

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 III
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

20
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1 repaving?

2 A. No, sir, we don't do -- I don't do a lot
3 of milling and repaving. Most of what I do is
4 overlay work.

5 Q. Well, let me ask you, on Page 92, did you
6 give this answer to this question, Line 16, and I'll
7 wait for you.

8 MR. CASHION: Let me give this to him.

9 MR. COBB: I'm almost through, but okay.

10 A. 92?

11 BY MR. COBB:

12 Q. Yes, sir.

13 A. Okay.

14 Q. And Line 16. And I -- didn't I ask, and in
15 checking the asphalt depth, you found not just
16 asphalt but water, right? And you answered,
17 correct. And that's unusual, correct? And your
18 answer was uh-huh. (affirmative response). And
19 that meant, yes, correct?

20 Question: That's a warning that there is
21 water coming from somewhere, probably subsurface.
22 What was your answer?

23 A. I said yes.

24 Q. And question was: If there's subsurface

1 water, that's a warning that the subsurface is not
2 stable, correct?

3 A. I said very possible.

4 Q. All right.

5 A. But I don't think that -- again, I don't
6 think that two core holes that showed water out of
7 four on an area that big is going to determine
8 whether you have subgrade issues or not.

9 Q. You may be right, but it certainly says,
10 you ought to dig some more holes and check, right?

11 A. I don't think so.

12 Q. Well, let me ask you this: If you were
13 serving up a big dish of food for your guests and
14 you took a couple of bites and it tasted bad, would
15 you say that -- I can't tell, that food may be fine
16 and serve it or would you check some more?

17 A. I --

18 Q. Assuming they're friends.

19 A. -- I'm not real sure what I would do
20 there. I mean, I -- I think what -- when -- I don't
21 know how to say -- I mean, when -- when I -- when
22 Danny told me that the -- there was water in two
23 core holes, and when I approached Austin and told
24 him, they weren't concerned about it.

1 Q. Because --

2 A. As being a problem so I was not concerned
3 about it because they're more experienced than I am
4 at it.

5 Q. But a year later -- I mean, you -- you had
6 talked to Austin by that time. A year later you're
7 telling me you still thought it was a problem, still
8 concerned, and still said it was an indication that
9 you needed to at least check more, right?

10 A. I'm not saying it's an indication we need
11 to check more, and I certainly don't want to go back
12 and change what I told you a year ago. I'm not
13 going to, and I don't want to. But again, in my
14 mind, during the deposition, the whole time I'm
15 thinking, water is not good. Water is not good.
16 I -- I know -- you know, I understand that.

17 But water in two core holes on a 700 x 50
18 area, I don't see where that would indicate subgrade
19 issues at all. I mean, it may or may not. I'm not
20 sure. But I'm not a tester, and I'm not an
21 engineer. So....

22 Q. All right.

23 MR. COBB: That's all.

24 THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CASHION:

Q. When you were giving your deposition, did it ever occur to you while you were testifying that the water possible source was the machine itself that was putting two gallons of water on there?

A. No, sir, I -- it never crossed my mind to -- and I know that the core machine uses water because you've got to keep the bit cool when you're taking out asphalt, but I never --

Q. You never thought --

A. If I would have, it would be in here. I assure you because, I mean, it's part of the process. I just didn't think about it.

Q. So when you were testifying in your deposition, you were thinking the only source was from below?

A. I was thinking when water -- when Danny said water, I -- I thought, well, that might be a -- that could be a problem, I mean, I was concerned about it. But if -- since I wasn't thinking about the core machine, I thought, well, it's got to be coming from somewhere, I mean, you know.

Q. Okay. And you relayed your concern in

1 both Danny and Austin Bates -- Bateman told you that
2 was not a problem at that time, they didn't tell you
3 why, they said don't worry about it?

4 A. Correct.

5 Q. It wasn't till later that you figured
6 out --

7 MR. COBB: Objection to leading, Your
8 Honor.

9 MR. CASHION: No further questions, Your
10 Honor.

11 MR. COBB: Mr. Taylor, I'm finished with
12 you.

13 THE COURT: All right. Thank you, sir.

14 MR. COBB: I had you subpoenaed, you're
15 free to go as far as I'm concerned.

16 MR. CASHION: Free to go.

17 THE WITNESS: Do you want this back?

18 MR. CASHION: Yeah.

19 THE WITNESS: Ma'am, do you want --

20 THE REPORTER: Thank you.

21 MR. CASHION: Ready for the next witness,
22 Your Honor?

23 THE COURT: Yes, sir. I tell you what,
24 let's -- let's take a ten-minute break.

1 (WHEREUPON, A SHORT BREAK WAS TAKEN. THE
2 PROCEEDINGS CONTINUED AS FOLLOWS.)

3 THE COURT: Go ahead, gentlemen.

4 MR. CASHION: Yes, Your Honor, for my next
5 witness, I call Danny Wimberly.

6 DANNY WIMBERLY,

7 Having been first duly sworn, was examined
8 and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. CASHION:

11 Q. Would you state your full name for the
12 Court.

13 A. Danny Lee Wimberly.

14 Q. And Mr. Wimberly, where do you live?

15 A. Buchanan, Tennessee.

16 Q. And give me kind of a work history.
17 What -- what have you done?

18 A. In 1969, I went to work for the Tennessee
19 Department of Transportation, I worked there for 33
20 years and retired in 2002. Then I went to work for
21 Tennessee Asphalt, and whenever they were bought by
22 Delta, I went to work for Delta. Now I'm working
23 with Buchart Horn out of York, Pennsylvania.

24 Q. Okay. And in your, I guess, 40 plus years

1 of construction, what have you been primarily doing,
2 what -- what type of work?

3 A. Well, I've done layout, surveying,
4 inspection on bridges, asphalt, gravel, concrete,
5 just generally whatever they need to do.

6 Q. So you understand the construction of
7 roads very well?

8 A. Yes, sir.

9 Q. And what -- when you worked from -- excuse
10 me -- you worked for Tennessee Asphalt and Delta
11 from 2002 to 2009, what were you primarily doing for
12 them?

13 A. Most of the time, it was layout and
14 grades. I cut cores when necessary whenever they
15 needed somebody, and just mainly grades and layout.

16 Q. And were you experienced at cutting cores?

17 A. Yes, sir.

18 Q. Okay. And you went to this project, the
19 raceway project to cut, I think, four cores,
20 correct?

21 A. Yes, sir.

22 Q. Okay. Explain to the Court the machine
23 you use to cut a core, what are you doing?

24 A. Okay. It's a large drill that's on a

1 stand that's on wheels. It's got a bit on it
2 approximately 3 to 4 inches around, and it's
3 approximately 11 inches long. It has it's own water
4 source where we have to keep the bit cool, you know,
5 whenever we're cutting our cores.

6 Q. So while you're cutting the core, you're
7 injecting water as it go -- cuts down?

8 A. Yes, sir.

9 Q. And I've got a sample. Is this one that
10 we pulled -- this is not from the -- this project.
11 Is this just a sample of a core?

12 A. That's just a core, yes, sir.

13 Q. Okay. And is that how the core's always
14 come out, I guess, vary in thickness, but --

15 A. Yes, sir.

16 Q -- you cut around where the bit is? Do you
17 want to show that to the Court?

18 MR. CASHION: If you want a paperweight,
19 Your Honor.

20 THE COURT: No, that's okay.

21 BY MR. CASHION:

22 Q. Okay. Now -- and how much water would you
23 use to cut a core, say, 2 inches or 2 1/2 inches?

24 A. Well, the container that we put water in

1 is approximately 1 1/2 to 2 gallons, and we fill it
2 up and -- just whenever it runs dry, we fill it up
3 again. So it -- it -- varying amounts of water goes
4 in it whenever we're cutting the cores.

5 Q. Depends on how the resistance?

6 A. And how thick, how hard the asphalt is or
7 concrete, whichever we're cutting.

8 Q. And I guess it makes a puddle on top of
9 the -- the asphalt?

10 A. Yes, sir.

11 Q. Now, was there anything significant about
12 the cores that you cut at the speedway or the
13 raceway job?

14 A. We went over there to cut them for their
15 depth, and I think the thinnest one we cut was an
16 inch and 7/8, and the thickest was 3 inches, I
17 believe is what it was.

18 Q. And I think when you reported back, you
19 said two of the four -- four corings had water
20 present after you removed them, correct?

21 A. Yes, sir.

22 Q. And was that of any surprise to you that
23 there was water there?

24 A. No, sir.

1 Q. And why not?

2 A. Well, a lot of cores have water in the
3 hole whenever we get through because of the -- well,
4 we have to have the water the cut the core so, I
5 mean, you're bound to get some in there.

6 Q. Okay. And how many different types of
7 base material do you have around here?

8 A. We have basically three. We have a red
9 rock that -- then we have the chert gravel, and then
10 we have the limestone gravel.

11 Q. And what were you cutting into -- when you
12 pulled the core out, what kind of base stone did you
13 have there?

14 A. Limestone.

15 Q. Okay. And is that a -- of the three, is
16 that the better or the worse one to have?

17 A. That's the better one.

18 Q. Okay. And is that the least porous or the
19 most porous?

20 A. It's the least porous.

21 Q. Okay. So it's more likely not to have
22 water run down through it?

23 A. It's denser, yes, sir.

24 Q. So you would expect the -- the denser

1 one --

2 MR. COBB: Object to leading.

3 BY MR. CASHION:

4 A. -- that there may be some water --

5 MR. COBB: Object to leading.

6 THE COURT: Sustained. Don't lead your
7 witness. Restate the question.

8 BY MR. CASHION:

9 Q. With -- I'll ask you again.

10 A. Okay.

11 Q. With the -- the dense grade limestone base,
12 what would you expect if you're pouring water in --
13 in that for it to -- to do?

14 A. Well, it -- it -- a lot of times, it would
15 just stand there, and sometimes it goes through,
16 depending on how much water is already existing in
17 the base.

18 Q. Okay. And was -- who was with you while
19 you were doing this at the raceway?

20 A. Terry Rice, and Cory was there when we
21 were cutting.

22 Q. Okay. And about how long did it take you
23 to do these -- these four cores?

24 A. Roughly an hour.

1 Q. And was it obvious that you weren't going
2 any further down than the -- the bottom of the
3 asphalt?

4 A. Yes, sir.

5 MR. COBB: Your Honor, I don't think that's
6 a proper question. Obvious -- obvious to who?
7 That's asking what somebody else was observing.

8 THE COURT: All right. Restate your
9 question.

10 MR. CASHION: Okay.

11 BY MR. CASHION:

12 Q. Describe how you cut the cores. How far
13 did you go down?

14 A. Till the water changed colors. Whenever
15 you go through the asphalt core, the material under
16 it, most of the time the water will have a different
17 color. So when we get to that different color, we
18 stop, and then see if we can get our cores out.

19 Q. And how do you get the cores out?

20 A. Use a little screwdriver or a pocket knife
21 or even a pen, yeah.

22 Q. Pry them out.

23 A. Well, some -- yeah. Sometimes you can
24 even pick them up.

1 Q. And did you talk to Mr. Todd as you were
2 doing these cores?

3 A. Yes, sir, he was there.

4 Q. And you never went below the bottom of the
5 asphalt on any of them?

6 A. No, sir.

7 Q. In your experience, it's not unusual to
8 see water in the core?

9 A. No, sir.

10 Q. And was that of any concern when you
11 reported back to Tennessee Asphalt to anybody?

12 A. No, sir

13 MR. CASHION: That's all the questions I
14 have, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. COBB:

17 Q. Hey, Mr. Wimberly, good to see you again.
18 Do you recall being in my office, gosh, it's almost
19 two years ago now?

20 A. Yes, sir.

21 Q. And we had a little conversation and had a
22 court reporter like this lady here taking down
23 questions and answers?

24 A. Yes, sir.

1 Q. I'm going -- I tell you what, I may ask
2 you about prior testimony, you're welcome to look at
3 that if I do. Do you recall us talking about the
4 coring process in my office?

5 A. Yes, sir.

6 Q. And you said that two cores had the water
7 and two cores didn't, right?

8 A. Yes, sir.

9 Q. And you told me that this -- I don't know
10 that this is a problem, it's not until you get it
11 out if you know it's a problem? Do you recall that?

12 A. I don't understand.

13 Q. Well, you know why? Because that was a
14 terrible question. Let me ask that again.

15 A. Okay.

16 Q. I asked you, I -- I said, two of the four
17 cores had water present; and you said, yes.

18 A. Yes, sir.

19 Q. You didn't report everything that happened
20 on those notes, did you? Now, you didn't say, the
21 sun is shining, the wind is blowing?

22 A. No, sir.

23 Q. You reported things that needed to be
24 preserved and a record made, right?

1 A. Well, what we were doing, whenever I was
2 talking about the water, we basically just
3 conversing, talking.

4 Q. But you wrote that down, that's in your
5 field notes, right?

6 A. I talked to Mr. Taylor, and I believe he's
7 the one that wrote them down.

8 Q. He's the one that wrote it, it's in his
9 field notes. And -- but you thought -- you thought
10 enough of that to tell that to him when you were
11 talking about it, right?

12 A. Yeah, I noticed it. Yes, sir.

13 Q. And it could be that that water's from the
14 core drill, or it could be that that water's in the
15 ground, right?

16 A. Yes, sir.

17 Q. And you don't know which it is unless you
18 investigate further, right?

19 A. Yes, sir.

20 Q. Now, there's a way to investigate further,
21 and you've done it where you take a medal rod and
22 you push it down into the ground to see how soft the
23 ground is, right?

24 A. Yes, sir.

1 Q. And you could have done that that day,
2 couldn't you?

3 A. Yes, sir.

4 Q. I mean, you're trained in how to do that.
5 What -- what's that process called, probing?

6 A. Probing, yes.

7 Q. And you've done probing?

8 A. Yes, sir.

9 Q. And you could have done probing that day?

10 A. Yes, sir.

11 Q. And what you told me was I don't know if
12 that was water from the coring machine or natural
13 water, you just don't know, right?

14 A. That's correct.

15 Q. But it could have been natural water?

16 A. Could have been.

17 Q. And if you got natural water standing in
18 the hole of -- of this place you're getting ready to
19 pave, that could be a disaster, couldn't it?

20 A. Could be a problem, yes, sir.

21 Q. And you don't normally find water in the
22 coring holes, do you?

23 A. Yes, sir.

24 Q. Now, this is where I want you to look at

1 what you told me two years ago, Page 18, Line 1.

2 A. Page?

3 Q. 18.

4 A. 18?

5 Q. Yes, sir. Let me ask you if I -- see if I
6 asked you this question.

7 A. Okay.

8 Q. Do you normally find water in the holes
9 where you core? And then you answered, not
10 normally, right?

11 A. No, sir, that's right.

12 Q. That's what you told me two years ago?

13 A. Yes, sir.

14 Q. And that was the truth, wasn't it?

15 A. Yes, sir.

16 Q. You normally do not find water in the
17 cores?

18 A. Not normally.

19 Q. All right. So you -- you reported an
20 abnormal finding to John Taylor, correct?

21 A. Yes, sir.

22 Q. And John Taylor could have said, hey,
23 maybe you need to do some probing to see what we're
24 dealing with, right?

1 A. Yes, sir.

2 Q. You've done that on other jobs?

3 A. I didn't have a probe with me that day.

4 Q. But -- how far away was the probe?

5 A. Paris.

6 Q. And that's --

7 A. 20 miles, 25 miles.

8 Q. Okay. And if somebody had told you,
9 Danny, go get the probe and let's see what we're
10 dealing with, you could have and would have done
11 that, right?

12 A. Yes, sir.

13 Q. Would have taken you, what, another hour
14 to do the probing?

15 A. Yes, sir.

16 Q. And you were out there on this paving job.
17 Were you out there when this -- with the milling and
18 paving --

19 A. No, sir.

20 Q. I thought you went out there later and
21 saw --

22 A. I went out there afterwards, after the
23 fact.

24 Q. It was a disaster, wasn't it?

1 A. Yes, sir.

2 Q. And it had huge ruts where the heavy
3 equipment had sunk into the new pavement, right?

4 A. Yes, sir.

5 Q. That's not normal, is it?

6 A. No, sir.

7 Q. And the prudent thing to have done when
8 you saw water in the hole is to find out is it from
9 the machine or is it from the subsoil, right?

10 A. Well, whenever you find dense grade
11 underneath, you can't push a probe through dense
12 grade.

13 Q. But you could have gone next to it, right?

14 A. I would have had to go outside of the --
15 outside of the racetrack.

16 Q. How deep would your core machine -- I
17 thought you had to go 11 inches?

18 A. Approximately.

19 Q. And you could have cored through that
20 base, couldn't you?

21 A. Yes, sir.

22 Q. And then you could have used your probe,
23 couldn't you?

24 A. Yes, sir.

1 Q. So you --

2 A. No, I -- you can't get the material out.
3 There's no way of getting that material out of the
4 hole. The hole is like this. And...

5 Q. I thought that limestone clumped
6 together?

7 A. No, sir.

8 Q. Well, you could have -- you could have dug
9 down and -- to see whether or not the water
10 dissipated, couldn't you?

11 A. Yes, sir.

12 Q. If you had cored deeper, then you would
13 know whether it's water from the coring machine or
14 water from the ground, right?

15 A. Yes, sir.

16 Q. I mean, there's several things that could
17 have been done to discover, is this ground water or
18 this machine water, right?

19 A. Yes, sir.

20 Q. That day?

21 A. Yes, sir.

22 Q. And looking back, that's what should have
23 been done, isn't it? Be better than wasting \$40,000
24 of asphalt, wouldn't it?

1 A. Well, yes, sir, but that -- that wasn't my
2 call.

3 Q. I hear you.

4 MR. COBB: Thank you.

5 MR. CASHION: No further questions from
6 this witness, Your Honor.

7 THE COURT: All right. Thank you, sir.

8 MR. COBB: I had you subpoenaed, you're
9 free to go as far as I'm concerned.

10 THE COURT: All right, next witness. All
11 right, sir. If you would, come around, please.
12 Raise your right hand.

13 AUSTIN BATEMAN,

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

16 THE COURT: Have a seat, sir.

17 DIRECT EXAMINATION

18 BY MR. CASHION:

19 Q. Would you state your name?

20 A. Austin Bateman.

21 Q. And where do you live, Mr. Bateman?

22 A. Paris, Tennessee.

23 Q. And where are you employed?

24 A. Currently at Delta Contracting.

1 Q. And Delta purchased Tennessee Asphalt a
2 couple of years ago?

3 A. Yes, sir.

4 Q. First, would you give me your educational
5 background?

6 A. I have a bachelor of science degree in
7 civil engineering from Tennessee Tech University,
8 and I have a master's degree in civil engineering at
9 the University of Tennessee, and I'm a licensed
10 professional engineer in the State of Tennessee.

11 Q. And what year did you graduate from
12 Tennessee Tech?

13 A. 1997.

14 Q. And what year did you get your master's
15 degree from UT Knoxville?

16 A. It was 2006, I believe.

17 Q. 2006?

18 A. Uh-huh. (affirmative response.)

19 Q. Now, what type of work have you been
20 engaged in since graduating in the civil engineer
21 from Tennessee Tech?

22 A. Been in the asphalt paving industry since
23 graduation.

24 Q. And what companies have you worked for?

1 A. Worked for APAC and Tennessee Incorporated
2 in Nashville, Highways Incorporated in Cookeville,
3 and then Tennessee Asphalt Company in Paris, and the
4 Delta Contracting in Paris.

5 Q. And what year did you start to work for
6 Tennessee Asphalt Company?

7 A. Be 2006.

8 Q. And what were your duties in 2006?

9 A. I was the area manager. Basically, our
10 office in West Tennessee was my responsibility. We
11 had a gravel operation, asphalt plant, paving crew,
12 base crew, that kind of thing. So
13 basically trucking, you know, all that kind of fell
14 under my area of responsibility. Looking after the
15 entire operation, you know, from the bidding process
16 to getting the work done, you know, that kind of
17 thing.

18 Q. So you were the, I guess, manager of the
19 Paris office.

20 A. Correct.

21 Q. And all it's operations.

22 A. Yes.

23 Q. Now, what involvement do you typically
24 have on projects that are being performed in the

1 asphalt part of the business?

2 A. Typically, I guess, you know, it would be
3 the scheduling of the work, the setting the crews
4 up, scheduling trucks, the asphalt plant, making
5 sure we've got materials on hand, that kind of -- of
6 things.

7 And then, if -- you know, if we have an
8 unusual circumstance, you know, that maybe some of
9 the staff isn't -- you know, doesn't run across
10 typically, you know, I would kind of help them work
11 through that and that sort of thing. So it's just
12 kind of a -- you know, just an overall management
13 of -- of the operation and the jobs.

14 Q. And what was your first encounter with the
15 raceway project?

16 A. The first -- the first encounter or
17 first -- of course, John had indicated to me we had
18 the job, you know, and kind of indicated to me what
19 the scope of work was. And we set up our milling
20 crew to come from Knoxville and do the cold planing
21 on the project, and then, of course, scheduled
22 trucks and all that kind of thing.

23 And then, the morning of the milling, I
24 guess everything got started. We were keeping the

1 millings on-site at the owner's request, and John
2 had called me and indicated that, you know, had some
3 possible soft conditions, you know, that kind of
4 thing and that we needed to take a look at it. And
5 so I told him to get with the owner and set up a
6 proof roll for that afternoon so we could all look
7 at it and kind of see what we had and, you know,
8 kind of what the next step in the -- in the process
9 needed to be.

10 Q. Okay. And on -- on proof rolling, does
11 that occur -- does that ever occur on top of the
12 pavement?

13 A. No.

14 Q. You never started overlay job with the --

15 A. No.

16 Q. -- proof roll?

17 A. No.

18 Q. That's just never done?

19 A. No.

20 Q. You start it on subgrade if you -- if you
21 go to subgrade. In this case, you weren't going to
22 subgrade, right?

23 A. Correct.

24 Q. So where are you starting the proof roll?

1 A. On top of the base stone. The mill --
2 after you complete your milling operation, you would
3 proof roll the base that was -- that remained.

4 Q. Okay. And that's what -- in the
5 proposal -- you're familiar with the proposal?

6 A. Yes.

7 Q. Number 6, it said, existing gravel based
8 on being proof rolled with the loaded truck before
9 installing asphalt pavement?

10 A. Correct.

11 Q. And that's what you were going over there
12 to witness?

13 A. Correct.

14 Q. Okay. Now, describe to the Court proof
15 rolling, what are you looking at as an engineer when
16 you talk about proof rolling?

17 A. Basically, when you conduct a proof roll,
18 what you do is you take a loaded dump truck that is
19 going to be, you know, in weight roughly equivalent
20 to what you're going to be paving with, and you have
21 that truck drive across the surface to be paved, and
22 then you observe how the -- how the subgrade or base
23 stone behaves under the load. You look for cutting,
24 deflection, you know, just -- just kind of --

1 it's -- it's a visual thing. You're looking for
2 something other than a solid surface, you know. And
3 if you see something other than a solid surface,
4 then you've got -- kind of got to address what you
5 need to do based on that.

6 Q. In this case, what did you see when you
7 went over to the raceway and observed the loaded
8 dump truck going up and down on the, I guess,
9 exposed base material?

10 A. Right. Basically, in this circumstance,
11 what you had was what I would kind of -- behind the
12 wheels, it kind of looks like a -- a small wave.
13 You had, like, a deflection, and then it would
14 return to the original elevation, so that tells you
15 that you've got something down under the base stone
16 that's not solid. If it was actually, you know, a
17 situation where you were cutting the base stone, you
18 know, then maybe you've got a problem with the
19 compaction on the base.

20 Q. In this case, the trucks weren't leaving
21 big ruts --

22 A. No.

23 Q. -- in the base stone?

24 A. No.

1 Q. Okay. But it was moving?

2 A. Yes.

3 Q. So you were concerned the movement wasn't
4 the base stone; it was the subgrade?

5 A. Yes.

6 Q. Okay. And we've talked a lot about this
7 coring that had some water in it?

8 A. Uh-huh. (affirmative response.)

9 Q. Was that mentioned to you?

10 A. I don't recall it being mentioned, but I
11 wouldn't really see it as significant.

12 Q. Why is that?

13 A. If -- basically, when you conduct a coring
14 operation, you're going to have water -- you're
15 using water to keep your drill bit cool. And if
16 they had come back to me and said, well, we didn't
17 have -- you know, all the cores were dry, I would
18 have found that more unusual than, you know, some of
19 the cores having a small amount of water in them.

20 Q. And whenever you had the opportunity to
21 look at all the base stone -- now, I'm not talking
22 about coring --

23 A. Uh-huh. (affirmative response.)

24 Q. -- you're looking at all the base stone

1 over that 700 feet, right?

2 A. Uh-huh. (affirmative response.)

3 Q. Did you see anything that would indicate
4 water that could have been underneath the pavement
5 when these corings were made?

6 A. If -- if you had had that circumstance,
7 when you proof rolled, you would have had more of a
8 cutting of the base because the base would have been
9 what -- you know, if you had water that was right on
10 top of the base stone, when you proof rolled, you --
11 your base would have been saturated, and you would
12 have had more of a cutting action with the proof
13 roll than the -- the wave.

14 U think during the -- the deposition,
15 the -- the analogy was made, you know, kind of like
16 a child riding a -- riding a tricycle across a
17 trampoline. That's kind of what it -- visually,
18 that's what it looks like. And if you have that,
19 you don't have too much moisture in your base, it's
20 down below that.

21 And I guess the other thing, in the whole
22 course of this, I never saw any surface water, you
23 know, free water, you know. And -- you know, we dug
24 a test pit, there wasn't water flowing into the

1 hole, that kind of thing. So I don't -- I don't
2 think what water was in those cores was anything but
3 the water from the core drill.

4 Q. So that confirmed that it was incidental
5 --

6 A. Correct.

7 Q. -- to you.

8 A. In my mind, yes.

9 Q. All right. And you never saw any free
10 water or -- and all you saw was --

11 A. No.

12 Q. -- you didn't see wet spots on top of the
13 asphalt, did you -- I mean, on top of the base stone
14 you --

15 A. After we milled?

16 Q. Yeah, after you milled.

17 A. No.

18 Q. No indication of any moisture or
19 saturation of area right at the top --

20 MR. COBB: I don't mind leading a little
21 bit, but when it gets to critical areas...

22 MR. CASHION: Let me break it up for you.

23 MR. COBB: Just don't lead, please.

24 MR. CASHION: All right.

1 BY MR. CASHION:

2 Q. Explain to me what you saw.

3 A. At what --

4 Q. On top.

5 A. On the base Stone?

6 Q. After the mill.

7 A. Okay.

8 Q. Okay.

9 A. Basically, you had dense grade limestone
10 base. Wasn't any of it that appeared to be overly
11 wet, there weren't any spots that were wet in one
12 location, dry in another, that sort of thing. And I
13 guess if you had a -- you know, ground water,
14 that -- it would be what I would expect, that you
15 would have, you know, either wet spots or you would
16 have a uniform wet condition across the base stone
17 depending on whether it was in isolated locations or
18 uniform.

19 Q. Did the base stone appear saturated at
20 all?

21 A. No.

22 Q. Now, once you saw the pumping, what did
23 that indicate to you as far as what you do next, is
24 that a good surface to go pave on or what?

1 A. No. It -- it -- any time you don't -- if
2 you conduct a proof roll, you don't have any
3 deflection, you don't have any cutting, and you --
4 that means you have a solid surface that you can
5 place a uniform depth on.

6 If you have any deflection or movement at
7 all in your -- in your base subgrade, there's no way
8 that you can go in there and guarantee that you can
9 put a uniform depth of 2 inches, 3 inches, whatever
10 your price is for.

11 So at that point, you've got to, you know,
12 get with your owner, address what -- what you have
13 determined, give them their options and, see how
14 they want to proceed.

15 Q. Is that what you did in this case?

16 A. Yes.

17 Q. And who did you meet with to --

18 A. I met with Monte and Cory the afternoon of
19 the proof roll, they were there for the proof roll.

20 Q. This was Monday, April 30th, you met with
21 them?

22 A. Yes.

23 Q. And what did you tell them at that time?

24 A. We showed them the proof roll, indicated

1 that we thought they had some subgrade issues, kind
2 of went over what we felt their options were as --
3 as far as how to proceed from that point forward.

4 And one was a -- you know, if they wanted
5 to sign an overrun agreement, agree to pay for the
6 extra asphalt, that we would try and pave it, that
7 their -- basically, that was an option that wasn't
8 necessarily addressing the subgrade issue, it was
9 described as a way to try to get around it and get
10 them an acceptable surface.

11 The other option that we talked about was
12 they could look at, you know, going in and removing
13 the unacceptable soil, placing large stone back into
14 it, and -- and constructing a subgrade that was
15 hard, that was proof rolled that we could put the 2
16 inches of asphalt on top of.

17 Q. Did you indicate then that this would be a
18 serious issue, or did you just say, oh, we got -- we
19 found some little spots or something?

20 A. No, it was -- it was a serious issue,
21 there was no question. You know, we had to -- there
22 was no way with the subgrade the way it was that you
23 could take the quantity of material bid for uniform
24 thickness of 2 inches and pave the track, it -- it

1 was not possible.

2 Q. And what -- how did they respond when you
3 gave them the two options of pave over with an
4 over -- I guess it's an overrun agreement or digout
5 and put it in right?

6 A. They elected to go with the overrun
7 agreement.

8 Q. And what were their constraints at that
9 time? Time, money, what -- what are we talking
10 about?

11 A. I think it's both. You know, I guess,
12 cost, I think, was a concern with them. You know,
13 what -- you know, how much is one going to cost
14 relative to the other and degrees of magnitude. We,
15 kind of talked about that.

16 The other thing, you know, in the whole
17 process, the schedule was very important to them.
18 In other words, they -- they had really wanted us to
19 try and get -- get the job done within the course of
20 a week, you know, so that they wouldn't miss A. week
21 of racing.

22 So if we had -- if they had elected to go
23 forward with the -- the digout and the aggregate
24 back operation, you're talking about probably

1 several weeks to get that accomplished because
2 you're talking hauling limestone large distances.
3 If you don't have a waste pit available and
4 permitted, you've got to go through that process.

5 So you've got a lot of -- a lot more goes
6 into doing that and getting that together and
7 getting that done from a time standpoint. So I
8 think that, you know, you're looking at -- at both
9 time and money.

10 Q. And did you tell them that there was risks
11 involved if you did the overrun agreement and went
12 out there and paved it the next day?

13 A. Yeah, we indicated to them there was no
14 100 percent guarantee that that would work, it had
15 the possibility of failure.

16 Q. And had you employed that technique
17 before?

18 A. It's what I would use as standard
19 practice -- a standard practice in these situations.

20 Q. And has that worked in the past?

21 A. Yes.

22 Q. And did they -- but you never guaranteed a
23 result to them?

24 A. No.

1 Q. And what happened once you went out there
2 and did that, started paving the next day?

3 A. Started paving the next day. Basically,
4 what we -- we were able to -- we -- the job was
5 50-foot wide so we were going to try and complete it
6 in four pulls. The first pull we were able to
7 complete with getting stuck one time, I believe.
8 The second pull we completed to -- within about 100
9 feet of the end and got very badly stuck, had to
10 pull the paver out with a dump truck and a grader,
11 that kind of thing.

12 At that point, we went ahead and paved the
13 portions of the last two pulls that we could
14 complete with the mix we had on hand, and then
15 halted the operation. And then had to go back to
16 the owner and -- and discuss, you know, how they
17 wanted to proceed from that point forward.

18 Q. Okay. And did you recognize and -- as an
19 engineer that the problem you were dealing with was
20 a bad subgrade?

21 A. Yes.

22 Q. And that was what you observed from the
23 pull -- I mean, from the proof rolling?

24 A. Yes.

1 Q. Okay. Now, on Monday afternoon after the
2 milling, did the owners ever tell you that your
3 trucks were tearing up the -- the shutdown area, was
4 there any complaints about your method of operation?

5 A. No.

6 Q. Now, after you did this and your -- after
7 Tuesday, when you -- you got the -- basically, when
8 your third and fourth pulls was just to use the
9 material that you had in the trucks, right?

10 A. Correct.

11 Q. All right. And that was left in an
12 unfinished state, to say the least?

13 A. Correct.

14 Q. What were you proposing to the owners at
15 that time since your plan to try to bridge over --
16 is that what you call it?

17 A. Yeah.

18 Q. Why do you call it bridging over?

19 A. Well, basically, you're not repairing the
20 problem. You're just trying to -- to take an un- --
21 unacceptable condition and kind of get around it and
22 get over it enough to where you give them a finished
23 product that -- that will work for the application.
24 You're not -- you're not addressing the subgrade

1 issue, you're just fixing the subgrade issue.

2 You're just trying to, you know, spend a little more
3 money and get them an acceptable product, something
4 that they can use.

5 Q. Was part of the factor the fact that this
6 is just a racetrack, the -- the loads on that not be
7 great?

8 A. Yes. Uh-huh. (Affirmative response.)
9 Yes. The -- long term, you know, if you had been
10 able to get the -- get the track paved, all you're
11 going to have on the track is race cars, which are
12 very significant from a -- I mean, very
13 insignificant from a loading standpoint. What --
14 what's going to load a pavement is large trucks and
15 that kind of thing.

16 Q. Now, let me go to -- after you put the
17 asphalt down, what solutions did you suggest to
18 them?

19 A. We had one more meeting with the owner,
20 and I don't recall if at that second meeting we
21 proposed any solutions or not. At some point in
22 there, they contacted our Knoxville office. My
23 boss, Bill Ratliff, he came down, and we had another
24 meeting with the owner.

1 Let me think. I'm trying to make sure
2 I'm -- I'm getting the order of events correct. I
3 believe what we did, we went out there and did some
4 measuring on the areas that weren't paved after --
5 on, say, Wednesday or Thursday, maybe Friday,
6 sometime the end of the week. I think over the
7 weekend, I called Monte and gave him some ranges on
8 some options, digging out, some aggregate back, that
9 sort of thing. Maybe on Sunday, you know, I called
10 him on his cell phone and said, well, here's kind
11 of, you know, rough numbers for what we're looking
12 at.

13 And then we had another meeting after that
14 where we discussed more options. Possibly using a
15 geotextile fabric under the base, that kind of
16 thing, and then get -- maybe gave him some more
17 pricing after that. I don't remember whether we
18 ever got to that of giving him an actual price on
19 that or not.

20 Q. But you're giving them some range of
21 numbers?

22 A. Yes.

23 Q. And what were the ranges of the numbers
24 you were giving to them?

1 A. I don't recall the numbers.

2 Q. Over 100,000 to do this?

3 A. Probably so. I -- it's -- it's in the --
4 the deposition, I think. I don't -- I don't
5 remember the numbers.

6 Q. And then did -- were they -- did they ever
7 respond to you about any option that they wanted to
8 try or whether they were going to pay you?

9 A. The -- the last conversation that I
10 remember having with them was that they were going
11 to get with their banker, check on their -- make
12 sure they could get the money, and then they would
13 be back in touch with us. And that was the last
14 contact I had with Monte.

15 Q. Thank you.

16 MR. CASHION: No further questions, Your
17 Honor.

18 THE COURT: Mr. Cobb?

19 MR. COBB: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. COBB:

22 Q. Mr. Bateman, how long have you been doing
23 civil engineering?

24 A. Since 1997.

1 Q. And I believe you went back and got a
2 master's in civil engineering?

3 A. Correct.

4 Q. And you've been doing paving how many
5 years?

6 A. Since 1997.

7 Q. And you've been in charge of the Paris
8 office for how long?

9 A. Since the fall of 2006.

10 Q. And as the guy in charge, if there's a
11 problem that comes up, you're the one that goes out
12 and handles that?

13 A. Correct.

14 Q. And that's why you were out at their
15 racetrack on Tuesday, the --

16 A. It was --

17 Q. -- May 1st?

18 A. It was Monday afternoon.

19 Q. Monday afternoon? Were you back there on
20 Tuesday while they were doing the paving?

21 A. Yes.

22 Q. All right. Because that was the hottest
23 fire you had burning at the time?

24 A. Yes.

1 Q. Now, Tennessee Asphalt -- Tennessee
2 Asphalt advertises itself as a turnkey construction
3 company, doesn't it?

4 A. Yes.

5 Q. And that they analyze problems and provide
6 solutions?

7 A. Yes.

8 Q. And that they do, not just paving, but
9 site preparation, they can do it all?

10 A. They have that capability, yes.

11 Q. All right. And it's reasonable for
12 somebody who does business with Tennessee Asphalt to
13 rely upon y'all's expertise in identifying what
14 needs to be done, how it needs to be done, as well
15 as doing it, correct?

16 A. That's correct.

17 Q. You said today that you didn't see water
18 in those cores as being any big deal?

19 A. That's correct.

20 Q. Did you -- or were you aware that
21 Mr. Wimberly did think that that was unusual at
22 least when he testified two years ago?

23 A. No, I didn't think that it was unusual. I
24 didn't know that he thought it was unusual. I don't

1 think it's unusual.

2 Q. Did -- did you know Mr. Taylor said he
3 thought it was unusual?

4 A. Did I know that his deposition said that?

5 Q. Right.

6 A. Yes.

7 Q. Well, I mean, did -- it wasn't his
8 deposition talking, Mr. Taylor said in April of '07
9 he thought it was unusual, right?

10 A. That's his opinion.

11 Q. And he thought it in '08 when he gave his
12 deposition, right?

13 A. Yes.

14 Q. Do you know why he changed his opinion?

15 A. (No verbal response.)

16 Q. Do you know why he changed his opinion?

17 A. Changed his opinion?

18 Q. Where he says --

19 A. I'm not following you. I'm -- I'm
20 under -- I'm not -- I'm not following you.

21 Q. I'll help you. In 2007, Mr. Taylor noted
22 that there were water in these holes dug in.

23 A. Okay.

24 Q. And he thought it indicated subsoil water.

1 A. Okay.

2 Q. In 2008, he testifies at the deposition he
3 saw water in the holes and thought it indicated
4 subsoil water.

5 MR. CASHION: Your Honor, I'm going to
6 object. I don't think he can tell the Court what
7 Mr. Taylor thinks. And I think --

8 MR. COBB: Let me put it this way. Let me
9 just assume there's a predicate for this question.
10 BY MR. COBB:

11 Q. Do you know when and why Mr. Taylor
12 changed his opinion?

13 A. I don't know what -- I don't -- I don't
14 know what Mr. Taylor's opinion is now; I don't know
15 what Mr. Taylor's opinion was in April of '07. I
16 know that there was a notation made that there was
17 some water in the core holes. I don't know what
18 John's opinion of them was; I don't know what
19 Danny's opinion of it was.

20 Myself, as a licensed professional
21 engineer doesn't think that it's significant that
22 there's a small amount of water in the core hole.

23 Q. And we've been wrestling on this for three
24 years. Do you have any learned text or treatises on

1 that, any industry to support your opinion? Did
2 anybody other than Austin Bateman say that, write it
3 down somewhere, is that --

4 A. I don't have anywhere that I can readily
5 recall, no.

6 Q. No authority for that?

7 A. Do what now?

8 Q. No authority for that that you --

9 A. What do you mean by authority, I don't --
10 I'm not following you?

11 Q. Well, you know, standard book of paving, I
12 don't know. I don't -- I don't read paving books.
13 I assume that something that's taught and you're
14 trained on, water in a hole, is it a problem; is it
15 not a problem?

16 A. On the -- it's all a matter of application
17 and what you're investigating. If we're taking a
18 2-inch core out of an asphalt pavement, I don't
19 think it's unusual that a half gallon, a gallon of
20 water that you use to drill a hole that some of it's
21 going to remain in the hole.

22 Q. Well, do you find it unusual -- two holes
23 had no water; two holes had water?

24 A. No.

1 Q. Okay.

2 A. You may have -- you may have a coarse --
3 the two holes that didn't have any water under them
4 may have a coarser material, the base may be
5 segregated right there, and the water runs out. The
6 two over here that still have some water in them,
7 the material under it may be finer.

8 There's nothing -- there's -- you know, you
9 go back in two hours, you go back the next morning,
10 there may be no water there. There should be no
11 water there at that point.

12 Q. Well, let me ask you this: If there's
13 enough water in that ground, if it's so saturated
14 that water is staying in those core holes, that is a
15 problem, isn't it?

16 A. You wouldn't -- no. You wouldn't have any
17 way to know that. You've got a 8, 10, 12 inches of
18 limestone base in between the subgrade and the
19 asphalt, so for there to be water in the core holes,
20 there has to be water in the base stone. If you
21 don't have water in the base stone, if you don't
22 have excess moisture in the base stone, you're not
23 going to have ground water in the core holes.

24 Q. Did you read David Evans' report?

1 A. Yes.

2 Q. Did you find the amount of water in the
3 site significant? Unusual?

4 A. I don't -- no, not necessarily unusual.

5 Q. I mean --

6 A. I mean, I -- I don't know what you mean by
7 unusual. It's what -- it's what's present. He went
8 in and did an investigation --

9 Q. Well --

10 A. -- did a moisture content.

11 Q. I'm sorry. I don't mean to cut you off,
12 and I've done it a couple times, and I apologize.
13 So if I do it, let me know. I thought you were
14 finished.

15 What I'm getting at is, in looking at his
16 report, was there an unusually large percentage of
17 water or was it a little above average, or -- or do
18 you remember?

19 A. I don't -- I don't remember it being
20 something that just jumped out at me. I guess the
21 thing that you've got to look at is he had to go
22 through and conduct a standard proctor. The amount
23 of water that impacts a particular soil, whether
24 it's too much, too little, the right amount is a

1 function of the soil present.

2 So for him to determine whether it was too
3 much or too little, there wasn't surface moisture
4 there. There wasn't, you know, water running in a
5 hole; there wasn't an overly saturated base stone
6 that -- that was cutting. To actually say, this
7 subgrade has too much water, he's actually got to do
8 a standard proctor test, determine what the optimum
9 moisture content is, determine what the maximum dry
10 density is.

11 Q. All right. When you -- is this
12 contract -- and I'm looking at the large blowup
13 Mr. Cashion had of this proposal that John Taylor
14 submitted. Is this a standard form that's done?

15 A. Other than the scope of work, it would be
16 standard.

17 Q. And in this form -- and if you -- if you
18 need this -- let me to hold it closer, I'll be glad
19 to. It says here, price does not include sodding,
20 backfilling. There was nothing -- no sodding or
21 backfilling contemplated here, was there?

22 A. No.

23 Q. So that was just in there because it's
24 part of the form?

1 A. Yes -- well, I mean, it's -- what it is is
2 you may run into a situation where you go in and you
3 pave above the existing elevation, and you want to
4 make sure that the owner doesn't expect that you're
5 going to come back and backfill up flush with the
6 pavement with, you know, topsoil, seed, sod, you
7 know, make sure they understand the condition with
8 which -- what they're going to wind up with as an
9 end product.

10 Q. All right. Now, Item No. 4, a minimum 6
11 inches of compacted gravel stone is required to pave
12 upon, that's in there?

13 A. Yes.

14 Q. Did y'all know that they had 6 inches of
15 stone to pave upon?

16 MR. COBB: I'm sorry.

17 A. I can't --

18 Q. And I think there's a copy of that floating
19 around somewhere, but... I'll give you the...

20 MR. COBB: Do you have Exhibit 4? Tell you
21 what, I'll just...

22 A. Don't know that -- there's no way we would
23 have known 100 percent that there was 6 inches of
24 compacted gravel or stone base to pave upon. I

1 guess, when -- when they did the core holes and they
2 saw the limestone base, typically, you're not going
3 to see that installed in less than 6 -- 6 inches, so
4 I guess an assumption was made there.

5 Q. Isn't there a way to check how much base
6 there is?

7 A. You could, yes.

8 Q. What do you have to do to check --

9 A. You have to --

10 Q. -- the coring?

11 A. The -- the problem with that core drill is
12 is -- is when you start getting above, say, you
13 know, 5, 6 inches, something like that, you start
14 having problems with, you know, figuring out where
15 you're stopping, getting the -- the core -- the core
16 drill that we use on asphalt doesn't remove the
17 material. Basically, it's just cut -- cutting it
18 out, and then allowing you to -- to break it at an
19 interface, either between layers of mix or between
20 the mix and the base stone.

21 So it -- it would be a situation where you
22 could check it, but it would be -- it would be
23 destructive to do that.

24 Q. There's that smaller copy. That might be

1 a little more convenient. Doesn't this form also
2 say that subgraded and proof roll with a loaded
3 truck before installing gravel?

4 A. It does, but that -- that would be --

5 Q. But you weren't going to do that?

6 A. We can't -- we weren't to the subgrade.

7 Q. Okay.

8 A. In other words --

9 Q. That -- that form's got a lot of language
10 in there that has no meaning for this contract?

11 A. No. No, it has meaning. If there was
12 subgrade that we were doing, we would proof roll it,
13 and in this case, to me, the subgrade is the base
14 that we're going to pave on.

15 Q. Well, here's what I'm really asking: This
16 form has a lot of stuff that doesn't apply to these
17 people, that's just a standard form contract.

18 A. No. I -- I think it -- I think it
19 applies.

20 Q. Well, y'all weren't going to get down to
21 subgrade, were you -- or did you intend to go to
22 subgrade?

23 A. No, we didn't intend to go to subgrade,
24 but we -- we proof rolled the surface to be paved

1 upon.

2 Q. And the next -- the existing gravel or
3 stone base to be proof rolled with a loaded truck
4 before installing pavement, right?

5 A. Correct.

6 Q. And you were called out to watch proof
7 rolling because you heard there was going to be a
8 problem or that there was a problem?

9 A. I -- I was told the milling machine got
10 stuck and that we may possibly have a soft
11 condition.

12 Q. And it's unusual for a milling machine to
13 get stuck, isn't it?

14 A. No, not -- not in this application. You
15 know, typically, the everyday milling you're
16 conducting on a highway with a thicker paving
17 section where you've got -- when you get done
18 milling, you've got asphalt, a significant depth of
19 asphalt remaining after you complete the cold
20 planing. In this circumstance after you did the
21 milling, you were down to a gravel base.

22 So, you know, it -- I wouldn't say it's
23 necessarily unusual for a milling machine to get
24 stuck, have to pick the head up and -- and relocate.

1 Q. Doesn't the milling machine getting stuck
2 scream subsoil problems, potential subsoil problems?

3 A. It indicates that there may be some.

4 Q. Doesn't it indicate that a prudent
5 engineer would check out what was going on in the
6 subsoil before proceeding?

7 A. That's what we did. That's why we proof
8 rolled.

9 Q. But the only thing you did was proof
10 rolled, right?

11 A. That's correct.

12 Q. That's not adequately --

13 A. Well, no. No, I take -- no. That's not
14 the only --

15 Q. Let me finish my question. That's not
16 adequate to determine what the subsoil issue is, is
17 it?

18 A. It doesn't determine -- it -- it
19 determines that you have a problem, it does not
20 diagnose what is causing it.

21 Q. All right. Well, would that be analogous
22 to somebody having a headache and saying, let's try
23 brain surgery? You don't -- you know there's a
24 problem, you just don't know where it is, right?

1 A. No, I don't -- I don't think it's -- no, I
2 don't --

3 Q. Did you tell these people that you knew
4 they had a serious subsoil problem at that point or
5 might have a serious subsoil problem at that point?

6 A. When we proof rolled, yes.

7 Q. You told them that?

8 A. Yes, we told them they had a problem with
9 their subgrade.

10 Q. Did you tell them John Taylor and Danny
11 Wimberly had reported finding water in the core
12 holes?

13 A. I don't recall being told before we met
14 with them that they -- that there was water in the
15 core hole.

16 Q. Don't you think for them to make an
17 intelligent choice about what to do that they should
18 have been provided full and complete information?

19 A. I think they were provided full and
20 complete information.

21 Q. And don't you think they need to
22 understand and have the benefit of your engineering
23 degrees?

24 A. I gave them that.

1 Q. You did?

2 A. Yes, I did.

3 Q. You put in writing that you were going to
4 sell them some asphalt, did you put anything in
5 writing explaining the serious potentially causing
6 total failure subsoil problems that you suspected?
7 Did you put anything in writing?

8 A. All that they were -- they were instructed
9 of all that verbally.

10 Q. Well, you put we're not going to pay for
11 sodding. That was important enough to put in
12 writing, wasn't it?

13 A. Mr. Taylor did that. Mr. Taylor
14 indicate --

15 Q. No, Tennessee Asphalt did that, didn't
16 they?

17 A. Well, that's right, but Mr. Taylor
18 generates the conditions and the scope of work when
19 he looks at the job.

20 Q. Well, the sodding issue was important
21 enough to put in writing, right?

22 A. Okay.

23 Q. The -- the fact that the subsoil may be so
24 soft that you can't even pave it without digging it

1 all out was not important enough to put in writing?

2 A. They knew that, they -- we talked about it
3 on-site.

4 Q. Where were you when you talked about it?

5 A. On-site at the proof roll.

6 Q. What did you tell them?

7 A. We showed them the proof roll; they were
8 there when we proof rolled. We indicated to them
9 that they had a subgrade issue. We went through
10 what their options were.

11 Q. What did you recommend?

12 A. Huh? I didn't make a recommendation, I
13 laid their options out for them. Said you can do
14 this, it won't fix the problem. We're just going --
15 you're -- you're just trying to get it paved and get
16 back open. You can do this, it'll fix the problem.
17 You're repairing the subgrade.

18 Q. You made no recommendations?

19 A. No, I wouldn't make a recommendation. I
20 don't know what their financial situation is, I
21 don't know how the time impacts them. That's a call
22 for the owner to make. All -- all I do is that, you
23 know, I say here are what your options are.

24 Q. Did you give them any advice?

1 A. What do you mean by advice?

2 Q. I mean engineering advice. Paving advice.
3 You're the paving expert out there, right?

4 A. It -- it's not all -- it's not all
5 about -- there a lot of other factors that enter
6 into it other than just the -- the engineering way
7 to fix the subgrade. You know, if you're going to
8 do that, you're going to say, you know, you're going
9 to repair it, you're going to spend a lot of money,
10 you know, we're going to go that route.

11 But maybe they didn't have the money to do
12 that, I don't know what their circumstance was. I
13 gave them their options, they made a decision based
14 on those options.

15 Q. And you gave them no advice, no
16 engineering advice?

17 A. I think the options are the -- the advice,
18 that's -- that's what their options are. It was
19 explained to them that -- that the -- the overrun
20 agreement might not work, that the sure thing was
21 the, you know, the digout and aggregate back.

22 Q. Would you guarantee the digout and
23 aggregate back could work?

24 A. Yes.

1 Q. You did, you said in your deposition you
2 wouldn't?

3 A. The digout and the aggregate back, if you
4 did it to an appropriate depth, would work.

5 Q. Well, do you recall in your deposition
6 saying you wouldn't guarantee that?

7 A. Where in the deposition, in what context?
8 I mean, I -- I don't know...

9 Q. Did you -- I'll find it here in a second.
10 Did you tell them we need to test to see what the
11 subsoil's like?

12 A. No.

13 Q. That's not your job, right? You don't
14 tell them they need testing?

15 A. That's -- well, if they had decided that
16 they wanted to go ahead with the other option or if
17 they had wanted to do some testing, that would be
18 fine. The testing is not -- that's not something
19 that -- that -- that would be for us to do.

20 Q. I didn't say do it. Did you recommend,
21 hey, guys, you ought to have some testing? There's
22 a guy named David Evans that can dig down here for
23 \$1,000 and find out what's really going on. Did you
24 make any recommendations like that?

1 A. No, we didn't recommend that they should
2 employ an engineer.

3 Q. But isn't that part of your job to make
4 the appropriate recommendations about testing of
5 unknown risks?

6 A. I think we made the appropriate
7 recommendations, and they made a decision to go
8 forward with what they did.

9 Q. And what was your recommendation?

10 A. We gave them options, we didn't make -- we
11 didn't recommend one option or the other. They had
12 the options before them; we explained what those
13 options were.

14 Q. Did you explain the risk?

15 A. We explained that there was no 100 percent
16 certainty that option one would work.

17 Q. Did you explain the risk?

18 A. What do you mean by risk?

19 Q. Well, what do you mean by risk because I'm
20 using your words. Did you explain the risk?

21 A. I think so.

22 Q. What did you tell them?

23 A. That it might not work. There was no 100
24 percent guarantee that that would solve their

1 problems.

2 Q. Did you tell them, I think it will work,
3 we do it a lot?

4 A. No.

5 Q. You didn't say, we bridge over -- are you
6 telling me that you offered to pave having no
7 expectation that it would work?

8 A. No, I mean, there's an expectation there
9 that -- that it would work, but there's no
10 100-percent guarantee that it will.

11 Q. Page 101 of your deposition, Line 7, I
12 asked you, (as read) Did you offer a guarantee?
13 And you said, no. And I asked, why not? And didn't
14 you say, we would have had to ask Mr. Ratliff that,
15 that was his decision?

16 A. At what point are we talking about? In
17 other words --

18 Q. Page 101 of --

19 A -- well, in other words, at what stage -- in
20 other words, are we talking about prior to -- to
21 paving? Are we talking about the first meeting
22 after paving? Are we talking about the second
23 meeting after paving?

24 Q. We're talking about --

1 A. If we're talking about Mr. --

2 Q -- how far along -- I'm reading at Line --
3 Line 2. How far along did y'all get in the process?
4 Answer: We constructed a test area here to give the
5 owner something to look for in evaluation purposes.
6 Did you offer a guarantee? No.

7 A. And the -- the test section was not a
8 digout shot rock application. It was geotextile
9 fabric and base stone. In other words, we're
10 talking about two totally different points in time.

11 The test -- the test section was
12 constructed, you know, after we tried to perform the
13 paving and it didn't work, then we said, okay, guys,
14 well, another thing we can look at is the geotextile
15 fabric. You know, we'll construct a test section.
16 Y'all look at it and see if that's something you're
17 interested in.

18 Q. But you still wouldn't guarantee that that
19 would work, did you?

20 A. The geotextile, no.

21 Q. And even though that was going to be
22 40,000 for this contract and another 100- to 150,000
23 for the geotech?

24 A. I don't remember the exact dollar figures.

1 Q. Well, even -- even the geotech, after you
2 done the digout work, was still not guaranteed,
3 right?

4 A. The geotech after the digout would not be
5 guaranteed.

6 Q. And that was the most expensive and most
7 disruptive procedure of all that you proposed?

8 A. No. No, that's incorrect. The shot rock
9 operation would be the most expensive, the most time
10 consuming. The geotextile was -- was -- would be
11 what I would have viewed as kind of in between.

12 Q. Well, on Page 103, Line 24, I said, (as
13 read) Well -- and this is your deposition, we're
14 going through all the options. But the point he was
15 making was, but it was never, quote, and we
16 guarantee this will fix it, and this is all you'll
17 ever need to spend, it was always, we think it will
18 work. If it works, this is what we think it will
19 cost, but we're not sure it will fix it. There were
20 no guarantees.

21 And your answer was: I'd say that's
22 accurate. I don't think we ever gave them a hard
23 and fast number and said this will fix it. That was
24 true then, wasn't it?

1 A. We never gave them a hard and fast number
2 on anything.

3 Q. And you never guaranteed that it would
4 work?

5 A. There again, what point in time are we
6 talking about?

7 Q. When -- with the last option you gave them
8 when you --

9 A. That -- that would have been when we were
10 talking about the geotextile and the base stone.

11 Q. On Tuesday, you knew that they had subsoil
12 problems and you started paving. And the paver got
13 stuck while paving, right?

14 A. Correct.

15 Q. Tore up the pavement that it was working
16 on, caused big huge ruts, didn't it?

17 A. No, tore up the pavement that -- are
18 you --

19 Q. Tore up the area that was getting ready to
20 be paved under the contract, right?

21 A. Are you talking about base stone, are you
22 talking about asphalt, what are you -- you said it
23 tore up the --

24 Q. I'm talking about the base stone that

1 had -- at one time had been smooth and you say
2 suitable for paving. Your paver broke through it
3 completely, didn't it? So bad it got stuck?

4 A. Under the paver, yes. The paver got
5 stuck.

6 Q. And you got a -- was it a front-end
7 loader?

8 A. A road grader.

9 Q. Road grader -- I never do get that
10 right -- and tried to pull it out, and it wouldn't
11 work, right?

12 A. Correct.

13 Q. And then you hooked a dump truck up to the
14 road grader and pulled the paver out, right?

15 A. That's correct.

16 Q. And you kept paving after that?

17 A. We had mix on-site. We put the mix
18 on-site that we had down, and then we stopped.

19 Q. So what you did is you -- you delivered
20 the mix to them although you knew it was a no -- no
21 good.

22 A. The mix was already on -- we ran enough
23 mix to pave 2 inches over the area that they had
24 contracted. We ran the theoretical quantity to pave

1 the 700-feet long by the 50-foot wide. I ran no
2 over that because I don't know what the overrun was
3 going to be.

4 Q. My point is --

5 A. I don't know if it's two loads or twice as
6 much as it takes. In other words, I -- I'm not
7 trying to sell them anything above and beyond what
8 they -- what they absolutely needed.

9 Q. You knew that that mix would not serve any
10 useful purpose on the ground, and you put it down
11 anyway, didn't you?

12 A. No, we put it down on the areas of the
13 track that were solid enough to pave. We didn't put
14 it down on an area that couldn't be paved. We
15 didn't put it down on an area that -- that wouldn't
16 work.

17 Q. Didn't you just spread some out with the
18 front-end loader? I mean, look at -- look at this
19 photograph here.

20 (WHEREUPON, THE ABOVE MENTIONED DOCUMENT
21 WAS PASSED TO THE PHOTOGRAPH.)

22 A. (Witness reviewing document.)

23 Q. Didn't y'all just --

24 A. We had --

1 Q. -- lay some on the ground and just --

2 A. We had to take and use a load to get
3 unstuck. We had to put a load down under -- in
4 front of where the paver was at to get something to
5 pull on. We had to pull the grade -- pull with the
6 grader and the -- and the dump truck. We put a load
7 down under that to -- where we could get the paver
8 pulled out.

9 Q. And then still put more asphalt down that
10 day?

11 A. On the third pull and the fourth pull,
12 yes.

13 Q. That's because the hot mix was -- was not
14 going to do you any good, and you were just going to
15 give it to them and charge them for it, right?

16 A. We put it on an area that was solid enough
17 to pave on-site.

18 Q. You know that when Ford came in they had
19 to dig all that asphalt y'all put up and mill it out
20 of the way, don't you?

21 A. I don't know what Ford did, I've not been
22 on-site since then.

23 Q. Well, how about this: If you were going
24 to go and dig out and replace a rock, you'd have to

1 dig up all that asphalt that you put down, the third
2 load, the fourth load, wouldn't you?

3 A. Not necessarily.

4 Q. Well, how are you going to dig the subsoil
5 out with new asphalt on top?

6 A. You don't dig out the areas where you have
7 pavement down, you could have dug out the areas that
8 weren't paved and tied into it.

9 Q. Wouldn't it look like a patchwork quilt at
10 that point?

11 A. It would.

12 Q. And you think that's suitable for the drag
13 race to have?

14 A. Well, it wouldn't -- you would have some
15 joints, but if you do a proper job of constructing
16 your joints, you know, we do joints on the
17 interstates, you build pavement joints all the time.

18 Q. But it's not going to be smooth enough for
19 their application, is it?

20 A. Yeah, if you do a proper job constructing
21 your joints -- you know, if you have joints that
22 are -- that wind up too rough, there's people that
23 grind joints, that's what they do for a living.
24 They grind bridge ends. They grind joints.

1 MR. COBB: No further questions, Your
2 Honor. Thank you.

3 THE COURT: Redirect?

4 MR. CASHION: Just a couple of issues.

5 REDIRECT EXAMINATION

6 BY MR. CASHION:

7 Q. Mr. Bateman, could you turn to Exhibit 28,
8 which is the Construction Materials Laboratory
9 report that --

10 A. Let's see --

11 Q. -- Mr. Cobb asked you about? It's the
12 folder.

13 A. This right here?

14 Q. Yes. Excuse me.

15 A. At what page?

16 Q. I don't know if I can tell you a page
17 number. It's going to be -- what he was asking you
18 about was the -- where he has the four holes, test
19 pits. It's over a little bit. It doesn't have a
20 page number. There you go.

21 A. Log of excavation pits?

22 Q. Right.

23 A. Okay.

24 Q. Now, Mr. Cobb, was asking you about the

1 moisture content or saturation of the base stone.

2 Do you recall that? If you knew what Dave Evans
3 said about the saturation of the base stone?

4 A. Yes.

5 Q. Okay. I want you to look at this report.
6 On hole number 1, did Mr. Evans report any in-place
7 moisture content of the limestone base?

8 A. No.

9 Q. On hole number 2, did Mr. Evans report any
10 characteristic of a limestone base?

11 A. Yes.

12 Q. Of a limestone base?

13 A. Oh, no, you're talking about -- okay.
14 No. No, character --

15 Q. Hole number 2.

16 A. Yeah. Dark, gray clay silt. Let's make
17 sure we're on the same page.

18 Q. Limestone base has no in-place moisture,
19 right?

20 A. Correct.

21 Q. Okay. I'm going to hole number 2.

22 A. Yeah.

23 Q. Below that.

24 A. 23 percent.

1 Q. No, hole number 2.

2 A. Hole number 2, yes.

3 Q. No. That's --

4 A. Sample 2.

5 Q. You're going down.

6 A. I'm not following you -- oh, okay. I
7 gotcha.

8 Q. He's just going deeper in sample numbers.

9 A. Okay. All right.

10 Q. Not -- those aren't hole numbers. Hole
11 number 2, did Mr. Evans report any condition of the
12 limestone base as far as in-place moisture?

13 A. No.

14 Q. He starts his analysis at subgrade?

15 A. Correct.

16 Q. Which is underneath the limestone,
17 correct?

18 A. Correct.

19 Q. On hole number 3, did Mr. Evans report any
20 in-place moisture content of the base stone?

21 A. No.

22 Q. Hole number 4, did Mr. Evans report any
23 moisture content of the base stone?

24 A. No.

1 Q. So from this report, there have no
2 recording as Mr. Cobb suggested that the limestone
3 was saturated, was there?

4 A. That's correct.

5 Q. Okay. And the other part -- Mr. Bateman,
6 I forgot to ask you in direct, I apologize for that.
7 Did you send an invoice to the owners?

8 A. Yes.

9 MR. CASHION: I'm going to hand one to the
10 Court.

11 BY MR. CASHION:

12 Q. Did you send this invoice to the owners?

13 A. Tennessee Asphalt Company did, yes.

14 Q. Okay. And what does this represent?

15 A. This would represent original contract
16 amount, change order to do some patching, and then
17 hourly charges for additional work done on-site.

18 Q. And the total of this invoice is?

19 A. \$44,918.40.

20 Q. Okay. And when the owners decided to put
21 the asphalt in the next day, was this part of the --
22 the charge?

23 A. Yes.

24 Q. Okay. This is the asphalt going in?

1 A. The 39,500. Basically, the -- the
2 quantity of asphalt that we put in place was
3 approximately equal to what was set up in the
4 original contract.

5 Q. Right.

6 A. Because we ran plans quantity because we
7 didn't know what the overrun was going to be. So
8 the 39,500 would be the milling and the asphalt.

9 Q. And you didn't complete it because they
10 never got back to you about how to fix the problem
11 they had?

12 A. On how they wanted to proceed, yes.

13 MR. CASHION: Your Honor, I move that as
14 Exhibit 29.

15 THE COURT: So marked.

16 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
17 WAS MARKED AS EXHIBIT NO. 29 TO THE TESTIMONY OF THE
18 WITNESS.)

19 MR. CASHION: That's all the questions I
20 have, Your Honor.

21 RE CROSS-EXAMINATION

22 BY MR. COBB:

23 Q. Let me ask you: Was any of this asphalt
24 planned to be used to fix the track that you

1 damaged, the shutdown track of the staging area, or
2 is this just the -- the --

3 A. This is actual work done.

4 Q. Were you going to fix the staging area
5 that y'all damaged?

6 A. The -- the staging area?

7 Q. The staging area in --

8 A. Where you come in?

9 Q. Yeah, y'all -- y'all damaged it, were you
10 going to fix that?

11 A. We were going to do a skin patch on it,
12 it's a per ton price.

13 Q. Free or were you going to charge them?

14 A. At the per ton price.

15 Q. Were you going to charge them for it?

16 A. At the per ton price.

17 Q. Were you going to fix the shutdown track
18 that you tore up?

19 A. I don't know that we ever got to that
20 point of discussing that.

21 Q. You did tear it up? The trucks rolling on
22 it did tear it up, didn't they?

23 A. I don't have any idea what tore it up.

24 Q. It was just torn up, you just don't know

1 what did it?

2 A. I don't -- I do not, no.

3 MR. COBB: That's all.

4 THE COURT: Anything further?

5 MR. CASHION: No, Your Honor.

6 THE COURT: All right. Thank you, sir.

7 You're excused.

8 MR. CASHION: Your Honor, for my last
9 witness, I call Mr. Bill Ratliff.

10 THE COURT: Sir, if you would, raise your
11 right hand.

12 BILL RATLIFF,

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

15 THE COURT: Have a seat.

16 DIRECT EXAMINATION

17 BY MR. CASHION:

18 Q. Would you state your name for the Court?

19 A. Bill Ratliff.

20 Q. And where do you live, Mr. Ratliff?

21 A. In Knoxville.

22 Q. And briefly describe to the Court your
23 background, education, work.

24 A. I graduated from UT in 1979 with a degree

1 in general business, worked for Tennessee Asphalt
2 Company prior to -- probably started in '76
3 part-time, and worked all the way through 2008.

4 Q. And what were your job duties progressing
5 up through Tennessee Asphalt?

6 A. Well, I was a -- did some sales early on,
7 did paving superintendent for the commercial work in
8 Knoxville, then was vice president and then
9 president and -- starting in 1991.

10 Q. And give me something about the company's
11 history.

12 A. Well, it -- it was founded in 1953. My
13 father started the company, A. 55-year-old company.
14 Had eight asphalt plants across the state. You
15 know, worked primarily in Tennessee.

16 Q. Okay. And how many different offices did
17 you have?

18 A. We had three locations: Knoxville, one at
19 Crossville, and one at Paris.

20 Q. And what kind of projects, say, in the
21 last ten years did you primarily perform?

22 A. We did anything from commercial job, even
23 driveways around rural areas up to interstates,
24 airports.

1 Q. Okay. And what happened to the company, I
2 guess would be the easiest way?

3 A. Well, my sister and I owned it, and as we
4 got more and more family members in it, it was just
5 their needs and where they lived, their family
6 circumstances, everything, it was just the time to
7 sell.

8 Q. Okay. And when did you sell the company?

9 A. We sold the company July the 2nd, 2008.

10 Q. And let's talk about this project.

11 A. Uh-huh. (affirmative response.)

12 Q. Did you have very much knowledge of this
13 project prior to the problems that were occurring, I
14 guess, primarily on May 1st?

15 A. No, I really didn't know anything about it
16 until I think Austin called me and said that, you
17 know, we had a drag strip, and I was familiar with
18 where it was because of being down here and just
19 driving around a lot. And then Monte called me and
20 asked me to come to town.

21 Q. And how long has Tennessee Asphalt had an
22 office in Paris?

23 A. Since 1965, I think.

24 Q. So you're familiar with this area?

1 A. Yeah.

2 Q. Now, did you visit the project?

3 A. I met Monte and Cory and their wives out
4 there on the job.

5 Q. Okay. Describe to the Court what you saw
6 when you visited -- I guess this was in either late
7 May, mid May.

8 A. It was on a Tuesday. I don't remember,
9 but you know, the job, it -- it was soft. The
10 subgrade was soft, and you could tell where the
11 subgrade had given way. And it was obvious that the
12 subgrade was -- was the problem. And we met down
13 there and determined that we would try some of this
14 stabilization cloth and just dig some test pit
15 areas.

16 Really, at the time, it looked to me like
17 we could probably go in there and just, you know,
18 looked more like a piece of Swiss cheese or
19 something and just address the specific areas
20 that -- that had failed.

21 Q. So overall, when you looked at it, it
22 looked bad.

23 A. Yes.

24 Q. Okay.

1 A. Of course, it was also in a state of
2 construction. It was not a completed, finished
3 product. It was just -- it had gotten as far as
4 they could go the way that the project was
5 originally bid.

6 Q. Now, I apologize. I think you met with
7 them on May 9th or something so. I indicated late
8 May, but it was...

9 A. I think it was a Tuesday is what I'm -- I
10 don't know.

11 Q. All right. I mislead you on that. Around
12 May 8th or 9th. Now, what discussions did you have
13 weren't to the owners on this project?

14 A. Well, they kept wanting me to guarantee
15 whatever proposal that we -- we came up with, and it
16 was clear what we had contracted did not include any
17 subgrade issues. And I would not guarantee the
18 work. I would come out with ideas, and we finally
19 said -- I think we agreed at that meeting, let's
20 hire a geotechnical engineer. We'll split the cost,
21 and we'll see what this person says. We did not
22 have a geotechnical engineer nor did we profess to
23 be geotechnical engineers.

24 Q. That was one point that -- does your

1 company do subgrade testing or base stone testing?

2 A. We just do quality control. We do
3 compaction. We don't analyze subgrade. Anything
4 that required -- most of the time, we worked for the
5 Department of Transportation, and they did all that.
6 We did cross sections, grades, layout work, asphalt
7 quality control; but we didn't do geotechnical.

8 Q. Okay. Now, after your discussions in mid
9 May, what happened next?

10 A. Well, we did -- we dug a couple of -- I
11 don't know how many -- several test pits down there,
12 put the geotextile fabric in, put some base on top
13 of it, and let that sit. And it did harden up the
14 areas where we put that.

15 It was my understanding from the meeting
16 that the racetrack was going to have to acquire
17 additional back financing and that we were -- they
18 couldn't tell us what they wanted to do because they
19 didn't know how much money that they could borrow
20 and -- so we were kind of left on hold.

21 We never left the job. We did leave
22 equipment on the job. We intended to return to the
23 job when we were instructed what they wanted to do.
24 You know, I had understood that time was an issue

1 with them and money; and so, because of the time
2 constraints and the money, it was -- the ball was in
3 their court to tell us what they wanted to do based
4 on what the geotechnical engineers recommendation
5 was.

6 Q. Did they ever get back to you?

7 A. No.

8 Q. And you reviewed the events of this
9 project that had got you to the point to where you
10 visited in mid May?

11 A. Do what?

12 Q. Did you review the events that happened;
13 you talked to your people --

14 A. Well, I talked -- I talked to John Taylor;
15 and he told me, you know, that he priced the job,
16 that it was going to be a mill. And I had 2 inches
17 of pavement. Put 2 inches of pavement back. That
18 he had wanted to put a 2-inch cap on there, but they
19 didn't want to pour A. new concrete starting pad,
20 and it would also required them to have to have to
21 raise the fence and -- so that was --

22 MR. COBB: Your Honor, I --

23 A. We thought the fence --

24 MR. COBB: Your Honor, objection. I -- I

1 can't tell what he's testifying that he knows or
2 what he's testifying based upon what one of his
3 employees told him. And it may be that he's cleared
4 that up, but I think he's testifying about
5 negotiations between Taylor and between Bateman and
6 not him.

7 MR. CASHION: Right.

8 MR. COBB: MR. COBB: Because he --

9 MR. CASHION: Well, no. He's testifying
10 what reviewed to know about the project. Now,
11 you're --

12 MR. COBB: That's fine. If it's not for
13 the truth of the matter asserted then it's just his
14 review.

15 MR. CASHION: His review.

16 MR. COBB: Right. Excuse me.

17 MR. CASHION: He was not there at that
18 time.

19 MR. COBB: I'll withdraw the objection.
20 Sorry.

21 A. Okay. That -- so the -- what I gathered
22 from that was that the -- doing anything with the
23 fence was not an option. I don't know whether there
24 was some electronics in the concrete pad or what.

1 But anyway, the -- so we elected to mill it; and
2 when it was milled, it didn't show, appear to have
3 any problems where the milling machine did get
4 stuck, but that's really not -- when the -- when you
5 mill, you can get the -- the head can get so heavy
6 on that, it can bog down.

7 But they just simply -- it's got
8 hydraulics. You just raise the head up, and it
9 walks right out so. The milling foreman was from
10 Knoxville, and Larry told me that the job was -- he
11 said it had a couple of soft spots in it. He said
12 that it wasn't bad.

13 MR. COBB: Your Honor, that is hearsay.

14 BY MR. CASHION:

15 Q. Don't tell what --

16 A. What?

17 Q. Don't tell what -- hearsay, what somebody
18 told you.

19 A. Well, I talked directly to Larry in
20 Knoxville.

21 Q. Okay. Well, from doing your review, did
22 you find that Tennessee Asphalt Company did anything
23 wrong or negligent?

24 A. I didn't see where we did anything

1 negligent. The whole -- the idea of trying to
2 bridge the material was certainly what I would
3 recommended to do because the money was the supreme
4 controlling factor. You know, if -- if money had
5 not been an issue, certainly, there's better
6 solutions.

7 But as I said in my deposition, if the
8 asphalt had doubled on this job, it would have been
9 A. much cheaper alternative than what -- than the
10 cement-treated base.

11 Q. And were you surprised at the -- the
12 amount of moisture in the subgrade?

13 A. Yes. I thought the subgrade moisture,
14 that was just a unique situation. I've never seen
15 subgrade moisture that was in the -- I believe some
16 of it was in the 30s, 30 percent. And, again, you
17 know, it's just hard to think that you wouldn't have
18 seen that, but there was no -- the -- you would have
19 thought at 30 percent moisture that the water would
20 have been in the base stone, which it was not.

21 And had the core been that consistent,
22 water should have pumped out of those holes once
23 they were drilled because water will go to the place
24 of least resistance.

1 Q. Okay. And, finally, did you find anything
2 that gave an indication of this subsurface subgrade
3 problem, anything that you reviewed before it was
4 milled --

5 A. No.

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

8 CROSS-EXAMINATION

9 BY MR. COBB:

10 Q. Mr. Ratliff, Lewis Cobb. We met a few
11 months ago and took your deposition, and I want to
12 just follow up on a couple of questions that
13 Mr. Cashion said.

14 When this problem developed, I heard you
15 testify that you didn't hear from them, didn't know
16 what to do. And I want to -- I actually called you,
17 didn't I, middle of May?

18 A. You may have. I know -- I know that --
19 yeah, you did because --

20 Q. Do all lawyers sound alike?

21 A. -- at -- at that point, you were -- yeah,
22 you called because you were trying to get me to
23 accept the subgrade -- or responsibility for
24 subgrade --

1 Q. Still am.

2 A -- and I would not. And that's why we're here
3 bothering Judge Maloan today.

4 Q. Well, he needs people like us. Maybe not
5 like us. Anyway, I wrote you a letter May 17th.
6 I'm going to show you a copy of that --

7 A. Okay.

8 Q. -- so we can get that in the record. Do
9 you recall getting that letter?

10 A. Yes.

11 Q. And you don't have to read the entire
12 thing, and I know -- but do you recall receiving a
13 letter from me?

14 A. That's correct. You were saying that
15 we're in default, but what we were waiting for was
16 how are we going to get paid for what we're going to
17 do.

18 Q. I understand. And then I sent another
19 letter to you May 21st where I -- I wrote, I said,
20 Mr. Ratliff, this will confirm our conversation
21 today where you advised you were contacting counsel
22 in response to my letter. And then, once you got
23 counsel, I've been dealing with Mr. Cashion, but
24 I -- but I did follow up four days later?

1 A. Okay. You did.

2 Q. And then I sent a third letter May 29th
3 saying I hadn't heard from you or counsel at that
4 time. Do you recall receiving that letter as well?

5 A. Yes.

6 Q. Okay.

7 MR. COBB: Your Honor, I'd like to make
8 those collective exhibits.

9 BY MR. COBB:

10 Q. And Mr. Cashion said that there was a
11 response from him, and I'm not trying to exclude
12 him, but I didn't have that.

13 A. I'm sorry. I -- I was thinking that he
14 was talking about Monte and...

15 Q. All right.

16 MR. COBB: Make those the next --

17 THE COURT: Marked without objection, it'll
18 be 30.

19 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
20 WAS MARKED AS EXHIBIT NO. 30 TO THE TESTIMONY OF THE
21 WITNESS.)

22 BY MR. COBB:

23 Q. And Mr. Ratliff, I'm not -- I know you've
24 had some eye difficulties, and I'm not trying to --

1 to make this difficult for you, but there's a couple
2 things in this letter I want to draw to your
3 attention. In my initial letter, we made it clear
4 that they were dis- -- dissatisfied with the way the
5 work was performed. Do you recall that?

6 A. Uh-huh. (affirmative response). Okay.

7 Q. And then said, I'd reviewed paragraph 11,
8 and it said that the Smith's must give you 30 days
9 written notice of default before filing suit. And
10 this was -- the letter was the written notice of
11 default?

12 A. Okay.

13 Q. Okay. And then -- and we followed up with
14 other two letters basically telling you -- and I
15 don't want to read all those letters in the record,
16 but -- but it was pretty clear when you got my
17 letter May 17th, the Smiths were unhappy, that they
18 expected you to -- to repair the problem, and that
19 they would pay you the contract price, correct?

20 A. The contract price of 39,000.

21 Q. Right.

22 A. Yes, but the problem was not -- the
23 problem was a subgrade issue, which belonged to the
24 racetrack, and that's where the whole disagreement

1 has come in. That's why Mr. Cashion responded to
2 you because we were not willing to accept
3 responsibility for the subgrade.

4 Q. And I'm not here arguing with you that
5 point now, I'm -- I'm going to argue with him. But
6 my point is you were on notice that they were
7 raising that issue very early, middle of May, right?

8 A. I was -- I was on notice that , yes, that
9 you were...

10 Q. Okay. Now, you mentioned that the
11 geotechnical report that David Evans did showed an
12 extremely high moisture content of that subsoil,
13 correct?

14 A. That's correct.

15 Q. And you're aware that the heavy trucks
16 that used the staging area damaged that staging
17 area, aren't you?

18 A. I'm aware that, yes, the -- the subgrade
19 couldn't hold up the trucks.

20 Q. All right. Well, the subgrade could hold
21 up normal traffic, right?

22 A. It could hold up cars and race cars.

23 Q. All right. And so could the track and the
24 shutdown area, right?

1 A. It had -- it had thus far, yes.

2 Q. For 23 years? So it would be reasonable
3 to assume that it could handle normal traffic or
4 normal for that road, right?

5 A. It could handle for a time period what --
6 what was on it, yes.

7 Q. All right. But when the heavy trucks used
8 roads meant for light traffic, that destroyed that
9 road, didn't it?

10 A. Yes.

11 Q. As a matter of fact, in -- in the
12 contract, the proposal, it actually says, light-duty
13 asphalt pavement, the 2 inches that you're putting
14 down cannot be guaranteed against heavy-duty
15 traffic, right?

16 A. That's correct. That's why we light
17 loaded the trucks going in there, but we had to get
18 the material. This is the same discussion we had in
19 your office. How are we going to get the material
20 to the job if we don't go in on the existing
21 pavement?

22 Q. Well, couldn't you use the ground next to
23 it, that's what Ford did?

24 A. Well, if the road isn't going to support

1 you, I wouldn't suspect that the field would support
2 you.

3 Q. Well, but if you're damaging the field,
4 it's not creating this \$180,000 problem, though,
5 right?

6 A. We didn't know who -- who owned the field.
7 We were not directed to do anything different than
8 what we did.

9 Q. Well, who's in charge when you do the
10 paving? Is Cory Todd telling y'all how to pave, or
11 are y'all -- y'all are using your expertise and your
12 30 years experience?

13 A. The owner has got to provide us a way to
14 get into the job.

15 Q. Did you ask --

16 A. We had no idea that the subgrade was in
17 the shape that it was or we would have never, ever
18 quoted the job period.

19 Q. I believe you. And if they had known that
20 you were going to do this to the job, they would
21 never have asked you, right? My question is: Who
22 has more knowledge and experience about paving, you
23 or Cory Todd?

24 A. I would suppose that I do, and I would

1 have done exactly what they did.

2 Q. Don't you provide recommendations and
3 advice to your customers?

4 A. No, sir, not when we're not responsible
5 for an area, and the subgrade we were never
6 responsible for. The subgrade was always there,
7 that was their responsibility. We did get a
8 geotextile engineer -- or geotechnical engineer. He
9 made recommendations, and it was up to them to make
10 a decision on how they wanted to proceed based on
11 their money, availability, time.

12 Q. If the heavy trucks that you used were
13 heavy enough to damage that paved subarea, don't you
14 think that -- that the -- let me back up, start
15 over.

16 When did you first realize y'all needed to
17 get geotechnical?

18 A. When I went down there and looked at the
19 job.

20 Q. All right. But when you have pavers
21 getting stuck, milling machines getting stuck,
22 trucks breaking through the ground, and you knew
23 that there was -- or -- or your company knew there
24 was a problem fairly early on, right, first day,

1 right?

2 A. We knew that the subgrade had some issues,
3 yes.

4 Q. Well, you tore the pavement up, too,
5 didn't you?

6 A. I don't know when the pavement got torn
7 up.

8 MR. COBB: I don't have an extra copy of
9 your deposition, Mr. Cashion. I'm going to ask him
10 a few questions about it.

11 BY MR. COBB:

12 Q. Mr. Ratliff, I'm directing your attention
13 to Page 48, and I'm trying to put this in context.
14 We've been talking about the coring that Danny
15 Wimberly had done.

16 A. Uh-huh. (affirmative response.)

17 Q. And I asked you on Line 9, question (as
18 read): And if a recommendation had been made at
19 that time to do more extensive sampling, that
20 probably would have been done, wouldn't it? And
21 didn't you say it's possible?

22 A. Uh-huh. (affirmative response.)

23 Q. And then I said, and you're saying you
24 just didn't -- you just didn't know that you needed

1 to do more sampling at that time, right? And you
2 said, that's correct. Are you following me?

3 A. Yes.

4 Q. Okay.

5 A. I'm reading right there with you.

6 Q. And neither did Cory or Monte, correct?
7 And your answer is correct. If we had any idea that
8 there was a problem, we would have never proceeded
9 with the milling, correct? Is that right?

10 A. Yes.

11 Q. And when Danny Wimberly drilled those
12 cores and found water in the hole, there was a
13 fairly simple and inexpensive way to do some more
14 testing to see how saturated that ground was, wasn't
15 there?

16 A. You're relying on water that wasn't a
17 quarter of an inch deep. It's not unusual in coring
18 to have water in the hole.

19 Q. You heard Danny Wimberly say it was
20 unusual what he saw?

21 A. I heard you get him to get the -- give you
22 that answer, yes, but I -- I don't agree with Danny
23 Wimberly's answer. I have seen about half the time
24 water in the hole when that coring machine comes out

1 of taking an asphalt core.

2 Q. All right. Let me -- let me ask you this
3 question though: If I'm right and Danny did see
4 something unusual, if you had done some additional
5 testing at that point, all this damage and
6 destruction could have been avoided, couldn't it?

7 A. When -- what would have been unusual was
8 when that core came out for that hole to be full of
9 water and that hole to have still been standing full
10 of water a day or two later, that would have shown
11 you that there was a problem.

12 What you -- what you're getting excited
13 about is about like if you have a heart murmur and
14 you go into the doctor and he says, well, boy, you
15 better do a heart transplant. I mean, what you're
16 using, you're using four, 4-inch diameter holes and
17 700 feet by 50 feet. I don't think that you can say
18 that that represents any problem with moisture.

19 Q. All right. Let me -- let me ask my
20 question again because I think you're arguing about
21 something different. My question to you is: If
22 sampling had been done to determine the amount of
23 moisture in that subgrade at that point, this paving
24 project would never have gone on, right?

1 A. Probably not, I don't know what --

2 Q. Because if -- because if you knew that you
3 had this very high moisture, you would know, you
4 can't mill and repave this section of asphalt,
5 right?

6 A. Not the way it was priced, no.

7 Q. Okay. And you would know you can't run
8 heavy trucks on this shutdown lane, right? If you
9 had had the David Evans' tests done before you
10 started, right?

11 A. Probably not.

12 Q. And so what would have and could have made
13 a difference is if there had been some geotechnical
14 testing done first where you could have had -- this
15 racetrack could have continued to operate without
16 this paving problem, right?

17 A. Probably, yes.

18 Q. Now, when soil is wet and a truck goes on
19 top of it, it does what's called pumping, right?

20 A. Right.

21 Q. And that's a lot like pumping up a bicycle
22 tire, each time it goes up and down, it creates
23 further and further problems, right?

24 A. Not necessarily. There's lots of roads

1 that have been paved that were pumping, and they're
2 out there today.

3 Q. All right. Didn't you describe it as a
4 paperclip where you bend it, flex it back and forth,
5 and each time it gets a little weak and a little
6 weaker? Do you remember giving me that example?

7 A. No, but --

8 Q. Maybe Austin Bateman did. Is that a fair
9 example that when you pump subsurface in the base,
10 it's like bending a paperclip back and forth, and,
11 eventually, it just fails?

12 A. It -- it can fail.

13 Q. And so each truck that went over was like
14 bending that paperclip one more time, right?

15 A. It was stressing the subgrade, yeah.

16 Q. And eventually, a track that worked fine
17 for -- for drag racing became one that -- that was
18 rutted and damaged, and even the -- the -- the base
19 was ruined, right?

20 A. The base?

21 Q. The base because -- after it got pumped so
22 much, the base broke down, right?

23 A. The -- the -- the subgrade is what caused
24 them to have to put the -- treat the -- the base.

1 Q. Well, it was a subgrade with trucks going
2 over -- over and over and over is what broke the
3 base down, right?

4 A. No, the moisture in the subgrade's what
5 broke the base.

6 Q. But if there's no trucks going over it,
7 the base is fine?

8 A. You were eventually going to have that
9 problem, and you will again unless the drainage
10 is -- is addressed. You know, it may be years down
11 the road --

12 Q. Okay.

13 A. -- but...

14 Q. And there's no way of telling how many
15 years down the road that would occur, is there?

16 A. Not at this point, no.

17 Q. Okay. Because your people all testified
18 when they went out and looked at it, it looked
19 pretty good?

20 A. It did look okay.

21 Q. All right. Look on Page 61 of your
22 deposition. Do you recall me asking you about the
23 paperclip analogy? Actually, it started at Page 60,
24 Line 21?

1 A. Okay.

2 Q. And that's -- that's a fair analogy, isn't
3 it?

4 A. I agreed to it, so...

5 Q. Okay. And what was proposed by
6 Mr. Bateman was to bridge over the ruts that were
7 created by the paver and by the building process,
8 correct, adding more asphalt?

9 A. Yes, adding more asphalt to the hole.

10 Q. But we now know as wet as that subsoil was
11 that wasn't going to work, was it?

12 A. No.

13 Q. And so that recommendation was based on
14 bad information, right?

15 A. It was -- it was just merely a suggestion,
16 it wasn't based on any information except history
17 that we've always been able to bridge -- take extra
18 material and bridge a -- a project like this.

19 Q. So you made a recommendation to Cory and
20 Monte based upon your experience that bridging would
21 work, right?

22 A. Told them we thought it probably would,
23 yes.

24 Q. But you were right, it didn't work?

1 A. That's correct.

2 MR. COBB: That's all.

3 A. But we didn't guarantee it.

4 BY MR. COBB:

5 Q. Well, I'm glad you said that. You never
6 would guarantee anything?

7 A. That's correct because we weren't
8 responsible for the subgrade, that's the primary
9 issue. We never took ownership of that subgrade nor
10 are we going to unless the judge says that we do.

11 MR. COBB: That's all.

12 THE COURT: Anything further?

13 MR. CASHION: No further witnesses, Your
14 Honor. I would ask --

15 THE COURT: Are you through?

16 MR. CASHION: Oh, yes, I'm through.

17 THE COURT: Thank you, sir.

18 MR. CASHION: Nothing further for
19 Mr. Ratliff.

20 THE COURT: Okay. Other witnesses?

21 MR. CASHION: Your Honor, I would only ask
22 to reserve the right -- and I don't know how you
23 want to address attorneys' fees. Do you want me to
24 submit something by affidavit to you now or after

1 your ruling? So I just want to reserve that right
2 and address it before we leave.

3 THE COURT: I think the proper thing to do
4 for both of you since both of you requested it is
5 that you file your affidavit and put it in the
6 record for the Court to consider, so...

7 MR. CASHION: Okay. Then I request an
8 opportunity to present you an affidavit of
9 attorneys' fees.

10 MR. COBB: I have no objection with that
11 practice if we both can do that, I -- I have no
12 problem with that procedure.

13 THE COURT: All right, gentlemen. Let
14 me -- let's do a little planning here. It's 5
15 o'clock. What do you want to do? If you want to
16 make a closing argument today, I would ask that you
17 be brief, I know that's hard for lawyers to do, or
18 you can submit written closing, or you can come back
19 at 1 o'clock, and I'll give you the rest of the
20 afternoon. It just depends on how long -- so you've
21 got -- you got three choices.

22 MR. COBB: Can I talk to my clients for one
23 second?

24 THE COURT: Yes, sir. Let's all stand in

1 recess.

2 (WHEREUPON, A SHORT BREAK WAS TAKEN. THE
3 PROCEEDINGS CONTINUED AS FOLLOWS.)

4 THE COURT: Mr. Cobb, I think you've chosen
5 the be-brief option?

6 MR. COBB: Yes, sir.

7 THE COURT: All right. Go ahead.

8 MR. COBB: Judge, this is sort of the
9 pottery barn rule, if you break it, you bought it.
10 I know that Tennessee Asphalt doesn't want to be
11 responsible for the subsoil, and I understand why.
12 But in this situation, they sold not just paving but
13 paving advice. And they are obligated to tell what
14 they know, such as finding water in the holes, and
15 to doing the appropriate inquiry at the appropriate
16 time.

17 If -- I mean, we all wish we weren't here
18 today, I promise you that, except the court
19 reporter, they get a lot of money. But -- but the
20 time to investigate was before the milling, and
21 Danny Wimberly saw water reported to John Taylor,
22 and they both said back then, hey, that's a warning
23 sign. That's dangerous. That's a problem. And the
24 water is the problem.

1 The problem is these people: Cory Todd,
2 Monte Smith, Stephanie Smith, did not know that.
3 And so proceeding with bad information is -- is
4 dangerous. And the paving company is the experts,
5 and they're selling, not just paving, but paving
6 advice. Mr. Smith and Mr. Todd are entitled to rely
7 upon that, and that reliance is reasonable, and
8 they've been damaged.

9 Now, the damage is -- to the shutdown area
10 was totally unnecessary. They could have paved that
11 area and never traveled on it. The damage to the
12 staging area was totally unnecessary. The damage to
13 the track was done -- was the only area there's
14 really any dispute, and we suggest that what we did
15 is we had a wet subsoil with a base that was
16 adequate to support a track that was adequate, and
17 these people had a nice little business.

18 When they tried to upgrade because of
19 inadequate information, they got bad advice, and
20 that bad advice took away the 2-inch surface,
21 destroyed the base, and required a very expensive
22 upgrade to -- to put back what they had.

23 Now, the argument is going to be they got
24 better, they really don't. What they had was -- was

1 good enough to run that track, and considering all
2 they've been through, we think that they're entitled
3 to the cost of the paving, the \$186,000 -- 6,000 of
4 that by the way was to move removed the asphalt that
5 they had basically dumped on them after the paving
6 failure with an offset for 395 plus Ms. Todd, I
7 mean, Ms. Smith went through and did an analysis of
8 45,000 was lost for those 13 weeks they were shut
9 and they had a loss business declined because of
10 people who went to other tracks for an extended
11 period of time.

12 I know they're going to argue this that it
13 doesn't have to be exact, it has to be based upon a
14 reasonable assumption and facts. We've got
15 statistics, actual accounting information. They've
16 lost half of these people for five years, it's
17 actually been more of that so far, we're being
18 conservative. So we've had 180- -- 86,000 in
19 paving costs less 39,5- and a 140,000 in loss of
20 income and future income.

21 THE COURT: Thank you, Mr. Cobb, that was
22 brief. Mr. Cashion?

23 MR. CASHION: Yes, sir. As an overview,
24 for this to be a negligence case, which is what he's

1 arguing, it's incredible that there's no standard
2 that's he's presented. There's no paver that came
3 in and said well, what Tennessee Asphalt did was
4 absolutely wrong. You never drive through the --
5 the deceleration lane, you -- you always go out and
6 get a geotechnical report. You, you know, and you
7 never, you know, make a -- this type of
8 recommendation, this is negligence.

9 This case is built on Mr. Cobb's oratory
10 skills in cross-examination of trying to take the
11 hindsight, which is wonderful, find out what we
12 didn't do and then tell the Court or through his
13 questions, this is what he should have done. Of
14 course you should have had a test from Dave Evans
15 and we would have never been here. Of course you
16 should have, you know, not recommended that option
17 to them, that was a bad recommendation knowing that
18 it -- it failed. Of course, you should have been.

19 It's all the same attorney trick I'm so
20 used to every day, take what didn't happen and make
21 that the standard. And here is a perfect example in
22 hindsight. But what they did, Tennessee Asphalt
23 did, as reasonable each step of the way. And the
24 most incredible thing is this is a contract case,

1 it's not a negligent case. He didn't prove the
2 standard of care yet, he didn't get to a negligent.

3 The risk started with the owner for
4 subgrade material, subbase and it stayed with the
5 owner, there was nothing that we did that
6 transferred that risk to us. Nothing in
7 conversation. The contract speaks and it tells you
8 exactly who's responsible for any subgrade work.

9 All these problems were caused by bad
10 subgrade. That's the owner's responsibility, every
11 one of them. There was nothing that they did in the
12 performance of their work that caused the problem.
13 And biggest red herring was when he found a note
14 that there was water in two holes, and that's --
15 that becomes, you know, his smoking gun and say, oh,
16 he had water in the hole, he should have told them,
17 there again, and you know the standards, you should
18 have had -- a good paving contractor will always
19 tell when water is in a coring hole that takes water
20 to cut the hole. He does not have a standard for
21 you. There is nobody else that has testified that
22 that is the standard and it's negligence for them
23 not to say anything.

24 In fact, there's no fact that support that

1 was even a significant event. Again, it's
2 hindsight. Well, you did have a subgrade saturation
3 problem probably 12 inches below where -- the top of
4 the base stone, so therefore you had a saturation
5 and you should have known this was a problem.
6 Again, hindsight argument, the red herring. This
7 was the linchpin to everything.

8 When the fact supports show the base stone
9 was not saturated, the water wasn't coming up
10 through the base stone. Mr. Evans never tested the
11 base stone for saturation. Mr. Bateman said the
12 base stone looked good, it looked dry. It wasn't --
13 it was flexing because of subgrade problems,
14 saturation, but the stone itself was holding up. So
15 even if you start thinking well, gee, that was water
16 in the hole, it has no significance because
17 everything else that came after that supports the
18 fact that the water was from the drill.

19 And so his whole linchpin just misses, but
20 something that breaks the hair back -- break the
21 hair back, that water in the hole, you should have
22 done what you didn't do, you didn't tell them, so
23 you should have told them.

24 So this whole argument that they did

1 something wrong is not based in the contract,
2 problem was to subgrade it, stayed to subgrade it,
3 stayed their responsibility and there was no
4 indications to us that there was any problem with
5 the subgrade when we looked at it, we observed it.
6 We went out there and milled it, and that's when we
7 had the first indication the actual indication that
8 there was a subgrade saturation, not a base stone
9 saturation.

10 So I would just submit, Your Honor, that
11 they do not cross any bar for negligence case and
12 the contract precludes us having any responsibility
13 for what the problem on this job was and that was a
14 saturated subgrade. Thank you.

15 THE COURT: All right. Thank you,
16 gentlemen. First off, let me compliment both the
17 attorneys, you've done a remarkable job to getting
18 all this proof in the record and, of course, in one
19 day. So both of you have done a very good job in
20 having all of your exhibits ready, very limited
21 amount of arguing and objecting. So both of you
22 have done a very fine job representing your client.

23 Now, I'm going to -- I'm going to take the
24 matter under advisement because I read your briefs,

1 but I've got to go back and relate all the facts
2 that have been put into the record. Let me ask you
3 one thing, both of you in your briefs cited cases,
4 unreported cases, cases from other jurisdiction but
5 didn't submit -- didn't submit them to me, so I may
6 not have access to all of those. So -- so the cases
7 that you're relying on that are unreported or from a
8 different jurisdiction, I'd ask that you submit
9 those to me.

10 So with that -- and if there's anything
11 after the proof that you want to add to your briefs
12 I'll give you 10 days to do that when you switch
13 cases, and I'll give you a decision after I receive
14 all that. All right. Thank you, gentlemen.

15 MR. COBB: Thank you, Your Honor.

16 MR. CASHION: Thank you, Your Honor.

17 (THE COURT RETAINED ALL EXHIBITS.)

18 (WHEREUPON, THE PROCEEDINGS CONCLUDED AT
19 APPROXIMATELY 5:20 P.M.)
20
21
22
23
24

C E R T I F I C A T E

STATE OF TENNESSEE:
COUNTY OF MADISON:

I, Joy Goodman, Court Reporter and
Notary Public, Madison County, Tennessee, CERTIFY:

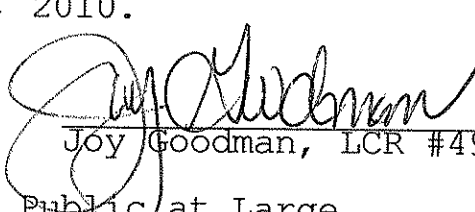
The foregoing proceedings were taken
before me at the time and place stated in the
foregoing styled cause with the appearances as
noted.

Being a Court Reporter, I then reported
the proceeding in Stenotype, and the foregoing pages
contain a true and correct transcript of my said
Stenotype notes then and there taken.

I am not in the employ of and am not
related to any of the parties or their counsel, and
I have no interest in the matter involved.

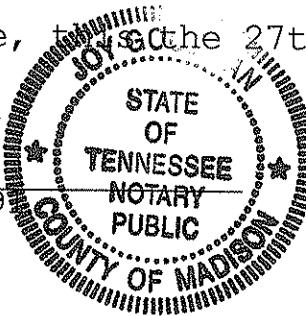
I FURTHER CERTIFY that this transcript
is the work product of this court reporting firm and
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39-14-149, Theft of Services.

Witness my signature, this 27th day
of October, 2010.


Joy Goodman, LCR #49

Notary Public at Large

For the State of Tennessee



My Commission Expires:

June 19, 2012