

1 IN THE CHANCERY COURT FOR WEAKLEY COUNTY, TENNESSEE
2 AT DRESDEN

3 NORTHWEST TENNESSEE
4 MOTORSPORTS PARK, LLC,

5 Plaintiff,

6 VS.

CASE NO. 20074

7
8 TENNESSEE ASPHALT COMPANY,

9 Defendant.
10

11 APRIL 6, 2010
12 VOLUME I
13 HONORABLE MICHAEL MALOAN

14 BE IT REMEMBERED, that the above-captioned cause
15 came on to be heard, on this, the 4th of April,
16 2010, beginning at approximately 9:00 a.m., before
the HONORABLE MICHAEL MALOAN, Judge presiding, when
and where the following proceedings were had,
to-wit:

17
18 **ORIGINAL**
19

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P R O C E E D I N G S

THE COURT: This is Case No. 20074 Northwest Tennessee Motor Sports Park, LLC versus Tennessee Asphalt Company. The Court has had the opportunity to review the pleadings in the case, and I've read your fine pretrial briefs by both the attorneys. I'd be glad to hear your opening statements you'd like to make, Mr. Cobb.

MR. COBB: Yes, sir, and I want to make it brief. It's always strange when a lawyer says that, but I -- we are -- mark this as Exhibit 1.

THE COURT: Any objection?

MR. COBB: I've already shown it to counsel.

THE COURT: All right. It will be Exhibit 1.

(WHEREUPON, THE ABOVE-MENTIONED DOCUMENT WAS MARKED AS EXHIBIT NO. 1 TO THE TESTIMONY OF THE WITNESS)

MR. COBB: This is a -- an aerial view of the real estate in question. It's a drag race strip out with the county that Monte Smith and his wife Stephanie own. And Stephanie's younger brother Cory Todd, who is a racing guy works there at

1 brother-in-law wages, I think is the testimony.

2 The reason this is important is this is
3 Highway 22, this is the entranceway in parking lot
4 that's paved. This area is called the staging area
5 right here, the upper left-hand corner. This --
6 that's paved. Here is the starting line, which is
7 shown in white, then the darker asphalt is the
8 1/8-mile racetrack. And then there's another
9 approximately 1/8-mile of paved area that's called
10 the shutdown area.

11 The Smith's wanted to upgrade the track
12 because they wanted to have a little better surface,
13 attract a higher horsepower car, a higher-dollar
14 contestant, and a higher-dollar contestant brings
15 bigger crews and more money and try to better the
16 track. But I want the Court to understand, the
17 track was fine. They had been racing for several
18 weeks already when this paving started.

19 MR. COBB: The paving started on Monday,
20 April 30th, and there's going to be things that
21 occur day by day that you might want to have that
22 sequence in your mind. Monday is April 30th;
23 Tuesday, May 1st is when most of the milling paving
24 occurred. They stopped Wednesday and Thursday, met

1 out at the track and discussed --

2 THE COURT: All right. Give me a year.

3 MR. COBB: 2007, sorry. Just about three
4 years ago.

5 THE COURT: Okay. Go ahead.

6 MR. COBB: And the reason the geography of
7 the track is important is because we have really
8 more of a tort claim than a contract claim.
9 Tennessee Asphalt made a bid to pave this for
10 39,500. Mr. Cashion has a blowup of the proposal.
11 It also had additional costs for testing. When they
12 got out to the track, they not -- they were going to
13 take 2 inches of asphalt and -- and repave that. In
14 the process, they tore up this track, tore up the
15 subsoil. They also --

16 THE COURT: Mr. Cobb, let me -- let me
17 interrupt you. You're saying that this is really a
18 tort claim. Do I have jurisdiction?

19 MR. COBB: You do.

20 THE COURT: All right.

21 MR. COBB: Because it -- it's a hybrid
22 claim, you'd have --

23 THE COURT: Okay.

24 MR. COBB: -- you can't get out of it that

1 easy.

2 THE COURT: Well, you said, this is really
3 a tort claim, I'm thinking, well, you may be in the
4 wrong court.

5 MR. COBB: It -- it -- it started out as a
6 contract to perform here. And the -- the point I'm
7 making is they not only didn't do this correctly,
8 but they damaged this -- what's called the staging
9 area. The heavy equipment was so heavy that it
10 created ruts. And I'm not talking about little
11 vibrations that you would feel, I'm talking about
12 looks like a wagon going through a plowed field
13 of -- of 6-, 8-inch ruts.

14 Also, during the construction, instead of
15 coming around this way, they went and loaded
16 their -- the heavy trucks, just turned this into --
17 to gravel, the -- the -- it's going to be called the
18 shutdown lane. So the terminology is this is the
19 racetrack, the 1/8-mile racetrack and they
20 contracted for 700 feet, which is just slightly more
21 than that. The shutdown area was not contemplated
22 to be constructed except for a small 12 by 30 foot
23 patch and the staging area.

24 As a result of the damage, Ford

1 Construction had to come in and dig up the subsoil,
2 totally replace it and pave not only the racetrack
3 but the -- but the shutdown track and repair the
4 staging area. So that's what the dispute is about.
5 Now, Tennessee Asphalt was a large multi-office
6 operation across Tennessee, had a Web site and
7 listed itself, advertised itself as being a
8 full-service paving company that could do turnkey
9 work, could do engineering, site prep, whatever was
10 needed.

11 The contract that was entered into said, we
12 assumed that the gravel is in place and that the
13 subsoil is fine, and we'll proceed accordingly. And
14 I think this is where the real dispute comes into,
15 the subsoil was not fine. The -- the Smith's relied
16 upon Tennessee Asphalt to tell them three things:
17 One, investigate what needs to be done to upgrade
18 this track; two, to recommend what needs to be done,
19 and then to do the -- do the service side of it. So
20 it's an inspection, it's a recommendation, and then
21 it's to perform.

22 What Tennessee Asphalt said, and Austin
23 Bateman said it most clearly, we don't think; we
24 don't analyze, all we do is pave. And if it doesn't

1 work out, that's not our problem, that's not our
2 responsibility. We have no responsibility for the
3 subsoil.

4 But what convinces me, and what I hope
5 convinces you is Item 10 on that contract says the
6 price does not include testing. In March -- March
7 2nd, John Taylor, who was the estimator sent a
8 letter saying, here's what we can do and here's the
9 price, but I want to cut some cords to do some
10 analysis, to do some testing. And Cory Todd said,
11 that's fine. And they met out there at the track,
12 and they --

13 THE COURT: Does the contract place any
14 responsibility on either party to do testing?

15 MR. COBB: It says that testing is not part
16 of this cost, but -- but -- and now, the -- we think
17 the law says that the pavers have a responsibility
18 to give them advice to tell them what they know.
19 They're -- they're the experts in the area. The
20 Smiths are relying, we believe, reasonably on
21 Tennessee Asphalt to advise them on how to proceed.

22 It's clear that the price doesn't include
23 testing; it's clear that the testing is extra. The
24 price doesn't include anything that has to be done

1 on the subsoil that's extra, but what Tennessee
2 Asphalt did was proceeded knowing, based on their
3 experience, knowing that there were subsoil problems
4 and not taking the appropriate steps to investigate
5 what needs to be done. And by proceeding without
6 checking, they created a tremendous amount of damage
7 unnecessarily.

8 So our -- our -- our dispute is what does
9 an expert in paving who advertises itself, who holds
10 itself out to the public as an expert in paving
11 turnkey site preparation, what duty do they have to
12 investigate the problem to make the recommendations
13 before they start servicing the problem. And that's
14 really where the dispute lies because it's --
15 because in the contract it says they will do what's
16 called proof rolling.

17 Proof rolling is a crude way to test does
18 the subsoil have integrity to support the heavy
19 equipment of the paving. And the proof rolling
20 showed very early on that the sub- -- that there was
21 a problem, and what Tennessee Asphalt did was to
22 say, we'll sell you more asphalt. We'll solve the
23 problem. My brother has an expression that -- to a
24 hammer, every problem is a nail.

1 And -- and here, their solution was, we'll
2 sell you more asphalt, and we'll just fill the ruts
3 in until it's level. But for less than \$1,000, they
4 could have done the appropriate testing. They had
5 the -- they had the equipment out there to do the
6 testing to determine what about the subsoil was
7 wrong and what was the reasonable way to proceed.

8 What they did was to proceed in a way that
9 required the subsoil to be totally -- the one
10 replaced is called soil cement. And an \$80,000
11 paving job -- I mean, a \$40,000 paving job turned
12 into a \$180,000 repair job. A job that was supposed
13 to start Monday and be through by Friday afternoon
14 delayed them 13 weeks before they reopened.

15 In the racing business, they have a
16 seasonal-long points system, so people who were out
17 for 13 weeks became attracted to and affiliated with
18 other tracks and they lost business, not just for
19 the 13 weeks they were closed, but they lost
20 business permanently from people who used to race
21 with them season after season who didn't come back
22 and who probably won't come back.

23 So there's been damage -- there's been
24 failure to perform the contract, there's been damage

1 to items of the track that were not under the
2 contract, and then there was damage to the business
3 for being closed and for losing the normal -- or
4 part of its customers.

5 THE COURT: All right. Thank you, Mr. Cobb.
6 Mr. Cashion?

7 MR. CASHION: Your Honor, as a preliminary
8 matter, can we invoke the rule?

9 THE COURT: Yes, sir, you can. Ladies and
10 gentlemen of the courtroom, if you're here on the --
11 on this case, if you're going to testify as a
12 witness, you need to -- you'll need to step outside,
13 but -- when I tell you to, but let me give you some
14 instructions before you leave. If you're a witness
15 in this case, you'll need to step outside so you
16 won't not be in the courtroom during the testimony
17 of other witnesses. After you testify, then you'll
18 need to check with the attorneys to see whether you
19 can leave or not or whether you'll be subject to
20 being recalled.

21 But do not discuss the case among
22 yourselves, do not discuss the case with witnesses
23 who have testified and who come in and out of the
24 courtroom. And after you've testified, if you

1 remain, do not discuss your testimony with any of
2 the other witnesses.

3 Do any of you have any questions about the
4 Court's instructions?

5 MR. COBB: Your Honor, Mr. and Mrs. Smith
6 own this as husband and wife. Can she remain in the
7 courtroom?

8 MR. CASHION: I think a one party
9 representative, I'm not sure if --

10 THE COURT: Well, I believe the Plaintiff
11 is an LLC.

12 MR. COBB: It is. They own it together.

13 THE COURT: You can designate a
14 representative. All right. If you are not going to
15 testify and you're interested in the case, you can
16 remain in the courtroom, but do not go in and out of
17 the courtroom and be discussing the testimony of the
18 witnesses with any witnesses who have yet to testify
19 so.

20 Again, do any of you have any questions
21 about the Court's instructions? Okay. So I'll have
22 to rely on the attorneys to designate, make sure
23 your witnesses are excluded because I won't know who
24 is who.

1 All right. So everyone that's in the
2 courtroom, I'm assuming is not going to testify; is
3 that correct?

4 MR. CASHION: That's correct.

5 THE COURT: All right. Go ahead.

6 MR. CASHION: Thank you, Your Honor. My
7 name is Greg Cashion, Nashville Bar Association, and
8 today I'm representing Tennessee Asphalt Company.
9 With me at counsel table is Mr. Bill Ratliff.
10 Mr. Ratliff was the owner of Tennessee Asphalt
11 Company. He resides in Knoxville, Tennessee, and he
12 sold Tennessee Asphalt in the spring of 2008. So
13 currently the office that was Tennessee Asphalt
14 during this project of 2007 has now been purchased
15 by Delta Contracting.

16 Today, Your Honor, we'll have four -- five
17 witnesses. The four primary witnesses, not
18 including Mr. Ratliff, will be John Taylor. Taylor
19 is a salesman and an estimator for Tennessee
20 Asphalt. He is not technical on -- in the asphalt
21 business. In fact, he has a biology degree. He was
22 the guy that was the estimator and salesman.

23 We'll have Danny Wimberly. He's been
24 testing asphalt, looking at asphalt for over 40

1 years. He went to the job site to take the coring
2 that you'll hear about. And he's worked for TDOT
3 for many of those years, about 30 years; and he
4 worked for about 10 years at Tennessee Asphalt.

5 We'll have Austin Bateman testify.

6 Mr. Bateman was the branch manager for the Paris
7 office that performed this work. Mr. Bateman has a
8 civil engineering degree from Tennessee Tech, he has
9 a master's degree from UT Knoxville, and he's a
10 professional engineer.

11 And, finally, we'll have Mr. David Evans.
12 Mr. Cobb may call him, but he was jointly hired by
13 most -- both Mr. Cobb and I as a professional
14 geotechnical engineer to test the soil after this
15 problem was discovered. I think his testing
16 occurred in early June of 2007. So those will be
17 our primary witnesses that will testify before the
18 Court today on our behalf.

19 Now, Your Honor, this is a contract claim.
20 This -- rights and responsibilities of the parties
21 start with the contract, and they stay with the
22 contract. I've got a blowup of the proposal that
23 will be, I'm sure, one of the early exhibits for
24 you. And it's a very simple contract, proposal,

1 which is signed by Cory Todd who is the authorized
2 representative for the owner, Northwest Tennessee
3 Motor Sports.

4 And in the proposal, the scope of work is
5 for \$39,500. And what they're going to do is take
6 off 2 inches of the existing asphalt, and then
7 they're going to look at that, and then they're
8 going to pave back 2 inches of asphalt. And that's
9 about as simple as it gets. Take off 2 inches; put
10 2 inches back. All day -- all total, that type of
11 project make take two days. Could take three, not a
12 big project.

13 The important thing for the Court is the --
14 the assignment of risk between the two parties. And
15 the one thing that Tennessee Asphalt was very
16 specific on, and I've highlighted it in Item No. 7
17 is that assuming that the proper gravel of base
18 material, minimum 8 inches, is existing in place
19 after milling 2 inches of existing asphalt. Surface
20 price, on the surface -- asphalt surface. Price
21 does not include gravel or base material,
22 undercutting, or any other subgrade work.

23 So we're assuming the base material is
24 there, it's in good shape, and we are not including

1 any work to be performed on the base material.
2 Everything below the 2 inches of asphalt is the
3 owners. We're in charge of -- from the top of the
4 base stone for the 2 inches that we're milling off
5 and putting back. This is how the parties chose to
6 assign the risk.

7 There's also another page to that contract
8 that we'll get into in the terms and conditions, but
9 that's the primary issue here is who was responsible
10 if the area below the bottom of the asphalt is not
11 proper.

12 Now, what I wanted to do now is kind of
13 tell you, you know, and it's important to know what
14 we knew and when. When we observed this job, there
15 was no indicators that there was a subbase problem
16 or a base stone problem. John Taylor will tell you
17 that when he went out there he did not see any
18 telltale signs of problems with the subgrade, there
19 wasn't alligator cracking, very large cracking,
20 where water or mud would ooze up through the
21 asphalt, and there was no indication that this was
22 going to be a job that would have that type of
23 problem.

24 Tennessee Asphalt asked to core the job for

1 the purpose of finding out the thickness of the
2 asphalt. And just for demonstrative, Judge, this is
3 what the core looks like. They -- they've cut down,
4 cut through the asphalt with the machine to find out
5 how thick that is. They don't care what's below it.
6 They only find the thickness of the asphalt. So he
7 asked them -- he asked the owner, can I go up there
8 and take the samples of the pavement? The owner
9 says, fine, not a problem.

10 It's important that we don't have
11 responsibility for testing, nor do we have the
12 ability to test what the subgrade is. That's not a
13 part of what we do. If that's necessary it's done
14 by geotechnical engineers. But we go out there,
15 core the subgrade, I mean, excuse me, wrong term,
16 core the asphalt, sorry, and go down to 2 inches.

17 And then there's a note in the coring where
18 there was water in two of the four cores, and the
19 Plaintiff puts tremendous amount of emphasis on
20 this. And I think John Taylor said that if there's
21 water in the base stone, then that's bad. Of
22 course, you've got to figure out what the source of
23 the water is. I think the thing that John
24 overlooked was this coring machine uses water to

1 cool the bits when it cuts through, so the coring
2 machine is using the water so, as Mr. Wimberly will
3 tell you when he does his test, it's not unusual to
4 have water in the tester because he's putting about
5 2 gallons of water on the surface when he cuts it.

6 Mr. Wimberly saw nothing unusual about
7 having any water in that area. Mr. Bateman, the
8 engineer -- professional engineer for Tennessee
9 Asphalt, said that wasn't significant because of the
10 type of machine that they use. So now, we got some
11 exaggeration going because the water pool machine
12 left a little water in the base stone.

13 So when we start milling, first thing we do
14 is go out there and start milling the asphalt off.
15 And this is where you get a milling machine, it's
16 dumping it into a big truck, and they're taking the
17 material away from the -- the project. When we
18 start milling, there's no indication of problems.
19 Start it; we're milling down. We do the milling in
20 one day, that's April 30th, 2007.

21 While milling, the milling machine does
22 have some problems getting through some areas.
23 Nothing to where we have to hook it up and pull it
24 out. It's noted that there are some problem areas

1 on this material below the asphalt, the base stone
2 and the subgrade. What we do is exactly what the
3 contract says we're supposed to do, and that's when
4 we get down to the base stone it says (as read)
5 existing gravel or stone base is not a number 6. To
6 be proof rolled with a loaded truck before
7 installing asphalt cable. That's exactly what we
8 do. We proof roll it.

9 We take a loaded dump truck and roll it,
10 drive it over this base stone and stone material.
11 Because there was an issue with the milling machine,
12 Austin Bateman, our engineer, comes and observes
13 what happens. Well, he observes first the
14 asphalt -- I mean, excuse me, the asphalt's not on,
15 he observes the base stone. When he looks at the
16 base stone, it's dry. He's -- they're correct that
17 you have water coming up, bubbling up from the
18 surface from -- from underneath, then the asphalt
19 would -- I mean, the base stone would look wet. The
20 base stone is not wet. There's not a wet spot,
21 there's no water standing on the base stone. Looks
22 pretty dry.

23 So he observes first, not a problem. And
24 then, secondly, he observes it's flexy, it's plumpy.

1 So he doesn't see the moisture on top, but he knows
2 he's got a problem. And it's not all rutted up, but
3 the -- the truck's not running through there making
4 ruts, it's just flexing the base stone where you
5 know you've got a problem with that that has to be
6 dealt.

7 So at that time, the end of the day on
8 April 30th, we know there's a problem. So Bateman
9 does what he needs to do, he talks to Mr. Smith. I
10 guess if you're talking about Plan A was to take it
11 off and put it back, so Plan A is not going to work.
12 We've got to do something now because we have a
13 problem with the base stone and the subgrade. And
14 in the contract, it's the owner's problem. That
15 risk does not shift to us.

16 We give them two options at that point in
17 time. We say, okay, we can try to pave over this,
18 and you're going to be responsible for any
19 overrunning asphalt because it's going take more
20 since it's flexing, it's going to take more asphalt.
21 But the risk is we're not going to guarantee you
22 that this will work, we don't know how bad it is.
23 But if you want your track opened up by the weekend,
24 then the only thing we know to tell you is pave over

1 it, take a chance, and see if that works to do it.

2 And this wasn't just some grand, immediate
3 off-the-cuff remark. Mr. Bateman has done this on
4 several projects, and it's always worked. He has
5 never had one that he didn't do an asphalt overrun,
6 and it didn't work. So that's solid recommendation.

7 The other alternate he says is, look,
8 there's bad stuff underneath here. We can go and
9 take this material out, dig it all out, dig out the
10 stone, dig out the subgrade, and put rock back in,
11 and we can do that, which is going to cost many
12 more. I mean, you're up in the 150- to \$200,000
13 range if you want to do that, and it's going to take
14 a long time to do it so forget about being open in
15 the next few weeks.

16 Given those two alternates, Mr. Smith chose
17 the first alternate, which was not a hard decision,
18 take a chance on getting about \$40,000, maybe a
19 little more, on the asphalt, and if it works he's
20 open the next weekend, he's in good shape. Rather
21 than saying, no, let's stop, I want the most
22 expensive alternate that's going to take all the
23 time.

24 So at that point, the owner takes the

1 cheaper and immediate fix, and he signs an agreement
2 called the overrun agreement where he agrees to pay
3 for that asphalt knowing it's going to overrun
4 because of the poor condition of the subgrade. Now,
5 the interesting point here is if he had picked point
6 C, that's generally what Ford Construction Company
7 came in there and did. They came in and stabilized
8 the base and put the pavement down. So saying that
9 we damaged something is inaccurate. He had a
10 problem, and the resolution of his problem cost a
11 lot of money, it wasn't damaged by us. Our trucks
12 didn't damage the subgrade. The subgrade was poured
13 and could not handle the load.

14 So Tennessee Asphalt tries to pave over it,
15 it doesn't work. Tennessee Asphalt has, probably at
16 that point, about \$8,000 in milling, maybe \$36,000
17 in asphalt. And, at that point, it's our risk of
18 getting paid because when we made that decision he's
19 already in it for the risk of the subgrade, and our
20 risk is the fact that we put down about \$36,000 and
21 about another \$8,000. We had about \$44,000 we're
22 out, and we're at risk of not being paid that. But
23 he signed the contract, he accepted the risk for the
24 asphalt, but now he won't pay that asphalt.

1 Then you get the exaggerations. We ran the
2 trucks over the length of the -- the track, and now
3 they're saying, well, you tore all that up. You
4 damaged it; you tore it up. Well, first, on Monday
5 afternoon when the trucks have done all the milling
6 work there was no complaints that we were doing
7 anything wrong with our manner of operation of
8 running it over the track.

9 Number 2, the owner never told us any
10 directions on how to put the asphalt. He never
11 said, you can't go in this area. He never told us,
12 you must come and go through the bean field or go
13 off or go through this gate. The owner never gave
14 us any instructions on what would have been a -- in
15 his opinion now, a prudent way to do it. In fact,
16 the owner told us there was a place up there that
17 was bad, and he wanted us to fix it. Now, how are
18 we going to fix it if we're not going to take our
19 trucks and material up there. So that didn't -- you
20 know, the owner did not tell us anything on that
21 Monday.

22 And, objectively, you want the trucks to go
23 straight, you don't want a big truck making a lot of
24 turns, that would tear up the asphalt. And -- and,

1 finally, the problem with that second set of asphalt
2 was not the truck's zone, it was the same subgrade
3 that was saturated.

4 Now, Mr. Evans will testify, the
5 geotechnical engineer, and he'll tell you that the
6 subgrade's the problem, the base material is
7 saturated, and the moisture content is about 28
8 percent in some areas. That's higher than we've
9 ever seen. That's a huge amount of moisture. And
10 remember, this is a dry time of the year. The
11 summer of 2007 is pretty dry, it's kind of a drought
12 condition.

13 And that when we looked at it, it was built
14 in '93, there were no signs of failure, dry part of
15 the year and there was no indication of the problem.
16 So what we're looking at and what Mr. Evans will say
17 is he went through and tested and found the problem,
18 and that's what they had to correct. And when they
19 put on their damages for correcting it, what they
20 basically had Ford Construction do is first come in
21 and mill off the asphalt that we left there, and
22 then they charged him, like, \$86,000 for soil
23 cement, which is basically a way of stabilizing the
24 base material underneath the asphalt.

1 But they charged him -- we were all in
2 charge of making a -- repaving a runway -- a raceway
3 700 feet. They decided because of this poor soil up
4 in -- for the full length to repave 1400 feet. So
5 what they're saying in damages, no, we don't want
6 you to repave this -- not paying us for what we put
7 down, we're going to repave 700 feet and we also
8 want to charge you for repaving 1400 feet.

9 We were going to put down 2 inches; Ford
10 Construction puts down 2-3/4 inch. So they're
11 putting much more material down. And so basically
12 they've improved their property as it should have
13 been done, but it wasn't because we damaged
14 anything. We expected a typical job. Unfortunately
15 for the owner, he had subgrade issues. The contract
16 very specifically addresses the subcontract issues
17 about who bears the risk of subsurface or subgrade
18 issues and that's the owner.

19 So what we're asking the Court to do in
20 this trial is dismiss their claim, award us the cost
21 of our paving, which is about \$44,000 that they
22 signed and agreed that we put down that that risk
23 involved, and award us the attorneys' fees for
24 enforcing the contract provisions, which is

1 specifically that they are responsible for the
2 subgrade and base material. Thank you, Your Honor.

3 THE COURT: All right. Thank you, sir.
4 Anything further, Mr. Cobb, before getting into the
5 proof?

6 MR. COBB: No, Your Honor.

7 THE COURT: All right. Just a second.

8 (WHEREUPON, A SHORT BREAK WAS TAKEN. THE
9 PROCEEDINGS CONTINUED AS FOLLOWS.)

10 THE COURT: All right. Mr. Cobb, call your
11 first witness.

12 MR. COBB: Call Monte Smith.

13 THE COURT: All right, sir. If you would,
14 come around. Watch your step there and raise your
15 right hand.

16 MONTE SMITH,

17 Having been first duly sworn, was examined
18 and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. COBB:

21 Q. Monte Smith, is this your racetrack?

22 A. Yes, it is.

23 Q. Is it still operating?

24 A. Yes, it is.

1 Q. And you fixed it after the 2007 paving
2 problems?

3 A. Excuse me?

4 Q. You fixed it after the 2007 paving
5 problems?

6 A. Yes, sir.

7 Q. Was it --

8 MR. COBB: Can y'all hear him okay?

9 MR. CASHION: Yeah.

10 BY MR. COBB:

11 Q. Where is your racetrack?

12 A. 5469 Highway 22 in Gleason, Tennessee.

13 Q. Tell me a little bit about yourself. Is
14 this how you make a living, or is this --

15 A. No, sir.

16 Q. -- sort of a weekend hobby?

17 A. This is a weekend hobby, kind of a
18 retirement project that I --

19 Q. If it doesn't kill you first?

20 A. If it don't kill me first. I work for the
21 West Tennessee Public Utility as a construction
22 coordinator for a pipeline and natural gas company.

23 Q. Let me go back a little bit. Where did you
24 grow up, Monte?

1 A. I grew up in Huntingdon, Tennessee.

2 Q. Went to high school in Huntingdon?

3 A. Yes, sir.

4 Q. What year did you graduate?

5 A. 1986.

6 Q. And did you go to college?

7 A. I went to Jackson State Community College
8 and also Tennessee Technology.

9 Q. And how long did you go?

10 A. Off and on for 10 years.

11 Q. How much progress -- do you have a degree?

12 A. Yes, I have a -- a degree in general
13 technology from Jackson State and also a drafting
14 degree from the Tennessee Technology.

15 Q. You're not an engineer?

16 A. No.

17 Q. Now, in the construction that you do, it's
18 for a natural gas pipeline?

19 A. Yes.

20 Q. And do you do any engineering there?

21 A. No.

22 Q. Just oversee?

23 A. I'm more of an inspector.

24 Q. Inspector? All right. How in the world

1 did you get into the drag racing business?

2 A. I married into it.

3 Q. And who did you marry?

4 A. Stephanie Todd.

5 Q. And her little brother is Cory Todd?

6 A. Yes.

7 Q. Cory is the one that signed these
8 contracts?

9 A. Yes, he did.

10 Q. Now, he's not a paid employee?

11 A. No.

12 Q. He's a brother-in-law?

13 A. Yes, he is.

14 Q. And does he build race cars?

15 A. He builds race cars at his shop in
16 Huntingdon, Tennessee.

17 Q. How long have the Todd's been in the drag
18 racing business?

19 A. Their dad owned Jackson Dragway from, I'm
20 guessing, 1980s until his death in 1990.

21 Q. When did y'all start operating the races
22 out there at the Gleason Dragway?

23 A. 1996.

24 Q. And I believe y'all -- y'all called it

1 Northwest Motor Sports?

2 A. Northwest Tennessee Motor Sports.

3 Q. And when did you actually purchase the land
4 that -- on which that track sits?

5 A. 1999.

6 Q. And you own that -- you and your wife own
7 the LLC?

8 A. Yes.

9 Q. And the LLC owns the land?

10 A. Yes.

11 Q. And did you get -- did you pay cash for
12 that or did you finance it?

13 A. Financed.

14 Q. All right. And when you started operating
15 the track, did you make some money?

16 A. Yes.

17 Q. And was that enough to pay your bills, pay
18 down -- pay down the mortgage?

19 A. Yes.

20 Q. Okay. Did things go well enough where you
21 decided to try to upgrade the track?

22 A. Yes, it was.

23 Q. Did you ever have a weekend that you
24 couldn't race because the asphalt wasn't good

1 enough?

2 A. Prior to this, no.

3 Q. Yeah. All right. And did you have some
4 pictures taken of the track, what it looked like
5 before?

6 A. Yes.

7 Q. Let me show you some pictures your wife
8 sent me that she calls the before shots and ask if
9 you can identify them. There are multiple
10 photographs on each page.

11 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
12 WAS PASSED TO THE WITNESS.)

13 A. (Witness reviewing document.) Yes.

14 Q. And I believe you did that in conjunction
15 with getting insurance for the track?

16 A. Yes, it was an annual insurance inspection.

17 Q. And those photographs were taken before the
18 spring 2007 racing season started?

19 A. Yes, they were.

20 Q. All right.

21 MR. COBB: I'd like to have those
22 photographs marked as collective exhibits, Your
23 Honor.

24 THE COURT: Any objection?

1 MR. CASHION: No objection, Your Honor.

2 THE COURT: All right. Be collective 2.

3 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
4 WAS MARKED AS EXHIBIT NO. 2 TO THE TESTIMONY OF THE
5 WITNESS.)

6 BY MR. COBB:

7 Q. And for the record, we're -- we have one,
8 two, three, four pages, six photographs each; is
9 that --

10 A. (Moving head up and down.)

11 MR. COBB: Pass back to the witness.

12 BY MR. COBB:

13 Q. And below each photograph, there's a
14 description that's typed on it?

15 A. Right.

16 Q. And have you looked at those photographs
17 and looked at the descriptions?

18 A. Yes.

19 Q. And do they fairly and accurately represent
20 the condition of the track at the beginning of -- of
21 the spring 2007 racing season?

22 A. Yes, they do.

23 Q. Let's talk a little bit about the track
24 itself. Did you draw a schematic of what that track

1 looked like?

2 A. I did.

3 Q. And why did you do that?

4 A. I just drew it to outline what the -- what
5 the drag actually looks like.

6 Q. I want you to look at that. Is that the
7 schematic that you drew?

8 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
9 WAS PASSED TO THE WITNESS.)

10 A. (Witness reviewing document.) Yes, it is.

11 Q. And it's not drawn to scale, but it's drawn
12 for illustrative purposes only?

13 A. Right.

14 Q. And does it illustrate the various paved
15 components of that racetrack facility?

16 A. Yes, it does.

17 MR. COBB: I'd like to have that marked as
18 the next exhibit.

19 THE COURT: Any objection?

20 MR. CASHION: No objection.

21 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
22 WAS MARKED AS EXHIBIT NO. 3 TO THE TESTIMONY OF THE
23 WITNESS.)

24 MR. COBB: Pass that to the Court.

1 BY MR. COBB:

2 Q. Mr. Smith, I want to just go through on
3 this photograph, and I think it's reflected on that
4 schematic as well, you have quite a bit of frontage
5 on Highway 22?

6 A. Yes.

7 Q. And this is the entrance to the track down
8 here on Exhibit 1 in the lower middle portion; is
9 that correct?

10 A. Yes.

11 Q. And then this area here, is that the
12 staging area?

13 A. That is the staging area.

14 Q. What is a staging area?

15 A. That's where the race cars will line up
16 prior to the race in four different lanes and -- so
17 they can be paired up to race down the racetrack.

18 Q. Is that like the on-deck circle, if you
19 will, for -- for racing?

20 A. Yeah.

21 Q. All right. So after they -- they're in the
22 on-deck line, it's their turn to go, how many race?

23 A. Two at a time.

24 Q. And so the two pull up to the -- to the top

1 of the staging area, and they turn right to get on
2 the starting line?

3 A. Yes.

4 Q. Now, what do you have to start the cars?

5 A. It's called a Christmas tree.

6 Q. And where is that Christmas tree located,
7 at the beginning of these light sections or at the
8 end?

9 A. About -- no, it's about -- it's about --
10 from where you see the white section, it's probably
11 100 feet, which would be about halfway.

12 Q. All right. So -- so the cars come off the
13 staging area onto the white area, stop at the
14 Christmas tree, and then go down the 1/8-mile
15 racetrack?

16 A. That's correct.

17 Q. And the racetrack runs parallel to Highway
18 22?

19 A. Yes, it does.

20 Q. Now, do you have safety devices or fencing
21 on each side of the track?

22 A. Guardrail.

23 Q. Guardrail?

24 A. Yes.

1 Q. And that's to redirect the cars back down
2 the track if they go off? Where do the fans sit?

3 A. Those white dots are bleachers right there.

4 Q. Right here, right by the starting track?

5 A. Yes.

6 Q. After the finish line, do you have an area
7 where the cars slow down and regain control?

8 A. Yes.

9 Q. And that's called the shutdown area?

10 A. Yes, it is.

11 Q. And how far is -- is the shutdown area past
12 the end of the finish line?

13 A. The first turnoff is approximately 700 feet
14 past the finish line.

15 Q. All right. And the first turnoff is -- is
16 this area up here?

17 A. Yes.

18 Q. And then there's an area that goes on past
19 it in a -- in a second or third turnoff?

20 A. Right. That's an additional for faster
21 cars.

22 Q. All right. So the faster a car is going,
23 the longer it takes to stop?

24 A. Correct.

1 Q. But in any event, these -- these cars slow
2 down in the shutdown area, and then use this road to
3 return to the staging area?

4 A. Yes.

5 Q. A car that's doing well will race or --
6 or will -- yeah, race how many times on a given
7 night?

8 A. Probably eight times.

9 Q. All right. Is the track and the shutdown
10 area paved?

11 A. Yes.

12 Q. Are the return roads, are they also paved?

13 A. Yes.

14 Q. Did you do that paving, or was it already
15 paved when you bought it?

16 A. It was already paved when I bought it.

17 Q. Tell me when you decided to upgrade the
18 track.

19 A. I guess it would probably be the winter
20 2006. We just had talked about upgrading, trying to
21 attract some faster cars, some, you know, heavy
22 hitters, bigger -- bigger races that we needed to
23 try to get more -- more income, you know,
24 generated. And that's the way we generate income is

1 the more racers, the more spectators they bring, and
2 more spectators they bring, the more spectators they
3 bring, the more income we can generate.

4 Q. Do the better cars come to the better
5 tracks?

6 A. Yes, they do.

7 Q. And do the better cars have higher racing
8 budgets -- have bigger racing budgets?

9 A. Yes, they do.

10 Q. Cars cost more? Drivers cost more?

11 A. Cars cost more, drivers cost more, they
12 have more crew that come with them.

13 Q. More support?

14 A. More -- more support, more followers. You
15 know, that's --

16 Q. Is -- is a significant portion of your
17 income the concessions that you sell?

18 A. Concessions, yes.

19 Q. Who keeps the books for this?

20 A. My wife.

21 Q. And is she an accountant?

22 A. Yes, she is.

23 Q. Now, your brother-in-law Cory, he -- he
24 builds race cars?

1 A. Yes, he does.

2 Q. And he's more or less the racetrack, race
3 car expert in the family?

4 A. Yes.

5 Q. Have you ever raced?

6 A. No, not officially.

7 Q. Okay. You got better sense?

8 A. Yes.

9 Q. Okay. Cory races?

10 A. He has.

11 Q. And he builds cars?

12 A. Yes.

13 Q. When you decided to upgrade this track to
14 elevate yourself in the area, who did you give the
15 responsibility of going out and doing that?

16 A. Cory.

17 Q. And when he signed the contracts, he had
18 your permission?

19 A. Yes, he did.

20 Q. Tell me what you asked him to do and what
21 did he do towards getting this racetrack -- this
22 racing track upgraded.

23 A. I just -- I told him, you know, we need to
24 go out and get some estimates. He had already been

1 spoken to a couple different people, you know,
2 about -- that actually raced with us about, you
3 know, they were wanting us to -- to give their
4 company a chance. And this -- this guy that raced
5 with us worked for Tennessee Asphalt, and he -- he
6 give a -- you know, he kind of was giving Cory the
7 nudge and give him John Taylor's phone number. And
8 he called John Taylor, got a bid from John Taylor,
9 and got --

10 Q. Cory called John Taylor?

11 A. Yes.

12 Q. When you say he called John Taylor --

13 A. Cory.

14 Q. -- Cory called --

15 A. Cory called John Taylor and got a bid from
16 John Taylor and also got a bid from Martin Paving.
17 And we also -- prior to that, we had gotten a bid
18 for AllConcrete, which was a -- a big astronomical
19 number.

20 Q. A big jump in price?

21 A. Yeah. So...

22 Q. To do concrete, you would have had to taken
23 all the asphalt out and replace it with concrete?

24 A. Yes.

1 Q. All right. Did you -- when -- when you got
2 competitive bids from Tennessee Asphalt and from
3 Martin Paving, did you go with the low bid or the
4 high bid?

5 A. Actually went with the high bid.

6 Q. Well, tell me why.

7 A. Well, the main reason -- one -- one reason
8 is because we had the guy that raced with us that,
9 you know, kind of said, hey, you know, I think we'll
10 do a great job for you and, you know, they really
11 know what they're doing.

12 Also, of course, I'm a -- in that -- in
13 that area of the Internet, and my wife, she got on
14 the Internet and she looked at the -- the
15 credentials that they placed on there and said that
16 they do this and did this and they've done a --
17 they've paved an airport. Well, you know, airports
18 have to be smooth, too, and that's what we always
19 had stressed to them that we needed a smooth finish
20 and a -- you know, great, you know, job. And that's
21 what we expected them -- we thought that Tennessee
22 Asphalt would give us through all the stuff that
23 we -- we checked on, you know. So...

24 Q. Okay. So after checking -- checking out

1 the concrete option, y'all ruled that out?

2 A. Yes.

3 Q. And then you checked and got Martin Paving
4 and Tennessee Asphalt, and you went with what you
5 thought was a better bid even though it's the higher
6 bid?

7 A. Right.

8 Q. All right. And who handled the
9 negotiations of the dialogue back and forth between
10 Tennessee Asphalt and -- and your company?

11 A. Cory.

12 MR. COBB: We've marked some documents as
13 exhibits to the complaint, Your Honor. I'm going to
14 make them exhibits right now. Mr. Cashion, I don't
15 think there's any dispute about that, is there?

16 MR. CASHION: No.

17 MR. COBB: Just go ahead and have them
18 marked here.

19 MR. CASHION: Which ones?

20 MR. COBB: I'll show you. Your Honor,
21 attached to the complaint itself is copies of
22 certain exhibits. Exhibit B to the complaint has
23 already been made an exhibit. I'm going to hand the
24 rest of the exhibits to the complainant and have

1 them marked into evidence by agreement.

2 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
3 WAS PASSED TO THE WITNESS.)

4 BY MR. COBB:

5 Q. Mr. Smith, I'm going --

6 MR. COBB: May I approach, Your Honor?

7 THE COURT: Yes, sir.

8 BY MR. COBB:

9 Q. Let's go through these documents one by one
10 and identify them for the record. The first one
11 is -- has fax stamps on it. The first one is fax
12 stamped dated March 2nd, 2007, from TAC in Paris.
13 Do you see that?

14 A. Yes.

15 Q. And then a second fax stamp is May 7th,
16 2007, from Northwest Motor Sports?

17 A. Yes.

18 Q. All right. And it is a letter from John
19 Taylor to Cory Todd?

20 A. Yes.

21 Q. And is that the first written communication
22 between Tennessee Asphalt company and your company
23 concerning this project?

24 A. I think so.

1 Q. All right. If you would, pass that to the
2 Court.

3 A. Just stop at this one.

4 Q. Just stop, yeah.

5 THE COURT: All right. Do you want these --

6 MR. COBB: I tell you what, let's just go
7 through it and identify them.

8 THE COURT: Do you want these marked
9 separately though?

10 MR. COBB: Yeah, let's do that. I think
11 that might be easier. Let's mark that as 4. Let's
12 stop for a second.

13 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
14 WAS MARKED AS EXHIB IT NO. 4 TO THE TESTIMONY OF THE
15 WITNESS.)

16 BY MR. COBB:

17 Q. Mr. Smith, Exhibit No. 4 is that fax from
18 Cory -- to Cory Todd. And, if you would, take a
19 look at that.

20 A. Okay.

21 Q. In that -- I tell you -- just read -- just
22 read that into the record.

23 A. (as read) It says, Cory, the following are
24 some bid prices for asphalt pavement per your

1 request. This price, we're assuming that there is
2 proper subgrading gravel base specification when
3 milling off 2 inches of asphalt. I'm sure you're
4 getting tired of waiting on me to get you these
5 numbers under the assumption that we can mill and
6 pave without subgrade and base issues.

7 I would like to cut cores -- cores to
8 investigate a little, but I've been out a few days
9 with family -- this week with family emergency. I
10 will try and get the core machine next week. Please
11 call if you have any questions. Thank you, John
12 Taylor.

13 Q. When you read that, did you know you had
14 any problems with the base or the subsoil?

15 A. No.

16 Q. When he said he wanted to cut some cores to
17 investigate further, did you know what he was
18 investigating?

19 A. I had no idea at the time. I thought he
20 was just going cut cores to check out -- make sure
21 that we didn't have any subgrading problems.

22 MR. CASHION: Your Honor, I'm going to
23 object. I'm not sure he's testifying from a
24 document that was sent to Cory Todd. I'm not sure

1 his -- I don't mind him reading the document, but
2 now he's going beyond where he doesn't have a
3 foundation laid yet.

4 MR. COBB: Let me see if I can lay the
5 foundation. I think I can -- I don't want to have
6 any subsoil problems with my questioning.

7 BY MR. COBB:

8 Q. When that fax is sent, whose office or
9 whose house does it go to?

10 A. Mine.

11 Q. And so when the fax was received by the fax
12 machine, it was in your house?

13 A. Yes, it was.

14 Q. And did you look at it?

15 A. Yes, I did.

16 Q. Did you talk to Cory about it?

17 A. Yes, I did.

18 Q. And did he have authority to accept that
19 proposal?

20 A. Yes, he did.

21 Q. Now, when you saw that John Taylor, the
22 estimator, was going to cut cores, what did you
23 assume that he was going to do with that coring?

24 A. I thought he was going to check the core --

1 core sample so he could, what he says, investigate a
2 little about the subsoil. He just talked about the
3 subsoil above it, you know, so that's what I
4 thought.

5 Q. All right. So you thought it was to
6 investigate the assumptions that he made to see if
7 they were reasonable?

8 A. Yes.

9 Q. All right. And look at the next document.

10 A. Okay.

11 Q. The next one is dated -- it also has a fax
12 stamp of 3/2/2007 and about the same time, doesn't
13 it?

14 A. Yes.

15 Q. And that is a more detailed price list?

16 A. Yes.

17 Q. All right.

18 MR. COBB: Have that marked Exhibit 5,
19 please.

20 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
21 WAS MARKED AS EXHIBIT NO. 5 TO THE TESTIMONY OF THE
22 WITNESS.)

23 THE COURT: So marked.

24 MR. CASHION: What was the date of that?

1 MR. COBB: It's -- it has a fax stamp of
2 3/2/2007, dated March 2nd, 2007, Mr. Cashion.

3 MR. CASHION: Thank you.

4 BY MR. COBB:

5 Q. And it describes a cold plane mill and
6 repave for 38,700; is that correct?

7 A. 3859 square yards, \$39,700.

8 Q. You're right. And in there, it has ten
9 notes; is that correct?

10 A. Yes, it does.

11 Q. And it goes down and gives price does not
12 include, what, seeding --

13 A. Yes.

14 Q. -- sodding?

15 A. Seeding, sodding, back filling around edge
16 of asphalt, curb or gutter. Light duty asphalt,
17 minimum two.

18 Q. What does it say on item 5?

19 A. Item 5 says, (as read) subgrade to be proof
20 rolled with loaded truck before installing hot mix
21 asphalt.

22 Q. All right. Did you know what that meant at
23 the time?

24 A. No, I didn't.

1 Q. You do now?

2 A. I do now.

3 Q. All right. Keep moving that, I'll never be
4 able to read that.

5 A. Oh.

6 Q. And you understood the owner was to keep
7 all the millings on your site, correct?

8 A. Yes.

9 Q. All right. Like to pass that, that's
10 Exhibit 5. The next one is also dated March 7th --
11 March 2nd, 2007; is that correct?

12 A. Yes.

13 Q. And it's also on Tennessee Asphalt's
14 letterhead?

15 A. Yes, it is.

16 Q. And it is a letter signed by John Taylor?

17 A. Yes, it is.

18 Q. And here it talks about the prices pegged
19 to an asphalt to the Tennessee Department of
20 Transportation asphalt price?

21 A. Yes.

22 Q. All right.

23 MR. COBB: Have that marked the next
24 Exhibit 6.

1 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
2 WAS MARKED AS EXHIBIT NO. 6 TO THE TESTIMONY OF THE
3 WITNESS.)

4 THE COURT: So marked.

5 BY MR. COBB:

6 Q. All right. The next document has a fax
7 stamp of March 29th, 2007. It's from Tennessee
8 Asphalt Company to Cory Todd?

9 A. Yes.

10 Q. And that's your fax number again?

11 A. It is.

12 Q. And what does that say?

13 A. It said that (as read), Cory, the following
14 is a proposal per -- as per your request. Please
15 sign, date the very bottom of the proposal and fax
16 or mail back so I can get the work order out.

17 Q. Had --

18 MR. COBB: Let me mark that the next
19 exhibit.

20 MR. CASHION: Excuse me, what was the date?

21 MR. COBB: 27th.

22 MR. CASHION: 27th?

23 THE WITNESS: 29th.

24 MR. COBB: I'm sorry, march 29th.

1 MR. CASHION: March 29th.

2 BY MR. COBB:

3 Q. In this cover letter, it shows a total of
4 four pages; is that correct?

5 A. Yes.

6 Q. All right. And are the next three pages
7 have the same fax stamp?

8 A. Yes, they --

9 Q. All right.

10 A. -- let me see. Yes, they do.

11 Q. Okay.

12 MR. COBB: Yeah. Let's -- let's mark those
13 four pages together as the next -- as the next
14 collective exhibit.

15 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
16 WAS MARKED AS EXHIBIT NO. 7 TO THE TESTIMONY OF THE
17 WITNESS.)

18 THE COURT: Why don't you staple those so
19 they don't get separated.

20 BY MR. COBB:

21 Q. The front page is a cover sheet. What is
22 the second page of Exhibit 7?

23 A. It's another little letter signed by John
24 Taylor. Do I need to read it?

1 Q. No, that's fine. What's the next page?

2 A. It is the contract proposal.

3 Q. And item 10, what does it say?

4 A. Price does not include testing.

5 Q. Was that the first time that you had seen
6 that separated out in the contract or in the written
7 documents about the testing?

8 A. Yes.

9 Q. Mr. Smith, you knew that John Taylor said
10 that they assumed that the gravel was okay?

11 A. Yes.

12 Q. They assumed that the subsoil was okay?

13 A. Yes.

14 Q. And that they wanted -- but you wanted to
15 do some coring to check?

16 A. That's correct.

17 Q. You knew that if there was additional
18 testing needed you'd have to pay for it?

19 A. That is correct.

20 Q. All right. And were you willing to pay for
21 the testing necessary to figure out what needed to
22 be done to repave your track?

23 A. Yes.

24 Q. If you knew that it was going to cost

1 \$180,000 to repave the track, would you have liked
2 to have known that before you got started?

3 A. Absolutely.

4 Q. Would you have said no?

5 A. Yes.

6 Q. And why is that?

7 MR. CASHION: Judge, we're getting leading
8 questions and speculation.

9 THE COURT: Don't lead the witness.

10 MR. COBB: All right.

11 BY MR. COBB:

12 Q. If the testing had showed that the subsoil
13 would not support repaving in the manner proposed
14 TAC, what would you have done?

15 A. We would have continued to race at the
16 level we were racing at. Same racetrack, you know,
17 same blacktop.

18 Q. All right. And then was that a -- was that
19 a feasible option for you at that time?

20 A. Yes.

21 Q. Did you assume that all the tested that
22 needed to be done had been done before they started
23 the paving?

24 A. Yes.

1 Q. Look at the next page of that contract.
2 And it is a -- looks like a preprinted form,
3 Tennessee Asphalt Company?

4 A. (Witness reviewing document.) Yes.

5 Q. It says Standards Terms and Conditions?
6 Was there any negotiation on what that contract
7 said, or did they just send a form for y'all to
8 sign?

9 A. Just sent the form for us to sign.

10 MR. COBB: Pass that.

11 BY MR. COBB:

12 Q. Did you tell Tennessee Asphalt what they
13 needed to do to pave your track properly or repave
14 your track properly?

15 A. No.

16 Q. Did you know that their heavy trucks would
17 damage the staging area if they rolled on them?

18 A. No.

19 Q. Did you know the heavy trucks would damage
20 the shutdown area if they rolled on it?

21 A. No.

22 Q. Did you expect them to use their judgment
23 about where to send heavy equipment and heavy
24 trucks?

1 A. Yes.

2 Q. Did you expect them to use their judgment
3 on what sort of testing to do before they started
4 milling and paving the --

5 MR. CASHION: Still leading quite heavily,
6 Your Honor.

7 MR. COBB: Sustained. Don't lead the
8 witness.

9 BY MR. COBB:

10 Q. What did you expect Tennessee Asphalt to do
11 before they started milling and paving the track?

12 A. I mean, I expected them to do everything
13 that they should do before they do it. My -- my
14 job -- you know, when I go into a job, I -- I
15 take -- inspect pipeline. I answer -- I go in and
16 buy easements and make sure the properties occur
17 before the -- you know, everything's ready before
18 the -- the contractor goes in to do it. I expected
19 they would come in, assess what needed to be done,
20 and, you know, do it and advise me on what needed to
21 be done.

22 Q. All right. The target date for the milling
23 and paving was the week starting Monday, April 30th,
24 to be ended by the next week; is that right?

1 A. Yes.

2 Q. All right. Who -- who talked to them about
3 that day; was that you or was that Cory?

4 A. Cory.

5 Q. And on Monday, when the milling started,
6 were you there when they got there?

7 A. No.

8 Q. And did you come by sometime that day?

9 A. I come by I think twice that day.

10 Q. All right. Tell me about it. When you
11 went by, what was going on, and what did you see?

12 A. The first -- first day I went by or first
13 time I went by that day, I think they were on the
14 first pass of milling, and everything seemed to be
15 going fine.

16 Q. All right. Now, milling is where they're
17 scraping off the asphalt or chewing it up?

18 A. They were grinding the 2 inches of asphalt
19 off of the -- of what was there.

20 Q. And did they do that all in one pass or
21 they have to make several passes?

22 A. I would say probably five passes.

23 Q. All right. And when you came by the second
24 time was everything still going okay?

1 A. Yeah. The second time I went by -- came by
2 was in -- maybe 2:30, 3 o'clock that afternoon. I
3 think he had said that they had a few soft spots
4 that they had found with the milling machine, and --
5 but everything looked like it was still going to be
6 fine.

7 Q. All right. Did they ask Cory to sign a
8 contract for overrun agreement for asphalt?

9 A. Yeah. He had asked him to sign it because
10 of the little area that they found that was a little
11 soft. He said, well, you know, you can bridge over
12 it and pave over that with a little extra asphalt.

13 Q. Well, did they explain to you what they had
14 found in any detail?

15 A. No.

16 Q. Did they explain to you the risk that they
17 had discovered?

18 A. No.

19 Q. Did they explain to you that, if they
20 continued doing it this way, it might not work at
21 all?

22 A. No.

23 Q. What did they explain to you?

24 A. Told me that they had a little rutting

1 and -- and -- and the -- the ruts could be filled up
2 with asphalt, you know. And the only -- he said the
3 only other option you got would be to dig out the
4 whole thing and -- and put chunk rock and all this
5 and was get a big price.

6 And I said, well -- I told him at that
7 point, you know, I said, we have to -- we have to
8 get the racetrack together. He give me a price, and
9 I said, well, you know, I don't have financing
10 available for that, but I'll -- I can acquire it,
11 you know. It may take me a day or so.

12 Q. Okay. Did he -- did -- well, let me put
13 these documents in the record. The next set of
14 documents are dated April 30th, 2007; is that
15 correct?

16 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
17 WAS PASSED TO THE WITNESS.)

18 A. (Witness reviewing document.) Yes.

19 Q. All right. The first one is a handwritten
20 information on a Tennessee Asphalt Company form?

21 A. Yes.

22 Q. To Cory Todd from John Taylor?

23 A. That's correct.

24 Q. And it says, please sign, date, and fax

1 back to me?

2 A. That's correct.

3 Q. Look at the next document. Is that a
4 document dated April 30th, 2007?

5 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
6 WAS PASSED TO THE WITNESS.)

7 A. (Witness reviewing document.) Yes, it is.

8 Q. And is it signed by Cory Todd?

9 A. Yes, it is.

10 Q. And it is an owner's agreement for asphalt
11 pavement?

12 A. Yes.

13 Q. All right. And was that done by Cory after
14 the -- talking to TAC --

15 A. Yes.

16 Q. -- and John Taylor, Tennessee Asphalt? All
17 right. What's the third document?

18 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
19 WAS PASSED TO THE WITNESS.)

20 A. (Witness reviewing document.) It is cost
21 for a patch area that they were going to patch
22 actually out of the bid area.

23 Q. All right. Let's talk about that -- that
24 patch area, and then I'm going to make all three of

1 those documents the next exhibit.

2 Was that patch area in the racetrack, or
3 was it in -- in the shutdown area?

4 A. It was about 100 feet past the racetrack
5 area they were going to pave.

6 Q. Right in here?

7 A. Yes.

8 Q. All right. And was that something that was
9 disrupting racing, or was that something that you
10 were trying to just do as preventative maintenance?

11 A. Just preventative maintenance.

12 Q. How large was the patch?

13 A. 30 by 12.

14 Q. No milling involved?

15 A. No.

16 Q. Just putting some hot mix over it?

17 A. I think they took a backhoe and just
18 scratched the top of it out, cut it out a little
19 square and, you know, pave it back.

20 Q. All right.

21 MR. COBB: Let's make these three
22 documents, April 30th, the Exhibit.

23 THE COURT: It'll be 8.

24 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT

1 WAS MARKED AS EXHIBIT NO. 8 TO THE TESTIMONY OF THE
2 WITNESS.)

3 BY MR. COBB:

4 Q. That afternoon, Monday afternoon, when John
5 Taylor asked Cory Todd to sign a contract to pay for
6 additional asphalt, were you there during that
7 discussion?

8 A. I can't remember if I was there. I know I
9 knew about it and talked to Cory about it.

10 Q. Well, you heard Mr. Cashion in his opening
11 say that the risk of this thing failing is something
12 that was explained to you and that you knew about
13 and that you had said go ahead and pave it this way.
14 Is that true, had the risks been explained to you?

15 A. No.

16 Q. Did you assume that they had done the
17 proper testing --

18 A. Yeah.

19 Q. -- at that time?

20 A. Yes.

21 Q. And when they asked for the authority to --
22 to do this paving overrun, what did you assume about
23 whether that would work?

24 A. I figured they were the people that pave

1 every day and they knew what they were doing, so I
2 don't pave so I didn't really -- you know...

3 Q. Well, did they tell you they thought it
4 would work?

5 A. Yes, they told me it would. It's worked
6 before.

7 Q. They told you it would work?

8 A. Yeah. Yes.

9 Q. Did you rely on that?

10 A. Yes, I did.

11 Q. And did you -- were you told that they
12 needed to do more testing before they knew it would
13 work or not?

14 A. No.

15 Q. If they had said, we need to do a little
16 more testing, like they had before in March 2nd,
17 what would you have said?

18 A. Let's do it.

19 Q. Did -- were you -- let me back up. After
20 that, what -- what happened the next day, on May
21 1st?

22 A. They began paving.

23 Q. How'd that go?

24 A. Well, evidently, not real good.

1 Q. Well, you -- you were there.

2 A. No, I was -- I was not there on -- actually
3 on that day.

4 Q. Well, you saw the results of that?

5 A. I saw the results of that, yes.

6 Q. Did they finish paving it?

7 A. No, they didn't --

8 Q. Sweep it clean, ready to go?

9 A. No, they didn't.

10 Q. What happened?

11 A. They started their paving, I think, on the
12 first pull of the paving. It was fairly well. I
13 think down toward the end of the first pull, at the
14 end of the 700 feet, they were -- got -- I'm not
15 really stuck, but they got mired down a little bit.

16 MR. CASHION: Your Honor, I'm going to
17 object. I'm not sure what he's testifying to if he
18 wasn't there.

19 MR. COBB: Actually, I was getting ready to
20 do the same thing.

21 THE WITNESS: Okay.

22 BY MR. COBB:

23 Q. Don't -- don't say what happened while you
24 weren't there --

1 A. Okay.

2 Q. -- but if they didn't finish paving, I'm
3 assuming you came and looked at why they stopped and
4 you saw -- I mean, I want to know what you saw --

5 A. Oh, okay.

6 Q. -- not what somebody --

7 A. I'm sorry.

8 Q. -- told you they saw. I'll tell them later.

9 A Okay.

10 MR. COBB: And I appreciate you pointing
11 that out.

12 BY MR. COBB:

13 Q. When -- let -- let's start piece by piece.
14 When you got there, had they damaged the staging
15 area with use of heavy equipment?

16 A. Yes. When I got there, I turned in the
17 gate. And just soon as I turned in the gate, I --
18 the staging area is right directly in front of the
19 entrance. I looked at that and just --

20 Q. Excuse me a second. All right.

21 BY MR. COBB:

22 Q. Let me --

23 MR. COBB: May I approach, Your Honor?

24 THE COURT: Yes, sir.

1 BY MR. COBB:

2 Q. Let me show you this photograph here.
3 What's that a photograph of?

4 A. (Witness reviewing photograph.) That's the
5 staging area.

6 Q. All right. That wasn't supposed to be
7 milled or paved?

8 A. No.

9 Q. If you would, pass that to the Court so he
10 can see that. And did you ask someone at Tennessee
11 Asphalt what happened?

12 A. Yes.

13 Q. What did they tell you?

14 A. That the trucks bringing the asphalt in had
15 broken through the asphalt.

16 Q. All right.

17 MR. COBB: Have that marked as the next
18 exhibit.

19 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
20 WAS MARKED AS EXHIBIT NO. 9 TO THE TESTIMONY OF THE
21 WITNESS.)

22 THE COURT: Exhibit 9.

23 BY MR. COBB:

24 Q. What I'd like to do, Monte, is keep all the

1 photographs up here because Mr. Cashion may want to
2 look at them.

3 Now, if it was going to tear up your
4 staging area to pave this, would you have liked to
5 have known that before you started?

6 A. Yes.

7 Q. Was it possible to get to this area without
8 running heavy equipment over the staging area?

9 A. Yes.

10 Q. All right. Would -- and what -- what did
11 you expect the paving company to do if they saw the
12 trucks were starting to damage your staging area?

13 A. To maybe take an alternate route.

14 Q. Did it also do damage to the shutdown
15 track?

16 A. Yes.

17 Q. Is that is a picture of the shutdown?

18 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
19 WAS PASSED TO THE WITNESS.)

20 A. (Witness reviewing photograph.) I think
21 so.

22 Q. All right.

23 MR. COBB: Let's mark that the next
24 exhibit.

1 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
2 WAS MARKED AS EXHIBIT NO. 10 TO THE TESTIMONY OF THE
3 WITNESS.)

4 THE COURT: Exhibit 10.

5 BY MR. COBB:

6 Q. And the photograph sort of speaks for
7 itself except it doesn't. Describe what -- what
8 that photograph shows.

9 A. It looks like one of the tire marks where
10 the -- the paving trucks continually drove in one
11 spot, the same spot time and time again.

12 Q. Broke through?

13 A. Yes.

14 Q. All right. How about this photograph here;
15 what area is that?

16 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
17 WAS PASSED TO THE WITNESS.)

18 A. (Witness reviewing photograph.) I think
19 that's going to be on the shutdown area, too.

20 Q. All right.

21 MR. COBB: Mark it Exhibit 11.

22 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
23 WAS MARKED AS EXHIBIT NO. 11 TO THE TESTIMONY OF THE
24 WITNESS.)

1 BY MR. COBB:

2 Q. And how about here?

3 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
4 WAS PASSED TO THE WITNESS.)

5 A. (Witness reviewing photograph.) That's
6 going to be your shutdown area, too.

7 Q. All right.

8 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
9 WAS MARKED AS EXHIBIT NO. 12 TO THE TESTIMONY OF THE
10 WITNESS.)

11 BY MR. COBB:

12 Q. How about this?

13 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
14 WAS PASSED TO THE WITNESS.)

15 A. (Witness reviewing photograph.) That's the
16 shutdown area.

17 MR. COBB: Mark it Exhibit 13.

18 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
19 WAS MARKED AS EXHIBIT NO. 13 TO THE TESTIMONY OF THE
20 WITNESS.)

21 BY MR. COBB:

22 Q. Is that the shutdown or staging?

23 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
24 WAS PASSED TO THE WITNESS.)

1 A. (Witness reviewing photograph.) staging.

2 Q. What's that?

3 A. Staging. Staging.

4 Q. All right. Let me show you three more
5 photographs. We'll mark those the next -- these are
6 all more of the staging area?

7 A. Yes.

8 Q. All right.

9 MR. COBB: COBB: Mark those 14, 15, 16.

10 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
11 WAS MARKED AS EXHIBIT NO. 14 TO THE TESTIMONY OF THE
12 WITNESS.)

13 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
14 WAS MARKED AS EXHIBIT NO. 15 TO THE TESTIMONY OF THE
15 WITNESS.)

16 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
17 WAS MARKED AS EXHIBIT NO. 16 TO THE TESTIMONY OF THE
18 WITNESS.)

19 BY MR. COBB:

20 Q. Monte, what is that one?

21 (WHEREUPON, THE ABOVE-MENTIONED PHOTOGRAPH
22 WAS PASSED TO THE WITNESS.)

23 A. (Witness reviewing photograph.) Staging.

24 MR. COBB: Mark it 17.

1 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
2 WAS MARKED AS EXHIBIT NO. 17 TO THE TESTIMONY OF THE
3 WITNESS.)

4 BY MR. COBB:

5 Q. What is that?

6 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
7 WAS PASSED TO THE WITNESS.)

8 A. (Witness reviewing photograph.) Staging
9 also.

10 MR. COBB: Mark that 18.

11 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
12 WAS MARKED AS EXHIBIT NO. 18 TO THE TESTIMONY OF THE
13 WITNESS.)

14 MR. COBB: Put that -- put those stages
15 together.

16 BY MR. COBB:

17 Q. And this is -- this is the shutdown area?

18 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
19 WAS PASSED TO THE WITNESS.)

20 A. (Witness reviewing photograph.) That's
21 actually the -- the racetrack part.

22 Q. All right.

23 A. This is the staging area.

24 Q. All right. Staging -- this is staging?

1 MR. COBB: Mark that one.

2 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
3 WAS MARKED AS EXHIBIT NO. 19 TO THE TESTIMONY OF THE
4 WITNESS.)

5 BY MR. COBB:

6 Q. All right. The Court may want to see
7 those.

8 MR. CASHION: Is that 19?

9 MR. COBB: 19, I'm sorry.

10 THE WITNESS: 19, yeah.

11 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
12 WAS PASSED TO THE WITNESS.)

13 A. (Witness reviewing photograph.) That's the
14 staging -- that's shutdown. This is staging.

15 BY MR. COBB:

16 Q. Mr. Smith, when you got to your track --
17 let me ask you this: Had you run a race the week --
18 that weekend before?

19 A. Yes, we had.

20 Q. When you got to the track and saw the
21 condition that it was in, what did you think?

22 A. It wasn't nice. I thought we were in a bad
23 problem going on right here.

24 Q. Well, was the -- was the racetrack itself,

1 was it paved?

2 A. No.

3 Q. Had they quit in the middle?

4 A. Yes.

5 Q. Was the staging area damaged?

6 A. Yes.

7 Q. Was the shutdown area damaged?

8 A. Yes.

9 Q. What did you think?

10 A. I didn't really know what to think. I knew
11 we had a bad problem in the -- I didn't know what to
12 do to fix it.

13 Q. Well, did you call the people you had hired
14 to fix it in the first place and talk to them?

15 A. Yes.

16 Q. Who did you call?

17 A. I don't know what day it was, but I called
18 Mr. Ratliff's office one day, and he was out of the
19 office.

20 Q. Mr. Ratliff was in Knoxville at that time?

21 A. Knoxville, yes.

22 Q. All right. And did you have a conversation
23 with him?

24 A. Not that day. He returned my phone call a

1 couple days later, and I just asked him if he knew
2 the problem we were having down here and what was
3 going on. And he said he knew a little about it,
4 but he would -- asked him would he come down and
5 take a look at it.

6 Q. All right. Did somebody come down and take
7 a look at it with you that week?

8 A. Yes.

9 Q. Who came down?

10 A. When we met that day to look at it,
11 collectively, it was Mr. Ratliff; I guess, Austin --

12 Q. Austin Bateman?

13 A. -- Bateman.

14 Q. And is he with the head of the Paris office
15 of the TAC?

16 A. A Yes. My wife, Stephanie --

17 Q. Stephanie Smith.

18 A. -- Smith, Cory --

19 Q. Cory Todd's your brother-in-law.

20 A. -- Todd, my brother-in-law; myself, and I
21 had a friend named Kyle Atkins that was there.

22 Q. All right. Kyle was an attorney in
23 Humboldt?

24 A. Yes, he is.

1 Q. All right. He wasn't representing you at
2 that time?

3 A. No, he's not.

4 Q. How did you know Kyle?

5 A. We went to high school together, played
6 football together, you know. Just real good
7 friends.

8 Q. Well, when you had that meeting, was that
9 the week the paving was supposed to be done, or was
10 that the next week?

11 A. It was the next week.

12 Q. Did you have a meeting without Mr. Ratliff
13 at the track?

14 A. Yes.

15 Q. That's what I want to talk you about.

16 A. Okay.

17 Q. When you saw the condition of that track
18 Tuesday with the staging area crumpled, with the
19 shutdown area broken through and the racetrack
20 unfinished, what did you and Mr. Austin say to each
21 other?

22 A. Well, just really, you know, what --
23 what -- what's the -- what happened, you know.
24 And -- and we told him -- you know, I told him, you

1 know, what do we need to do to fix it. And...

2 Q. When -- when you said, what happened, what
3 did he tell you?

4 A. Well, he said, it broke through and started
5 pumping. You know --

6 Q. Did you know what that meant then?

7 A. No.

8 Q. Do you now?

9 A. Yes.

10 Q. Did he say anything else?

11 A. Well, he said that --

12 Q. Did he say, this is your fault, I told you
13 this would happen, or anything like that?

14 A. No. No, he just -- he just told me -- you
15 know, he said, you know, when it started, I guess,
16 sinking, you know, the day -- the day before, you
17 know, he just had said, you know, we can fix it with
18 asphalt.

19 Q. Did you have any idea that these people
20 that were there to pave and make your track better
21 could do this to it?

22 A. No.

23 Q. Did they ever explain to you that was one
24 of the risks of them continuing to do the way they

1 were doing?

2 A. No.

3 Q. Did you ever accept that risk?

4 A. No.

5 Q. Would you have accepted that risk if it had
6 been explained to you?

7 A. No.

8 Q. Did you ask Tennessee Asphalt and
9 Mr. Austin Bateman and Mr. Ratliff to fix it like
10 they promised that it would be?

11 A. Yes.

12 Q. Did they agree to do that?

13 A. No.

14 Q. Did they say that for a certain amount of
15 money they would go and do something else?

16 A. They -- they give me a price, a couple
17 different -- like I say, I don't know exactly when
18 and when these prices come about, but at one point
19 in time they give me a price of -- I mean, I -- it
20 was like 80- to \$90,000 to do the 700 feet. But
21 then I would be responsible for the -- what they
22 messed up on the other 700 feet plus the original
23 contract cost.

24 Q. At that point, did they suggest maybe we

1 ought to do some geotechnical testing?

2 A. At one point they did.

3 Q. It was after you hired me, though, right?

4 A. Yes.

5 Q. Okay. But -- but what -- when it was just
6 you and Mr. Ratliff, did they say, we probably ought
7 to go down and do some coring samples, any other
8 testing?

9 A. No.

10 Q. Did they guarantee that this 100,000,
11 \$150,000 solution would work?

12 A. No.

13 Q. Did you ask them, can you guarantee this
14 will work?

15 A. Yes.

16 Q. And what'd they say?

17 A. No.

18 Q. Who said that, Mr. Ratliff?

19 A. Mr. Bateman.

20 Q. All right. Austin Bateman? All right.
21 Now, at some point, you called my office and asked
22 me to enter into negotiations with them, correct?

23 A. Correct.

24 Q. And we were not able to get it resolved?

1 A. That's correct.

2 Q. Did you hire somebody else who would
3 guarantee you?

4 A. Yes.

5 Q. What did you do to fix this problem?

6 A. I investigated just what needed to be done
7 and talked to Jimmy Harrison at Ford Construction.
8 Mr. Harrison said that he thought he could fix it,
9 said he knew that -- he built the road out there on
10 Highway 22, knew what he did there, and he knew he
11 could take care of it.

12 Q. All right. Did you share with him the
13 geotechnical report that David Evans had produced?

14 A. I think so.

15 Q. And did he make a proposal to you of a plan
16 of action?

17 A. Yes, he did.

18 Q. What did he do?

19 THE COURT: What was the -- what's the date
20 on the report that you --

21 MR. COBB: June the 7th was the date of the
22 investigation, and Mr. Evans will -- will testify, I
23 don't think there's any dispute, he was out there
24 the 7th and the report was dated June 20th.

1 BY MR. COBB:

2 Q. What did Mr. Harrison at Ford say he
3 would -- would do?

4 A. He said he would come in and strip the --
5 what asphalt had been put back down, take it up, and
6 install soil cement in the first 700 feet area, and
7 then to -- he said to stabilize what they had done
8 in the shutdown area, the same thing would have to
9 be done to fix that.

10 Q. Because of the damage that TAC had done to
11 the shutdown area, could it simply be paved over?

12 A. No.

13 Q. Okay. Because of the damage to the staging
14 area, could it be paved over?

15 A. Yes, because it's not a high traffic -- a
16 high speed area.

17 Q. All right. So the requirements were a bit
18 less?

19 A. A whole lot less.

20 Q. All right. Did you enter into an agreement
21 with Mr. Harrison to fix the problem after TAC left?

22 A. Yes.

23 Q. And how much did that cost?

24 A. \$186,000, I think.

1 Q. All right. And is the track any longer
2 than it used to be?

3 A. No.

4 Q. Is it any wider than it used to be?

5 A. No.

6 Q. Is the staging area any better than it used
7 to be?

8 A. No.

9 Q. And the track is now back in operation?

10 A. It is.

11 Q. How many weekends of racing did you miss
12 while it was shut down?

13 A. 13.

14 Q. All right. And when it reopened, did
15 everyone that had been racing there before come
16 back, your regulars, or did you lose some?

17 A. We lost some.

18 Q. Tell me about that.

19 A. Racing is kind of a family sport, and
20 when -- when racers race at a place they race
21 continually for -- in our -- in our case, we do a
22 year-long points program. And in the 13 weeks that
23 we were closed, of course, we weren't racing, so
24 that meant that -- that the racers had to go

1 somewhere else because racers are going to race no
2 matter whether you're open or somebody else was
3 racing.

4 Q. Was it good racing weather that summer?

5 A. Yes, it was.

6 Q. Warm? Dry?

7 A. Warm and dry.

8 Q. So the racers went somewhere else?

9 A. Yes, they did.

10 Q. You talk about this point system, let me
11 see if I understand it. Is this something where the
12 more times you show up, you accumulate points for
13 the season?

14 A. Right. Each -- each day you show up, you
15 get what we call is show-up points, and then each
16 round you win, you get additional points. And at
17 the end of the year we have a payout for the points,
18 participants, and who finishes the higher, gets the
19 more money throughout the year. It's just kind of
20 an incentive to race with us week after week after
21 week.

22 Q. When the track was reopened and it had the
23 new surface, did you have some -- some new people
24 that came the see the new track?

1 A. Yes.

2 Q. Did you have some regulars who had gotten
3 locked into other tracks that didn't come back?

4 A. Yes.

5 Q. Did your -- is your wife the one that kept
6 the books --

7 A. Yes, she is.

8 Q. -- and crunched the numbers?

9 MR. COBB: No further questions.

10 Mr. Cashion may have some.

11 THE COURT: All right, let's take a short
12 10-minute break -- recess.

13 (WHEREUPON, A SHORT BREAK WAS TAKEN. THE
14 PROCEEDINGS CONTINUED AS FOLLOWS.)

15 THE COURT: All right. Be seated. Are you
16 finished with your direct?

17 MR. COBB: Yes, Your Honor, I am.

18 THE COURT: All right. I tell you what, if
19 you would, close that door. Mr. Cashion, are you
20 ready to do cross?

21 MR. CASHION: MR. CASHION: Yes, Your
22 Honor.

23 THE COURT: Go ahead.

24 CROSS-EXAMINATION

1 BY MR. CASHION:

2 Q. Mr. Smith, I understand that you have an
3 associate's degree from Jackson State --

4 A. Yes.

5 Q. -- Jackson State -- Jackson State Community
6 College? And you worked for West Tennessee Public
7 Utility since 1989?

8 A. That's correct.

9 Q. The past 17 years or so, you've been a
10 construction inspector for West Tennessee?

11 A. That's correct.

12 Q. And West Utility performs about \$5 million
13 per year over the last several years?

14 A. Roughly.

15 Q. And you worked out of the Huntingdon
16 office?

17 A. That's correct.

18 Q. Do you live in Huntingdon?

19 A. I do.

20 Q. And on your jobs, you interfaced with
21 engineers weren't to the design of the construction
22 line improvements, correct?

23 A. Yes.

24 Q. And you worked primarily with civil

1 engineers?

2 A. That's correct.

3 Q. And so you're used to dealing with
4 contractors in your work?

5 A. Contractors, yes.

6 Q. And you're used to dealing with engineers?

7 A. Yes.

8 Q. And you're used to dealing with soil
9 conditions in your line of work?

10 A. No.

11 Q. You don't, as a --

12 A. Well, we dig it up -- we dig it up and put
13 it back down, yes.

14 Q. Okay. If you buy a bad soil condition, you
15 have to address that?

16 A. We dig it up and put it back down.

17 Q. So -- and, generally, you understand the
18 construction process?

19 A. That's correct.

20 Q. I think you said the track was built in
21 1993?

22 A. Yes.

23 Q. Okay. And you started leasing in '96 and
24 purchased in '97?

1 A. '99.

2 Q. Excuse me, '99. Thank you. And that you
3 worked basically 10 or 12 hours at the -- at the
4 racetrack per week?

5 A. Roughly. I mean, maybe more, maybe -- you
6 know, most of the time more..

7 Q. Okay. And you're president of the LLC?

8 A. That's correct.

9 Q. And did you execute the contract or did
10 Mr. Todd execute the contract?

11 A. Cory.

12 Q. And if you would, pull out that contract,
13 it's Exhibit 7.

14 A. (Witness complying.)

15 Q. And when we read the proposal, and I'm
16 looking at my blowup of item number 7. Do you see
17 that? I believe it's the third page.

18 A. That would be Page 3?

19 Q. Yeah, Page 3.

20 A. Okay.

21 Q. Okay. And you realize that the assumption
22 on the part of the contractor was assuming that
23 proper gravel and base material is existing in place
24 after milling 2 inches of asphalt surface. Do you

1 see that?

2 A. Yes.

3 Q. And price does not include gravel or base
4 material, undercutting, or any other subgrade work.
5 Do you see that?

6 A. Yes.

7 Q. Okay. Now, you recognized that if you have
8 a subgrade or base material problem, that's not in
9 their price, correct?

10 A. Yes.

11 Q. Okay. And did you ever ask anyone from
12 Tennessee Asphalt to remove this Item No. 7 from the
13 contract, that you wanted them to be responsible for
14 everything?

15 A. No.

16 Q. Okay. And on this particular job, your
17 brother-in-law, Cory Todd, was doing the interface
18 with Tennessee Asphalt?

19 A. That's correct.

20 Q. He signed the proposal, he signed the
21 change orders, he was the one that was administering
22 this contract for the raceway?

23 A. That's correct.

24 Q. And I think you testified that he didn't --

1 he does not receive money from the racetrack, he's
2 got the brother-in-law deal as you described?

3 A. That is right.

4 Q. And while this work was going on, you're
5 still working full-time with the utility company?

6 A. Correct.

7 MR. COBB: Mr. Smith, do you want some of
8 this water?

9 THE WITNESS: Please. Thank you.

10 BY MR. CASHION:

11 Q. Now, Mr. Smith, what I want to do is focus
12 a little bit on the -- what you saw on Monday, April
13 the 30th, 2007. Okay. And that was when they were
14 doing the milling, correct?

15 A. Correct.

16 Q. They completed the milling that day,
17 correct?

18 A. That is correct.

19 Q. Okay. And were you there when they took
20 the -- the loaded dump trucks and proof rolled
21 the -- what was -- the base stone --

22 A. No.

23 Q. -- out there? So you didn't see the proof
24 rolling?

1 A. No.

2 Q. Okay. Did you know it was performed?

3 A. No.

4 Q. Did Cory tell you that they proof rolled
5 it?

6 A. No.

7 Q. Okay. But you came out there at some
8 point, and you talked to Austin Bateman, correct?

9 A. The first day?

10 Q. The first day, after it's -- it's all --

11 A. After it was over, okay, yeah. I think so.

12 Q. After it's milled?

13 A. That's correct.

14 Q. And John Taylor brought Austin Bateman
15 because there was an issue with the -- the base
16 stone. The -- do you recall being told that the
17 milling machine --

18 A. Had rutted -- had rutted a couple times.

19 Q. Right. Now, in your direct testimony, you
20 stated that Mr. Bateman explained that there was
21 some little spots that they could bridge over. Do
22 you remember that?

23 A. Yeah.

24 Q. Didn't he tell you much more -- that this

1 was much more serious problem than just some little
2 spots that he could bridge over?

3 A. No.

4 Q. Well, if he just told you there were some
5 little spots they could bridge over, you also said
6 that he told you, well, we may have to dig out the
7 whole thing and put chunk rock in it. You remember
8 testifying to that?

9 A. Oh. Oh, yeah, yeah. I'm sorry.

10 Q. Okay.

11 A. He did say something about it.

12 Q. So was he explaining that under -- let's
13 just call it plan B because plan A's not working
14 well, you can't just put it right back. Under plan
15 B, you just got some little spots, but plan C is we
16 got to take all this out and put all this chunk rock
17 back in. Was that the way he was explaining it to
18 you, or was he telling you there was a big problem
19 here that maybe you could bridge it, maybe -- if you
20 didn't you were going to have to take it all out?

21 A. He told me that -- that the -- the rutting
22 that he -- that had happened, he said, you know, it
23 could have been a big problem and it could be just
24 the easy-fix problem with a little extra asphalt.

1 Q. So he did explain that this could be a big
2 problem?

3 A. He said it could be a problem, I don't know
4 exactly if he said big.

5 Q. But he told you that it could, that I -- if
6 you didn't want to just pave over it, then the only
7 thing he needed to do was take it all out --

8 A. Right.

9 Q. -- and put the chunk rock in, and that's
10 going to be very expensive, right?

11 A. That's correct.

12 Q. And after he told you he could maybe -- did
13 he say -- you said he told you -- Austin Bateman
14 said -- told you that it would work. Is that what
15 you're testifying to? Did he tell you, if you pave
16 over it, that will work?

17 A. He said that they had done it several times
18 before on soft soil like that and had no problems.

19 Q. But did he tell you in this type that I
20 guarantee you that's going to work?

21 A. He didn't never say he'd guarantee
22 anything.

23 Q. Okay. But he didn't -- what he told you
24 was we've done it before, and it's worked in the

1 past?

2 A. He said it's worked several times.

3 Q. Okay. But he never guaranteed that if you
4 agreed the extra asphalt overrun agreement that that
5 would cure this problem, did he?

6 A. He said it -- it had worked several times
7 in the past and he said he thought it would work.

8 Q. But he didn't guarantee that it would work?

9 A. No.

10 Q. Okay. You understood that there was still
11 a risk there that, if you paved over and did some --
12 just put more asphalt, that it might not work?

13 A. Not really.

14 Q. Okay. Well, you understood from the
15 proposal that you still had the risk if there was a
16 subgrade problem, correct?

17 A. From what it said on the proposal, yes.

18 Q. And I think, on that same day, you told him
19 to -- you gave him authorization to go repave that
20 area, I think it was a 30 foot by 12 foot?

21 A. 30 foot by 12 foot.

22 Q. And that was in the slowdown lanes, right?

23 A. It was about -- about 100 feet past the --
24 the 700.

1 Q. I'm going to hand to you --

2 A. Okay.

3 Q. -- I'm going to hand to you Exhibit 1 which
4 is the large aerial photograph.

5 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
6 WAS PASSED TO THE WITNESS.)

7 A. (Witness reviewing photograph.)

8 Q. Just point to me where this is going to be
9 occurred as far as the area to be paved and the
10 slowdown area.

11 A. Actually, it's that little light spot right
12 there.

13 Q. Okay. So it's about -- you're guessing
14 100, 150 feet from the end of the 700-foot
15 racetrack?

16 A. That's correct.

17 Q. Okay. And on that day, on Monday, did you
18 make any complaints about the trucks that had been
19 passing over the slowdown area?

20 A. No.

21 Q. Okay. And do you know if those trucks were
22 loaded with the milled material or not when they
23 were passing up through there?

24 A. I don't know.

1 Q. Okay. Did you not notice that condition or
2 was that something that was fine on Monday and it
3 got worse on Tuesday?

4 A. I didn't notice it on Monday.

5 Q. Okay. And you never told Tennessee
6 Asphalt, you need to run off in -- I think it was a
7 bean field back then, wasn't it?

8 A. No, it just grass, I mean, it was an old
9 field. I mean, the --

10 Q. At one time, it may have been?

11 A. May have been -- it is now, but if -- at
12 that point in time, it was just a grown-up crop
13 field.

14 Q. But you never told them that, hey, guys,
15 you don't need to be running on this, I want to you
16 run somewhere else, did you?

17 A. No.

18 Q. Okay. I think you -- on May the 2nd, the
19 day after the paving -- or May 1st is when they
20 paved it?

21 A. Correct.

22 Q. When the asphalt sunk down, it looked bad.
23 It wasn't going to be usable for a track, correct?

24 A. That's correct.

1 Q. Okay. The problem was worse than what
2 anyone thought?

3 A. That's correct.

4 Q. On May 2nd, I think you recall that
5 Mr. Bateman told you that to undercut this bad
6 material would be about \$150,000?

7 A. That -- I think that's right.

8 Q. Okay. That would be \$150,000 in addition
9 to the \$39,500 contract?

10 A. Yes.

11 Q. So you know on May 2nd, as far as Tennessee
12 Asphalt's looking at this, it's about \$190,000
13 problem, right?

14 A. Roughly, yes.

15 Q. Okay. And plus, at that time, you knew
16 that you would also be paving for the rutted
17 slowdown area, that would be in addition to that,
18 that's what Mr. Bateman told you?

19 A. Yes.

20 Q. Okay. And he didn't have a price for
21 paving in that rutted area of the slowdown, did he?

22 A. No.

23 Q. He just said you'd be paying for that as
24 well, so it could have been \$200,000 problem?

1 A. That's correct.

2 Q. And, at this time, you didn't know why it
3 was rutting up and why you were having these
4 problems, did you?

5 A. No.

6 Q. Now, you testified that you hired Mr. Jimmy
7 Harrison from Ford Construction Company to come in
8 and fix this, correct?

9 A. That's correct.

10 Q. And that he stated to you that he thought
11 he could fix it, correct?

12 A. Yes.

13 Q. Did he guarantee that he would fix it?

14 A. The words guarantee, no.

15 Q. Did he put in the contract, I guarantee I'm
16 going to be responsible for subgrade, base stone,
17 pavement, everything?

18 A. He said I can fix it; I know what to do to
19 fix it to make it stable.

20 Q. But he didn't guarantee it in the contract?

21 A. I didn't read a guarantee, no.

22 Q. And I think he went to work in, say, late
23 July 2007; is that about right?

24 A. That's -- somewhere along that.

1 Q. Mid to late? Okay. And isn't it true that
2 part of what you had to do because he gave you the
3 price of, I think, \$178,000, and it costs 186-,
4 something like that?

5 A. That's correct.

6 Q. And what you had to do to get financing for
7 this?

8 A. That's correct.

9 Q. And so it took you a little while to get
10 your financing to turn him loose to go fix it,
11 didn't it?

12 A. No.

13 Q. Didn't take any time at all?

14 A. No.

15 Q. And are you saying that Tennessee Asphalt
16 should pay the full amount of everything that you
17 paid to Ford Construction Company?

18 A. I'm saying that anything above and beyond
19 the original contract costs.

20 Q. And so you're saying, I'm going to get a
21 credit for \$39,500; is that --

22 MR. COBB: Your Honor, I'll be glad to -- I
23 mean, I think he's having a -- having a debate about
24 legal principals, and it just a matter of practice,

1 obviously, we should owe the cost of the services
2 we'd asked for, 39,5, I didn't see that, 39,8- --

3 MR. CASHION: 39,5-?

4 THE WITNESS: 39,5-.

5 MR. COBB: 39,5? I'll concede that. I
6 think it's more of a legal question.

7 BY MR. CASHION:

8 Q. So you can see that we got a credit
9 somewhere, you never paid us anything, did you?

10 A. No.

11 Q. Zero?

12 A. Zero.

13 Q. And you can see there's a credit there
14 somewhere of 39,500, right?

15 A. That's correct.

16 Q. Isn't it true that you don't expect for us
17 to pay for the soil cement, whatever that value is?
18 I think it's about \$86,000, you're not expecting us
19 to pay to have the soil cement, correct?

20 A. On part of it. I think you'll be
21 responsible for it on the shutdown area that was
22 damaged as a result of the truck travel across it.

23 Q. Well, do you remember when you gave your
24 deposition, when I took your deposition?

1 A. Yes, sir.

2 MR. CASHION: Could you hand him his
3 deposition?

4 MR. COBB: If I can. Let me -- let me find
5 the copy so I can read along with you, too. You
6 stole my copy.

7 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
8 WAS PASSED TO THE WITNESS.)

9 MR. CASHION: Sorry.

10 BY MR. CASHION:

11 Q. I want to ask you to look on Page 102,
12 Mr. Smith. Are you with me on 102?

13 A. (Witness reviewing document.) I'm looking.
14 I guess that's the big writing of 102?

15 Q. Yes, sir.

16 A. All right.

17 Q. At the very end of the deposition.

18 A. Okay.

19 Q. And I complete my questions, and then a
20 question by your counsel, Mr. Cobb, says, Monte,
21 when counsel asks you about your claim for damages,
22 you understand that Ford did more work than you
23 asked TAC to do in the contract? You say yes.

24 A. Yes.

1 Q. Okay. Like the soil cement, correct? And
2 you say, yes, correct?

3 A. Yes.

4 Q. And then, question is: You don't expect
5 TAC to pay for the soil cement part of the contract,
6 do you? And you say, no, correct?

7 A. That's correct.

8 Q. So when I took your deposition, you said
9 you don't expect TACC to pay for the soil cement
10 that Ford Construction performed, correct?

11 A. In the original contract area.

12 Q. You didn't say that in the original
13 contract?

14 A. Okay.

15 Q. Okay. So you're changing your testimony
16 now?

17 A. No.

18 Q. Okay. So you don't expect for Tennessee
19 Asphalt to pay for the soil cement, correct? I just
20 want to make sure I'm clear on this.

21 A. In the -- in the 700 feet, the first 700
22 feet.

23 Q. Okay. Was the soil good in the -- in the
24 second 700 feet, or do you know?

1 A. Well, we -- we weren't supposed to do
2 anything to the second 700 feet. It --

3 Q. But why did you -- but you repaired all the
4 soil cement in the second 700 feet, right?

5 A. Because it was damaged.

6 Q. But you couldn't put the pavement back.
7 Why was it damaged?

8 A. Because of the trucks.

9 Q. Isn't it true it was damaged because it was
10 saturated, wet, not capable of receiving pavement?

11 A. After the fact of the testing. That was
12 found out --

13 Q. After the fact.

14 A. -- after the fact of the testing, yes.

15 Q. Okay.

16 MR. CASHION: That's all the questions I
17 have, Your Honor.

18 THE COURT: Any redirect?

19 MR. COBB: Please.

20 REDIRECT-EXAMINATION

21 BY MR. COBB:

22 Q. Mr. Smith, if the pavers had come in and
23 simply repaired the racetrack and not run heavy
24 equipment, destroyed that, would the shutdown have

1 needed soil cement?

2 A. No.

3 MR. COBB: That's all.

4 THE COURT: All right. Thank you, sir.
5 You can return to your seat.

6 MR. COBB: Your Honor, I'm going to call
7 Mr. Harrison of Ford Construction Company.

8 (WHEREUPON, THERE WAS A DISCUSSION OFF THE
9 RECORD AND THE PROCEEDINGS THEN CONTINUED AS
10 FOLLOWS:)

11 THE COURT: Sir, if you would, come around,
12 please. Raise your right hand, please.

13 JAMES E. HARRISON,

14 Having been first duly sworn, was examined
15 and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. COBB:

19 Q. Good morning.

20 A good morning.

21 Q. I like to always like to start off with an
22 easy question. What is your name?

23 A. James E. Harrison.

24 Q. Mr. Harrison, where do you live?

A. Union City.

1 Q. And what do you do for a living?

2 A. I'm superintendent, Ford Construction
3 Company in Union City.

4 Q. And how long have you been in the
5 construction business?

6 A. 48 years.

7 Q. And do y'all do paving?

8 A. We do.

9 Q. And did you handle the paving job on
10 Mr. Smith's drag strip at Northwest Motor Sports?

11 A. I did.

12 Q. I pulled off of the Internet an aerial view
13 of that drag strip. Do you recognize that?

14 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
15 WAS PASSED TO THE WITNESS.)

16 A. (Witness reviewing photograph.) I do.

17 Q. This is a highway, and this is the
18 entranceway and the racetrack itself, and the
19 shutdown track. When you got there, what did you
20 see?

21 A. He had an area that had been milled and
22 paved and was broken.

23 Q. Did you look at the area called the --
24 the -- where the cars lined up to go race, the

1 staging area?

2 A. I did.

3 Q. Had it been damaged?

4 A. It had.

5 Q. And did you look at the area where the cars
6 slowed down, what we call the shutdown area, had it
7 been damaged?

8 A. I don't recall that particular area.

9 MR. COBB: Your Honor, may I have the
10 photographs?

11 BY MR. COBB:

12 Q. Let me show you some photographs that have
13 been identified as the shutdown area, and --

14 (WHEREUPON, THE ABOVE MENTIONED PHOTOGRAPH
15 WAS PASSED TO THE WITNESS.)

16 A. (Witness reviewing photograph.) That's
17 definitely damaged.

18 Q. And can you tell what -- what caused that?

19 A. Well, I mean, it -- it would be --

20 Q. I don't need to look at it. Is -- is it
21 from overloading?

22 A. It would be trucks traveling over it. It
23 would be my estimation.

24 Q. Okay. And when you saw what had been done

1 to the track, did you talk to Mr. Smith about what
2 he wanted you to do to the track?

3 A. Yeah.

4 Q. And tell me about that conversation.

5 A. Well, he just -- he wanted us to look at
6 what we could do to repair it and -- and repave it.

7 Q. Did you have the benefit of the subsoil
8 analysis that David Evans had done?

9 A. I -- I don't recall having that.

10 Q. Did you know that the -- it had been
11 determined that the soil below was soft?

12 A. Well, I could tell by looking.

13 Q. Because things had broken through?

14 A. Right.

15 Q. All right. If the -- if trucks had broken
16 through, what does that tell you that have that
17 you -- did you -- I mean, what did it tell you below
18 the surface that you can't see?

19 A. Well, you've got a probably a wet base
20 there or something of that --

21 Q. And how do you deal -- how do you deal with
22 wet base?

23 A. Well, there's several ways. The way we
24 dealt with this one was to get APAC to come and look

1 at it as far as cement treatment.

2 Q. All right. And who is APAC?

3 A. They're a contractor out of Memphis.

4 Q. And you mentioned the word cement
5 treatment, what is that?

6 A. That's where they come in with a -- it's
7 like a big garden tiller that tills cement into the
8 existing base.

9 Q. How deep do they go?

10 A. I think on that one he went 12 inches.

11 Q. And when they do the tilling and mix the
12 mix in, how does that change the subsoil?

13 A. Well, they add the cement to it which makes
14 it a -- a -- just a low-grade concrete.

15 Q. And does that then make a suitable
16 subsurface to pave on?

17 A. That makes a good stable base, yeah.

18 Q. And when you proposed that, what did you
19 tell Mr. Smith about whether that would solve the
20 problem or not?

21 A. Well, of course, I had APAC look at it and
22 make sure that they thought that would do it, and --
23 and then we told him that --

24 THE COURT: Mr. Harrison, you need to tell

1 us what APAC is.

2 BY MR. COBB:

3 Q. What is APAC?

4 A. They're a --

5 Q. What does it stand for?

6 A. Well, I'm not sure. That's a -- that's one
7 of the largest paving companies in the United
8 States.

9 Q. All right. They were your subcontractor on
10 this job?

11 A. They were.

12 Q. All right. And you hired them to make
13 recommendations and then --

14 A. Do the work.

15 Q. -- figure out the plan of action?

16 A. Yeah. They prepped the base.

17 Q. All right. So when they finished prepping
18 the base, did they tell you we're ready to go?

19 A. Right. And we proof rolled it.

20 Q. All right. Now, tell me about that.
21 What -- after they did the subsoil, what did you do
22 to make sure it was ready for paving?

23 A. We take a loaded truck and -- and run over
24 it and make sure there's no movement --

1 Q. All right.

2 A. -- in the base.

3 Q. And is that something that you -- that you
4 just do visually?

5 A. Right.

6 Q. If there had been movable, would you have
7 known?

8 A. Then they would have to go back in and
9 treat those particular areas more.

10 Q. All right. And if it's movement, though,
11 it's not ready to pave?

12 A. Right.

13 Q. All right. And after you had APAC do the
14 subsoil, then you proof rolled it to check, what did
15 you do?

16 A. Then I -- I mean, it -- it didn't move so
17 we were ready to pave.

18 Q. All right. And did you pave it?

19 A. We did.

20 Q. And did you bill Mr. Smith for the total
21 cost of that job?

22 A. I did.

23 Q. And what was that total cost?

24 A. Somewhere around 180,000 or -- in that -- I

1 don't have that figure in front of me.

2 Q. You sent him a bill?

3 A. I did.

4 Q. And he paid you?

5 A. Right.

6 Q. In full?

7 A. Well, actually, I had him pay me after the
8 cement treatment --

9 Q. Okay.

10 A. -- to cover that part, and then the final
11 bill.

12 Q. All right. But -- but he's paid you in
13 full?

14 A. Oh, yeah.

15 Q. And he's paid APAC's subcontracting firm?

16 A. We paid -- we paid APAC.

17 Q. All right.

18 MR. COBB: That's all.

19 THE COURT: Cross?

20 MR. CASHION: Yes, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. CASHION:

23 Q. Mr. Harrison, my name is Greg Cashion, I
24 represent Tennessee Asphalt. Let me hand to you a

1 copy of your statement that you just testified
2 about.

3 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
4 WAS PASSED TO THE WITNESS.)

5 A. (Witness reviewing document.)

6 MR. CASHION: Your Honor, I have a copy for
7 you.

8 THE COURT: Thank you.

9 MR. COBB: No objection in making that
10 exhibit.

11 MR. CASHION: Let that be the next Exhibit
12 20.

13 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
14 WAS MARKED AS EXHIBIT NO. 20 TO THE TESTIMONY OF THE
15 WITNESS.)

16 BY MR. CASHION:

17 Q. Can you identify that document?

18 A. Right. It's -- it is our statement.

19 Q. Okay.

20 A. That's actually the second statement.

21 Q. Right, but your final price there that you
22 charged to Northwest Tennessee Motor Sports Park is
23 \$186,603, correct?

24 A. That's correct.

1 Q. Okay. Now, on this, I think you -- we took
2 your deposition. You recall that?

3 A. I do.

4 Q. Okay. And I think you testified that you'd
5 called Billy Jones of APAC to price the soil cement
6 option?

7 A. That's correct.

8 Q. And the part of APAC's work was \$86,000; is
9 that correct?

10 A. That's -- that sounds right.

11 Q. Okay. Because that's the payment they made
12 on 7/19, correct?

13 A. Right.

14 Q. That's what you passed on to APAC?

15 A. Well -- that's correct, yeah.

16 Q. Now, after -- and in your final invoice,
17 I'm looking at the first page, they had some
18 additional charge for cement patching at 4,000 --
19 looks like 553 dollars, correct?

20 A. That's correct.

21 Q. And then they had -- you had an additional
22 charge for trucks being used in milling at \$1,044,
23 correct?

24 A. That's correct.

1 Q. All right. And on that staging area that
2 we seen some photographs of, you charged Motor
3 Sports \$2,000?

4 A. That's correct.

5 Q. Now, I think you told me in your deposition
6 that you weren't familiar with the -- the work of
7 Tennessee Asphalt, what they performed or how they
8 performed it or anything like that, correct?

9 A. On that particular job, I was not.

10 Q. Okay. And you didn't know how much -- did
11 you know that they were only contracted to do 2
12 inches of asphalt on this?

13 A. I don't recall.

14 Q. Okay. But how much asphalt were you going
15 to put in?

16 A. 2 and 3/4 is what we put in.

17 Q. Okay. And who decided to not put back 2
18 but to put back 2 3/4?

19 A. I'm assuming I proposed it at 2 3/4 based
20 on what I thought it needed.

21 Q. So, basically, APAC came in using their
22 soil cement method and stabilized the subbase?

23 A. Correct.

24 Q. Okay. And I guess they stabilized that

1 subbase, which is a combination of rock and dirt,
2 whatever it was there, correct?

3 A. And the -- they milled the old asphalt and
4 tilled some of it in.

5 Q. Okay. So they milled what Tennessee
6 Asphalt had left on there, the new asphalt portion?

7 A. Correct.

8 Q. And then they milled the rest of the
9 runway --

10 A. They milled it down to the point of the
11 asphalt, and then what was under that is what they
12 cement treated --

13 Q. Right.

14 A. -- 12 inches deep.

15
16 Q. 12 inches deep? That's what I was
17 going to say.

18 A. Yeah.

19 Q. So that went through the subbase all the
20 way --

21 A. Right.

22 Q. -- to the subgrade, the dirt --

23 A. Right.

24 Q. -- down there? And then you -- you paved

1 the whole area starting from the concrete all the
2 way through the 1400 feet?

3 A. 1400.

4 Q. Okay. And then they also -- did their soil
5 cement go the whole way up there, or did they stop
6 at what -- that area?

7 A. They cement treated the -- the whole.

8 Q. 1400 feet?

9 A. Right.

10 Q. Okay. And you paved the whole 1400 feet?

11 A. Right.

12 Q. With 2 3/4 inches of asphalt, correct?

13 A. Correct.

14 Q. I guess from -- do you know how much it
15 would have cost if you'd have put down just 2 inches
16 instead of 2 3/4?

17 A. I don't have that unit price.

18 Q. Okay. If I did like a -- a ratio, if I had
19 2 3/4 is the 2 as -- I think the -- the 92,000 was
20 your asphalt price, wasn't it? Let me make sure I
21 get that right.

22 A. Yeah. I'm not -- I don't know if it's
23 broke down.

24 Q. Let me see if I can reverse engineer that

1 number so at least we know what the asphalt price
2 that you had. I'm going to write on this board. I
3 look on Item No. 9, contract price. Go over there.

4 A. Okay.

5 Q. And if we start with 178,600, and I
6 subtract 86,000, which was the APAC number, right?

7 A. Correct.

8 Q. And I get \$92,600, right?

9 A. Correct.

10 Q. Okay. And that's the cost of your asphalt
11 at 2 3/4 inches, right?

12 A. You may have -- does that figure have these
13 additional charges like the staging area and the
14 cement patching?

15 Q. No, the -- the one -- if you look on the
16 first page, the 178,600 --

17 A. Okay.

18 Q. -- number is the first --

19 A. Okay.

20 Q. -- number up there.

21 A. Okay.

22 Q. So your additional charges were cement
23 patching --

24 A. Yeah. Okay.

1 Q. -- additional trucks, patching the staging
2 area is not in there.

3 A. Okay.

4 Q. Okay. All I'm trying to do is see what
5 your asphalt price is.

6 MR. COBB: Would you like a calculator to
7 follow along? Would that help?

8 THE WITNESS: It might.

9 MR. COBB: You're welcome to use it, too.

10 A. Okay. 92,6-, is that what you had?

11 BY MR. CASHION:

12 Q. Yes, sir. Okay. So 96,6- is the number
13 for your asphalt, correct?

14 A. Correct.

15 Q. And if I -- if I wanted to work a proration
16 to find out what 2 inches would be -- let me see if
17 you agree with my math. You said 2 inches and 3/4
18 over 2 inches would be 92,600 over, we'll call it X
19 would be the 2-inch price. Would that be a way to
20 get to it?

21 A. That's -- that would be right.

22 Q. Okay. And if my math was correct, that
23 comes out to about \$67,345 if you were pricing that
24 number. And you can check my math there, I just

1 cross-multiplied.

2 A. That's correct.

3 Q. Okay. So if they asked you to come out and
4 2 inches, it would have been \$62,345 thereabouts,
5 correct?

6 A. (No audible response.)

7 Q. And this price for going \$60,000, that's
8 for 1400 linear feet, right?

9 A. 1400 x 50, I believe.

10 Q. Yeah, 1400, excuse me, by 50-feet wide.
11 And if Tennessee Asphalt was only doing half of
12 that, 700, it would be half of that number, which
13 half of that number -- 700 feet x 50 would be
14 33,672. That's just half that number, right?

15 A. Correct.

16 Q. Okay. Now, in this case -- oh, one other
17 thing, the 86,000 -- I think you testified in your
18 deposition that soil cement of APAC plus milling,
19 right?

20 A. Right.

21 Q. I think you testified the milling was
22 \$8,000; do you remember that?

23 A. If that's what I said in the deposition, I
24 had the paperwork in front of me then. So...

1 Q. Okay. I represent to you that you told me
2 in the deposition --

3 A. Yeah.

4 Q. -- it's \$8,000.

5 A. That would have been correct.

6 Q. I don't see it in your -- so that included
7 78,000 for soil cement, 8,000 for milling, right?

8 A. Correct.

9 Q. Okay. And Tennessee Asphalt's price was
10 39,500 for 2 inches in that area; yours is lower.
11 You're a lot closer to this --

12 A. We're just 3 or 4 miles away.

13 Q. Okay. And that would explain the
14 difference in price?

15 A. Probably.

16 Q. Okay. Do you know why they didn't ask you
17 to bid this since you're -- you performed their work
18 previously, hadn't you?

19 A. I had done some, not all.

20 Q. Okay. Do you know why they didn't ask you
21 to bid this?

22 A. No, I don't.

23 Q. Okay. You didn't have a fuss with them or
24 anything?

1 A. No.

2 Q. And as far as you know, you did not see the
3 report of Dave Evans of CML, Construction Materials
4 Lab?

5 A. I don't recall.

6 Q. Okay. You know Mr. Evans, don't you?

7 A. Oh, I do.

8 Q. And you're familiar with Construction
9 Materials Lab?

10 A. I am.

11 Q. You never saw in his report where they said
12 that you had to address the drainage, that the
13 swells were not deep enough and they needed to be
14 excavated further in order to keep this water out of
15 the subgrade and the base stone?

16 A. I don't recall that.

17 Q. As far as you're concerned, you never
18 looked at that report and tried to price that
19 report, did you?

20 A. I didn't.

21 Q. And whenever you were looking at this job,
22 no one ever mentioned to you that the drainage
23 around it was an issue, did they?

24 A. I don't recall that.

1 Q. And certainly, you never attempted to do
2 anything with the drainage, did you?

3 A. I didn't.

4 Q. That was not part of your scope of work?

5 A. No.

6 MR. CASHION: That's all the questions I
7 have, Your Honor.

8 MR. COBB: Couple questions.

9 REDIRECT EXAMINATION

10 BY MR. COBB:

11 Q. You don't drag race, do you?

12 A. I don't.

13 Q. You think if TAC had somebody that
14 performed out at the track and they knew him, that
15 might have been one explanation of doing business?

16 A. Oh, I think so.

17 Q. Let me ask you, I -- I don't -- I know you
18 didn't have this note, but if you'll look at
19 Paragraph 5 of this exhibit where it says soil
20 conditions just to refresh your recollection.

21 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
22 WAS PASSED TO THE WITNESS.)

23 A. (Witness reviewing document.)

24 Q. See if I read this correctly (as read):

1 Contractor shall have read a copy of the subgrade
2 inspection report performed by David Evans of
3 Construction Materials Lab --

4 A. Uh-huh.

5 Q. -- and under result reported therein.
6 Owner shall not be responsible for any damage
7 suffered by contractor as a result of soil
8 conditions at the work site.

9 Does that refresh your -- refresh your
10 recollection that that report had been distributed
11 to you?

12 A. Well, it -- it could have. I mean, three
13 years ago, and I've looked at thousands of jobs.

14 Q. I understand. But that's why you put it in
15 writing, though?

16 A. Yeah.

17 Q. Clearly --

18 A. Right.

19 Q. -- clearly, the contract talks about David
20 Evans in the report? And I'm not trying to trick
21 you or trap you --

22 A. Oh, yeah, I understand.

23 Q. -- I know it's been three years.

24 A. Yeah.

1 Q. All right. And when it says that the
2 owners are not responsible for damage, that means
3 that the contractor is going into that eyes wide
4 open?

5 A. Correct.

6 Q. And that they read the report, they
7 understand the soil -- subsoils got the problems
8 it's got, and we're going to deal with it in the
9 contract?

10 A. With the cement treatment, yeah.

11 Q. All right.

12 MR. COBB: Was that made an exhibit,
13 Mr. Cashion?

14 MR. CASHION: Yes, that's 20.

15 MR. COBB: Okay.

16 BY MR. COBB:

17 Q. Now, you said that when you proof rolled --
18 and not necessarily this job, but when you proof
19 roll, that's to detect if the -- subsoil is --

20 A. If it's moving.

21 Q. -- moving? And if it's moving, that tells
22 you you've got to figure out what's down below
23 before you proceed?

24 A. You've got to do a little something --

1 you've got to do something to stop it.

2 Q. And one of the ways to do it is to dig down
3 and inspect and see what's below?

4 A. Yeah, in the case of cement treating, they
5 just come back and -- and treat that area again.

6 Q. Okay.

7 A. If -- if that's what you're doing.

8 Q. Right.

9 A. Now, if you were out here and you were just
10 working on rock, you would dig it out deeper until
11 you found a stable area and then back fill it with
12 more rock.

13 Q. But if you realize you've got a problem,
14 you've got to identify the problem before you can
15 solve the problem?

16 A. Correct.

17 MR. COBB: That's all.

18 THE COURT: All right. Anything further
19 for this witness?

20 MR. COBB: No, sir. I'd like to excuse him
21 for the day.

22 THE COURT: All right. Thank you, sir,
23 you're excused.

24 THE WITNESS: Thank you.

1 MR. COBB: Your Honor, I call Cory Todd.

2 THE COURT: All right. Sir, if you would
3 come around, please.

4 CORY TODD,

5 Having been first duly sworn, was examined
6 and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. COBB:

9 Q. Good morning. You're Cory Todd?

10 A. Yes, sir.

11 Q. Mr. Todd, take that gum out of your mouth.

12 A. It's a piece of candy.

13 Q. Take that piece -- oh, okay. Well, eat and
14 swallow it.

15 A. It's a cough drop.

16 Q. Okay. Can you talk?

17 A. Yeah.

18 Q. All right. Tell me just a little bit about
19 yourself. How old are you?

20 A. I'm 33.

21 Q. Where do you live?

22 A. Huntingdon.

23 Q. And are you married?

24 A. Yes.

1 Q. What's your wife's name?

2 A. Candice.

3 Q. And Candice works where?

4 A. At Jackson General. .

5 Q. She's at work today?

6 A. Yes.

7 Q. Now, your older sister is married to Monte,

8 --

9 A. Yes.

10 Q. -- Stephanie? How much older is she than
11 you?

12 A. Six years.

13 Q. And I believe you -- your father ran the
14 Jackson Dragstrip?

15 A. Yes.

16 Q. And y'all have been in racing how long, all
17 your life?

18 A. Yeah, all my life.

19 Q. And you grew up in it?

20 A. Yes.

21 Q. Would you go down there when you were a
22 little boy?

23 A. Yes, sir.

24 Q. Did you race?

1 A. Yes.

2 Q. Did you build cars?

3 A. Yes.

4 Q. Do you still?

5 A. Yes.

6 Q. Is that how you earn your living?

7 A. Yes.

8 Q. When this drag strip --

9 MR. CASHION: Mr. Cashion, if you don't
10 mind, I'm going to take this down.

11 MR. COBB: Sure, please do.

12 BY MR. COBB:

13 Q. Did you race on this drag strip before your
14 family became involved with it?

15 A. Yes.

16 Q. And you knew what it was like?

17 A. Yes.

18 Q. Was it a good track?

19 A. Yes.

20 Q. And when it -- when it went up for sale,
21 did you -- were you interested in your family
22 getting back into racing?

23 A. Yes.

24 Q. And did you have the financial resources at

1 that time to buy it?

2 A. No.

3 Q. Did Stephanie and Monte?

4 A. Yes.

5 Q. Did they first test drive it for a couple
6 years, by that I mean, rent it and run it?

7 A. Yes.

8 Q. And then later bought it?

9 A. Yes.

10 Q. Now, you don't have a legal ownership
11 interest in it?

12 A. No.

13 Q. But you're interested in it?

14 A. Yes.

15 Q. And you work there?

16 A. Yes.

17 Q. And you don't get a paycheck, but you hope
18 maybe someday, if this works out, you might have an
19 interest in it?

20 A. Yes.

21 Q. And that's what we've been calling the
22 brother-in-law deal you got?

23 A. Yes.

24 Q. Okay. You might want to talk to a lawyer

1 about that. Let's talk about this track. Who else
2 in the family works out there on the weekends?

3 A. On the weekends?

4 Q. Yeah.

5 A. My mother works there, my wife works there,
6 my uncle works there occasionally. Monte's niece
7 works there.

8 Q. How do you make money in the drag racing
9 business if you're not -- I mean, I understand how
10 it's building cars, you charge -- you can charge by
11 the hour on a job, but running a drag race, how do
12 you make money?

13 A. The more cars, the more spectators you get
14 there, the -- the more money you make.

15 Q. They charge admission?

16 A. Yes.

17 Q. To the -- for spectators?

18 A. Yes.

19 Q. Entry fees for -- for cars?

20 A. Yes.

21 Q. Concessions?

22 A. Yes.

23 Q. Do y'all have any camping or anything out
24 there?

1 A. Like, on the bigger races, the two-day
2 events, I mean, they can camp for -- but it's free.
3 I mean, it's not...

4 Q. And when you have drag races, it's one on
5 one?

6 A. Yes.

7 Q. And the winner advances?

8 A. Yes.

9 Q. If you lose, are you gone forever, or can
10 you buy your way back in?

11 A. On most of the races, you can buy your --
12 buy your way back in the first two rounds.

13 Q. Okay. And was that track successful?

14 A. Yes.

15 Q. Had a good crowd?

16 A. Yes.

17 Q. What was the thought process of -- of the
18 decision to upgrade? Tell me about that.

19 A. We thought we could upgrade the track and
20 attract higher horsepower cars, and, by that fact,
21 most of the guys that had the higher horsepower cars
22 had more money and brought more people with them and
23 attracted more spectators.

24 Q. All right. Had you started racing that

1 spring of '07?

2 A. Yes.

3 Q. And they would run races every weekend?

4 A. Yes.

5 Q. I mean, the track -- the track was
6 serviced?

7 A. Oh, yes.

8 Q. In good condition -- good condition?

9 A. Yes.

10 Q. All right. When the decision was made to
11 upgrade, who was put in charge of finding the person
12 to do the upgrade?

13 A. I was.

14 Q. All right. And why was it -- why were you?

15 A. Because I had more free time because I
16 was -- I just work for myself.

17 Q. All right. And what did do you when you
18 looked, first, did you check out first doing it all
19 concrete?

20 A. Monte had talked to someone about the all
21 concrete, I -- I didn't.

22 Q. Let me point out, in this white section
23 here, the starting line, is that concrete?

24 A. Yes.

1 Q. Okay. And why was concrete rejected?

2 A. It was -- I think the bid was like 200,000
3 or something.

4 Q. Just wouldn't work financially?

5 A. Yeah. I mean, it just...

6 Q. All right. So what did do you -- after you
7 decided not to do concrete, what did you do?

8 A. We checked into getting it repaved.

9 Q. All right. And who did you talk to?

10 A. I talked to Martin Paving and Tennessee
11 Asphalt.

12 Q. Did you know somebody that worked at
13 Tennessee Asphalt?

14 A. Yes.

15 Q. Okay.

16 A. Bill Dodd that races with us works there.

17 Q. All right. And when -- did -- did you tell
18 him you were looking for a paver?

19 A. Yeah. We -- we had told him we was
20 thinking about upgrading the track, and he told me
21 to give John Taylor a call and gave me his phone
22 number.

23 Q. All right. And did y'all like doing
24 business with people that did business with you?

1 A. Oh, yeah.

2 Q. All right.

3 A. We try to every chance we get.

4 Q. And you got a -- you got a bid from John
5 Taylor?

6 A. Yes.

7 Q. All right. We'll talk about specifics in
8 just a minute. And then you -- did you get another
9 bid?

10 A. Yes.

11 Q. To make sure they were competitive?

12 A. Yes.

13 Q. Who was lower, Martin Paving or Tennessee
14 Asphalt?

15 A. Martin Paving was lower.

16 Q. Well, why'd you go with the higher bid?

17 A. They're a bigger operation all over the
18 state and Stephanie had looked at their Web site,
19 and they had done airports and done work for the
20 State. So...

21 Q. You felt comfortable that they knew what
22 they were doing?

23 A. Yes. Felt --

24 Q. And you were willing to pay for quality?

1 A. Yes.

2 Q. Okay. And so you recommended TAC, and
3 that's what y'all did?

4 A. Yes.

5 Q. All right. Now, were some contract
6 documents and proposals sent back and forth?

7 A. Yes.

8 Q. The documents show that they were faxed.
9 Where is that fax machine kept?

10 A. It's at Monte and Stephanie's house.

11 Q. All right. And when the proposal was faxed
12 to you, what'd you do?

13 A. I went over to Monte and Stephanie's house
14 and took a look at it. And...

15 Q. I want to go through those documents with
16 you real quickly. Exhibit No. 4, the yellow
17 exhibit, that's the ones for trial, is a fax from
18 Tennessee Asphalt to Cory Todd?

19 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
20 WAS PASSED TO THE WITNESS.)

21 A. (Witness reviewing document.) Yes.

22 Q. And is that the one John Taylor sent you?

23 A. Yes.

24 Q. And look down here at the bottom where he

1 says, I'm sure you're waiting. I wanted to get this
2 to you. The numbers are all on the assumption that
3 we can mill and pay without subgrade and base
4 issues.

5 Did you understand what he was talking
6 about when he said, under the assumption we can mill
7 and pave without subgrade issues? Did he explain
8 that?

9 A. I mean, I'm -- that's basically all he said
10 was --

11 Q. All right.

12 A. -- that, and he told me they were going to
13 do some core samples.

14 Q. Before all this started, did you know what
15 a subgrade issue was?

16 A. No.

17 Q. The significance of it?

18 A. No.

19 Q. Did you have any idea that somebody, while
20 paving your track, could destroy your track?

21 A. No.

22 Q. Did he explain what the milling process
23 was?

24 A. I mean, he told me it was just a big

1 machine that more or less ground the blacktop up and
2 threw it in the back of the truck.

3 Q. All right. And he said he wanted to do
4 some coring?

5 A. Yes.

6 Q. Did you -- did you -- did he explain to you
7 what that was?

8 A. He just told me he wanted to take some core
9 samples.

10 Q. Did you assume that the core samples were
11 to address the assumptions of subbase issues?

12 A. Yes.

13 Q. All right. And when he went out there, did
14 he ask you to go and open up a place for him to go?

15 A. Yes.

16 Q. And I believe Danny Wimberly went with him?

17 A. Yes.

18 Q. And they had a machine they went out and
19 like a post hole digger sort of?

20 A. Yeah, more or less, like a big drill press.

21 Q. Did you do anything with it, I mean, were
22 you there helping, or were you just watching?

23 A. I was just there watching.

24 Q. Did they explain what they were doing?

1 A. No, not really. I mean --

2 Q. Did they explain how deep they went?

3 A. No.

4 Q. Did they explain that they were going to
5 look for some things and not for others?

6 A. No.

7 Q. When they finished, did you assume that
8 they had done all the checking they needed to do?

9 A. Yes.

10 Q. Okay. If they had needed to do more
11 checking, would you have said okay?

12 A. Yes.

13 Q. All right. What happened next? And you've
14 got the contract documents in front of you, Cory.
15 After he sent that proposal, did you approve it, or
16 did you talk to Monte and Stephanie before approving
17 it?

18 A. As far as the contract?

19 Q. Yeah.

20 A. Well, I talked to Monte and Stephanie
21 before I...

22 Q. Because they're the ones that are going to
23 have to go borrow the money?

24 A. Yes.

1 Q. And they're the ones who have to pay them
2 back?

3 A. Yes.

4 Q. Okay. That's a good part of the
5 brother-in-law deal, right?

6 A. Yeah.

7 Q. Okay. And did y'all reach an agreement
8 that you would say yes to Tennessee Asphalt and go
9 ahead?

10 A. Yes.

11 Q. All right.

12 MR. COBB: Let me approach, Your Honor.

13 BY MR. COBB:

14 Q. In late March, did Mr. Taylor send some
15 additional documents requesting that you sign giving
16 authorization?

17 A. Yes.

18 Q. Let me see. Here they are. There's
19 another set of documents, and it's Exhibit 7 in the
20 trial where Tennessee Asphalt is faxing to you
21 following some proposal per your request. Please
22 sign at the bottom and -- and mail back. Did you
23 sign it and send it back?

24 A. Yes.

1 Q. And did you talk to Monte and Stephanie
2 before you did?

3 A. Yes.

4 Q. And did they say they would be paving the
5 asphalt?

6 A. Yes.

7 Q. Now, at any time between the proposal that
8 they sent in the corings, did they ever tell you
9 they thought they might have subsoil problems?

10 A. No.

11 Q. Did they ever tell you they needed to do
12 any testing to be sure?

13 A. No.

14 Q. Did you read in this proposal, the third
15 page of Exhibit 7, where they said, subgrade to be
16 proof rolled with a loaded truck before installing
17 gravel or existing -- Number 6, existing gravel or
18 base to be proof rolled with a loaded truck before
19 installing? Did you read that?

20 A. Yes.

21 Q. Did you know what that meant?

22 A. No.

23 Q. All right. Did anybody explain to you what
24 that meant?

1 A. No.

2 Q. On Monday, April 30th, when the crew got
3 out there and started working, did they proof roll
4 that track?

5 A. Not that I'm aware of.

6 Q. Would you have known it if you had seen it?

7 A. No.

8 Q. All right. Were you there while they
9 started doing their work?

10 A. Yes.

11 Q. When did they bring their equipment in,
12 Cory?

13 A. They brought some of it in on Friday
14 before.

15 Q. Did you know that that equipment could bust
16 up your staging area?

17 A. No.

18 Q. Q. Did you know that it could bust up
19 the shutdown track, just --

20 A. No.

21 Q. If you had known that, would you have asked
22 them to stay off?

23 A. Yes.

24 Q. When they started, did they ask you, you

1 know, anything about where do you want us and where
2 do you -- you know, what it is you want to stay off
3 of?

4 A. No.

5 Q. Any discussion at all?

6 A. No.

7 Q. Who was -- who was running the crew at that
8 point?

9 A. On Monday?

10 Q. Yeah, who was in charge of the group that
11 was out there? Mr. Ratliff was not out there?

12 A. No.

13 Q. Austin Bateman was not out there?

14 A. No, it was John Taylor.

15 Q. It was John Taylor there watching the work?

16 A. Yeah, john Taylor was there on Monday.

17 Q. All right. Was he the -- was he the head
18 guy there?

19 A. I -- I guess. I mean, that's -- that's the
20 only person I ever talked to.

21 Q. Do you know who was on the milling machine,
22 know his name?

23 A. No, I don't.

24 Q. Did he tell you that he encountered some

1 soft spots?

2 A. Yes, after he was through milling that
3 afternoon he had told me that it -- it was -- it
4 was -- let's see. He said it was pretty soft, but
5 he had been on worse.

6 Q. Did that raise any bells and whistles or
7 red flags to you?

8 A. I mean, he didn't talk like it was that big
9 of a deal, that it was -- it was soft, but he had
10 been on much worse. And...

11 Q. All right. Had you noticed that -- that
12 any problems with the truck had gotten stuck or
13 anything -- the milling machine, I mean?

14 A. No.

15 Q. All right. At the end of that afternoon,
16 did Mr. Bateman come and ask you to sign a document
17 for more asphalt?

18 A. Yes.

19 Q. Did you know why you were signing that?

20 A. I -- I think actually Monte signed that,
21 or...

22 Q. Well, let's look.

23 A. Who was it?

24 Q. You may be right.

1 A. I can't remember on that.

2 Q. Well --

3 A. Because he actually talked to -- to Monte
4 and myself both that afternoon.

5 Q. All right. On this March 29th contract,
6 that is your signature --

7 A. Yes.

8 Q. -- you signed it? Now, on Page 10 that
9 we've talked -- I mean, Item 10 on that second --
10 third page, it says, price does not include testing.
11 Did you understand what that meant?

12 A. No.

13 Q. Did you consider the coring that had been
14 done to be part of the testing?

15 A. Yes.

16 Q. If there had been some other tests that
17 needed to be done, would you have approved it or at
18 least talked to Monte about it?

19 A. I would at least talk to Monte about it
20 before.

21 Q. All right. Now, the next set of documents
22 is Exhibit 8, and it says, to Cory Todd from John
23 Taylor, April 30th, 2007, sign, date, and fax
24 back --

1 A. Okay.

2 Q. -- the overrun agreement?

3 A. Yes.

4 Q. You did sign that?

5 A. Yes.

6 Q. Did you -- did you understand the
7 significance of that overrun agreement?

8 A. No, I mean, they told me that -- that it
9 might rut up a little bit while they were paving,
10 but if they used -- added more asphalt that it would
11 bridge over and be fine.

12 Q. Okay. Did they say, this whole thing may
13 not work at all, and y'all maybe left with a big --

14 A. No.

15 Q. -- swamp here? No big deal?

16 A. No.

17 Q. And you signed that on Monday afternoon?

18 A. Yes.

19 Q. All right. So -- so on Monday, the guy
20 running milling machine told you it was a little
21 soft, but he'd seen worse?

22 A. Yes.

23 Q. Then Mr. Bateman and Mr. Taylor asked you
24 to sign a modification agreement, and you bought

1 more asphalt?

2 A. Yes.

3 Q. And they said it was to be used for filling
4 the ruts?

5 A. Yes.

6 Q. Or bridging over?

7 A. Yes.

8 Q. All right. Did you understand what that
9 meant?

10 A. No.

11 Q. All right. Then what happened, I guess
12 they went home and came back the next day?

13 A. Yeah, they --

14 Q. Were you there the next day?

15 A. And the -- yes.

16 Q. What happened the next day?

17 A. The next day, they started paving. They
18 made one full run, and I think they ended up having
19 little problems on the very end of it. And then,
20 after they had made that full run, Austin had come
21 to me and told me that he had a few issues that we
22 needed to talk about. And...

23 Q. Well, tell me about it. What did he say
24 the -- the few issues were?

1 A. One of them was the staging lanes, that
2 they were broke up. And he said we can fix it one
3 of two ways: We can either cut it up and tear it
4 out and repave, or we can just roll it back down and
5 pave over it.

6 Q. Did he say they would do that for free or
7 that he was expecting you to pay for it?

8 A. That was never discussed. I was lead to
9 believe that that was something that Tennessee
10 Asphalt would take care of.

11 Q. Okay. Did you ask him why y'all driving
12 those heavy trucks on that?

13 A. No.

14 Q. Okay. Did he apologize for tearing it up?

15 A. No.

16 Q. What else happened?

17 A. I told him that that would be fine with me
18 just to -- they could just roll it down and pave
19 over it because that wasn't a -- a critical point.
20 And then he said that there was a -- a few roller
21 marks on the part that they had paved, and we went
22 and looked at those, and I mean, it wasn't nothing
23 that was significant. It was out over by the edge
24 of the guardrail, and it wasn't maybe an 8th of an

1 inch or so, just a little small mark in the
2 pavement. And I told him that I didn't have a
3 problem with that.

4 Q. All right. Did things go smoothly after
5 that?

6 A. No.

7 Q. What happened after that?

8 A. After that, they started on the second run
9 and at the -- almost the end of the second run, the
10 paver had pretty much just sunk. And...

11 Q. Sunk into the area he was paving?

12 A. Yes.

13 Q. All right. What did that look like?

14 A. It looked pretty rough. They hooked a road
15 grader to it and tried to pull it out, and that
16 didn't work. So then they hooked a -- loaded a
17 asphalt truck up to the road grader, and it took
18 both of them to pull the paving machine out.

19 Q. Looked like they were having tug of war
20 with the pavement?

21 A. Yes.

22 Q. Like -- sort of like got stuck in a tar
23 baby? What did you think when you saw the paver
24 stuck, the -- the machine you're trying to pull it

1 out?

2 A. I thought that we were in trouble, that
3 wasn't good.

4 Q. All right. Did they ever tell you that
5 they were having that kind of trouble where the
6 paver got so stuck they couldn't even pull it out?

7 A. No.

8 Q. Did you call --

9 A. And they never said anything about it.

10 Q. All right. Did they ever tell you the
11 subsoil was -- was critical and they couldn't
12 proceed?

13 A. No.

14 Q. Did they ever tell you this may not work
15 and you assume the risk -- did they ever give you
16 any -- an explanation?

17 A. No.

18 Q. All right. When the pavement -- when the
19 paver got stuck, did they stop then?

20 A. No, they kept on going.

21 Q. Why?

22 A. Well, I was told -- I think --

23 Q. Who told you?

24 A. On Thursday, Austin told me that the

1 pavement was already mixed and in the trucks on the
2 way, that they had to use it. That it would be
3 garbage if they didn't use it. And --

4 Q. So even though the paver had gotten stuck,
5 they continued to pave?

6 A. Yes.

7 Q. On that soft subsoil?

8 A. Yes.

9 Q. Broke through?

10 A. Yes.

11 Q. And he told you he did that because --

12 A. Because it --

13 Q. -- it was hot, had to use it --

14 A. -- they already had it on the way, and if
15 they didn't use it, it would be garbage. And I told
16 him that it was garbage after they put it out.

17 Q. Well, did they put all that in the paver,
18 or did it start sprinkling it out around the...

19 A. Well, there was at least two truckloads I
20 know they just dumped out in the racetrack and took
21 the tractor and the box blade and just kind of
22 smoothed it over.

23 Q. Well, did that make a nice, smooth surface
24 like y'all expected?