville
18 and then get transferred to Paris?

19 A No, no.

20 Q So you hired on and went to Paris
21 immediately?

22 A Yes. We had done a lot of work with
23 Tennessee Asphalt while I was at Highways, so I knew
24 Bill previously before going to work for him.

25 Q Okay. How far along did you get in your

1 master's program?

2 A I actually finished it after I came back
3 to work.

4 Q What does having a master's in civil
5 engineering give you that you don't get from a
6 bachelor's?

7 A I would say just a little more maybe
8 specialized or detailed knowledge in some of the
9 subject matter.

10 Q Well, okay. I didn't ask that very well.
11 Tell me what types of things does -- I mean, do you
12 get a master's in paving? I'm serious. Do you get
13 a master's in hydrology or a master's --

14 A Yes, uh-huh.

15 Q -- in fluid dynamics?

16 A There's a subject matter, yes, structures.

17 Q Okay. Structures like bridges?

18 A Uh-huh, yes.

19 Q Would structures be like buildings?

20 A Buildings, bridges.

21 Q And is that coursework plus a thesis?

22 A I did the nonthesis option.

23 Q Good for you.

24 How many hours of coursework is that?

25 A 36, I believe.

1 Q 36 semester hours?

2 A Yes, sir.

3 Q What motivated you to go back and get a
4 master's?

5 A I had always kind of wanted a graduate
6 degree, and the opportunity came up at the
7 University of Tennessee that they would pay -- pay
8 me to go to school and pay for my school, so I just
9 took advantage of the opportunity basically.

10 Q How did you swing that? That sounds like
11 a pretty good deal.

12 A It's just one of those opportunities that
13 come up, and, like I say, I just took advantage of
14 it.

15 Q Well, I mean, actually a more serious
16 question. Did they come and say, "Hey, we're
17 looking for people like you," or did you see it on
18 line, or --

19 A No. They came to me. Of course, I knew
20 one of the structures faculty that had been there
21 for a long time. I had actually talked to him when
22 I graduated from Tennessee Tech about coming to
23 graduate school, and I just -- at the time I decided
24 to go ahead and go to work. And he had another
25 opportunity come up a little down the road, and

1 he -- we revisited it, I guess, and I decided to go
2 back to school.

3 Q Are you married?

4 A Yes.

5 Q And what's your wife's name?

6 A Misty, M-I-S-T-Y.

7 Q What's her maiden name?

8 A Lambert, L-A-M-B-E-R-T.

9 Q Do y'all live in Paris now?

10 A Yes.

11 Q And have you lived in Paris since '06?

12 A Yes.

13 Q Children?

14 A No.

15 Q If I had gotten back here without all the
16 drama, I was going to make a copy of this file, but
17 we've made it an exhibit. This is the documents
18 that have been identified and produced by counsel
19 for TAC. Have you had an opportunity to look
20 through those?

21 A Yes.

22 Q When you were getting ready to do your
23 deposition, what did you do to get ready?

24 A I just basically went through the file
25 start to finish and just kind of read through it and

1 just kind of refamiliarized myself with all of it.

2 Q All right. Anything else?

3 A No.

4 Q What I would like for you to do in your
5 own words is just tell me what happened from the
6 time you became involved in this paving until TAC
7 made the decision to pull off the job.

8 A Okay. Basically my first involvement on
9 the project was the afternoon that we were
10 conducting our milling operation. I talked to John
11 Taylor before lunch that day, and he indicated that
12 we had had a situation where the milling machine had
13 gotten stuck once, you know, maybe had, you know,
14 the possibility of some soft conditions and wanted
15 me to look at it. So I told him to get with the
16 owner, arrange for them to be there, that way we
17 could all look at it, set up a truck where we could
18 proof-roll it. Of course, I already had a backhoe
19 there where we could, you know, maybe dig a test
20 hole and that kind of thing. So we did that,
21 observed, I guess, more pumping than anything with
22 the proof-roll and got with the owner about what
23 their options were as far as, you know, proceeding
24 on with the paving.

25 Basically the two things that I

1 remember us discussing with the owner were the
2 possibility of trying to go ahead and proceed to
3 pave on what was there and, in turn, them signing an
4 overrun agreement. That would be option one.
5 Option two would be that they would have to look --
6 if they wanted to actually repair the subgrade, they
7 would have to look at, you know, something along the
8 lines of digging it out and putting a lot of large
9 rock back in it. The owner selected to try and
10 proceed with going ahead and paving it and paying
11 for the overrun on the asphalt.

12 The next day we came out to start the
13 paving process. The -- I guess let me back up. One
14 precautionary thing that I elected to do was to go
15 ahead and light-load our trucks. Typically we're
16 going to haul 20 to 24 tons, depending on whether
17 it's a tandem or a tri-axle truck. We elected to
18 haul 15-ton loads to try and alleviate some of the
19 problems that we might encounter from the soft
20 conditions. So that was something that we
21 voluntarily did at no cost to the owner.

22 We started paving that morning,
23 completed our first -- well, basically we divided
24 the project up into four pulls. It's 50-foot wide,
25 so we were going to do four twelve-and-a-half-foot

1 pulls. We started paving on the first pull,
2 completed that. I think the paver maybe got stuck
3 one time, not terribly bad. Started on the second
4 pull, got to the last, I don't know, hundred feet or
5 so of the second pull, and it became badly stuck.
6 Then after the second pull, we completed what we
7 could with the mix we had on hand the third pull and
8 the fourth pull.

9 At that point, that would be
10 Wednesday. I don't remember exactly how it
11 transpired on Thursday, but in some manner we set up
12 a meeting for Friday on-site. No, no. Let me make
13 sure I've got my days straight. We milled on
14 Monday, we paved on Tuesday. Nothing that -- we
15 would have met Thursday on-site, not Friday.

16 Q If you need to look at that, please feel
17 free.

18 A That's fine. Like I say, we milled on
19 Monday, paved on Tuesday. We didn't do anything
20 on-site Wednesday. We met on-site Thursday with the
21 owners. Basically it was just a situation where we
22 were trying to figure out, you know, what needed to
23 be our next move based on the conditions we had, and
24 I think at the end of the meeting basically what we
25 agreed to do was to go through, take some elevation

1 shots, do some measurements on, you know, what was
2 in place, what couldn't be paved, and try and
3 develop some budget ranges, so they could evaluate
4 what they wanted to -- where they wanted to proceed
5 next.

6 Sent some of our guys out there
7 Friday, did that, and then worked on those budget
8 numbers. And then I believe I called Monte on
9 Sunday and gave him a verbal range, you know. I
10 think I give him a couple of scenarios and what we
11 felt was maybe an upper and a lower limit to those.
12 At that point, I think, is when he contacted Bill,
13 who was my boss, and asked him to come down and kind
14 of go over the situation with him.

15 We had another meeting when Bill was
16 able to get down there. I believe it was on
17 Wednesday. And basically where we got to with that
18 was the same point of maybe giving them some unit
19 prices and some, you know, options of what we felt
20 they could do. And, also, we agreed to construct a
21 test section using some geotextile fabric at our
22 expense, so they could kind of evaluate that and see
23 if they thought that would be an acceptable option
24 to pursue. And after that we, you know, constructed
25 that test section, and that was really as far as it

1 went from a construction standpoint.

2 Q Okay. And is that -- and here we are?

3 A And here we are.

4 MR. CASHION: I don't have any
5 questions.

6 (Everyone laughs.)

7 Q (By Mr. Cobb) The corporate structure of
8 TAC is something I want to understand. It's a -- it
9 was a -- I'm going to talk about it in the past
10 tense because it's my understanding that company has
11 been sold?

12 A Correct.

13 Q The whole thing?

14 A Correct.

15 Q But back in '07 the home office was in
16 Knoxville?

17 A Correct.

18 Q And was Bill Ratliff the head of the
19 company?

20 A He's the president.

21 Q Okay. Was he the owner of the company?

22 A He and his sister were the owners of the
23 company.

24 Q All right. And had offices at different
25 locations across the state?

1 A In East and West Tennessee.

2 Q Were you the head of the West Tennessee
3 office?

4 A Yes.

5 Q And that's based in Paris?

6 A Yes.

7 Q Who was head of that office before you got
8 there?

9 A Jon Hargett.

10 Q And where did Jon go?

11 A Jon went into business for himself.

12 Q Doing what?

13 A Pavement restoration work. He does
14 infrared patching, pavement rejuvenators, things of
15 that nature.

16 Q Did you know John Taylor before coming to
17 work at TAC?

18 A No.

19 Q How many people work out of the Paris
20 office approximately?

21 A You're talking still past tense?

22 Q Yeah.

23 A Before?

24 Q Everything I'm asking you now --

25 A Relates to when this happened.

1 Q -- is April/May 2007, yeah.

2 A About 50 people roughly.

3 Q How many of those are engineers?

4 A One.

5 Q That would be you?

6 A Yes.

7 Q Do any of the other people have -- I'm not
8 sure of the right word -- engineering-like -- an
9 engineering technician, some sort of --

10 A We had -- at that time we've got -- had
11 three employees that were former TDOT employees.

12 Q Was one of them Danny Wimberley?

13 A One of them is Danny Wimberley.

14 Q Would Danny be someone who had
15 engineering-like experience, background, training?

16 A To a certain extent.

17 Q Okay. Who were the others?

18 A Terry Rice and Durante Pryor,
19 D-U-R-A-N-T-E, Pryor, P-R-Y-O-R.

20 Q And what sort of experience did Mr. Rice
21 and Mr. Pryor have?

22 A They were just both former TDOT employees.
23 Terry Rice is our quality control guy. He does our
24 asphalt testing. And then Durante was actually in
25 material sales at the time for aggregate operation.

1 Q There is a contract that was signed
2 between TAC and the drag strip. Did you draft that
3 contract, or did somebody else draft it?

4 A The -- you talking about the legalese or
5 the scope of work?

6 Q The legalese.

7 A The legalese, someone else.

8 Q Do you know who?

9 A No.

10 Q Was it someone that worked for or worked
11 with TAC?

12 A I don't know.

13 Q It wasn't the drag strip guys, was it?

14 A Not to my knowledge, no.

15 Q Were you -- were you involved in the
16 negotiation of the contract?

17 A No.

18 Q Would that have been John Taylor?

19 A Yes.

20 Q When did you first realize that there
21 might be a problem with TAC's performance of that
22 contract?

23 A Define "performance."

24 Q Getting paid.

25 A Okay.

1 Q Actually, when the contract was signed --

2 A Uh-huh.

3 Q -- they expected to get the drag strip
4 repaved, and y'all expected to get paid, right?

5 A Uh-huh.

6 Q And you say "uh-huh" and nod, and I take
7 that for a yes --

8 A Yes.

9 Q -- but your answer will be clearer if --

10 A Right.

11 Q As I understand it, during the paving
12 process -- and I'm counting milling and everything
13 as a paving process.

14 A Uh-huh.

15 Q It became apparent what y'all had planned
16 to do wasn't going to work, right?

17 A Correct.

18 Q And once what y'all planned to do wasn't
19 going to work, it occurred to you, I'm assuming,
20 that y'all might not get paid or get paid what you
21 thought you should get paid, and there might be a
22 dispute?

23 A Basically I thought we were negotiating in
24 good faith with the racetrack for us to continue on
25 and fix the problem for them up until the point that

1 you contacted us.

2 Q Well, all right. And what I'm asking you
3 is not at that point, but when did -- how about
4 this. Plan A was to perform according to the
5 contract?

6 A Uh-huh.

7 Q Yes?

8 A Yes.

9 Q At some point you shifted to a Plan B,
10 correct?

11 A Correct.

12 Q All right. When did you realize Plan A
13 wasn't going to work?

14 A When we proof-rolled the base after the
15 milling and saw that we had a condition that
16 couldn't be paved at a uniform depth.

17 Q Tell me what you mean by "proof-rolling."

18 A Taking a loaded dump truck and running it
19 over an area, either base or subgrade.

20 Q And who --

21 A Then you observe how the -- how the area
22 performs under the load.

23 Q I've never seen that, but I have in my
24 mind's eye what it would look like if a child was
25 walking across a trampoline where -- would that be

1 an exaggerated -- that you can see the --

2 A It's more continuous than that. With a
3 trampoline you have steps. With a truck it's
4 continuous.

5 Q How about if you rode a tricycle across
6 the trampoline?

7 A Yes.

8 Q And the gravel, whatever, gives way on the
9 load --

10 A If it's unstable.

11 Q -- and comes back up?

12 Did it look like it was unstable when
13 you proof-rolled it?

14 A Yes.

15 Q All right. Did you -- did you have an
16 opinion at that time what was causing the
17 instability?

18 A The subgrade --

19 Q Okay.

20 A -- would be my assumption.

21 Q All right. When you use that term, you
22 probably know what you mean, but I don't. And I
23 want to make sure that you explain it enough so that
24 a fourth grader can understand it and maybe I can,
25 too. What do you mean by "the subgrade"?

1 A Subgrade is basically -- you have what you
2 call a pavement schedule, okay. If you -- let's
3 start at the top of the pavement schedule and go
4 down.

5 Q Okay.

6 A At the top of the pavement schedule you
7 have your asphalt pavement.

8 Q All right.

9 A Below that you're going to have an
10 aggregate base course. Then below that you're going
11 to have your subgrade material, which is typically
12 the -- what the layman would call dirt, you know.
13 It's native material to that site that has been
14 placed at an elevation such that you can put your
15 pavement structure on top of it. So it's on-site
16 materials that have been graded out.

17 Q Would it be accurate to classify that as
18 what was there before somebody started trying to
19 pave it?

20 A The materials were on-site more than
21 likely before they started trying to pave it, yes.

22 Q Sometimes you might bring in some dirt,
23 and would that be called fill dirt?

24 A Borrow.

25 Q Spell that.

1 A B-O-R-R-O-W. You go somewhere, and you
2 borrow -- I guess that's the origin of the term.
3 You go off-site, get it, and bring it on-site.

4 Q Okay. And what was out there at the drag
5 strip you assume was what had been there since the
6 Indians was roaming around, right?

7 A Correct, or something from the general
8 vicinity.

9 Q Okay.

10 A You're not going to go 50 miles away and
11 get it and bring it in.

12 Q And when you say that that was unstable,
13 what do you mean?

14 A Basically in order to pave on something
15 and be able to do it at a specified depth, it's
16 going to not have to deflect, move, or anything
17 under a load.

18 Q Okay.

19 A If you have any deflection or movement,
20 what's going to happen is the screed on the back of
21 the paver seeks an elevation.

22 Q Spell screed.

23 A S-C-R-E-E-D.

24 Q Okay.

25 A The screed on the back of the paver seeks

1 an elevation. If the tires on the side of the paver
2 sink down, the screed is going to still try and
3 maintain a uniform grade. Something has to make up
4 the difference between where the tires are at and
5 where the uniform elevation is. You know, if you're
6 figuring on paving two inches and you're paving six,
7 because the -- it's giving, something has to make up
8 the difference, and that's where the overrun
9 agreement came in.

10 Q Okay. If the underlying ground is not
11 stable, would putting three inches of asphalt
12 instead of two solve the problem?

13 A No.

14 Q Would putting four instead of three solve
15 the problem?

16 A Depends on how bad it is.

17 Q Okay. Assuming it's as bad as what the
18 drag strip was, would that have -- would putting
19 more asphalt have solved the problem?

20 A What do you mean by "solve the problem"?

21 Q All right. I perceive the problem as that
22 during the paving process the equipment got stuck
23 and broke through and that the ground ultimately
24 proved to be quite unstable.

25 A Uh-huh.

1 Q Would that be a fair definition of the
2 problem?

3 A Yes.

4 Q Based on what we know now?

5 A Uh-huh.

6 Q Yes?

7 A Yes.

8 Q Okay. Would putting four inches of
9 asphalt on top of that have solved that problem, or
10 would it have still been unstable underneath?

11 A It would still be unstable underneath, but
12 the whole -- the whole issue is what kind of loads
13 are you going to put on it long-term. If you're --
14 if you're going to just have cars on it, as long as
15 you can get it paved, you're going to be fine. If
16 you're going to be running heavy trucks over it,
17 you're talking about a whole different ball game.

18 Q So the issue was how to get it paved
19 without -- without damaging it while you're paving
20 it?

21 A Correct.

22 Q When were you first aware that the ground
23 under the racetrack was unstable?

24 A When we proof-rolled it. You had -- there
25 was some instability there, and that's why after --

1 you know, when the -- well, I take that back. When
2 John Taylor called me and said that we had the --
3 the milling machine had had some difficulties, I
4 anticipated that we had some instability to deal
5 with. Now, I didn't know that myself until we went
6 out there and proof-rolled it. Then we've got some
7 instability, and that's when we presented the owner
8 with their options.

9 Q All right. If you suspect instability,
10 then the next step is to determine is it really
11 unstable or not, right?

12 A There was some instability there. The
13 proof-roll indicated that there was.

14 Q All right. But the proof-roll was to
15 prove whether it was unstable or not, right?

16 A Correct.

17 Q And that's the reason you did it was to
18 determine for sure is it unstable or not, right?

19 A Correct.

20 Q What does a milling machine look like?

21 A It -- of course, it -- it's a function of
22 what brand it is.

23 Q Assume I know nothing.

24 A Okay. It --

25 MR. CASHION: Would you like to

1 know the milling machine on this job?

2 MR. COBB: Yeah.

3 MR. CASHION: He's got other
4 options, but I think --

5 MR. COBB: Yeah, talking about
6 this job.

7 MR. CASHION: This job.

8 Q (By Mr. Cobb) The one that got stuck, what
9 does it look like?

10 A It runs on tracks.

11 Q Like a bulldozer?

12 A No. They're rubber tracks.

13 Q Okay.

14 A And they're smaller. And I believe
15 there's -- I think this machine -- some of them have
16 four, some of them have three. I believe this one
17 has four. I'm not a hundred percent sure, though.

18 Q Four tracks?

19 A Four tracks.

20 Q Okay.

21 A And then in the middle of the machine you
22 have a cutting head with teeth on it that revolves.

23 Q Speak English. What --

24 A It's a cylinder.

25 Q Okay.

1 A It's a cylinder with teeth welded onto it.

2 Q Does it look like a rolling pin with teeth
3 on it?

4 A Yes.

5 Q Okay.

6 A And it rotates and basically removes the
7 old asphalt. The closer together the teeth are, the
8 finer the material you're going to get out of it.
9 It's all a function of the space. Load it onto a
10 belt, and then you have a conveyor that comes out of
11 the front of the machine and loads it into the back
12 of the truck.

13 Q All right. And what made it get mired
14 down and stuck? Did it just break through the base?

15 A I didn't see that.

16 Q Did you get a report on it?

17 A I was just told it was stuck.

18 Q I mean, what were you told?

19 A That they got stuck one time, that the
20 milling machine was stuck one time.

21 Q Is that unusual?

22 A Not necessarily. I mean, I wouldn't --
23 you know, I wouldn't say it's unusual for a piece of
24 equipment to get stuck.

25 Q Okay. Is it unusual for a milling machine

1 to get stuck during the course of milling?

2 A Normally you're not going to be running on
3 base after you get done milling. Because, you know,
4 like on, say, a highway you've got a thicker
5 pavement section. So in that scenario it's very
6 rare for it to get stuck. If you're milling and
7 running on top of base, I would say it's not all
8 that uncommon for it to get stuck.

9 Q How did they get it unstuck?

10 A I think it was able to pull itself out.
11 It just kind of bogged down was my understanding.
12 But, there again, I didn't see it.

13 Q Did you talk to the operator of the
14 milling machine?

15 A No.

16 Q Was there ever any written report of what
17 had happened?

18 A No.

19 Q I read somewhere where somebody described
20 it as being marred down, M-A-R-R-E-D. Is that a --
21 I would think mired down would be, but there's a --
22 I find out there's more I don't know about this
23 than --

24 A That's definitely not an engineering term.
25 I don't --

1 Q Okay.

2 MR. CASHION: I think they may
3 be the same term.

4 MR. COBB: Two ways of spelling
5 the same thing? West Tennessee spelling?

6 MR. CASHION: Yeah.

7 Q (By Mr. Cobb) When John Taylor was
8 estimating this job, is that something that he does
9 for TAC, and he doesn't need to run that by you for
10 approval?

11 A No.

12 Q And he didn't run that by you for approval
13 in this case?

14 A No.

15 Q Do you remember how much was in the dump
16 truck when the proof-rolling was done?

17 A It was full. I mean, it would probably be
18 in the 20 to 24-ton range would be my guesstimate.
19 You know, we didn't have a weigh ticket on it, but
20 that would be my guess.

21 Q Guesstimate is good enough. And it was
22 full of asphalt?

23 A The way I recall, we used the milled
24 asphalt from the track.

25 Q Would that weigh about the same as the

1 other -- the fresh asphalt?

2 A Yes.

3 Q All right. So you run the dump truck over
4 the -- is it the base?

5 A Uh-huh.

6 Q Is all the asphalt gone at this time?

7 A Yes.

8 Q Then do you do any other analysis of the
9 area?

10 A No. It's strictly visual.

11 Q All right. And you said there was a
12 backhoe already on the scene?

13 A Yes.

14 Q Is that typical to have a backhoe?

15 A For cleanup purposes.

16 Q Okay.

17 A In other words, like at the end of a pull
18 when the milling machine -- when you pick the
19 cutting head up, you'll have a pile that you've got
20 to pick up.

21 Q And the backhoe will clean that up and put
22 it where it needs to be?

23 A Right, put it in the back of a truck and
24 haul it off.

25 Q All right. How difficult would it have

1 been at that point to dig a few pits to see what
2 the --

3 A We did dig a pit.

4 Q And what did you see when you dug a pit?

5 A Just that the subgrade was -- that it
6 would give.

7 Q Were you able to tell what kind of soil
8 was in the pit?

9 A No.

10 Q Were you able to tell whether it was wet
11 or not?

12 A No.

13 Q Did you do the digging?

14 A No.

15 Q Were you on the bucket end of the process?

16 A No.

17 Q Were you there when it was actually being
18 dug?

19 A Yes, yes.

20 Q When they -- when they would dig, would
21 they take the dirt up and set it in a pile?

22 A We didn't excavate any subgrade material.
23 We strictly just dug down to the top of the subgrade
24 to see if it was yielding. We didn't -- we dug
25 through the base stone. You've got limestone base

1 out there. We dug through the base stone to the top
2 of the dirt.

3 Q Okay. Why didn't you go ahead and dig
4 down into the dirt at that time?

5 A Because I don't guess we viewed that as
6 something that needed to be done.

7 Q Who was there while that was being done?

8 A I was there, John was there, and my
9 recollection is that we showed that to Monte and
10 Corey when we met with them.

11 Q Showed them the hole?

12 A Yes.

13 Q Did you explain to them at that time that
14 you chose not to dig down into the subbase?

15 A They could see that.

16 Q Okay.

17 A I'm sure we explained to them what we had
18 done and why.

19 Q All right. I'm not asking my question
20 very well. Let me try to come at it at a different
21 direction. It seems to me with the benefit of
22 hindsight that the problem is the subsoil.

23 A Correct.

24 Q And --

25 A And that was established then. We

1 indicated that we thought they had a subgrade issue.

2 Q All right.

3 A And then it's a matter of what options do
4 you choose to try and proceed onward.

5 Q Don't you have a better idea what your
6 options are if you know what the subsoil consistency
7 is?

8 A That wouldn't be something that we could
9 evaluate.

10 Q All right. Tell me why. Why not?

11 A I mean, what kind of test are you going to
12 do for consistency?

13 Q Well, I'm not going to do anything. I can
14 promise you that.

15 What kind of test -- do you know what
16 kind of test needs to be done?

17 A Basically we knew we had a subgrade issue,
18 and that's why we didn't proceed any further. In
19 other words, we indicated to them they had a
20 subgrade issue. "Our contract precludes us from --
21 you know, this isn't in the scope of our work."

22 Q Okay.

23 A "Now, how do y'all want to proceed?"

24 Q So it was up to them to determine what
25 needed to be done about analyzing the subgrade?

1 A It would be their choice if they wanted to
2 analyze it.

3 Q Did you make a recommendation?

4 A No.

5 Q Why not?

6 A I mean, we showed them what we had, and
7 then it's up to them to carry it from there. If
8 they want to have it analyzed, it's -- you know, it
9 would have been fine.

10 Q Well, isn't it true that until the
11 subgrade was explored you would have an incomplete
12 analysis; you would just be, more or less, guessing
13 what you're dealing with?

14 A You might -- you would not be guessing
15 that you had a problem. You might be guessing as to
16 what the most effective way to fix it is.

17 Q All right. And they came to you looking
18 for paving solutions, right?

19 A They came to us to get a price on
20 overlaying the racetrack or milling and paving the
21 racetrack. And that's what we gave them was a price
22 on milling and paving the racetrack.

23 Q Well, once a problem arose with the
24 subsurface, who was in the best position to evaluate
25 the subsurface conditions, the significance of it,

1 what needed to be done to analyze it and correct
2 you? You or Corey Todd?

3 A That was not in our scope of work.

4 Q And that wasn't, with all due respect, not
5 my question. My question was who was in the best
6 position to do that analysis, someone who builds
7 drag cars or someone who's got a bachelor's and
8 working on their master's in civil engineering?

9 A Neither one of us would be in a place to
10 -- I have more background in pavement than he does,
11 but it wasn't my place to tell him how to spend his
12 money.

13 Q Why not?

14 A Where is it my place to tell him how to
15 spend his money? In other words, they've got to
16 make a decision as to what risk they wanted to
17 incur.

18 Q Well, who's in the best position to
19 explain the risk?

20 A We explained the risk.

21 Q Well, how could you evaluate the risk
22 unless you actually examined the subgrade?

23 A We knew we had a subgrade issue. We say,
24 okay, option one, we try and pave it with this
25 subgrade problem, you sign an overrun agreement. So

1 that's option one. No removal of our -- that we're
2 not responsible for the subgrade. We don't give
3 them any warranty. Or we look at the option of, you
4 know, let's take the subgrade out and put some kind
5 of aggregate back in it at considerably more cost.
6 And they chose not to pursue that option any
7 further.

8 Q Did you explain to them, "If you choose
9 not to do digging out, this may not work"?

10 A Yes.

11 Q Did they say, "We don't care?" What was
12 their response?

13 A I don't remember them saying anything one
14 way or the other.

15 Q Was any of those recommendations made in
16 writing?

17 A No.

18 Q Were any of those conversations recorded?

19 A Not to my knowledge.

20 Q How much time would it have taken to get a
21 backhoe and dig down two or three feet to dig a pit
22 and take a look at the soil?

23 A Minimal.

24 Q Would you have been in a position to
25 realize that the soil was clay? Is that something

1 that as a civil engineer you are able to do?

2 A You could tell that without digging
3 further that it was a clay.

4 Q Could you tell without digging further how
5 deep the clay was?

6 A No.

7 Q Could you tell without digging how much
8 was going to have to be dug out and filled back in
9 in order to create a condition that would make it an
10 acceptable surface?

11 A No. I mean, that's something that if they
12 had decided they wanted to explore the option of
13 digging it out and putting rock back in it, that's
14 at things that would have happened at that point.

15 Q So if they had said we want to dig out and
16 put back in, then you would have done the pit to
17 investigate how deep you were going to have to dig?

18 A We could have, yes.

19 Q So there's no way of knowing how much
20 Option B is going to cost without doing that
21 testing; is that true?

22 A Correct. No exact way.

23 Q Did you give Monte and Corey a cost
24 estimate of digging out and putting it back at the
25 time they made the selection to go ahead and just

1 keep paving?

2 A I don't think we gave them an exact dollar
3 figure, no.

4 Q Well, did you give them a guesstimate?

5 A I would think that we did.

6 Q Would that have been in writing?

7 A No.

8 Q Did you know at the time of this
9 conversation that Danny Wimberley had done coring at
10 the track?

11 A Yes.

12 Q Did you know that two of those cores had
13 shown water in the hole?

14 A No.

15 Q If you had known that, would you have told
16 Monte and Corey?

17 A I wouldn't have seen that as a problem.

18 Q A problem telling them or a problem not
19 telling them?

20 A I wouldn't have had a problem telling
21 them. I wouldn't have seen it as a problem if there
22 was some water in a core hole.

23 Q Why not?

24 A Because the core is only taken to the
25 bottom of the asphalt depth. Core drill uses water

1 to keep the bit cool. It would have been my thought
2 that it was more than likely water from the core rig
3 itself.

4 Q Well --

5 A We never saw any surface water down there.

6 Q When Danny was testifying and the notes
7 that John made, it said there was water in two of
8 the holes and not in two of the other holes. Would
9 that be unusual?

10 A It's possible. If you had one area where
11 you happen to drill over some course material that
12 didn't have a lot of fines in it, it might drain the
13 water out more quickly. If you drill over some
14 other material where it's dense, the water doesn't
15 drain out as quickly.

16 Q Well, you're telling me that a finding of
17 water in a core hole is an insignificant finding?

18 A On the kind of cores that we drilled it
19 would be.

20 Q Let me show you a document that I think is
21 the contract that was entered into between TAC and
22 Northwest.

23 A It is.

24 Q Do you recognize it?

25 A Yes.

1 Q And paragraph 7 talks about heading:
2 "Work of Others"?

3 A Uh-huh.

4 Q Is that a yes?

5 A Yes.

6 Q Would you read that just aloud into the
7 record?

8 A "Work of Others: Neither grading or
9 compaction of subsurface ground are the
10 responsibility of Tennessee Asphalt Company under
11 this agreement. Tennessee Asphalt Company does not
12 warrant its work were defective work product or
13 drainage problems result from improper preparation
14 or installation of the underlying soil, gravel or
15 base stone, when gravel or base stone is not a part
16 of Tennessee Asphalt Company's work."

17 Q Did you ever find any evidence of improper
18 preparation or installation of the underlying soil?

19 A Can I see that?

20 Q Sure.

21 A Now, could you repeat the question for me?

22 Q I'm not sure, but I'll try. Did you see
23 where anyone had done any improper preparation or
24 installation of the underlying soil?

25 A The fact that it -- that it was in a state

1 where it would give indicated that something had
2 been done improperly, whether it was installation,
3 whether sufficient drainage wasn't on-site and it
4 became saturated after the fact, something was done
5 improperly to make that soil wet.

6 Q Do you think every soil that's wet is the
7 result of improper preparation?

8 A Depends on the amount of moisture.

9 Q Well, I mean, isn't there some soil that's
10 just wet because it's wet --

11 A No.

12 Q -- that has never been prepared by
13 anybody?

14 A Well, but then it's a function of
15 drainage, and the drainage is a function of the
16 preparation that was done on-site. In other words,
17 they've got drainage ditches along the sides of the
18 racetrack. If the drainage is not sufficient to
19 carry away the water, then that's what's causing the
20 soil to become wet, overly wet. You need a certain
21 amount of moisture for compaction. Just because
22 something is wet doesn't mean it's unstable.

23 Q Did you see any improper preparation of
24 the gravel or base stone at this site?

25 A The gravel or the base stone I don't think

1 was our problem. It was the subgrade.

2 Q Was the drainage out there improper, out
3 at the racetrack?

4 A The drainage ditches?

5 Q Well, drainage anything.

6 A I don't think they had enough -- obviously
7 it was, or it wouldn't have been saturated.

8 Q Well, is that something that you could
9 tell just by looking at it?

10 A No.

11 Q Is that something that could only be told
12 by digging down into it and discovering water?

13 A I don't think anybody discovered water.

14 Q Didn't David Evans discover water?

15 A He didn't discover free water, I don't
16 believe.

17 Q How about moisture?

18 A Moisture you're always going to discover.
19 Anytime you're digging -- like you said earlier, if
20 you dig into a soil, you're going to have moisture.
21 It's just a matter of how much, and that's a
22 function of the drainage.

23 Q All right. Let me try again. I'm not
24 making myself clear apparently.

25 Did you read the David Evans report?

1 A Yes.

2 Q He said there was a problem.

3 A Correct.

4 Q What did you understand the problem to be?

5 A Saturated soil, saturated subgrade
6 material.

7 Q With -- saturated with what?

8 A Water.

9 Q So what was causing that soil to be
10 saturated with water?

11 A (No verbal response.)

12 Q I thought you said improper drainage.

13 A That's one possibility.

14 Q What are the other possibilities?

15 A That's the only one I can think of right
16 now.

17 Q All right. Is improper drainage apparent
18 when you look at it without digging into it?

19 A If it appears that you have a subgrade
20 that's unacceptable, moisture is one way that can
21 happen, if you've got too much moisture in it. Now,
22 you can't determine that without testing if moisture
23 is the cause of it. There's other things that --
24 you know, you can actually be too dry. So you can
25 have too much moisture, you can have not enough.

1 There's lots of scenarios.

2 Q My question was can you tell that there's
3 too much water in the soil just from standing on the
4 surface and looking at it?

5 A No.

6 Q You have to dig into it to find that out,
7 right?

8 A You would have to run a test to determine
9 if there was too much moisture.

10 Q And that test, the only one I know of is
11 digging or using a probe, right?

12 A No. To determine if there was too much
13 moisture you would have to run a standard proctor to
14 know a hundred percent for sure that you've got too
15 much moisture.

16 Q And a "standard proctor" means what?

17 A That you take a sample of the soil, you
18 run it at various moisture contents, and determine a
19 maximum dry density and an optimum moisture content.

20 Q All right. Are you saying that David
21 Evans did not do enough analysis to determine the
22 soil was saturated with water?

23 A David Evans did a standard proctor.

24 Q Okay. Are there some ways to get a
25 reasonable idea of whether the soil is saturated

1 with water, oversaturated?

2 A There's no way to know for certain unless
3 you do the standard proctor.

4 Q All right. I understand. And "certain"
5 means 100 percent?

6 A Correct.

7 Q All right. But we make decisions all the
8 time based on 90 percent sure, 80 percent sure.
9 What I'm asking you is aren't there ways to get a
10 reasonable expectation of whether or not the soil is
11 saturated -- oversaturated with water?

12 A I would say there are reasonable ways to
13 determine that you have a substandard soil. I
14 wouldn't say that there's necessarily -- in my mind
15 there's not a reasonable way to say that this is the
16 problem. You can -- you can identify you have a
17 problem reasonably.

18 Q All right. What are the ways to identify
19 that you have a problem?

20 A Proof-rolling.

21 Q Anything else?

22 A You could -- just depends on how far you
23 want to take it. I mean, you could use a probe, you
24 know, see how -- and just, you know, kind of see how
25 firm the soil is, but that's basically the same

1 thing as proof-rolling to a large extent. You're
2 measuring a deflection basically, you know, seeing
3 how much it gives and that kind of thing.

4 Q Let me ask you this: As somebody who is
5 the head of a large paving company, what
6 responsibility do you believe you have to your
7 customers to help them understand the risk
8 associated with paving?

9 A I mean, I think it's part of our job.

10 Q All right. You understand that you're
11 selling not only asphalt but the expertise on how to
12 lay it properly, right?

13 A Yes.

14 Q And that's part of what you advertise
15 yourself as on your web site and other places?

16 A I have not seen our advertising.

17 Q Well, do you think if someone comes to
18 your company and asks you to pave, that it is
19 unreasonable to expect you to pave it in a
20 commercially reasonable manner?

21 A I think we do that.

22 Q Well, that's a reasonable expectation,
23 isn't it?

24 A Yes.

25 Q And that one of the things you do when you

1 come out and do your estimate is to identify what it
2 will take to achieve the desired paving result,
3 isn't it?

4 A Yes.

5 Q And if you see that there may be a
6 problem, you would have a duty to let the customer
7 know, "We see there may be a problem"?

8 A If you see --

9 MR. CASHION: Object to the
10 form. Go ahead and answer.

11 A If you see that there's a problem.

12 Q (By Mr. Cobb) And if you have a concern
13 that there may be an oversaturation of water in the
14 subsoil, that's something that could be a problem,
15 correct?

16 A An oversaturation of water in the subsoil
17 would be a problem, yes.

18 Q All right. And the reasonable thing to do
19 if you have a concern that there may be saturation
20 -- oversaturation of water in the subsoil is to do
21 enough testing to find out if it is, in fact, a
22 problem, correct?

23 A That wouldn't be our place to do the
24 testing.

25 Q Well, do you have people that you work

1 with closely who can do the testing?

2 A Are you talking about people that work for
3 Tennessee Asphalt?

4 Q Or people who you use on a regular basis
5 to do things you don't have the expertise to do.

6 A Yes.

7 Q As a matter of fact, you did do testing on
8 this site, didn't you? You proof-rolled it?

9 A Yes, we proof-rolled it.

10 Q So you do do testing?

11 A Yes. To the extent that we're capable to
12 do it, yes.

13 Q All right. And isn't it reasonable to
14 expect that a paving company would not start putting
15 down \$40,000 of asphalt if there was concern that it
16 could not be put down without it being ruined?

17 A Yes. But we met with the owner and
18 explained to them exactly what you're talking about.
19 This is what you have, and these are the options as
20 we see them. And they elected to go with one of the
21 options.

22 Q All right. Tell me in as much detail as
23 you recall who you met with, when you met with them,
24 where, and what was said.

25 MR. CASHION: Where are you

1 starting from?

2 MR. COBB: He said, "I met with
3 the owners" and --

4 MR. CASHION: So you're starting
5 on Monday, April 30, when he met with the
6 owners after the milling. I want to make sure
7 we've got the right -- they had several
8 meetings.

9 A There's three meetings.

10 Q (By Mr. Cobb) Take them first, second, and
11 third.

12 A Okay. First meeting met with Monte and
13 Corey.

14 Q All right.

15 A And that's what we've been discussing here
16 this last little bit --

17 Q Okay.

18 A -- about all the proof-rolling and the
19 test pit and all those sorts of things.

20 Q All right. Tell me in as much detail as
21 you can recall the conversation.

22 A Well, I don't remember details of the
23 conversation. I remember us showing them that we
24 had a subgrade issue, why we thought they had a
25 subgrade issue. We presented the options that we've

1 already talked about, the overrun agreement, that we
2 could look at maybe digging it out, putting large
3 stone back in, and they elected to go with the
4 overrun agreement.

5 Q And did you explain to them the risk of
6 electing to do that, that it may be a total failure?

7 A I felt that we adequately conveyed to them
8 what their risks were and what the pluses and
9 minuses to each option were.

10 Q I understand that's what you think. Tell
11 me what you actually said.

12 A I told you I don't recall the exact
13 details of, you know, I said verbatim this. I don't
14 recall that.

15 Q Well, did you use words like this or to
16 this effect: "You can do it this way, but it may be
17 a total failure"?

18 A I doubt that I ever said "total failure."

19 Q Well, which weighs more, the paving
20 machine loaded with asphalt or the milling machine?

21 A I don't know.

22 Q What do you think?

23 A I don't think. I don't know.

24 Q You surely did not tell me you don't
25 think. You didn't mean to say that, did you?

1 Which is bigger?

2 A Volume?

3 Q Yeah.

4 A The milling machine.

5 Q Does it carry a load, or does it throw the
6 load on something else?

7 A No. It just carries -- it doesn't have
8 the load on it all the time.

9 Q If the milling machine was sinking down,
10 wouldn't it be reasonable to expect that the paving
11 machine might also sink?

12 A The milling machine did not get stuck
13 enough where it couldn't pull itself.

14 Q Did it get stuck enough where it made
15 ruts?

16 A Yes.

17 Q Did the paving machine get stuck?

18 A At the end -- well, it got -- yes, it got
19 stuck.

20 Q Did it get stuck on the unpaved portion or
21 the paved portion?

22 A I don't understand what you're talking
23 about, unpaved and paved.

24 Q That may be a stupid question. I'm
25 serious. It may be.

1 Tell me about how the paving machine
2 got stuck. Where did it get stuck, what did it get
3 stuck in, and how did you get it out?

4 A The first time it got stuck, it was fairly
5 similar to how the milling machine -- how it was
6 explained to me how the milling machine got stuck.
7 It just kind of, you know, bogged down and had some
8 difficulty proceeding onward in the first pull. The
9 second time it got stuck, the paving machine sank.
10 We had to take a grader, dump truck, hook a chain to
11 it, and pull it out.

12 Q Okay. Was it stuck in the base material,
13 or did it also damage the asphalt that it had
14 recently laid? That's what I'm trying to
15 understand.

16 A No, it shouldn't have damaged the asphalt
17 that it laid, other than what was immediately under
18 the screed. In other words, it would damage what
19 was immediately behind it when it sank.

20 Q Does the paver run on wheels?

21 A Yes.

22 Q How many wheels?

23 A Total or per side?

24 Q Total.

25 A Six.

1 Q Three per side?

2 A Yes. Two small ones that are called bogie
3 wheels and then one big rubber wheel, or rubber
4 tire, I guess.

5 Q Was the offer that you made for additional
6 material made after the paver got stuck or before
7 the paver got stuck?

8 A They had already signed the overrun
9 agreement before we commenced paving.

10 Q All right. And after the paver got stuck,
11 did you think the option that you offered them, the
12 overrun agreement, was a feasible option? Would
13 that have worked?

14 A What do you mean by "worked"?

15 Q Would it have produced a asphalt strip
16 suitable for drag racing?

17 A Up to the point we -- up to the point we
18 were able to pave to, yes. Before we got stuck, no.

19 Q Why not?

20 A Because we could not physically pave it.

21 Q All right. And why not?

22 A Because the subgrade was bad.

23 Q So the option you offered him would not
24 work?

25 A In that location, yes.

1 Q What was it going to take to work in that
2 location?

3 A That's where we had our next meetings and
4 discussions and all that kind of thing.

5 Q All right. So with the benefit of
6 hindsight -- let me back up. I want to agree on a
7 name to use. Plan A was the original contract?

8 A Uh-huh.

9 Q Is that yes?

10 A Yes.

11 Q Plan B is what you did after the milling
12 machine got stuck where there was some overrun
13 agreement, correct?

14 A Okay.

15 Q Plan C is the next agreement. What was
16 Plan C that you offered?

17 A Plan C was the second option they didn't
18 take the first time.

19 Q With the benefit of hindsight, would you
20 have started with Plan B if you had known it was
21 going to fail the way it did?

22 A It wasn't my choice.

23 Q That's not what I had asked you. If you
24 knew now -- if you knew then what you know now,
25 would you have offered Plan B, a plan that you knew

1 was going to fail?

2 A I wouldn't intentionally offer somebody
3 something that I know was going to fail.

4 Q All right.

5 A If I know it's going to fail, I
6 wouldn't -- I'm not going to intentionally offer
7 that.

8 Q What if it's 50/50 that it might fail?

9 A I'm not going to intentionally offer
10 somebody something that I know is going to fail.

11 Q All right. I understand that. I
12 understood your answer. My question was different.
13 What if it's just 50/50 it might fail?

14 A I think that's where you get into --

15 MR. CASHION: Object to the
16 form. You can answer the question.

17 A I think that's all a matter of where you
18 get into explaining the risk, and then it's, you
19 know -- then it's a matter of whoever is paying for
20 it making a decision, how comfortable they are with
21 the risks that are there.

22 Q (By Mr. Cobb) Would you agree with me that
23 for Monte and Corey to make an intelligent decision
24 about risk, they would have had to have had the risk
25 explained to them?

1 A Yes.

2 Q And what did you think the risk of Plan B
3 being a failure was when you explained the risk to
4 them?

5 A I mean, I didn't have a percentage. Like
6 I'm not breaking it down how you're saying. I'm not
7 saying that it's 50/50 or 75/25 or, you know --

8 Q Well, you were the one that was making the
9 assessment of risk, though, right? You're the
10 engineer.

11 A No, no, I wasn't assessing risk.

12 Q You were not assessing the risk of
13 failure?

14 A No.

15 Q Who was?

16 A I mean, that would be up to them to
17 determine, I guess.

18 Q How -- I thought you said that they didn't
19 have the engineering background you did to assess
20 the risk. How are they going to assess the risk if
21 you, the engineer, don't explain it?

22 A I think what --

23 MR. CASHION: I'm going to
24 object to the question. I think y'all are way
25 off on communication. Just to clarify, he's

1 already --

2 MR. COBB: Please don't. Please
3 don't.

4 MR. CASHION: No. He's already
5 explained to you this same thing. You're
6 asking again -- he's explained to you the risk
7 both ways, and now you're asking him to assess
8 the risk, and he's thinking it's their monetary
9 risk that they're assessing. So he's already
10 answered this question. So my objection is
11 it's already asked and answered. You're
12 reploting the same ground.

13 MR. COBB: Am I getting mired
14 down?

15 MR. CASHION: You're getting
16 marred down.

17 Q (By Mr. Cobb) Well, let me ask you one
18 more time and try to come at it this way. I think
19 it's important for me to understand this. Someone
20 out there has to be looking at what needs to be done
21 to make a paving plan that works, right?

22 A Correct.

23 Q And initially that was John Taylor, right?

24 A Correct.

25 Q And the plan he came up with got mired

1 down, right?

2 A Due to the subgrading.

3 Q Right.

4 All right. Now, then he calls you as
5 the engineer, right?

6 A Correct. Not as an engineer. As the --

7 Q Head of the office?

8 A As the head of the office.

9 Q Well, as far as Paris goes, you have more
10 engineering experience than anybody there, right?

11 A Correct.

12 Q And when you come on-site, isn't one of
13 the things you do is to try to figure out what went
14 wrong?

15 A Correct.

16 Q And then the next thing you figure out is
17 how to make it right, correct?

18 A Yes.

19 Q All right. And then if you're going to
20 ask your customers to make a choice, you've got to
21 explain to them the risk of proceeding with Plan B
22 or Plan C, right?

23 A Pluses and minuses, I guess, is the way I
24 would view it.

25 Q Okay.

1 A I mean, more than assessing risk. To me
2 assessing risk is you're going through and you're
3 applying money and percentages and all that.

4 Q All right. Let me ask you this: When you
5 inspect bridges, do you do a failure analysis?

6 A I don't inspect bridges.

7 Q Okay. I thought you had a master's in
8 structures.

9 A I do.

10 Q Are you qualified to inspect bridges?

11 A I could, yes.

12 Q If you did, wouldn't what you would be
13 doing is looking at it and saying, "Is this bridge
14 going to hold up, or is this bridge going to fail"?
15 I mean, don't you do that in engineering and then
16 have a margin of safety and all that kind of stuff?

17 A It's not that simple.

18 Q Well, if it was, I could do it. And I
19 can't do it. But --

20 A I mean, we're oversimplifying the thing.

21 Q All right.

22 A I mean, it's not --

23 MR. CASHION: If it's not
24 disrupting your thought, can we take a break?

25 MR. COBB: You can take a break.

1 That actually might help.

2 (Recess.)

3 Q (By Mr. Cobb) We pulled some information
4 off of the web site. Have you seen that document
5 before?

6 A No.

7 Q I want you to assume that that is an
8 authentic printed version of the web site TAC used
9 to have. Let me have it back. I want to ask you
10 some questions.

11 A (Witness complies.) Do you have a copy I
12 could look at while you're asking me the questions?

13 Q No. But I'm going to read it to you and
14 then have you -- I tell you what.

15 A I need to see it. I process better
16 reading.

17 Q Me, too. I tell you what. Why don't you
18 read that section that's in orange.

19 A "TAC offers turn-key site preparation from
20 site clearing and grading to asphalt surfacing and
21 striping consolidating what would traditionally take
22 as many as four subcontracts into one."

23 Q Is that true?

24 A It wouldn't be on there if it wasn't.

25 Q Is that a yes?

1 A Yes.

2 Q Okay. In order for TAC to do site
3 preparation, somebody's got to be able to figure out
4 what needs to be done in order to have an adequately
5 prepared site; is that true?

6 A Yes.

7 Q And that would include drainage and
8 subsurface issues, correct?

9 A Site preparation, okay, let's define that.

10 Q Let's you define it because I have no
11 idea.

12 A Let me define what I see as site
13 preparation.

14 Q Fair enough.

15 A Okay. If you're doing site preparation,
16 you're going to have a set of specifications.
17 You're going to have a set of drawings. You're
18 going to take those, you're going to formulate a
19 price, and you're going to develop a subdivision, or
20 you're going to do a Wal-Mart site, or you're going
21 to do a Walgreen's. That, to me, is what site
22 preparation, site clearing, and grading are.

23 Q Well, let me take issue with your pronoun
24 "you." When you say the word "you," you're talking
25 about me. I'm assuming TAC would do site

1 preparation.

2 A No. I'm talking about Tennessee Asphalt,
3 you. You -- a contractor.

4 Q Would it be fair to say that you, as part
5 of TAC, would do site preparation work from time to
6 time?

7 A If that's what we're contracted to do,
8 yes.

9 Q So you have the ability to do that?

10 A Yes.

11 Q Have the expertise to do that?

12 A Correct.

13 Q Have the reputation for having done that
14 successfully?

15 A Yes.

16 Q Would it be reasonable for Corey and Monte
17 to assume that you can do site preparation work?

18 A Yes.

19 Q All right. When it says, "Can do what it
20 would traditionally take as many as four
21 subcontractors," what other subcontractors are being
22 referred to there, if you know?

23 A Well, they mention four -- one, two,
24 three, four work phases, so I guess that's what they
25 -- I mean, I didn't write it. I don't know for sure

1 what they're talking about. My assumption would be
2 site clearing is one, grading is one, asphalt
3 surfacing is one, and striping is one.

4 Q All right. Did you perceive any grading
5 needed to be done to the drag strip site before
6 paving?

7 A I didn't see the site before we milled.

8 Q All right. When you got there, did you
9 see that any grading needed to be done. Even if it
10 hadn't been done, did you perceive it needed to be
11 done?

12 A What sort of grading? I don't -- I'm not
13 following your question.

14 Q Any. Well, one of the things I heard you
15 say was the drainage wasn't good, drainage wasn't
16 proper.

17 A I said that was something that could cause
18 saturation of the subgrade.

19 Q And I understand that grading can be
20 something that can alleviate a saturation problem,
21 or bad grading can cause it. Did you see any
22 grading issues with that site when you went there?

23 A I mean, I'm still not following your
24 question. We weren't -- we weren't doing grading.
25 I mean, the scope of the work was not grading, so we

1 weren't focused on grading. We were focused on
2 milling, paving, etc.

3 Q All right. Read the page 2. Read the top
4 in orange, please.

5 A "We have our own engineering staff capable
6 of handling any issues that may arise during the
7 construction process, eliminating costly delays and
8 insuring we maintain the level of quality our
9 customers have come to expect."

10 Q Is that true?

11 A Yes.

12 Q Is that true for the Paris office?

13 A Yes.

14 Q All right. There's another highlighted
15 section further down the page. Would you read it?

16 A "Based on our many years of experience, we
17 have the ability to advise our customers on any
18 asphalt needs, from new construction to asphalt
19 maintenance."

20 Q Is that true?

21 A Yes.

22 Q Would it be reasonable for Corey and Monte
23 to expect you to give them advice on their asphalt
24 needs?

25 A Yes.

1 Q Would it be reasonable based on what we've
2 talked about that they could expect you to give them
3 advice on things like grading or things like subsoil
4 conditions?

5 A Yes. I mean, we did that.

6 Q Read that sentence there on page 3.

7 A "Should any of our workmanship or material
8 fail to meet the job specification, we will
9 immediately endeavor to rectify the situation."

10 Q Is that true?

11 A Yes.

12 Q And did you do that in this case?

13 A Yes.

14 Q Tell me what you did in an effort to
15 rectify the situation.

16 A We realized or thought we had some kind of
17 subgrade issue. We met with the owner. We laid out
18 their options for them. We tried to make sure that
19 they understood this is this option, this is that
20 option. And I felt like we did that the whole way
21 through the process. In other words, we tried to
22 keep them informed and apprized of what we felt
23 their options were.

24 Q Did you have enough information at the
25 time you laid out their options to make appropriate

1 recommendations?

2 A Repeat the question.

3 Q Did you have enough information when you
4 laid out the options for your customers, so that
5 they can make an intelligent choice?

6 A Yes.

7 Q Why did the paver get stuck then?

8 A We never said that the paving option would
9 work.

10 Q Did you have enough information to know
11 whether the paving option would work or not?

12 A No.

13 Q Why not?

14 A You wouldn't know that for sure until you
15 actually did it.

16 Q You mean you'd have to actually pave and
17 get stuck, or couldn't you have done some testing to
18 determine --

19 A No.

20 Q -- if you could pave?

21 A No.

22 Q There's no testing that could be done to
23 have prevented that?

24 A You could test and determine that -- okay.
25 Let me put it this way: If I had went out there and

1 proof-rolled it and it had proof-rolled good,
2 everything was hard, I can guarantee you a hundred
3 percent that it could have been paved.

4 Q All right.

5 A If you have any kind of questionable
6 material, there's no hundred percent guarantee that
7 you can, there's no hundred percent guarantee that
8 you can't, and no amount of testing is going to
9 remove that question mark.

10 Q All right.

11 A In other words, if you take what's there
12 and you go forward, everything may be paved, it may
13 be fine, everything may not work, you may not be
14 able to get it paved.

15 Q All right. You ever had statistics and
16 probability?

17 A Yes.

18 Q You understand that the more samples you
19 take, the more likelihood that they're a
20 representative sample? It's a basic fundamental
21 upholding, right?

22 A Well, no, not -- no. If that were the
23 case, you would -- more samples doesn't necessarily
24 yield better data.

25 Q Are you sure about that?

1 A Yeah.

2 Q Because that's not what statistics and
3 probability say. The more representative samples
4 you have, the greater --

5 A If that were the case --

6 Q -- the less range of deviation, right?

7 A You get to a point of diminishing returns.

8 Q How many samples did you take before
9 sending the paver out when it got stuck?

10 A What kind of samples? I mean, what kind
11 of samples are you talking about?

12 Q To sample the subgrade that you knew had a
13 problem with moisture.

14 A We did not -- we didn't know it had a
15 problem with moisture.

16 Q When you proof-rolled it, you did.

17 A No. We knew it was not solid. We did not
18 know that it was a moisture problem. We knew it was
19 not solid. We did not know what kind of problem it
20 had.

21 Q So you didn't even know what kind of
22 problem it was. You hadn't even isolated it down to
23 moisture?

24 A We knew it was a stability problem.

25 Q And what was causing the stability

1 problem?

2 A We don't know. We didn't know. We know
3 we had a stability problem.

4 Q What would you have to do to find out?

5 A You would have to do some sort of
6 investigation to determine what the cause of the
7 problem is.

8 Q And isn't that what should have been done,
9 to do some sort of investigation at that point?

10 MR. CASHION: Object to the form
11 of the question.

12 A That was not our choice.

13 Q (By Mr. Cobb) Isn't that what should have
14 been done, an investigation?

15 A That was not our choice.

16 MR. CASHION: Object to the
17 form.

18 Q (By Mr. Cobb) That's not my question.
19 Isn't that what should have been done, to do an
20 investigation?

21 MR. CASHION: Object to the form
22 of the question.

23 A I mean, that was not our place. That was
24 not our choice whether to make an investigation.
25 That's the owner's choice.

1 Q (By Mr. Cobb) Whether it's your choice or
2 Mr. Cashion's choice or my choice, isn't that the
3 prudent thing to do, to investigate?

4 MR. CASHION: Object to the form
5 of the question.

6 A They were given options --

7 Q (By Mr. Cobb) No, no, no. Answer my
8 question, and then you can --

9 A I am answering your question. They were
10 given options, okay. It was explained that here's
11 this paving option. We'll go out there, we'll try
12 and pave it, you pay for the extra materials it's
13 going to take, and this may not work. There's no
14 hundred percent guarantee that it's going to work.
15 We took no more responsibility for the subgrade
16 after that agreement was signed than we did before.
17 There's nothing in that agreement that says now all
18 this language in the contract -- you know, that
19 we're not taking responsibility for the subgrade,
20 there's nothing that says that that goes away.
21 There's nothing that says that we give a warranty.
22 I think it was explained that this may not work.
23 The other option is we do more
24 investigation. We try and figure out, you know, how
25 much rock it takes, three foot, two foot, whatever.

1 You know, that's a whole different ball game.
2 That's what we got into after the paving didn't
3 work. What we selected did not work. So then we
4 get into, okay, we'll build you a test area, see if
5 the geotextile is a possibility. We're trying to
6 work with the customer to find an acceptable
7 solution to the problem the whole way through the
8 process. We worked in good faith with them the
9 whole way through the process to try and find a
10 solution to the problem.

11 MR. COBB: Let me make this
12 three-page document that we've been talking
13 about which was from the tnasphalt.com the next
14 exhibit.

15 (Exhibit Number 16 was marked.)

16 Q (By Mr. Cobb) You mentioned that Tennessee
17 Asphalt didn't guarantee the subgrade in the
18 contract. Show me which part you're talking about.

19 MR. CASHION: I think he ought
20 to be shown the full contract.

21 MR. COBB: Well, sure. Be glad
22 for him to.

23 MR. CASHION: Well, you asked
24 that a while ago on part of the contract. The
25 contract is the first four pages -- first three

1 pages of that.

2 A Okay. Item number seven on the first page
3 addresses subgrade work.

4 Q (By Mr. Cobb) That's what we read earlier?

5 A No, no. Item number seven of the scope of
6 work.

7 Q Okay. Let me just -- all right. Read
8 that into the record.

9 A "Bid is quoted assuming that the proper
10 gravel or base material minimum of" -- I can't read
11 the fax copy.

12 Q I understand.

13 A Some depth "is existing in-place after
14 milling two inches of existing asphalt surface.
15 Price does not include gravel or base material,
16 undercutting, or any other subgrade work." So
17 that's the first place that it's addressed.

18 Q Okay.

19 MR. COBB: Mr. Cashion, if you
20 want to help him. I want to make sure I
21 understand everywhere where that language is,
22 so --

23 A Number seven: "Work of Others: Neither
24 grading or compaction of subsurface ground are the
25 responsibility of Tennessee Asphalt Company under

1 this agreement."

2 Q Okay. That's what we talked about
3 earlier?

4 A Right, correct.

5 Q Anything else?

6 MR. COBB: And, Mr. Cashion, if
7 you need to direct him anyplace else.

8 MR. CASHION: I've already done
9 my duty there.

10 A I don't see anywhere else right now.

11 Q (By Mr. Cobb) Okay. Let me get this far
12 enough away where I can read it.

13 Let me ask you to read what I think
14 should be item number two, although the hole punch
15 has blocked it out. Can we agree that that would be
16 item number two on the front page where it starts
17 off "light duty"?

18 A Uh-huh.

19 Q Read that out loud.

20 A "Light-duty asphalt pavement, two inches
21 surface mix only, cannot be guaranteed against
22 heavy-duty traffic."

23 Q What does "heavy-duty traffic" mean?

24 A Anything other than cars.

25 Q All right. Are those standard clauses

1 that are in most paving contracts?

2 A In my experience, yes.

3 Q Okay. And then on item number five, read
4 that out loud.

5 A "Subgrade to be proof-rolled with a loaded
6 truck before installing gravel or stone base."

7 Q Was that done?

8 A It was proof-rolled, yes.

9 Q Before installation of stone?

10 A There was no installation of gravel or
11 stone base on this contract.

12 Q What's the reason that that is the
13 standard clause in your contracts, though?

14 A To sub -- to proof-roll subgrade if you
15 are installing stone base?

16 Q Isn't that to check --

17 A To make sure that -- that it will hold up
18 under the installation process and down the road.

19 Q But the standard process for TAC in doing
20 paving, if you're doing it on unpaved ground, is to
21 proof-roll the ground before you install the stone,
22 correct?

23 A Correct.

24 Q Because generally the pavement is going to
25 be no better than the foundation it's laid on,

1 correct?

2 A It's a flexible pavement.

3 Q And the subsurface is an integral part of
4 the finished paving product, correct?

5 A Correct.

6 Q And the way you check that in this
7 contract is to proof-roll it, correct?

8 A Correct.

9 Q Okay. Now, on item number six, that was
10 done, "Existing gravel or stone base to be
11 proof-rolled with a loaded truck before installing
12 asphalt pavement," correct?

13 A Correct.

14 Q And that's where the proof-rolling showed
15 that there was some subsurface problems, correct?

16 A Correct.

17 Q And it would be unrealistic to assume
18 there were no subsurface problems after the
19 proof-rolling showed there were, correct?

20 A Correct.

21 Q Did TAC change its plan after the
22 proof-rolling? Is that when you went to Plan B?

23 A Yes.

24 Q To sell more asphalt, all right.

25 A No. That wasn't the purpose.

1 Q What was the purpose?

2 A The purpose was to try and get the race
3 track or the drag strip paved. That was the purpose
4 throughout the whole process. That was the ultimate
5 goal the whole time.

6 Q And to get it paved in a fashion that
7 would allow drag racing to continue there, right?

8 A Correct.

9 Q Did you have an understanding of how
10 smooth the track had to be to accommodate the needs
11 of a drag race?

12 A I felt that we did.

13 Q What did you do specifically for drag
14 racing?

15 A It would -- it would be the same process
16 as highway paving or anything like that. You're
17 going to try and get a smooth surface with any kind
18 of paving that you do.

19 Q You're aware that the Smiths/Northwest
20 Motorsports is upset that there was damage done to
21 the other pavement that was not part of this
22 contract, the staging area?

23 A The staging area, yes.

24 Q And the slow down -- I think we called it
25 the slowdown lane?

1 MR. CASHION: Shutdown.

2 MR. COBB: Shutdown lane. Thank
3 you.

4 A Yes.

5 Q (By Mr. Cobb) Was that necessary to damage
6 that during the process, or could this have been
7 paved without doing that damage?

8 A I don't think you could have paved it
9 without getting some trucks on those two areas.

10 Q Well, would it be reasonable if it could
11 be paved without doing damage, to pave it without
12 doing the damage? That seems like an easy one.

13 A You had no way of knowing that it would be
14 damaged. There was nothing that we did to actively
15 promote the damage.

16 Q Wasn't it your trucks that rolled over it
17 and did the damage?

18 A Correct. But we had no way of knowing
19 that the truck would do that.

20 Q Well, could you have proof-rolled it to
21 check to see if it was safe to put that heavy truck
22 on it? I mean, your contract says --

23 A You could have, yes.

24 Q Your contract says you recognize that two
25 inches of asphalt is not something you're warranting

1 for heavy-truck traffic, right?

2 A Correct.

3 Q That's a known hazard, right?

4 A Correct.

5 Q And so you would agree that TAC knowingly

6 exposed this asphalt, which it knew to be two

7 inches, to that hazard, correct?

8 A We didn't know this asphalt was two

9 inches.

10 Q Well, what did you think it was?

11 A I didn't. I didn't know.

12 Q Did you ask?

13 A No.

14 Q Did John Taylor asked?

15 A I don't know what John Taylor asked.

16 Q Well, let me ask you this: What is a --

17 if the drag strip is only two inches, what do you

18 think the rest of it is?

19 A I don't know. I have no way of knowing.

20 Q I mean, you really don't think that it

21 would be consistent -- let me ask you this.

22 A I can't absolutely tell you what that is.

23 Q Right. What do you think is most likely?

24 A I don't think.

25 Q Okay.

1 A Again --

2 Q I'll live with that answer if you will.

3 So what you're saying is you rolled
4 the trucks over without thinking?

5 A No, no.

6 Q Well, did you think before you put --

7 A You're misconstruing my words.

8 Q Well, maybe I am, maybe I'm not. What did
9 you do to check and make sure that you wouldn't do
10 damage to that pavement before you rolled these
11 heavy trucks over it? Shouldn't somebody be
12 thinking about that?

13 A We did not proof-roll the shutdown area.

14 Q Shouldn't somebody be --

15 A We did not proof-roll the shutdown area.

16 Q Shouldn't somebody be thinking about that?

17 A Let me explain to you how we paved it in
18 order --

19 Q If you'll answer my question first.

20 A Well --

21 Q If you'll answer my question, you can
22 explain.

23 A This will answer your question. This is
24 where I'm heading.

25 Q Mine's a yes or no question, and then if

1 you want to explain until midnight, I'll listen.

2 A It was thought about.

3 Q All right. Who thought about it?

4 A I did. And this is how -- did we
5 proof-roll it? No, it was not proof-rolled.

6 Basically the way that the job was paved to minimize
7 the loading on this pavement -- okay?

8 Q And you're now talking about the shutdown
9 area?

10 A Shutdown area. We started our paving at
11 the concrete area, take --

12 Q Down at the starting line?

13 A Starting line, whatever you want to call
14 it, at the beginning of the concrete. So basically
15 what happened is our trucks would come in off the
16 highway, come across the concrete, unload, then go
17 out down the rest of the racetrack, and then out the
18 shutdown area and around. So they were actually
19 unloaded when they were on this asphalt, not loaded.
20 The trucks were light-loaded at 15 tons rather than
21 their capacity of 20 to 24, depending on whether
22 we're talking about a tandem or a tri-axle. So did
23 I -- did I proof-roll this? No. Did I make
24 arrangements to try and minimize any possible damage
25 to this subgrade or anything else on the site? Yes,

1 I did. We didn't have any choice but to be on this
2 at some point.

3 Q You could have gone on the grass, couldn't
4 you?

5 A There's a guardrail.

6 Q All the way down?

7 A I don't know. I don't remember. Where
8 does the guardrail end?

9 Q Well, here's a photograph. It doesn't go
10 all the way down, does it?

11 A I can't tell.

12 Q There's a -- there's an exit there that I
13 think is shown here. Could you have used that exit?

14 A No.

15 Q Why not?

16 A Trucks couldn't make the turn, and you
17 would have had additional twisting and turning if
18 you could on the subgrade that we already knew was
19 suspect.

20 Q Have you seen the photographs that David
21 Evans exhibited yesterday.

22 A No. I don't believe that I have. If I
23 have, I don't recall.

24 Q Well, I haven't -- I don't think I had
25 seen them until yesterday. This is one of his

1 photographs, and he has written on the bottom
2 "proof-roll subgrade," and I'm not sure I can read
3 that date. I think it's maybe 6 --

4 A Probably 6-8-07, it looks like.

5 Q All right. Does that fairly and
6 accurately represent what -- what it claims to be, a
7 proof-roll of the subgrade at the northwest track?

8 A Looks like base stone to me, not subgrade.

9 Q There's a rut over here. Do you know what
10 caused that rut?

11 A No.

12 Q And over here I'm talking about the upper
13 left-hand corner of that photograph.

14 A No.

15 MR. CASHION: Are you going to
16 make those exhibits?

17 MR. COBB: I thought they were
18 made exhibits to David's deposition.

19 MR. CASHION: We need to put A,
20 B, something; otherwise, we'll never figure out
21 which one you're pointing at.

22 MR. COBB: I think you're right.

23 MR. CASHION: I'm just thinking
24 if somebody reads it later, what was that that
25 they were talking about. However you want to

1 label it, I just think that we need to have
2 something.

3 MR. COBB: I agree. Do you have
4 the exhibit itself?

5 THE COURT REPORTER: Yes. It's
6 Exhibit 12.

7 MR. CASHION: If you want to
8 start numbering them, that's fine with me.

9 MR. COBB: Yeah. I just want to
10 make sure that your numbers and my numbers --
11 because we're numbering the originals, and the
12 copies don't have them on there. All right.
13 You want to do 12A, 12B?

14 MR. CASHION: Yeah, let's do it
15 that way.

16 MR. COBB: 12A, 12B, 12C, 12D,
17 12E, 12F, and 12G.

18 MR. CASHION: For the record we
19 were just talking about 12G.

20 MR. COBB: I think so. All
21 right.

22 Q (By Mr. Cobb) 12G appears to be what looks
23 to be tire tracks in gravel.

24 A Uh-huh.

25 Q And I take that for a yes, but --

1 A Yes.

2 Q What made those tracks? The trucks?

3 A I don't know that for 100 percent. My
4 anticipation or my guess would be is that he's
5 showing where he proof-rolled the gravel, and the
6 truck that he used to proof-roll made those
7 impressions.

8 Q Well, what I'm trying to understand is
9 that rut on the top left-hand corner appears to be
10 quite a bit deeper than the other two, and I'm just
11 wondering if there's any significance to that. Does
12 it show that there's a bigger problem with the
13 subgrade there?

14 A Not necessarily.

15 Q Okay.

16 A Like I say, that looks like to me this is
17 where -- and the way he's labeled it, I would think
18 that these that are kind of centered up would be
19 showing how he did his proof-rolling and what it
20 resulted in.

21 Q All right. Let's take a look at 12A.
22 It's labeled "New Asphalt - West End," and it
23 appears like it's got a crack in it, that
24 something's broken through the new asphalt.

25 A I mean, there's a crack in the asphalt,

1 yes.

2 Q All right. If that is the new asphalt,
3 what was TAC's plan to deal with that crack? How
4 were y'all going to fix that?

5 A I don't recall a crack like that in the
6 new asphalt when we left it.

7 Q Would a crack like that be unacceptable?

8 A You would have to do something to it to
9 repair it.

10 Q What would -- what could be done to repair
11 it?

12 A You could patch the area.

13 Q Anything else?

14 A You know, there's several options. You
15 can -- a lot of times you can do -- they have these
16 infrared trucks where you can reheat and recompact,
17 that kind of thing. You just have to look at the --
18 you know, you can't really tell that from a
19 photograph. There's options to repair it.

20 Q Look at 12B with it, please.

21 A (Witness complies.)

22 Q The label that David Evans gave was "North
23 Side Looking East," and I believe in his
24 nomenclature looking east is back towards the
25 starting line.

1 A Okay, all right.

2 Q Do you recognize that area of the track?

3 A That looks like the starting line. Best I
4 can tell, that would be correct.

5 Q All right. Was this the existing stone
6 that was on the track, or was this a test section?

7 A I believe that the test section, you can
8 see some asphalt at the --

9 Q At the top of the picture?

10 A Like going down this base, you can see
11 some asphalt. The best I remember, I think the test
12 section was on the other -- like there's another
13 short -- there was just a short section in this pull
14 that was paved, and I think that test section may
15 have been from the --

16 Q From the asphalt further east?

17 A From the asphalt towards the concrete is
18 the best I can remember. I think he identifies --
19 have you got his report?

20 Q I do.

21 A I think it shows where we put the
22 geotextile in. I think he's got a diagram in there
23 that shows that, so we can be sure. He's got a
24 drawing that he labeled.

25 MR. CASHION: Flip to the next

1 page.

2 THE WITNESS: Right there.

3 A The best I can tell, from what I'm seeing,
4 this picture, this area looks like -- this area
5 before you get to where it widens out. That's the
6 way I'm interpreting the photograph. We're talking
7 about this area right here.

8 Q (By Mr. Cobb) Okay.

9 A So he says we placed geotextile in this
10 area.

11 Q And the area you're talking about is
12 labeled "Unpaved Area in Between the Concrete and
13 the Asphalt"?

14 A Right. In other words, which would be on
15 the other side of the asphalt you can see right
16 there.

17 Q Okay. Let me ask you to look at 12C. It
18 has here, "Proof-Roll New Asphalt - West End," and,
19 again, it looks like that the weight of the truck
20 has broken through the asphalt and cracked it,
21 correct?

22 A It appears so, yeah.

23 Q And so that -- if that is the new asphalt,
24 what does that tell you about the quality of the
25 pavement of that area?

1 A It tells me that it would not hold up a --
2 consistently hold up loaded dump trucks. It doesn't
3 tell me anything about whether it would hold up a
4 drag strip -- a drag car or not.

5 Q All right. Then why was it being
6 proof-rolled the way it was?

7 A You would have to ask Mr. Evans that. I
8 don't know.

9 Q All right. Let me ask you to look at 12D.
10 Here there is a ruler or a yardstick showing a rut
11 some four to five inches deep?

12 A Uh-huh.

13 Q Yes?

14 A Yes.

15 Q And is that a rut that was in the base of
16 the drag strip?

17 A What it appears to me to be based on his
18 labeling is kind of like that first picture. It's
19 where he has proof-rolled some of the exposed area,
20 and then that's what's resulted from his proof-roll.

21 Q Here's what I've been wondering as I
22 looked at that. When you proof-rolled the base
23 prior to putting the first pull of asphalt down, did
24 you get a five-inch rut like that?

25 A No, sir.

1 Q Any idea why his proof-rolling showed a
2 five-inch rut like that?

3 A No.

4 Q If you had done a five-inch rut, would you
5 have said, "It looks like it would be okay to pave
6 over that," or would you say, "Oh, my gosh, this is
7 serious"? I mean, you wouldn't pave over that,
8 would you?

9 A No.

10 Q You wouldn't pave over that without at
11 least regrading it, right?

12 A Correct.

13 Q And would probably want to check and see
14 what's under that to make it give way so much,
15 wouldn't you?

16 A I mean, I think that's been the point of
17 all -- what all we've talked about here. You take
18 the situation at hand. You weigh out your options
19 and make a decision and go forward from there. So
20 you would have to evaluate what you have, and then
21 you would take and make a decision based on those
22 options and move forward with either some sort of
23 construction process or a further evaluation.

24 Q All right. I agree with you. Evaluate.
25 What do you have here?

1 A I can't tell from that photograph. You've
2 got a rut where he proof-rolled some subgrade.

3 Q Well, if the subgrade started out at six
4 inches, how much -- how much is left?

5 A I mean, you can't tell from that
6 photograph.

7 Q All right.

8 A It's very hard to look at very small
9 things and draw big conclusions. You've got to look
10 at the overall picture.

11 Q Look at 12E.

12 A (Witness complies.)

13 Q These are the four test holes that were
14 dug by a backhoe?

15 A Uh-huh.

16 Q I'm not fussing at you, but I want your
17 answers recorded accurately. That was a yes?

18 A Yes.

19 Q Okay. And you had a backhoe similar to
20 that when you were on-site prior to the paving?

21 A Same backhoe.

22 Q Same backhoe?

23 A Yes.

24 Q Could have dug those pits after the
25 milling was done, right?

1 A Could have, yes.

2 Q Whose choice was it not to dig the pits?

3 A I don't think anybody made an active
4 choice not to dig a pit. I don't think that was
5 ever something that was discussed.

6 Q You never offered to dig the pits for
7 Corey and Monte?

8 A They never asked.

9 Q You never offered?

10 A We dug a hole down to the top of the
11 subgrade.

12 Q Stay with me. You never offered?

13 A No.

14 Q Okay. Now, do you want to explain
15 anything else?

16 A We were never asked to dig a pit. And it
17 all goes back to what we're talking about. You know
18 you have a problem. Now, what's the next step? Do
19 we proceed on? Do we do further evaluation and that
20 kind of thing? We made a decision to proceed on and
21 not discover what the subgrade issue was -- or not
22 "we." I should say they made the decision to go on.

23 Q Well, they didn't make a decision not to
24 dig with the backhoe. They were never offered that
25 option, were they?

1 A They never asked for that option.

2 Q Well, we can quibble, I guess, forever,
3 but they were never -- they couldn't have made a
4 decision on an option they were never offered, could
5 they?

6 MR. CASHION: Object to the form
7 of the question.

8 Q (By Mr. Cobb) You can answer.

9 A No.

10 Q Now, in this file of stuff that was
11 produced, there's some typewritten notes --

12 A Yes, sir.

13 Q -- that I've been told were your notes?

14 A Yes, sir.

15 Q They're pages 100 and 101.

16 A Okay.

17 Q Did you type those up based on handwritten
18 notes that you made --

19 A No, sir.

20 Q -- or did you type those up from memory?

21 A Typed them up from memory.

22 Q All right. I'm assuming that you've
23 looked at these before coming to the deposition
24 today?

25 A Yes.

1 Q Okay. Is there anything in the notes that
2 you would change having the benefit of thinking
3 about them for a year?

4 A I don't -- let me just read over it real
5 quick.

6 Q Sure.

7 A I don't see anything that I would change.

8 Q You used the words "after cold" -- is that
9 "planing was completed"?

10 A Yes, sir.

11 Q Is that the same thing as milling?

12 A Yes, sir. Just another term for the same
13 process.

14 Q Now, it says, "A test hole was dug, and a
15 spongy material was observed." Who dug the test
16 hole?

17 A Tennessee Asphalt.

18 Q What did they use to dig it with?

19 A Backhoe.

20 Q Is that the one you talked about earlier?

21 A Yes, sir.

22 Q What was the spongy material that you
23 observed?

24 A The subgrade.

25 Q I don't mean to belabor the point, but

1 when I think of clay -- and I don't think of
2 sponge -- I think of like a pottery wheel, a big
3 lump of junk on a pottery wheel. That and sponge
4 don't seem synonymous, so help me understand what it
5 was y'all saw. I mean, I think of a sponge as
6 something that's soft and got holes in it.

7 A That it would deflect.

8 Q Okay.

9 A Spongy means that it was not solid and
10 firm.

11 Q Okay. Did it appear to be clay --

12 A Yes.

13 Q -- or clay-like?

14 A Yes.

15 Q And then you write, "Drag strip was
16 advised TAC could not proceed due to subgrade
17 conditions." Tell me what -- what -- tell me who
18 explained what to who. Was this you talking to
19 Monte?

20 A Monte and Corey.

21 Q Okay.

22 A And John Taylor was present also.

23 Q And why could you not proceed?

24 A Because the surface that we were to pave
25 on was not solid based on the proof-roll.

1 Q And then you offered some options?

2 A Correct.

3 Q And you suggested either excavation and
4 replacement with a suitable material, or they could
5 sign an overrun agreement, and we would proceed to
6 attempt to pave over the existing base and subgrade,
7 correct?

8 A Correct.

9 Q And when you use the word "attempt," I
10 read into that you're thinking this may work, may
11 not?

12 A Right. It all goes back to explaining to
13 them that it's not a hundred percent sure thing.

14 Q Did you give them a price on the digout?

15 A No, not -- I'm trying to get straight.
16 We're talking -- let me look at that just for a
17 second.

18 Q Sure.

19 A The three meetings kind of run together.
20 I want to make sure I'm talking about the right one.
21 I don't think we would have given them the exact
22 price, but we may have ball-parked something, given
23 them some kind of rough estimate. But we would not
24 have said -- like later on I recall that we gave
25 them firmer numbers; in other words, I actually went

1 through and calculated the amount of stone it would
2 take and all that kind of thing. You know, we gave
3 them a whole lot better numbers, firmer numbers,
4 later on.

5 Q Paragraph number 2 you write, "On the day
6 of paving, first pull was completed with slight
7 difficulty." Were you there for that first pull?

8 A Yes.

9 Q "On second pull, paver became stuck, and
10 the pull could not be completed." Is that where you
11 talk about where you actually had to get the other
12 equipment to pull it out?

13 A The grader and the dump truck, yes.

14 Q And you wrote, "At this point we noted
15 staging area damage."

16 A Correct.

17 Q What caused that damage? The heavy
18 equipment?

19 A I would assume the trucks. That was my
20 assumption. I didn't notice anything until we
21 hauled some asphalt across it.

22 Q All right. And did you offer to repair
23 that with a skin patch?

24 A That's what Corey and I talked about, yes.

25 Q Item three is the change order that was

1 signed by Mr. Todd?

2 A Uh-huh.

3 Q Yes?

4 A Yes.

5 Q And that was in the shutdown area?

6 A Correct.

7 Q In page 5 ---in paragraph 5 you responded
8 to my letter?

9 A Uh-huh.

10 Q And you write, "However he" -- talking
11 about me -- "ignores the primary conclusion of the
12 geotechnical evaluation. Saturation of the
13 subgrade, coupled with poor drainage, took a soil
14 that was acceptable previously to become a soil with
15 no strength." Was that based on what Mr. Evans --

16 A Yes.

17 Q Okay.

18 A That's how I interpreted Mr. Evans'
19 conclusion.

20 Q Paragraph 6 you wrote, "The only damages
21 we noticed during the prosecution of the
22 installation of the new pavement were in the staging
23 area and at the actual interface of the new and old
24 pavements." Is that correct?

25 A Correct.

1 Q And is that still your testimony?

2 A Yes, yes.

3 Q In paragraph 7, I never have completely
4 understood what was done. I have a better
5 understanding of where it was done. What -- what
6 was the test area? What were you doing?

7 A Have you got the report again --

8 Q I do.

9 A -- so we can --

10 Q All right. I understand the where. Tell
11 me the what.

12 A Okay. Do you have -- there should be --
13 and I think I may even have saw it on the backside.
14 Did they give you like a copy of some geotextile
15 samples? I think there were some geotextile
16 samples. Look at the very back of what we gave
17 y'all. I think I saw them.

18 MR. CASHION: At the very back.

19 A At the very back, right here.

20 Q (By Mr. Cobb) Okay.

21 A There may even be another one. There
22 should be two materials. There should be another
23 page that's kind of the same. It may not have like
24 a sample.

25 Q This looks like something that -- a

1 miniaturized version of what you get a six-pack in,
2 plastic. Is that --

3 MR. CASHION: I think it's more
4 of a twelve-pack.

5 Q (By Mr. Cobb) We're talking about plastic
6 with some holes in it to stabilize the ground?

7 A Basically I guess I'll kind of take you
8 through the process.

9 Q I mean, for the record, what I've got is a
10 Xerox of something, a geometric shape.

11 A Right. That's a sample of a geotextile
12 material that we used coupled with another
13 geotextile material.

14 Q What is that material made of? Plastic?

15 A It's -- it's got -- it's plastic-coated.

16 Q Micro --

17 A Metal. It's metal on the inside. I don't
18 really know how to describe it, but it's like a
19 metal mesh, and it's coated in plastic.

20 Q All right. Does it -- are the holes
21 holes, or are they just clear?

22 A They're holes.

23 Q Okay.

24 A But -- do you want me to just walk you
25 through the process of what we did and --

1 Q Please.

2 A -- kind of explain it?

3 Basically what we did is we came in
4 and excavated out the base, okay, what base was
5 there.

6 Q With a backhoe?

7 A With a backhoe, yes, sir. And it seemed
8 like we may have even brought in a track loader.
9 I'm not a hundred percent sure about that. That's
10 just a different type of excavating tool. And then
11 we placed two layers of geotextile fabric down. One
12 is more like felt is the best way I know to describe
13 it. The only purpose it serves is separation. What
14 it does is it separates the subgrade material from
15 the base stone and keeps it -- basically one of the
16 problems you run into is the fault -- like if you
17 have a substandard subgrade, it will infiltrate into
18 your base and degrade your base stone.

19 So the first -- the first layer is
20 for separation purposes. The second layer is the
21 one that we're talking about, the photocopy of the
22 sample. It's for stabilization purposes. Then you
23 put the base stone on top of that. So it's kind of,
24 I guess, a four-phase process. You dig it out. You
25 place one, two layers of geotextile and put base

1 back on top of that.

2 Q Okay. How far along did y'all get in the
3 process?

4 A We constructed a test area here to give
5 the owners something to look at for evaluation
6 purposes.

7 Q Did you offer a guarantee?

8 A No.

9 Q Why not?

10 A You would have to ask Mr. Ratliff that.
11 That was his decision.

12 Q Well, surely he talked to you about it.

13 A You will have to ask him that. That was
14 his decision.

15 Q Okay. I understand it was his decision,
16 but I'm assuming he talked to you about it and that
17 you know at least what he said he was thinking; am I
18 correct?

19 A We didn't get to the point of really
20 evaluating this, whether -- we went ahead -- we did
21 this, and that's basically -- after this was done,
22 that's kind of the point that everything stopped.

23 Q Okay.

24 A So really I don't know whether -- thinking
25 back on it, I don't know whether we got to the point

1 of even giving a price on this and saying what we
2 would and wouldn't do.

3 Q At the time you did that, you still hadn't
4 done the test pits, had you?

5 A No.

6 Q Why not?

7 A If you choose this application, you're not
8 going to correct the subgrade problem. You're
9 basically going to bridge over it. If this will
10 work, you're not going to fix this faulty subgrade.
11 You're just kind of bridging over it basically. So
12 basically what the test pits is going to tell you is
13 what's the cause of it. And now that we know what
14 the cause of it is, we're going to fix the subgrade.
15 This isn't a fix to the subgrade. This is a
16 let's-try-and-make-due-with-what-we've-got type
17 thing.

18 Q That's why it wouldn't be warranted,
19 right?

20 A And I told you I didn't remember whether
21 we got to that point or not.

22 Q All right.

23 MR. COBB: Let's take a short
24 break. I think I am fairly close.

25 (Recess.)

1 Q (By Mr. Cobb) During the break I was
2 talking to Corey, and he said that no one at TAC
3 ever gave him a this-is-what-it-will-take price,
4 that what he got was unit cost, so much per ton, so
5 much per cubic foot.

6 A At what point?

7 Q Ever.

8 A Ever.

9 Q That even when you were doing the test
10 area, that it was, "We're not sure what it will
11 take"?

12 A I think if you'll look at Monte's notes, I
13 think I gave him -- at some point I gave him some
14 ranges on some things; in other words, it was not a
15 hard and fast number, but they were given some
16 ranges on some options at this point.

17 Q Okay. Do you agree with the ranges that
18 he talks about?

19 A Yes. I think if you look at the stuff we
20 gave you, I think there's -- if you ask me to go
21 back and recall it off the top of my head I
22 wouldn't, but I think there's something in the file
23 where we figured that.

24 Q Well -- but the point he was making was
25 but it was never, "And we guarantee this will fix

1 it, and this is all that you'll need to spend." It
2 was always, "We think this will work. If it works,
3 this is what we think it will cost, but we're not
4 sure that this will fix it. There's no guarantees."

5 A I'd say that's accurate. I don't think we
6 ever gave them a hard and fast number and said this
7 will fix it.

8 Q And the numbers were based on fixing the
9 700 feet of racetrack, not the shutdown track?

10 A Let's see. When was that? This was just
11 the 700 feet of racetrack.

12 Q All right. Do you have a diary or a day
13 book or daytimer where you --

14 A No.

15 Q Did you keep any notes on this file or on
16 your interaction or on phonecalls or anything like
17 that?

18 A No. You've got everything that I had.
19 And those notes that we were talking about earlier
20 of mine, I generated that basically when we got to
21 the -- to the point where we were getting into a
22 legal issue. We went back and -- that was when
23 those recollections were done. It was not done as
24 we went along.

25 Q Okay. I didn't ask you this. Are you a

1 licensed engineer?

2 A Yes.

3 Q How long have you been licensed?

4 A Since 2002.

5 Q Does your job require you to have a
6 license?

7 A No.

8 Q There was some testimony by Danny
9 Wimberley that he did some surveying of the crown,
10 and then there was some notes about the crown. They
11 wanted to have an inch and a half fall, but they
12 only got an inch. Do you recall why that happened?

13 A I don't. I don't recall what the -- I
14 remember us shooting some grade, but as far as the
15 details of why or what the results of it were, I
16 don't remember.

17 Q What I really want to know is did you --
18 can you set those machines to do an asymmetric
19 profile?

20 A What do you mean by "asymmetric"?

21 Q Well, if it's going to be higher on one
22 side than the other -- if it's higher in the middle
23 and you make four passes, you've got to have them --

24 A You have grade and slope control on the
25 paver. Is that what you're asking?

1 Q Well, no. I didn't know to ask that, but
2 yeah, that sounds like what I'm asking.

3 A Yes. You have grade and slope control on
4 the paver.

5 Q Was there a problem with the grade and
6 slope control on the paver that made it not have an
7 inch and a half, or was there a problem with the
8 subsurface that made it sink in the middle?

9 A Do you remember at what point he was
10 saying that we -- at what point was the problem, I
11 guess?

12 Q I think it was after the second pull and
13 the paver got stuck, and Danny Wimberley went out
14 and shot the grade, although he didn't date his
15 notes. But my assumption was that it was towards
16 the end of the part of the job that TAC did.

17 MR. CASHION: They only did work
18 for two days.

19 THE WITNESS: Yeah.

20 MR. COBB: Be nice.

21 A I'm going to guess that probably this was
22 after -- let's see. This looks like it was the day
23 after we milled.

24 Q (By Mr. Cobb) Monte is telling me his
25 notes are that Danny came out Friday, May 4th.

1 A But, see, the crown issue -- if you look
2 at Monte's notes on the 1st of May, that's when the
3 crown issue was addressed.

4 Q Right.

5 A And that was after we had milled. And
6 what I'm probably guessing is it may have been a
7 situation where that may have been what was already
8 existing in the base or something.

9 Q Okay.

10 A What Danny came out and did on Friday was
11 more, okay, how much did we pave, how much did we
12 not, what kind of grade -- you know, we shot a grid.
13 Those type things is what we did that day more so
14 than address the crown. The crown was in between
15 milling and the commencement of paving is the way it
16 looks. Like I say, I don't remember -- seems like I
17 vaguely remember something about some crossfall
18 issues, but --

19 Q But you don't remember --

20 A I don't remember what facilitated it.

21 Q And let me just make a correction. I said
22 one and a half inches. It's actually one and a half
23 percent.

24 A Right.

25 Q All right.

1 MR. COBB: Anybody want to ask
2 any questions?

3 MONTE SMITH: I thought you said
4 I couldn't.

5 MR. COBB: I did. And you
6 can't.

7 MR. CASHION: I don't have any
8 questions.

9 AND FURTHER DEPONENT SAITH NOT

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C E R T I F I C A T E

STATE OF TENNESSEE)

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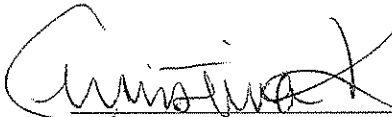
AT LARGE)

)

I, Christina K. Shupert, hereby certify that the witness in the foregoing deposition was first duly sworn; and that the foregoing is a true and accurate transcript of the testimony given by said witness on July 23, 2008.

I further certify that I am neither kin nor counsel to any of the parties hereto and that I am not interested in the outcome hereof.

Witness my hand and seal, at office, on this 7th day of August, 2008.


 Christina K. Shupert, Notary Public at Large in and for the State of Tennessee
 Notary Public
 Madison County

My Commission Expires:

November 21, 2010

Tennessee Asphalt Company

<http://www.tnasphalt.com/index.htm>

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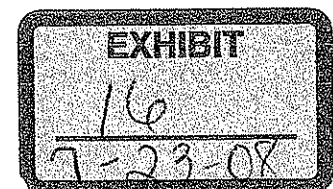
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