

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 II
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
17 the HONORABLE MICHAEL MALOAN, Judge presiding, when
18 and where the following proceedings were had,
19 to-wit:

20
21 **ORIGINAL**

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1 A. No.

2 Q. Let me show you some pictures of this area
3 and ask you if they fairly and accurately represent
4 what that track turned into that week that Tennessee
5 Asphalt was paving. Just go through them all.

6 (WHEREUPON, THE ABOVE-MENTIONED PHOTOGRAPHS
7 WERE PASSED TO THE WITNESS.)

8 A. (Witness reviewing photographs.)

9 Q. Okay. Are those all of the track during
10 that week?

11 A. Yes.

12 Q. Who took those?

13 A. Stephanie.

14 Q. All right. I want you to go through and
15 just kind of give me -- tell you what --

16 MR. COBB: Your Honor, can we just stop and
17 mark them, I think that would be the easiest way,
18 fastest way.

19 THE COURT: You want to mark them
20 collectively or individually?

21 MR. COBB: Collectively I think will be
22 fine.

23 THE COURT: All right. What's our next
24 exhibit?

1 THE REPORTER: 21.

2 THE COURT: 21?

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

6 MR. COBB: Your Honor, there are 41
7 individual photographs in that grouping.

8 BY MR. COBB:

9 Q. Cory, what I want you to do is, first,
10 let's get some of these that show the overall track.
11 If -- these two here. Show -- show the Court what
12 we're talking about.

13 A. These?

14 Q. Yeah. What's going on in those
15 photographs? That doesn't look like a racetrack, it
16 doesn't even look like a road. What --

17 A. No, this -- this is the part like where
18 they put part of the pavement down, and -- and this
19 is like where they stopped and just left is.

20 Q. All right. That -- so they -- they stopped
21 paving --

22 A. Yeah.

23 Q. -- in this condition?

24 A. Yes. That's the way it was left on

1 Wednesday afternoon.

2 Q. All right. And these photographs have a
3 date stamp on them, like this one shows 5/10/2007?

4 A. Yeah.

5 Q. This is one that shows the -- the
6 guardrail. What's that there on the edge?

7 A. This?

8 Q. Yes.

9 A. That --

10 Q. It looks like chunks of asphalt?

11 A. Yeah, that's chunk of asphalt. I think
12 that's where they went back and -- and cut part of
13 it out.

14 Q. Do you know why they cut -- cut that part
15 out?

16 A. No, I don't.

17 Q. All right. Here's a picture that shows the
18 two pieces of equipment on there. Is that the
19 equipment that was being used?

20 A. Yes.

21 Q. All right. Are they stuck at that point,
22 or is that before they got stuck?

23 A. No, that's -- that's after the fact.

24 Q. Have they already been stuck?

1 A. Yes.

2 Q. And they're still out there paving on that
3 ground -- soft ground?

4 A. Yes.

5 Q. Okay. All right. Now, here's a picture,
6 5/8/2007, that shows -- looks like some asphalt had
7 just been spread?

8 A. Yes.

9 Q. Is -- is that the part you talked about
10 where they just --

11 A. Yeah. That's --

12 Q. -- dumped it?

13 A. -- that's part of it where they dumped it
14 out and just spread it out with the tractor.

15 Q. And is that part that had to be milled back
16 up by Ford when they started working on it?

17 A. Yes.

18 Q. I mean -- okay. That wasn't suitable to
19 race on, was it?

20 A. No.

21 Q. Would that even be suitable for a driveway?

22 A. No, not my driveway.

23 Q. All right. Here's two pictures that show
24 some more of -- of the track, how it was left.

1 What's that mound of dirt in this one, do you know?
2 Do you know why they did that?

3 A. I believe that is where they dug up and
4 maybe put that fabric down.

5 Q. Where they tried to do an alternative?

6 A. Yes.

7 Q. Here's a -- shows a crack. What -- where's
8 that crack, Cory, can you tell?

9 A. That crack, that is -- let's see how to
10 explain it. By -- by the return road and where that
11 hot gate is.

12 Q. Right up here, just past the -- where the
13 track ends and -- is -- is it on the shutdown area?

14 A. I believe that -- this is by the -- the
15 time slip.

16 Q. Right here?

17 A. No, back.

18 Q. This way?

19 A. Yeah, right there. Right about where your
20 finger is right there.

21 Q. Okay. Were you in -- were you involved in
22 the discussions with Mr. Ratliff or did Monte Smith
23 handle that?

24 A. I mean, he -- he handled that. I was there

1 the day he came and looked at it, but...

2 Q. Okay. Were you there the day David Evans
3 came and did his investigation?

4 A. Yes.

5 Q. What did David Evans do during his
6 investigation?

7 A. He had them dig a hole probably 4 or 5-foot
8 deep with the --

9 Q. With the backhoe?

10 A. Yes, with a backhoe.

11 Q. And took some soil samples out?

12 A. Yes.

13 Q. All right. Did you understand, even at
14 that point, what they were doing and why?

15 A. No.

16 Q. They came and build Monday and they
17 attempted to pave Tuesday. Did they ever do anymore
18 work on that track?

19 A. They -- like I say, that -- they stopped
20 paving on Wednesday, and then later on, I'm not for
21 sure if it was that week is when they come back and
22 dug the hole and -- and put the fabric down.

23 Q. Let me show you these photographs.
24 These -- this the fabric you're talking about?

1 A. Yes.

2 MR. COBB: Let's make that the Exhibit 22.

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

6 BY MR. COBB:

7 Q. Were you there during the discussions of --
8 of whether to use that fabric or not or did Monte
9 handle that?

10 A. Monte handled that.

11 Q. All right. Was that fabric ever put down?

12 A. I think there was a small section of it
13 that was put down.

14 Q. Did you hear the discussions on whether
15 they would stand behind that work and guarantee that
16 it would work?

17 A. No, they -- well, I mean, I heard them
18 talking about it, and what they said, they would
19 never guarantee anything at that point.

20 Q. Let me ask you now about what happened
21 after the track got finished. You probably knew the
22 racers more -- well, I mean, who knew the racers the
23 best, you or Monte? I mean, did -- did you work for
24 them, work with them, race against them?

1 A. Yeah, I mean, I -- I worked for a lot of
2 them. I do a lot of work for a lot of them.

3 Q. When this track was closed for 13 weeks,
4 did y'all lose people who had been regulars of
5 yours?

6 A. Yes.

7 Q. One or two or several?

8 A. Several.

9 Q. And it was -- was it because anything you
10 had done, or was it for some other reason?

11 A. Mainly because we were closed, and they
12 started going other places and got involved in their
13 points. And once you're involved in somebody's
14 points, then you tend to finish out the year and
15 stuff, the season there and get accustomed to going
16 there.

17 Q. Well, when -- when racers get accustomed to
18 going to a track, do they tend to go back to the
19 same track --

20 A. Yes.

21 Q. -- every week when they race? Did that
22 happen to your track?

23 A. Yes.

24 Q. Did you lose some good racers?

1 A. Yes.

2 Q. Some good friends?

3 A. Yes.

4 Q. And did -- are they still --

5 A. Yes.

6 Q. -- other places?

7 A. Yes.

8 MR. COBB: That's all.

9 THE COURT: Cross-examination?

10 MR. CASHION: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. CASHION:

13 Q. Mr. Todd, I'm Greg Cashion, we met
14 previously.

15 A. Yes.

16 Q. I represent Tennessee Asphalt. I want to
17 go over a few things that you testified about. You
18 recall that you received bids from, I think, Martin
19 Paving and Tennessee Asphalt Company, right?

20 A. Yes.

21 Q. Okay. And I believe you told me that the
22 proposals were fairly close together?

23 A. Yes.

24 Q. But Tennessee Asphalt was slightly higher,

1 correct?

2 A. Yes.

3 Q. Okay. And at the time, you couldn't
4 remember exactly what the numbers were, but --

5 A. No.

6 Q. All right. And I think I asked you what
7 would you have done if you knew you had bad
8 subgrade; do you remember that?

9 A. Yes.

10 Q. Okay. And -you told me at that time you
11 would have probably waited a little longer before
12 you did the repairs, right?

13 A. Yes.

14 Q. Now, isn't it true that Tennessee Asphalt
15 told you that they were not going to be responsible
16 for the base stone or any of the subgrade work?

17 A. I mean, it -- it was wrote on this piece of
18 paper, but, I mean, as far as someone telling me
19 that, not until the after the fact that the -- the
20 mess was already there.

21 Q. You remember when I asked you in your
22 deposition --

23 MR. CASHION: Can you hand him his
24 deposition, please?

1 MR. COBB: I sure can.

2 MR. CASHION: Thank you.

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

5 A. (Witness reviewing document.)

6 BY MR. CASHION:

7 Q. Look on Page 21. Are you with me?

8 A. Yeah.

9 MR. COBB: Go ahead.

10 MR. CASHION: Do you have a copy? I'm
11 sorry.

12 MR. COBB: Go ahead, I trust you.

13 MR. CASHION: Okay.

14 BY MR. CASHION:

15 Q. On Line 17, I asked the question (as read):
16 And did you recognize that Tennessee Asphalt had
17 told you that they were not going to be responsible
18 for the base stone or the subgrade work. And what
19 was your answer?

20 A. Yes.

21 Q. Okay. So that time you -- you agreed that
22 they had not told you that, that they had told you
23 they were not going to be responsible for it?

24 A. Yes.

1 Q. Okay. And no one at Tennessee ever --
2 Asphalt ever told you that they were going to be
3 responsible for the base stone, for the subgrade at
4 any time, correct?

5 A. Repeat that, please.

6 Q. Tennessee Asphalt either -- John Taylor.
7 Let's just take John first.

8 A. Yeah.

9 Q. He never told you, Cory, my company is
10 going to be responsible for the base stone and
11 subgrade on this project?

12 A. No.

13 Q. And you never told Tennessee Asphalt
14 anything about the way they should run their trucks
15 or do their operation, did you?

16 A. No.

17 Q. And you saw them going through the shutdown
18 area, correct?

19 A. Yes.

20 Q. Okay. When they started milling, I'm
21 assuming that when the milling machine comes in and
22 the truck backs up and they move and it fills up
23 with asphalt, you know, chunks of asphalt or mill,
24 then they would take off through the shutdown area?

1 A. Yes.

2 Q. Okay. And so that traffic kept going all
3 day Monday, right?

4 A. Yes.

5 Q. Okay. Now, at the end of Monday, there
6 wasn't any complaint about the shutdown area to
7 anyone at Tennessee Asphalt, was there?

8 A. No, I hadn't looked at the shutdown area.

9 Q. So when you talked to John Taylor or --
10 Austin Bateman came in Monday, late afternoon,
11 didn't he?

12 A. Yes.

13 Q. You never said, y'all are tearing up the
14 shutdown area, did you?

15 A. No.

16 Q. Okay. But you knew that you had some areas
17 in the shutdown area that needed repairs?

18 A. Yes, there was one spot I'd asked them
19 about if they would...

20 Q. Okay. And so you expected them to get on
21 this shutdown area with their milling machine and
22 with the trucks in order to repair that area,
23 correct?

24 A. Well, I told him we needed that --

1 everything was like a 12 by 30 area that was maybe a
2 couple hundred feet past where they were paving,
3 something like that, that I wanted to replace while
4 they were there.

5 Q. So you knew they were getting on that area
6 for that replacing anyway, right?

7 A. Well, I mean -- yes, they -- yes.

8 Q. Okay. And I think that was going to be a
9 charge of another like \$300 that you signed for?

10 A. Yes.

11 Q. And you knew that during the milling
12 operation, I think you testified, you saw some --
13 some ruts in the base stone, --

14 A. Yes.

15 Q. -- correct? And that you approved for
16 Tennessee Asphalt to go ahead and pave over despite
17 the fact that there was ruts and there were some
18 problems with the base stone, right?

19 A. Yes, they told me they could add more
20 asphalt to fill up the ruts and it would be fine.

21 Q. Now, you mentioned about the coring. Do
22 you remember the coring took place in early April?

23 A. Yes.

24 Q. It was after the proposal was signed,

1 correct?

2 A. Yes.

3 Q. Okay. And you testified that you assumed
4 it was being cored for subgrade issues. Do you
5 remember testifying to that just today?

6 A. Yes.

7 Q. Okay. But now, you were there when
8 Mr. Danny Wimberly and his assistant came on the
9 racetrack, correct?

10 A. Yes.

11 Q. And you were there with Mr. Wimberly when
12 was operating the coring machine, y'all were
13 talking?

14 A. Yes.

15 Q. I mean, you just said chitchat or
16 something?

17 A. Yeah.

18 Q. It wasn't substantive --

19 A. Yeah.

20 Q. -- y'all were just talking?

21 A. Yes.

22 Q. And I guess what he was doing was he was
23 pulling out a core, and this isn't one from your --
24 well, anyway, but something that looked like that, a

1 disk that he would cut all the way around it and
2 pull that out, right?

3 A. Yes.

4 Q. And you saw him pulling it out?

5 A. Yes.

6 Q. I think you said he had to get a
7 screwdriver and kind of pry it out. Do you remember
8 seeing him get it out?

9 A. No. I don't -- I don't remember that part,
10 no.

11 Q. And you saw the machine, and the machine
12 was -- had water squirting on it. He said it takes
13 about 2 gallons per hole, but you had a -- a puddle
14 of water just generating there from cooling the bits
15 on the machine?

16 A. Yes.

17 Q. And that was part of his operation?

18 A. Yes.

19 Q. Now, you knew when you saw what he did that
20 he never went into the stone or the dirt, did he?

21 A. I mean, I -- I saw him pull out that piece
22 of asphalt.

23 Q. Right. So I pull that out --

24 A. Yeah.

1 Q. -- and then he -- did he put some asphalt
2 back in or anything or just leave a hole?

3 A. No, he -- he patched it back up with
4 something, I don't remember exactly what it -- how
5 he done it, but, I mean, he put something back over
6 it.

7 Q. He didn't leave a hole in --

8 A. No, he didn't leave a hole there.

9 Q. -- the racetrack?

10 A. No.

11 Q. Okay. But you saw at that time that he did
12 not dig down 6 or 8 or 12 inches into that rock or
13 dirt or whatever was underneath the asphalt, did he?

14 A. Not while I was there.

15 Q. Okay.

16 A. He told me that there was limestone under
17 it.

18 Q. Right, he could look at what was there
19 after he pulled the hole out. He knew what -- I
20 think he said it was limestone or something, it was
21 rock?

22 A. Yeah, that's all.

23 Q. Okay. But he never dug into the rock,
24 correct?

1 A. Not while I was there --

2 Q. Okay.

3 A. -- that I know of.

4 Q. And he completed his -- it didn't take him,
5 what, 45 minutes maybe, an hour?

6 A. I -- it don't seem like it was very long,
7 no.

8 Q. All right. He patched it up, and he left,
9 right?

10 A. Yes.

11 Q. Okay. So you knew they didn't dig down
12 into the subgrade, right? Tennessee Asphalt never
13 dug down into the subgrade while you were there
14 watching them test and --

15 A. Not -- not while I was watching, no.

16 Q. Okay. So you testified earlier that you
17 assumed the coring was about the subgrade issue, but
18 you knew from watching it that it was not about the
19 subgrade issues, didn't you?

20 A. Well, he was seeing what was underneath the
21 asphalt.

22 Q. Right, but he saw stone --

23 A. I mean, I don't really know what subgrade
24 issues are.

1 Q. Okay. Okay. Well, that's what you -- you
2 answered the lawyers question and he said you
3 assumed there were subgrade issues, you said yes.
4 But, realistically, you don't know what they were?

5 A. No.

6 Q. Okay. And, also, when you agreed to the
7 overrun in asphalt, that wasn't just for the 17- --
8 I mean, excuse me, the 700-foot strip; that was for
9 asphalt if it took anywhere else, correct, it wasn't
10 just for that specific place; do you remember that?

11 A. No. I thought it was just for...

12 Q. Okay. Let me check. Let me ask you to
13 look at Page 35 of your deposition. Are you with
14 me?

15 A. Yes.

16 Q. Okay. Line 16, I asked you -- and we're
17 talking about this overrun asphalt. (as read) Now,
18 that -- now, that's what you were saying. Okay. If
19 it takes more asphalt then we'll pay you extra for
20 the asphalt. Is that what you're saying in this,
21 the document? You say, yes; you remember that?

22 A. Yes.

23 Q. Okay. But this wasn't -- was this any
24 particular area or just in general, the 700 feet

1 that they were going to repave? You said just in
2 general, right?

3 MR. COBB: Actually, he said, just in
4 general, I guess.

5 MR. CASHION: You're correct. Sorry.
6 BY MR. CASHION:

7 Q. You said, just in general, I guess?

8 A. Yes.

9 Q. Okay. And you testified that you and
10 Mr. Bateman talked about some of the rough areas in
11 the staging lanes?

12 A. Yes.

13 Q. I think you also said that Mr. Bateman
14 never said he was going to pay for that?

15 A. He led me to believe that -- he didn't tell
16 me it was going to cost me to fix it.

17 Q. Okay. So he didn't say either way.

18 A. No.

19 Q. He didn't say you're going to pay for it;
20 he didn't say I'm going to pay for it?

21 A. No.

22 Q. And now -- but when the asphalt paver got
23 stuck because of the bad subgrade, he never told you
24 that he was going to fix that problem on his own,

1 did he?

2 A. No.

3 Q. You knew that he was going to charge you if
4 he had to take out the rock and replace it; that was
5 going to be a charge to you, correct?

6 A. That's what he said, yes.

7 Q. All right. And did you look at the
8 geotechnical report of Dave Evans?

9 A. No.

10 Q. Okay. Did you ever know that part of this
11 problem was because you didn't have sufficient
12 drainage around the track, your -- your ditches
13 weren't deep enough, and it was letting water stand
14 underneath the track?

15 A. No.

16 Q. So did they not tell you that, that you
17 needed to fix that drainage while you were going to
18 fix this problem?

19 A. I mean, I -- I think -- at some point,
20 somebody said that -- that that was what the problem
21 was, but I don't -- I don't remember exactly who it
22 was or -- or when it was.

23 Q. Okay. But you've never done anything to
24 try to fix the drainage at the racetrack?

1 A. No.

2 MR. CASHION: That's all the questions I
3 have.

4 THE COURT: Any redirect?

5 MR. COBB: Please, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. COBB:

8 Q. Cory, when Danny Wimberly came in did the
9 coring, if he had needed to drill to China, he could
10 have, couldn't he?

11 A. Yes.

12 Q. Okay. You didn't say, don't drill any
13 deeper?

14 A. No.

15 Q. Did you tell him to drill deeper?

16 A. No.

17 Q. He was the one that knew how deep he had to
18 drill?

19 A. Yes.

20 Q. Were you expecting him to go as deep as he
21 needed to?

22 A. Yes.

23 Q. Do you understand what Ford did as far as
24 fixing that track, is that they laid 12 inches of

1 soil cement?

2 A. Yes.

3 Q. And so it's going to be stable whether it's
4 wet or not?

5 A. Yes.

6 Q. And is drainage a problem for the -- for
7 the patrons or anybody else up there?

8 A. No.

9 Q. What's your expectation that if a truck is
10 riding over your parking lot or your asphalt or
11 staging area and it starts damaging, what are they
12 going to do, keep driving on it?

13 A. No.

14 Q. Or stop?

15 A. Stop.

16 Q. And if somebody damages something that
17 doesn't belong to them, it belongs to you, what do
18 you expect somebody to do?

19 A. Fix it.

20 Q. Or at least tell you?

21 A. Yeah.

22 Q. And was it possible to pave that racetrack,
23 that 700 feet, without getting on the staging area
24 and without damaging the shutdown area?

1 A. Yes.

2 Q. How?

3 A. They could go out the -- the hot gate
4 there. It's --

5 Q. There's been some -- some statements that
6 it wasn't wide enough to go out the hot gate. Could
7 you have taken down the fence?

8 A. Yes, we could have taken down --

9 Q. Would that have been -- would that have
10 been difficult?

11 A. No.

12 Q. Who put the fence up?

13 A. Monte and myself.

14 Q. And could y'all have taken it down and put
15 it back up easily?

16 A. Yes.

17 Q. Quickly?

18 A. Yes.

19 Q. Would you rather have done that than tear
20 up 700 feet of track?

21 A. Oh, yes.

22 Q. At a cost of \$90,000?

23 A. Yes.

24 Q. Of course you would.

1 MR. COBB: That's all.

2 MR. CASHION: All right.

3 RECROSS-EXAMINATION

4 BY MR. CASHION:

5 Q. Well, let's talk about that hot gate. Tell
6 the Court, where's the hot gate. I'm going to hand
7 you Exhibit 1, and I want you to point to it.

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

10 A. (Witness reviewing document.) It is right
11 there.

12 Q. Okay. And the 700 feet they're paving goes
13 about 50 or more feet beyond the hot gate, right?

14 A. Yeah, it goes right past it.

15 Q. Goes right past it?

16 A. Yes.

17 Q. And so if you -- did you expect them to
18 take their trucks and then make a big turn,
19 90-degree turn off that onto that hot gate? What's
20 that going to do to your pavement if they make
21 hundred trucks turn right there?

22 A. I'm assuming it would do the same thing it
23 done now --

24 Q. Okay.

1 A. -- on the shutdown area.

2 Q. And plus you've got to go beyond that, so
3 if they turn there, you're going beyond at least 50
4 feet for paving, correct?

5 A. Yes.

6 Q. Okay.

7 A. But couldn't they have used the hot gate to
8 do this part, and then use the rest of the track to
9 do that 50 feet?

10 Q. Okay. But they couldn't use the hot gate
11 for the whole track, number 1, right?

12 A. Right.

13 Q. If they would start making 90-degree turns
14 on that pavement, then they for sure going to tear
15 that up, correct?

16 A. Yes, but, I mean, that's a service road.
17 That's hardly ever used.

18 Q. But they're going to tear up the track
19 turning on the track. You're not going to turn on
20 the service road, you'd be straight by the time you
21 get to the service road?

22 A. Yeah, but that's the part they're paving.
23 I mean, if they're turning right there before they
24 paved it, what's it going to hurt?

1 Q. Okay. But they couldn't get the -- surface
2 the whole track from that hot gate, could they?

3 A. No.

4 Q. Okay. And you never mentioned to them that
5 whole time you were out there?

6 A. No.

7 Q. All right.

8 MR. CASHION: That's all the questions I
9 have.

10 CONTINUED DIRECT EXAMINATION

11 BY MR. COBB:

12 Q. Cory, to make it clear, there is a -- a hot
13 gate where a race car can get through easily?

14 A. Yes.

15 Q. And then the -- the guardrail comes back up
16 for a distance?

17 A. Yes.

18 Q. You could have taken that guardrail down
19 completely, correct?

20 A. Yes.

21 Q. For -- for a few dollars?

22 A. Yes.

23 Q. And your and Monte's time?

24 A. Yes.

1 Q. All right. And so there didn't have to be
2 a gate at all?

3 A. Right.

4 Q. It would have been a hot plate, the whole
5 area would have been, right?

6 A. Yes.

7 Q. All right.

8 MR. COBB: That's all.

9 THE COURT: Anything further for this
10 witness?

11 MR. CASHION: Nothing further.

12 THE COURT: All right, sir, thank you.
13 You're excused. All right, it's noontime. Let's
14 break for lunch. Let's -- let's talk -- let's talk
15 about our scheduling. How long do y'all think it's
16 going to take to finish up the case?

17 MR. COBB: I'm going to have Stephanie
18 Smith testify, then I'm going to have David Evans
19 testify, then I think I'll be through.

20 THE COURT: Okay. Mr. Cashion, how long do
21 you anticipate it's going to take you to put on your
22 case?

23 MR. CASHION: I only have four witnesses.
24 Two hours, depending how much cross he does. But...

1 THE COURT: All right.

2 MR. CASHION: I'm not going to be real
3 long, Your Honor.

4 THE COURT: Okay.

5 MR. CASHION: This is not -- this is two
6 days worth of work that we -- we did out there. If
7 he finishes by 2 o'clock, I can make a run at
8 getting through by 5:00.

9 THE COURT: All right. Well, let me say
10 this: I've got court tomorrow in Union City -- let
11 me check to see. It's set for half a day, so
12 assuming they don't go over we could use the rest of
13 the afternoon tomorrow at 1 o'clock if y'all are
14 available.

15 MR. COBB: I'm available.

16 THE COURT: Did y'all -- did y'all -- y'all
17 were both under the assumption that you had two
18 days?

19 MR. COBB: I thought it was a two-day
20 trial, but...

21 MR. CASHION: I thought he had one day.

22 THE COURT: Okay.

23 MR. CASHION: We've been arguing about
24 that.

1 THE COURT: Okay.

2 MR. CASHION: Well, I'm available.

3 MR. COBB: Your Honor --

4 MR. CASHION: Are both of you available
5 tomorrow at 1 o'clock?

6 MR. COBB: Yes.

7 MR. CASHION: Yes, Your Honor.

8 THE COURT: Okay. So if we don't finish
9 today, we can start at 1 o'clock tomorrow and finish
10 tomorrow?

11 MR. COBB: We should finish in that time.

12 MR. CASHION: And I think, realistically,
13 we can get close today.

14 THE COURT: Okay. All right.

15 MR. CASHION: I don't know if you wanted to
16 --

17 THE COURT: That sounds great. Okay.
18 Well, let's break for lunch. Come back at 1:00.

19 (WHEREUPON, A LUNCH BREAK WAS TAKEN. THE
20 PROCEEDINGS CONTINUED AS FOLLOWS:)

21 THE COURT: MR. Cobb, call your next
22 witness.

23 MR. COBB: All right. Stephanie Smith.

24 THE COURT: Ma'am, if you would raise your

1 right hand, please.

2 STEPHANIE SMITH

3 Having been first duly sworn, was examined
4 and testified as follows:

5 THE COURT: Please have a seat.

6 DIRECT EXAMINATION

7 BY MR. COBB:

8 Q. You're Stephanie Smith?

9 A. Yes, I am.

10 Q. Stephanie Todd Smith?

11 A. Yes, I am.

12 Q. Older sister to Cory Todd?

13 A. Yes.

14 Q. You helped raise him?

15 A. Sure did.

16 Q. You get some of the credit, all of the
17 blame?

18 A. Most of the time.

19 Q. This is your husband?

20 A. Yes.

21 Q. Y'all have been married how long?

22 A. Married for 17 years.

23 Q. Where did you grow up?

24 A. In Huntingdon.

1 Q. And went to school where?

2 A. In Huntingdon.

3 Q. Graduated when?

4 A. In 1988.

5 Q. And after high school, where did you go?

6 A. To Union University.

7 Q. And did you finish your degree there?

8 A. I did.

9 Q. And what's you're degree in?

10 A. In accounting.

11 Q. And did work for a while in the accounting
12 field?

13 A. I did. I worked for Randy Wallace, he's a
14 CPA.

15 Q. Now, you don't have your CPA?

16 A. No.

17 Q. But you do have an accounting background?

18 A. Yes.

19 Q. And are you the one who does the accounting
20 work for the Smith family?

21 A. Yes.

22 Q. Now, your dad was who?

23 A. Larry Todd.

24 Q. And he ran the Jackson Dragstrip?

1 A. Yes.

2 Q. Did you ever do any of the drag racing?

3 A. Not really.

4 Q. Okay. Did you -- did you work at the --

5 A. Yes.

6 Q. -- at your dad's place?

7 A. Yes.

8 Q. How did --

9 MR. COBB: Let me set this down,

10 Mr. Cashion.

11 BY MR. COBB:

12 Q. How did -- how did you get talked into
13 getting back into the drag racing business?

14 A. I'm not sure. Just -- we grew up there,
15 and that's really all we know.

16 Q. Well, was Cory still racing cars?

17 A. Yes.

18 Q. Building cars?

19 A. Yes.

20 Q. Okay. And that track became available?

21 A. Yes.

22 Q. And you and Monte leased the track --

23 A. Yes.

24 Q. -- for a little while? And then bought it

1 in the late '90s?

2 A. Yes.

3 Q. Or you and the banks bought it?

4 A. Yes.

5 Q. And y'all have been operating it ever
6 since?

7 A. Yes.

8 Q. Now, how -- how long -- when the season is
9 open, when do you start, and when do you end?

10 A. We open in March, and we end usually in
11 November.

12 Q. If there's a thunderstorm or if there's
13 some -- some -- if there is a bad weather, can you
14 race?

15 A. No.

16 Q. All right. Are you the one that keeps the
17 books, accounts, and records?

18 A. Yes.

19 Q. Were y'all doing -- were you making -- were
20 you making your bills?

21 A. Yes.

22 Q. Making some profit?

23 A. (No audible response.)

24 Q. She can't record head shakes.

1 A. Well, I know. If you take out depreciation
2 and things like that, we were.

3 Q. Okay. Cash flow is okay?

4 A. Right.

5 Q. Who came up with the idea that you were
6 going to upgrade the track?

7 A. We all did, we were just kind of...

8 Q. What was the reason? What was the thinking
9 behind that?

10 A. Hopefully to attract more expensive race
11 cars that ran faster that would attract more
12 spectators; therefore, make more money, bring more
13 people with them, spend more money because they had
14 more money.

15 Q. So it was a profit thing?

16 A. Yeah.

17 Q. All right. But you were able to start
18 racing in March of '07?

19 A. Yes.

20 Q. Raced every weekend up until the week the
21 paving started?

22 A. Yes.

23 Q. Who -- who actually handled the contact
24 with the pavers?

1 A. That would be Cory.

2 Q. All right. But when he got some
3 information, would he bring it back to you and Monte
4 to discuss?

5 A. Yes, we all sat down and discussed it
6 together.

7 Q. Had a family counsel?

8 A. Yes.

9 Q. And then -- and then said, sign the
10 contracts or whatever?

11 A. Yes.

12 Q. And did he discuss with you that he had
13 received three proposals, one for a concrete track?

14 A. Yes.

15 Q. And he -- he testified earlier it was over
16 200,000. That wasn't practical, was it?

17 A. Uh, no.

18 Q. Okay. And the second one was with
19 Tennessee Asphalt?

20 A. Yes.

21 Q. Did he get another one?

22 A. Yes.

23 Q. And who was that from?

24 A. Martin Paving Company.

1 Q. And it was about \$1,000 less?

2 A. I think so.

3 Q. Why did y'all go with the one that -- the
4 higher bid?

5 A. Mainly because we have racers that race
6 with us that worked for Tennessee Asphalt and, you
7 know, they're like, they can do a really good job.
8 And Monte had been -- he knew that they had paved
9 highways and things, and we looked at their Web
10 site, and they had paved an airport and things like
11 that. And I thought, surely, if they can pave an
12 airport, they can pave a drag strip.

13 Q. You're -- Northwest Motor Sports has a Web
14 site.

15 A. Yes.

16 Q. And you are the webmaster?

17 A. If you want to call it that.

18 Q. Were you the one that updates --

19 A. Yes, I do.

20 Q. And puts information --

21 A. Yes.

22 Q. And does the layout and...

23 A. Yes.

24 Q. So you're -- you're fairly Web savvy, tech

1 savvy?

2 A. Yes.

3 Q. And so when it came time to make a decision
4 about paving, you're the one that went online and
5 did the research on that?

6 A. Yes.

7 Q. And did you look at this, is this a copy of
8 the Web site information?

9 A. Yes.

10 Q. All right. I've shown this to counsel.
11 I'd like for you to look at that and identify that,
12 please, ma'am.

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

15 A. (Witness reviewing document.) Yes, this
16 was what was on their Web site.

17 Q. All right.

18 MR. COBB: I'd like to have this document
19 marked as the next exhibit, Your Honor.

20 THE COURT: Let it be so marked.

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

24 THE COURT: Where are we?

1 MR. COBB: 23.

2 BY MR. COBB:

3 Q. And I want you to look -- on -- on the
4 front page, it lists the services. Read that into
5 the record.

6 A. (As read) We offer turnkey site
7 preparation from site clearing and grading to
8 asphalt surfacing and striping, consolidating what
9 would traditionally take as many as four
10 subcontractors into one. In addition to asphalt
11 paving, our capabilities include cold plane milling,
12 sealcoating and striping, concrete curbs, sidewalks
13 and gutters, site grading, excavating, and outside
14 material sales.

15 Q. Now, on the next page, did they talk about
16 having engineers?

17 A. We have our own engineering staff capable
18 of handling any issues that may arise during the
19 construction process eliminating costly delays and
20 insuring we maintain the level of quality our
21 customers have come to expect.

22 Q. All right. Continue on.

23 A. Our in-house testing laboratory is state
24 certified by the Tennessee DOT for pavement mix

1 design and analysis allowing us to set the standard
2 for quality control.

3 Q. What about the sand and gravel?

4 A. We also offer classified sand and gravel
5 and crushed limestone through our subsidiary,
6 Tennessee Aggregate Company.

7 Q. Read that last paragraph there.

8 A. Based on our many years of experience, we
9 have the ability to advise our customers on any
10 asphalt needs from new construction to asphalt
11 maintenance. Please let us provide your business
12 with an in-depth analysis to help you decide the
13 most cost-effective way to meet your needs.

14 Q. And did you expect them to provide you with
15 the analysis of the most cost-effective way to meet
16 your needs?

17 A. Yes.

18 Q. I mean, is that one of the reasons you went
19 with the higher bid?

20 A. Yes.

21 Q. Okay. So when Cory signed the contracts
22 with Tennessee Asphalt Company, did he then get
23 asked to do some testing, you've heard us talk about
24 the core sampling?

1 A. Yes.

2 Q. Were you aware of that at the time?

3 A. At the time when?

4 Q. All right. Let me get the contract. First
5 of all, when a fax comes in to Cory Todd, where does
6 it actually come?

7 A. It comes to my house --

8 Q. And you --

9 A. -- which is our business office.

10 Q. And you -- all right. And you saw it, and
11 you gave it to Cory?

12 A. Right.

13 Q. Let me get those.

14 MR. COBB: Excuse me. I'm -- I'm trying to
15 figure out, this is Cory's deposition, I think.
16 Just leave it there.

17 BY MR. COBB:

18 Q. Look at Exhibit No. 4, Stephanie. It
19 should be in here.

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

22 A. (Witness reviewing document.) Okay.

23 Q. Did you see that fax when it came in --

24 A. Yes, I did.

1 Q. -- in March? And it says, I would like to
2 cut cores to investigate a little, but I've been out
3 a few days?

4 A. Yes.

5 Q. So you were aware that John -- Mr. Taylor
6 wanted to come out to the track and cut some cores
7 to do an investigation?

8 A. Yes.

9 Q. And when you read that and you had read
10 their Web site, did you think that was part of the
11 analysis that Tennessee Asphalt said that they would
12 do for their customers?

13 A. Yes.

14 Q. Did you know what cutting a core meant at
15 that time?

16 A. No.

17 Q. Did you know that they were only going to
18 go part of the way down necessary to do the
19 analysis?

20 A. No.

21 Q. If they needed to go all the way down a
22 foot, two, would you have been willing to do that?

23 A. Yes.

24 Q. And if testing costs additional, if it was

1 necessary in order to do the analysis --

2 MR. CASHION: Your Honor, leading.

3 MR. COBB: Quit leading?

4 MR. CASHION: Yes, please.

5 THE COURT: Sustained. Leading.

6 BY MR. COBB:

7 Q. All right. If it costs more to do the
8 testing, what was -- what was your family's -- your
9 company's position on that?

10 A. We would have paid it. Any reasonable
11 amount to do any kind of testing that would have
12 given us...

13 Q. Were there ever any tests that were
14 suggested that you refused?

15 A. No.

16 Q. Now, if you knew that it was going to cost
17 over 200,000 in concrete and you turned it down,
18 what would you have done if you knew it was going to
19 cost \$180,000 to put down soil cement and repave the
20 entire track?

21 A. We would have continued racing just like we
22 were.

23 Q. All right. When did you first realize that
24 Tennessee Asphalt considered themselves to be pavers

1 only and that they didn't analyze the subsoil?

2 A. I guess after everything fell apart.

3 Q. Okay. Were you there on-site when the --
4 when the actual milling started?

5 A. Yes.

6 Q. And did you see any problems that you could
7 tell?

8 A. No.

9 Q. You've heard testimony about there was a
10 miller that got stuck a couple of times?

11 A. Yes.

12 Q. Do you know enough about paving to know
13 whether it got stuck or not?

14 A. No.

15 Q. Did anybody come up to you and say, we've
16 got a problem?

17 A. No.

18 Q. Were you aware that John Taylor and Austin
19 Bateman got Cory to sign another contract, an
20 addendum to pay for more asphalt?

21 A. Yes.

22 Q. Did you know why that was being done? Did
23 they explain that to you?

24 A. I think I knew why. They had explained

1 that some of the --

2 Q. What did they tell you was the reason?

3 A. -- that some of the ground was soft or
4 something after the milling was done.

5 Q. You now know the significance -- that -- at
6 that time, did you, Cory, or Monte realize how
7 serious that could be?

8 A. Oh, no. I just thought that was part of
9 the paving process, that -- I mean, to me, they
10 acted like that was no big deal. It was just...

11 Q. We'll sell some more asphalt and go on?

12 A. Just something that we needed to do so we
13 signed it and went on. I think they told us it
14 wouldn't be a tremendous amount of money.

15 Q. All right. And the next day, were you out
16 there the next day?

17 A. Yes.

18 Q. When the paving started? Did -- could you
19 tell something was wrong that day?

20 A. Not initially, but after a couple of
21 passes, it was obvious.

22 Q. What happened -- tell -- tell me what
23 happened.

24 A. On the second run of the paving, the -- the

1 paver got stuck, which I don't know anything about
2 paving, but I know that when we looked down there
3 and there was a road grader trying to pull it out,
4 and then a loaded dump truck in front of the road
5 grader to pull the road grader -- to pull it all
6 out, I thought something was probably not right.

7 Q. That didn't seem right?

8 A. Well, it didn't seem like a normal way to
9 pave something, but...

10 Q. Well, what did you do? What did you say?

11 A. Oh, I didn't do anything; I didn't say
12 anything to anybody. I just assumed they knew what
13 they were doing, and if there was a problem they
14 would let us know. I thought it was rather strange,
15 but...

16 Q. You --

17 A. I didn't have any reason to...

18 Q. Did you trust them?

19 A. Yes.

20 Q. Did you rely upon them --

21 A. Yes.

22 Q. -- as they said in their Web site? Did
23 they ever tell you that they needed to stop and do
24 some more testing?

1 A. No.

2 Q. At the end of the day, did -- did Monte and
3 Cory have another conversation with John and Austin?

4 A. Yes.

5 Q. And were you -- were you there for that
6 conversation; did you hear it?

7 A. I think I heard bits and pieces of it. I
8 wasn't in the conversation myself.

9 Q. Well, I don't want to not ask you about it
10 if you heard enough, but -- but I don't want to you
11 testify about something you didn't hear from
12 Tennessee Asphalt. And you didn't hear enough of
13 that to testify?

14 A. No.

15 Q. All right. When you went home that night,
16 did you and your husband and Cory think everything
17 was still okay, or -- or --

18 A. Uh, no. No. We were pretty stressed out
19 that night.

20 Q. All right. What happened the next day?

21 A. The next day was when they went over and
22 met -- I think was when they went over and met at
23 the track with John and Austin. Cory and Monte and
24 Candice, I think.

1 Q. All right. Candice is Cory's wife?

2 A. She is Cory's wife, yes.

3 Q. You didn't go to that meeting?

4 A. I didn't go to that meeting. It seemed
5 like I had something to do with my children that
6 day, and I couldn't attend.

7 Q. Well, don't testify about what you hear
8 that day --

9 A. I'm sorry.

10 Q. -- because that would be what your husband
11 told you.

12 A. Okay.

13 Q. Did you go on Thursday when they went out
14 to talk about the possible alternative solution, the
15 geotread and all that -- geofabric?

16 A. On Thursday?

17 Q. Uh-huh. (affirmative response).

18 A. No, Thursday was the day I didn't go.

19 Q. Okay. When did you realize that they were
20 not going to finish the paving job, they being TAC?

21 A. Well, we had had conversation and faxes
22 back and forth with them to try to solve the problem
23 or what we needed to do to solve the problem, what
24 they needed to do --

1 Q. Let me ask that question more carefully.
2 What I don't want you to do, Stephanie, is tell what
3 Monte said they told him.

4 A. Okay.

5 Q. All I want to know is what you heard. My
6 understanding is is that most of that was done by
7 either Monte --

8 A. Oh, yes.

9 Q. -- or Cory?

10 A. Right.

11 Q. So if that's the case, that would be
12 hearsay, and I don't want you --

13 A. Okay.

14 Q. -- to tell that. All right. So the rest
15 of the -- once the paver got stuck and they quit
16 paving on Tuesday, your communication directly with
17 them pretty much ended?

18 A. Yes.

19 Q. I want to talk to you about your role as
20 the accountant for Northwest Motor Sports. You do
21 the recordkeeping?

22 A. Yes.

23 Q. Tell me about the records, what do you
24 keep, and how do you keep it?

1 A. Well, we keep --

2 Q. Do you have daily -- daily sheets?

3 A. We have daily sheets we fill out at the end
4 of the night.

5 Q. All right.

6 A. And then we have the tax returns and stuff
7 for the end of the year, W-2s, 1099s, that kind of
8 thing.

9 Q. Well, you've done some analysis at my
10 request, and I want to get to that. But first of
11 all, I want to lay the foundation for the
12 analysis --

13 A. Okay.

14 Q. When y'all are -- are doing racing, do you
15 keep track of how many people come, what your gate
16 receipts are --

17 A. Yes.

18 Q. -- what your concessions are?

19 A. Yes.

20 Q. Do y'all charge parking?

21 A. No.

22 Q. Entry fees, things like that --

23 A. Yes.

24 Q. -- you keep a record of what it is every

1 night, every weekend?

2 A. Yes, and we keep a record whether it was,
3 you know, a rainy day, a cloudy day, cold day, hot
4 day just because that all determines whether --
5 might answer if you went back to look as to why
6 there wasn't very many people there that day or...

7 Q. And you're the one that keeps those
8 records?

9 A. Yes.

10 Q. And you -- you analyze those records. And
11 what I want to know is how many weeks was the
12 racetrack closed because of this paving?

13 A. We were closed for 13 weeks.

14 Q. Okay. And did you go back and estimate
15 your loss of income for those 13 weeks?

16 A. Yes.

17 Q. All right. What I want to do first is
18 start off with how did you go about estimating,
19 let's talk about the process before we get to the
20 number. What did you do?

21 A. Well, the weekends that we were closed were
22 our peak operating season.

23 Q. Why is that?

24 A. Well, because of -- a Saturday night in

1 March is -- is totally different from a Saturday
2 night in June or July.

3 Q. Is this a summer sport?

4 A. Yes.

5 Q. All right. And so you missed from the
6 first of May --

7 A. We missed May, June, July.

8 Q. Really, you missed most of the weeks school
9 was out.

10 A. Yes.

11 Q. Do families travel more?

12 A. Yes.

13 Q. Do you have the same people come week after
14 week?

15 A. Yes. Most --

16 Q. Why is that?

17 A. -- mostly. Because they get involved in
18 our points program, and they accumulate points every
19 week.

20 Q. Do you have the same people that come year
21 after year?

22 A. Yes.

23 Q. Okay. When you went to analyze what you
24 would have earned if you had been open 13 weeks that

1 you were closed, what records did you look at?

2 A. We looked at -- we looked at our points --
3 our points sheets that -- from the years past.

4 Q. Did you also look at your daily records?

5 A. And we looked at our daily sheets, yes.

6 Q. All right. Did you compare what you would
7 have -- did you compare 2007 that you missed with
8 the 2008 period of time?

9 A. Yes.

10 Q. Why did you compare it to 2008?

11 A. Because 2008 was when we had -- after we
12 had opened back up and things were better and -- and
13 plus 2008 was we used May, June, and July and
14 August, the -- the peak racing season.

15 Q. All right. When you looked at 2008, was
16 2008 with the -- with the upgraded track better than
17 2006?

18 A. Yes.

19 Q. And was that -- do you think that was in
20 part due because of the better track?

21 A. Yes.

22 Q. All right. When -- when you looked at the
23 upgraded numbers, 2008 numbers, what was your
24 analysis of what your total revenue would have been

1 for the 13 weeks?

2 A. Can I look at my sheet?

3 Q. Sure. That's why you write it down.

4 A. Okay.

5 MR. COBB: May I approach?

6 THE COURT: Yes, sir.

7 BY MR. COBB:

8 Q. Do you have an extra copy?

9 A. I do.

10 Q. Do you have more than one extra copy?

11 A. I do.

12 Q. Do you have one more copy?

13 MR. COBB: Your Honor, I'm going to pass
14 this copy to the Court, I think it might be useful.

15 BY MR. COBB:

16 Q. Stephanie, first I want you to look at, is
17 this the one that analyzed the 13 weeks?

18 A. Yes.

19 Q. All right. Let's talk about what you've
20 got. You -- you kept -- you called it a calculation
21 of lost profits, and you look at the month of August
22 '07, and you put total nonfuel. What does that --
23 what is total nonfuel income?

24 A. Everything besides the fuel. The

1 concessions, the entry fees, the spectators, the
2 buybacks.

3 Q. All right.

4 A. Any other kind of income.

5 Q. And the buyback means if somebody gets
6 knocked out of a race they can buy their way back
7 in?

8 A. Yes.

9 Q. All right. And then you also list fuel
10 sales?

11 A. Yes.

12 Q. And you list total revenue?

13 A. Yes.

14 Q. And that's for the entire month of August?

15 A. Yes.

16 Q. And then you break it down to how many
17 weekends in that particular month?

18 A. Yes.

19 Q. Obviously, some -- a couple months have
20 five weekends?

21 A. Right.

22 Q. All right. And you do that for August '07,
23 September '07, May, June, July, August, and
24 September of '08?

1 A. Yes.

2 Q. And that's -- that's the comparison numbers
3 that you're using to predict what you would have
4 earned if you had been open '07?

5 A. If we had opened, yes.

6 Q. All right. Now, when you went through --
7 there are some expenses that you have whether you're
8 open or not?

9 A. Right.

10 Q. Those are called fixed expenses, I think?

11 A. Right.

12 Q. And then you have some expenses that you
13 spend if you're open; and if you're not open, you
14 don't spend?

15 A. Right.

16 Q. So when you were closed for 13 weeks, you
17 didn't have some expense -- some expenses?

18 A. Right.

19 Q. And have you tried to separate those out?

20 A. Yes.

21 Q. All right. Did you go back and look at
22 '07, '06, and '05 --

23 A. Yes.

24 Q. -- as to your expenses, the fixed expenses

1 versus nonfixed?

2 A. I did.

3 Q. And did you find out that they were --
4 percentage is usually somewhere around 60 percent?

5 A. Yes.

6 Q. 67 -- I mean, 2007, they were 55.92
7 percent; 2006, 57.49; 2005, 65.58 percent?

8 A. That percentage of the revenue.

9 Q. That percentage of your revenue --

10 A. Right.

11 Q. -- you lost for the nonfixed expenses?

12 A. Right.

13 Q. So your average was 59.67 percent?

14 A. Right.

15 Q. So when you looked at how much revenue you
16 would have earned if you'd been open 13 weeks, you
17 came up with -- with what number?

18 A. The total lost revenue was 113,000; but
19 then when we subtract the variable cost --

20 Q. All right. Stop just a second.

21 A. Okay.

22 Q. And you got that based on an average
23 weekend times 13?

24 A. Right.

1 Q. All right. So -- so the first column is --

2 A. Average peak weekend.

3 Q. Average peak weekend? And so those are the
4 columns you have, the -- the weekends of August,
5 September, May, June, July, August, September?

6 A. Right.

7 Q. And so you went each weekend to total them
8 up, divided by the number of weekends?

9 A. Right.

10 Q. To get your average per weekend?

11 A. Yes.

12 Q. Then you multiplied that times 13?

13 A. Yes.

14 Q. And that was 113,061.60, wasn't it?

15 A. Yes.

16 Q. Then you tried to derive what was variable
17 expenses and nonvariable. And so the -- the
18 percentage you used was 59.67?

19 A. Yes.

20 Q. And so your total net loss by this analysis
21 was 45,603.23?

22 A. Yes.

23 Q. Okay.

24 MR. COBB: Your Honor, I'd like to make

1 that an exhibit.

2 THE COURT: 24.

3 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
4 WAS MARKED AS EXHIBIT NO. 24 TO THE TESTIMONY OF THE
5 WITNESS.)

6 BY MR. COBB:

7 Q. So we're clear, what you're saying is your
8 total revenue would have been about \$45,000 higher
9 if you had been open those 13 weeks than not?

10 A. Yes.

11 Q. Okay. Now, was that the only economic loss
12 that y'all suffered by being closed those 13 weeks,
13 or was there some additional?

14 A. No, there was additional.

15 Q. Tell me how -- tell me what the additional
16 loss is before we start trying to quantify it.

17 A. Well, when you have racers that race with
18 you every weekend and you close before your points
19 ever start, then they go to other tracks and begin
20 their point system. And once they do that, the
21 likelihood of them coming back is pretty slim
22 because they're involved in their points, and
23 they're tallying points at that track.

24 Q. Are the points cumulative for the year?

1 A. Yes.

2 Q. And once somebody starts racing in a
3 track --

4 A. Yes, they last the entire season.

5 Q. All right. And are the -- are the
6 cumulative prizes the big prizes?

7 A. Yes.

8 Q. And is that what a lot of tracks do?

9 A. Yes.

10 Q. If somebody leaves your track for an
11 extended period of time, what's the likelihood that
12 they'll come back to your track for the end of the
13 season?

14 A. Zero.

15 Q. And why is that?

16 A. Because they're involved in the other
17 track's points program, and they're possibly winning
18 money for their points finishing at the end of the
19 year.

20 Q. All right. And if somebody races with you
21 for year after year and then goes to another track
22 and starts racing, what's the likelihood that
23 they'll come back versus stay with the other track?

24 A. Very slim.

1 Q. Well, talk about that. Did you go back and
2 try to research --

3 A. I did.

4 Q. -- names and people?

5 A. I went back and compared our points ledgers
6 and actually came up with names of racers that did
7 not return during 2007, and then racers that did not
8 return during 2007 or 2008.

9 Q. Okay. Let me ask you this: When you
10 compare 2008 to 2007, 2008 was better?

11 A. Yes.

12 Q. Was that -- and why was that?

13 A. Why was 2008 --

14 Q. Right.

15 A. -- better than 2007?

16 Q. Right.

17 A. Because we were closed 13 weeks --

18 Q. I'm sorry.

19 A. -- in 2007.

20 Q. Right.

21 A. I'm not following you.

22 Q. Well, that was because it was a stupid
23 question. The revenue for 2008 was better than
24 2006, wasn't it?

1 A. I think so, I'll have to look back at the
2 sheet. Yes.

3 Q. And was that the reason that you upgraded
4 the track is so you would attract a better quality
5 of contestant?

6 A. Yes.

7 Q. And make more money?

8 A. Yes.

9 Q. And so when you finally got opened, you did
10 do that?

11 A. Yes.

12 Q. But were there -- was there some people
13 that you would have had in addition to that that
14 went somewhere else?

15 A. Yes.

16 Q. And did you attempt to quantify that?

17 A. Yes.

18 Q. All right. Let's talk about the
19 quantification, the people you lost that didn't come
20 back.

21 A. Okay.

22 Q. Did you go through and -- and -- do you
23 know these people by -- by -- by names?

24 A. Yes, most of them.

1 Q. Been with you several years?

2 A. Yes.

3 Q. All right. And did you go back through and
4 identify some specific names?

5 A. Yes.

6 Q. People who left and never came back?

7 A. Right.

8 Q. Did you make some assumptions about what
9 percentage of people in this point program that left
10 in '07 and that never came back?

11 A. Yes.

12 Q. And what was your percentage?

13 A. Well, the ones that -- I assumed that 50
14 percent of the racers that we lost in 2008 never
15 came back.

16 Q. All right.

17 A. Because --

18 Q. And why did you assume that?

19 A. -- because to assume that all of them never
20 came back was kind of unreasonable, I thought.

21 And --

22 Q. Even though --

23 A. -- I figured 50 percent was a reasonable
24 amount --

1 Q. All right. Let's talk about --

2 A. -- even though it possibly could have been
3 all of them.

4 Q. All right. Let's talk about the basis of
5 that. You've been in -- you and your family have
6 been in drag racing how many years?

7 A. For my whole life.

8 Q. And -- well, that would be rude.

9 A. 30-something years, yeah.

10 Q. All right. And do you feel like you have
11 the experience and -- in knowing what a -- about
12 this marketing problem, about this retention
13 problem?

14 A. Yes.

15 Q. Do you think 50 percent is an accurate
16 number?

17 A. Yes.

18 Q. And have you -- is that less than what
19 you've actually gotten back -- I mean, of these
20 people that left, how many of them have actually
21 come back?

22 A. Have actually come back?

23 Q. Uh-huh. Not even that much?

24 A. Not even that much, no.

1 Q. All right. Let's talk what the affect of
2 not having these people back. Have you gone through
3 and analyzed what it is in a single year?

4 A. Yes.

5 Q. Let's talk about that single year. In
6 2008, do you have the analysis for that year?

7 A. I did.

8 Q. All right. Let's look --

9 A. Well, first, I went in -- I guess you can
10 see where I figured how much that each person would
11 have spent on each weekend.

12 Q. All right. Let's go through that. You
13 have a superpro?

14 A. Yes.

15 Q. Somebody in the superpro is -- is entry fee
16 of \$40; is that right?

17 A. Right.

18 Q. All right. And the buybacks are 25 times
19 two rounds?

20 A. Right.

21 Q. Most people that spend that much to get
22 in --

23 A. They're going to buy back both rounds.

24 Q. All right. The average spectator spends

1 \$15?

2 A. Well, that's -- the average spectator is
3 just saying that each racer brings an average of 1.5
4 spectator with them.

5 Q. All right. And they average \$10 a
6 spectator?

7 A. Right. So that was \$15 in spectator income
8 that we would have lost.

9 Q. All right. And you averaged concession
10 sales?

11 A. Right.

12 Q. All right. And --

13 A. And fuel sales.

14 Q. All right. So for each person, the
15 superpro that doesn't compete, you -- you figure up
16 how much loss --

17 A. Right.

18 Q. -- revenue? 135 --

19 A. \$135.50 --

20 Q. All right.

21 A. -- per night.

22 Q. And you estimated seven people in that
23 category did not return?

24 A. Correct.

1 Q. All right. How about the pro footbrake?

2 A. Basically the same thing I did except their
3 entree fees are a little different so the amount was
4 \$115.50, and there was 15 of those that didn't
5 return.

6 Q. Do I need to ask the difference between a
7 superpro and a footbrake, or is that something
8 technical?

9 A. It's kind of technical.

10 Q. All right. Never mind.

11 A. Okay.

12 Q. But you break them up by categories because
13 the price is different?

14 A. Right.

15 Q. So each footbrake you think costs you
16 115.50?

17 A. Right.

18 Q. And how many of those did you lose?

19 A. 15.

20 Q. Street sportsman?

21 A. Right.

22 Q. Again, we're going down in terms of dollar
23 figure?

24 A. Correct, yes.

1 Q. All right. Each sportsman was how much?

2 A. Was \$80.

3 Q. And how many of those did you lose?

4 A. Eight.

5 Q. And junior dragster is at the bottom end of
6 this spectrum?

7 A. Right, but we didn't -- I didn't come up
8 with any junior dragsters that we particularly lost.

9 Q. All right. Now, what did you assume going
10 for that you lost them for a year, for two years,
11 for how many years?

12 A. Well, after the '07 and -- then I assumed
13 that we lost them for over the next five years.

14 Q. All right. And -- and did you assume you
15 lost all of them or 50 percent?

16 A. 50 percent of them over the next five
17 years.

18 Q. What was the total of the 11 weekends of --
19 for this point that you had?

20 A. In '07?

21 Q. Total revenue lost per weekend of 3 --
22 3321?

23 A. Yes, that was in 2007.

24 Q. And you lost 11 weekends?

1 A. Correct.

2 Q. So there were two weekends that you didn't
3 race, but you wouldn't have had points anyway,
4 right?

5 A. Yeah.

6 Q. So 13 weekends, right, in '07?

7 A. No, there's more than 13 weekends.

8 Q. After -- oh, this is after you -- oh, this
9 is after --

10 A. Yeah. This is after we...

11 Q. Okay. So -- so after you got back open in
12 August, you had 11 more weekends --

13 A. Correct.

14 Q. Okay.

15 A. Correct.

16 Q. Okay. So you assumed you lost 36,000 in
17 '07?

18 A. Right.

19 Q. And how about for the next -- in '08?

20 A. In '08, we had -- we -- I didn't assume
21 every single weekend in '08. I only assumed the 26
22 points events that were on schedule in '08, and that
23 was \$57,005.

24 Q. All right. And how many years did you

1 assume?

2 A. So I totaled '07 and '08, and then I
3 assumed that the future revenue over the next --
4 lost over the next five years was 50 percent of the
5 2008.

6 Q. And did you apply your variable cost
7 estimate to that?

8 A. I did. The total projected revenue lost
9 was \$236,048, and I, again, used the 59.67 percent
10 of variable cost and came up with a net loss of
11 95,198.36.

12 Q. And so this 95,000 should be added to the
13 45,000?

14 A. Yes.

15 Q. For a total demonition of income by this
16 track of about 140 --

17 A. \$140,801.59.

18 Q. All right. Were you -- were you there
19 during the discussions with Ford Construction
20 Company on how to repair and replace?

21 A. No.

22 MR. COBB: That's all, Your Honor.

23 THE COURT: Cross-examination?

24 CROSS-EXAMINATION

1 BY MR. CASHION:

2 Q. Ms. Smith, my name is Greg Cashion, we met
3 before.

4 A. Yes.

5 Q. Represent Tennessee Asphalt.

6 A. Let me ask you just a few questions. This
7 analysis that you've been testifying about --

8 MR. COBB: Excuse me, I'm sorry. I meant
9 to make that an -- I apologize. Can I make that an
10 exhibit?

11 MR. CASHION: I want to object to this
12 being made an exhibit on the basis that it's pure
13 speculation. There's no basis. In fact, it's made
14 by a witness with obvious bias, and it's
15 speculative, every bit of it.

16 THE COURT: All right. What's your
17 response, Mr. Cobb?

18 MR. COBB: Well, Your Honor, she says that
19 she based it -- she's an accountant, she's kept the
20 books for this company, she's been in drag racing
21 for all of her life, she gave you the raw data that
22 was based upon, how it's accumulated night by night,
23 weekend by weekend, and then she went through --
24 through the assumption that she made.

1 The only assumption is that 50 percent of
2 these people in the pros categories that she
3 identified are the points. She assumed only 50
4 percent were lost, the other 50 percent might come
5 back. That's the only one, and she says that that's
6 based upon her experience and is a conservative
7 estimate. So I think they can attack the -- the
8 weight of it.

9 THE COURT: Mr. Cashion, I'm going to allow
10 it as an exhibit. Now, what weight I give the
11 testimony is -- that's a different matter, so it
12 will be marked as the next exhibit.

13 MR. CASHION: Thank you.

14 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
15 WAS MARKED AS EXHIBIT NO. 25 TO THE TESTIMONY OF THE
16 WITNESS.)

17 MR. CASHION: What is that, 20 what? 25?

18 MR. COBB: 25.

19 THE COURT: Okay. What was 24?

20 MR. COBB: The other calculations of the 13
21 weekends.

22 THE COURT: Okay. So -- she went through
23 the -- so we've got two sheets, one's 24 and one's
24 25?

1 MR. COBB: Yes, Your Honor.

2 THE COURT: Okay. Go ahead.

3 BY MR. CASHION:

4 Q. Ms. Smith, do you recall when you made your
5 first attempt at this damage calculation?

6 A. Yes.

7 Q. Which was nothing like what you presented
8 to the Court today, correct?

9 A. Actually, I think the first one just had
10 the -- the revenue on it. It didn't have the
11 variable cost associated with it.

12 Q. Okay. Let me hand to you what you gave to
13 us the first time, which we'll -- let me ask you to
14 identify it.

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

17 MR. CASHION: Here's one for the Court.

18 BY MR. CASHION:

19 Q. Can you identify this for the Court,
20 please, ma'am?

21 A. (Witness reviewing document.) Yes.

22 Q. And this is what you gave to us
23 originally?

24 A Yes.

1 MR. CASHION: Your Honor, I move this as
2 Exhibit 26.

3 THE COURT: So marked.

4 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT
5 WAS MARKED AS EXHIBIT NO. 26 TO THE TESTIMONY OF THE
6 WITNESS.)

7 BY MR. CASHION:

8 Q. When you presented this, you were
9 testifying in your deposition under oath that your
10 loss was \$133,096.89, correct?

11 A. Correct.

12 Q. And in that analysis, I mean, none of this
13 has been audited, has it?

14 A. No.

15 Q. No CPA has looked at this in any way,
16 fashion, or form, correct?

17 A. Yes. No, that's not correct.

18 Q. Have you had a CPA look at any of this?

19 A. John Widebrew with Arnold, Thompson, and --
20 ATA.

21 Q. Well, what did --

22 A. -- actually helped come up with this, yes,
23 he did.

24 Q. Okay. And do you have audited financial

1 statements?

2 A. No, we do not.

3 Q. Okay. Now, at this time, when we took your
4 depositions, you were just trying to make an
5 estimate of gross income that you lost?

6 A. Right. We had -- I had failed to take into
7 account the variable cost.

8 Q. Okay. And then you also provided to us
9 your net income per year as substantiation for your
10 numbers, correct?

11 A. Yes.

12 Q. Okay. Let me hand to you what we'll mark
13 as the next exhibit.

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

16 A. (Witness reviewing document.)

17 BY MR. CASHION:

18 Q. Can you identify this document, Ms. Smith?

19 A. Yes, this is our revenues with fixed
20 expenses and variable expenses. Actually where the
21 percentage came from was this worksheet.

22 MR. CASHION: I move this as Exhibit 27.

23 THE COURT: So marked.

24 (WHEREUPON, THE ABOVE-MENTIONED DOCUMENT

1 WAS MARKED AS EXHIBIT NO. 27 TO THE TESTIMONY OF THE
2 WITNESS.)

3 BY MR. CASHION:

4 Q. Now, Ms. Smith, in this, I've highlighted
5 the net income per year, correct?

6 A. Correct.

7 Q. Okay. And some years, the track makes a
8 little money; some years it loses money, correct?

9 A. Yes.

10 Q. Now, when you decided -- and -- and after
11 your deposition, you went back and created this
12 analysis, correct, that you've been testifying to
13 the Court about?

14 A. Yes.

15 Q. And you recognize that, I think, you're a
16 50 percent owner of the LLC, Northwest Tennessee
17 Motor Sports?

18 A. Yes.

19 Q. And you recognize that you have a definite
20 financial interest in doing this analysis, correct?

21 A. Yes.

22 Q. I mean, your family would get 100 percent,
23 you are 50 percent with Mr. Smith?

24 A. Yes.

1 Q. Okay. Now, knowing that you had a definite
2 financial interest in presenting income loss to the
3 Court, did you intentionally decide not to have
4 someone else that could give an objective analysis
5 present this?

6 A. No.

7 Q. Okay. And when you were making these
8 assumptions on the people that do not come back,
9 you've identified them by name, did you interview
10 all these people?

11 A. No. Not individually, no.

12 Q. So you didn't go and ask these people why
13 they didn't come back, they may have retired, they
14 may have done any number of things, correct?

15 A. Yes.

16 Q. But you made no attempt to verify your
17 assumptions by interviewing the very people that you
18 identified, did you?

19 A. No, I know several people on the list that
20 do still race.

21 Q. But you did not ask the ones that you say
22 are not there --

23 A. I did not ask each and every one of them,
24 no.

1 Q. All right. And when we -- when this
2 proposal was being faxed to you and you commented on
3 it that you received it, you looked at it...

4 A. Which --

5 Q. The proposal from Tennessee Asphalt.

6 A. Oh, the -- the -- the contract. Okay.
7 Yes.

8 Q. Contract.

9 A. Yes. I'm sorry.

10 Q. The contract -- make sure we're looking at
11 the same thing. You looked at this at the time
12 before your -- your brother signed it, right?

13 A. I did.

14 Q. And was time an important factor in your
15 decision in this case, the amount of time it would
16 take to perform this work?

17 A. Well, yes, it was important.

18 Q. Did you think to maybe add like time is of
19 the essence to this proposal so everybody would
20 know, time is important, guys?

21 A. No, we verbally communicated that with
22 them. I didn't think it was necessary to have it
23 written down.

24 Q. Did this verbal communication come before

1 the proposal was entered into?

2 A. Yes.

3 Q. Okay. Did you read the proposal and
4 realize, hey, they -- they don't say anything about
5 time, do they?

6 A. I read it, yes. I never thought about it
7 not saying anything about time, but yes, I read it.

8 Q. Well, did you ever think maybe a completion
9 date would be in order that we have to complete this
10 by June 1, July 1?

11 A. To be honest, I never thought about time.
12 I don't normally sign contracts or deal with
13 anything like that. I -- I never thought about time
14 on the contract.

15 Q. And on this case, there is no completion
16 date, is there?

17 A. No.

18 Q. And did you ever tell anyone prior to
19 entering into this proposal, which is March 29th,
20 '07, that, you know, if you don't complete this
21 immediately, we're going to charge you about \$10,000
22 per week?

23 A. I never told anyone. I never had any
24 conversation with anyone at Tennessee Asphalt until

1 after the beginning and everything went south.

2 Q. So on the front end, you never told them --

3 A. No, I did not.

4 Q. -- what you thought you might lose or -- a
5 number was never mentioned --

6 A. No.

7 Q. -- as what your -- would be your damage if
8 they didn't complete it soon? You don't even have a
9 date but --

10 A. Right.

11 Q. -- soon?

12 A. No.

13 Q. Okay. And when it got into a problem,
14 after the paver got stuck, they finished paving, and
15 it was rough in an unfinished condition?

16 A. Right.

17 Q. And you were aware that Tennessee Asphalt
18 and Mr. Ratliff and Mr. Bateman was trying to talk
19 about different proposals --

20 A. Right.

21 Q. -- you knew they were looking to you, to
22 your -- your company to pay more money to get this
23 thing fixed, right, you understood they were giving
24 you proposals like \$150,000 to take it out --

1 A. They were giving us proposals that never
2 had a finished amount -- a -- a concrete figure as
3 to how much it would cost.

4 Q. Okay. But you knew they were looking to
5 you to pay money if they were going to fix this
6 problem?

7 A. Not for the entire amount.

8 Q. They were looking to pay -- you were going
9 the pay something for it, or you don't -- or you
10 don't know?

11 A. I don't really know that that was a --

12 Q. Did you ever any conversations with Austin
13 Bateman?

14 A. Did I?

15 Q. Yes.

16 A. Not that I recall.

17 Q. Okay. Probably wrong person to ask the
18 question. Did you ever tell anyone at Tennessee
19 Asphalt after this problem was discovered in early
20 May of 2007 while you were talking to them that, if
21 you don't fix this, I'm going to charge you \$10,000
22 a week?

23 A. No.

24 Q. Did you ever mention to anybody that this

1 was costing you some amount of money and they were
2 going to be responsible -- Tennessee Asphalt was
3 going to be responsible if they didn't fix this
4 problem?

5 A. I never mentioned it. I -- most people
6 would understand that, if a business is closed, it
7 would cost them money to be closed. Didn't find it
8 necessary to have that conversation.

9 Q. But you didn't tell them that, correct?

10 A. No.

11 MR. CASHION: Your Honor, I have no further
12 questions.

13 THE COURT: All right. Any redirect?

14 MR. COBB: No, Your Honor.

15 THE COURT: Thank you, ma'am. You're
16 excused.

17 MR. COBB: Let me call David Evans. Let me
18 see if he's here.

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

21 THE COURT: Have a seat, sir.

22 DAVID EVANS,

23 Having been first duly sworn, was examined
24 And testified as follows:

1 DIRECT EXAMINATION

2 BY MR. COBB:

3 Q. Good afternoon. You're David Evans?

4 A. Yes, sir.

5 Q. Mr. Evans, you've been testifying in cases
6 as long as I've been litigating, right?

7 A. Yes, sir.

8 Q. Bad for both of us, I'm afraid.

9 A. Yes, sir.

10 Q. What do you do for a living?

11 A. I'm a civil engineer.

12 Q. And did you do some work at the request
13 of -- joint request of Tennessee Asphalt Company and
14 me?

15 A. We did.

16 Q. And what did you do?

17 A. We're a testing lab, and we visited the
18 Northwest Tennessee Motor Sports Track area. At
19 that time there had been some work had gotten
20 started, and we were asked by Austin Bateman and you
21 to gather some data relative to the base, subgrade,
22 just the overall situation relative to the pavement
23 section and what might be happening and what might
24 not be happening.

1 Q. Let's talk a little bit about the
2 relationship between the subsoil and the pavement.
3 What is that relationship?

4 A. Well, this is an asphalt or was an as
5 asphalt drag strip, obviously. It's a flexible
6 pavement. Generally, a flexible pavement is held up
7 by a base, and then the flexible pavement and the
8 base is held up by a subgrade.

9 And in this case, we had roughly 2 inches
10 of pavement, 6 inches of base, and then the soil
11 subgrade. So the subgrade is very important as a
12 stabilizing agent for the pavement area.

13 Q. And was it that subgrade that you and your
14 company were asked to analyze?

15 A. Yes, we were asked to look at it. Yes,
16 sir.

17 Q. And how do you go about looking at it?

18 A. Well, at this time, the -- a lot of the
19 pavement had been removed, and some of the base had
20 been removed. We were basically talking about 700
21 feet. So in that area, we obtained what we call
22 some excavation pits. It's -- it's pretty simple.
23 We just used a backhoe. I think it was a Tennessee
24 Asphalt had a backhoe, and they let us use it to

1 excavate some test pits.

2 And using these test pits, we can look at
3 the base, we can look at the subgrade, we can obtain
4 samples from it. We can take tests on it, we can
5 take moisture samples on it. We took some Shelby
6 tube samples on it so. Just various and sundry
7 things that you can take data with.

8 Q. And did you do that from a single location
9 or more than one location?

10 A. We did it on four locations.

11 Q. And --

12 A test -- four test pits.

13 Q. -- and there is -- there is a report that
14 you prepared; is that correct?

15 A. Yes, sir.

16 Q. And it's addressed to Mr. Austin Bateman?

17 A. Yes, sir.

18 Q. And --

19 A. June the 20th.

20 Q. All right. And in that report, did you
21 give him the results --

22 A. Yes, sir.

23 Q. -- of the digging?

24 A. We did.

1 Q. And what did you find out about the test
2 pits; what -- what --

3 A. Generally, the test pits indicated that the
4 upper 2 feet, 2 1/2 feet was fairly wet and fairly
5 soft. And so it had caused some failures, some
6 distress in the pavement, and some failures in the
7 pavement. And generally, you have to attribute it
8 to the subgrade and the base. The pavement is just
9 kind of -- it -- it doesn't do much for strength.

10 Q. So with just 2 inches of asphalt, if the --
11 if the subsoil is not strong enough, the -- the
12 pavement is going to fail?

13 A. Yes, sir.

14 Q. You have a copy of your report in front of
15 you?

16 A. I do.

17 Q. If you would, look at the sheet that says
18 CML Lab, and it has location hole number 1?

19 A. Okay.

20 Q. And it -- it starts about sample 1, 2, 3,
21 4, and 5?

22 A. Yes, sir.

23 Q. Is that samples as you go down --

24 A. Yes, sir.

1 Q. -- in depth?

2 A. Yes, sir.

3 Q. And the first sample is?

4 A. First sample is basic limestone base. It
5 was 5-1/4 inches thick.

6 Q. Described it as soft?

7 A. Yes, it was described as soft. Now, you
8 know, things have happened to it several days before
9 that. I -- I -- I can't predict why it was soft.

10 Q. Okay.

11 A. But under normal conditions as you were
12 paving, of course it would not be soft, it would be
13 compacted.

14 Q. And then below that, you've got dark gray
15 clay silt --

16 A. Yes, sir.

17 Q. -- was described as soft?

18 A. Yes, sir.

19 Q. And you -- it says probe of 2 to 3 inches.
20 What do you do with probe?

21 A. Well, it's a 5/8-inch probing rod, and, you
22 know, this is something we do every day on different
23 jobs. So 2 to 3 inches indicates a rather soft
24 condition; 3 to 4 inches next indicates even softer.

1 That's putting mild pressure on a 5/8-inch smooth
2 probing rod.

3 Over in the other column, the PPRs are the
4 same thing. That's a pocket penetrometer reading,
5 which as the -- as the figures are smaller, that
6 indicates it takes less pressure to achieve what
7 you're doing. So smaller the figures, the -- the
8 softer the soil.

9 Q. Are the -- is this soil soft? Real soft?
10 Or very, very soft?

11 A. I would say it's fairly soft. The moisture
12 contents are up, that's another big indication. The
13 in-place moisture contents, 23, 22, 25, 27. The
14 optimum moisture I think was around 16 percent, and
15 so when you get that far above -- when you get 7, 8
16 percent above optimum, you -- you just are getting
17 into a soft situation.

18 Q. Would it surprise you that trucks loaded
19 with -- with asphalt riding over this pavement with
20 this kind of subsoil would crack it, dent it, rut
21 it?

22 A. No, sir.

23 Q. That would be expected, wouldn't it?

24 A. Yes, sir.

1 Q. Let's look at hole number 2. Were the
2 results --

3 A. About the same.

4 Q. -- about the same?

5 A. Uh-huh.

6 Q. Hole number 3?

7 A. Yes, sir.

8 Q. About the same?

9 A. About the same.

10 Q. And hole number 4?

11 A. Hole number 4 was a little better, it
12 looked like a little drier. It was a little more
13 stable. The moisture content was up. I -- as I
14 recall, the density test was a little better at hole
15 4, and the PPR readings are higher. The probing is
16 less. So I would say -- hole 4, for some reason --
17 don't know why -- was -- was more stable, was
18 stronger.

19 Q. All right. Mr. Evans, this is a map, an
20 aerial view of that racetrack. There's Highway 22,
21 and this is the entrance, and this is the racing
22 part of the track and the shutdown part of the
23 track.

24 A. Yes.

1 Q. Using that as a reference, where were the
2 holes dug. Do you recall?

3 A. Yes, basically, I do. We started at the
4 700-foot point, which is probably right -- yeah, or
5 a little bit -- well, right there, I'd say. The
6 first test hole was about 100 foot, which would be
7 south, I guess you'd say. Yeah, somewhere there.

8 The next test hole was 220 feet south. The
9 next one was 390 feet, and then hole 2 was actually
10 back toward the end right -- yeah. No. It was
11 about 25 feet off the end.

12 Q. Okay.

13 A. Right -- right in there.

14 Q. 1, 2, 3 --

15 A. 4.

16 Q. -- or 1, 2, 3, 4?

17 A. Yeah. 4 was actually the highest hole --

18 Q. Okay.

19 A. -- the one most south.

20 Q. Okay.

21 A. I skipped 2 on you.

22 Q. All right. After you did this analysis,
23 what, in your opinion, would need to be done in
24 order to successfully repave this area?

1 A. Well, of course, we were there June the
2 8th, that's the first part of the summer. There's a
3 moist situation here. We -- we had too much
4 moisture in the subgrade. Now, as I understand,
5 this track was 13, 15 years old. Possibly, when the
6 track was built, the subgrade was in pretty good
7 shape. Probably was.

8 But through time, these fine grain silty
9 clays can get wet, they can get soft. Generally,
10 it's a factor of -- of drainage. Maybe the drainage
11 isn't as good as it should be; maybe the swells on
12 the side should have been cut out deeper to allow
13 the -- the soils to drain.

14 A drag strip by nature is flat. So water
15 doesn't have a tendency to run off of it real fast.
16 If the pavement get crack -- gets cracks in it, the
17 water goes down in it, so it has a tendency to wet
18 the subgrade.

19 You just going to have to do something to
20 stabilize the subgrade because that's what's holding
21 up the pavement. There are a lot of ways to do it;
22 there's probably no easy way. I understand Ford
23 came in later and, of course, the conditions were
24 probably better because the pavement had been

1 removed, some of the base had been removed so things
2 were drying a little bit.

3 Q. All right.

4 A. Nature. It gets 95 degrees, these
5 conditions get better, especially if the pavement's
6 not on there. You can stabilize the base; you could
7 take the base off and recompact the subgrade. You
8 could increase the thickness of the base a little
9 bit; you could increase the thickness of the
10 pavement a little bit. All those things are
11 options.

12 Q. All right. Are you aware that Ford came in
13 and did a process --

14 A. I was told that.

15 Q. -- 12-inch soil cement?

16 A. Yeah.

17 Q. And that's a well-recognized procedure?

18 A. Oh, yeah.

19 Q. And then paved over the top of it?

20 A. I understand -- did they use the base, or
21 did they -- did they stabilize the subgrade?

22 Q. What I understood is they used the base and
23 just kind of ground it up like a tiller --

24 A. Yeah.

1 Q. -- and mixed the concrete in with it.

2 A. Yeah, that's a good -- that's a good
3 procedure. But I am sure that they received a
4 little benefit from the drying, too, because that
5 would have even been hard to do in this case until
6 it dried a little bit.

7 Q. Let me back up before Tennessee Asphalt
8 started paving. When you start a job, is there a
9 process known as proof rolling --

10 A. Yes.

11 Q. -- where you get an idea of what you've got
12 below the asphalt?

13 A. Are you asking me as a lab and an engineer?

14 Q. Yes, sir.

15 A. Okay. We -- we probably wouldn't entertain
16 trying to make a recommendation without getting some
17 kind of data.

18 Q. Okay.

19 A. It just wouldn't make much sense. So proof
20 rolling is one way; another way is we take some
21 cores. We take cores all the time. We've got a
22 small coring rig, you can do it by hand. And so
23 we -- we would want to know what the pavement
24 section is, we want to know what the subgrade was

1 like. Then maybe we could make an intelligent
2 decision, you know.

3 Q. If you don't have the data, you're just
4 guessing?

5 A. Unless you're real familiar with it, you
6 know what I'm saying.

7 Q. Well, if you knew that somebody was getting
8 ready to go out and mill and then try to repave over
9 this subsoil in the condition that that you had
10 analyzed, would you expect it to -- to succeed or to
11 fail?

12 A. I would want some data first.

13 Q. All right. But assume that you had this
14 data.

15 A. I wouldn't mill it.

16 Q. Okay.

17 A. Milling -- milling is a tough process. It
18 requires all kind of heavy machinery and heavy
19 trucks. It's a tough process. It's a good process,
20 don't get me wrong, but in certain cases, it tears
21 up stuff.

22 Q. Are you aware that the heavy trucks also
23 broke through this area called the staging area?

24 A. No, but I'm not surprised.

1 Q. Not surprised? Are you aware that they
2 also damaged this shutdown area rolling --

3 A. I would assume it was the same pavement
4 section.

5 Q. All right.

6 MR. COBB: That's all I have.

7 THE COURT: Mr. Cashion?

8 CROSS-EXAMINATION

9 BY MR. CASHION:

10 Q. Mr. Evans?

11 A. Yes, sir.

12 Q. Greg Cashion, we've talked before. Thank
13 you for coming down today.

14 A. Yes, sir.

15 Q. I have a few questions. We've talked about
16 this moisture?

17 A. Yes, sir.

18 Q. And you had moisture well beyond the
19 optimum moisture content?

20 A. Yes, sir.

21 Q. And any time you get the moisture beyond
22 that 8, 9, 10, 12 points, how much structural
23 integrity can you expect of the soil, whatever it
24 is?

1 A. You're going to expect trouble. Things are
2 going to break down, they're just going to get soft,
3 and you're going to lose your strength.

4 Q. So based on your analysis, the problem
5 here, they're trying to pave on something that was
6 not sufficiently strong enough to hold it?

7 A. Yes, sir, and -- and the more you work it,
8 the worse it gets. You know, it pumps and it has a
9 tendency to just break down worse.

10 Q. And in your opinion, after reviewing this
11 data, how long had the subgrade been wet?

12 A. It takes a few years for something like
13 that to get wet, but we've had some really wet
14 winters. We just had one, very wet. These fine
15 grain clays, when they're underneath a flat surface
16 that doesn't drain very well, for some unknown
17 reason, they have a -- they have a way of getting
18 wet.

19 And that wet -- that -- that moisture is
20 difficult to get out of it, it takes several years
21 or it takes processes to do that. So I would say
22 it's been wet for several years. It had a bad
23 color. It had a dark gray color to it. A color
24 that's kind of indicative of moisture being

1 associated with it.

2 Q. And I think you told me in our deposition
3 that really and truly the swells do not appear to
4 you to be deep enough?

5 A. No, sir. I -- just when I walked on the
6 site, I just didn't -- they didn't seem to be
7 exaggerated enough. And I understand why people
8 don't like to do that, they don't like to walk
9 through ditches. They don't want people to stand in
10 them. Doesn't make any difference, you know, you've
11 got to have drainage; otherwise, you've got wet
12 subgrade.

13 Now, the ditch may not have prevented all
14 of that, but it probably certainly would have helped
15 it some, a deeper -- a deeper swell.

16 Q. And as the density -- I think as the
17 moisture goes up, the density of the soil decreases?

18 A. Yes, sir.

19 Q. And that's the way it's supposed to happen?

20 A. Yes, sir.

21 Q. And I think you -- you've told us before
22 that, when you look at this situation, it gets wet
23 for a lot of reasons; but, basically, it has to be
24 looked at and maintained?

1 A. Yes, sir.

2 Q. What do you mean by looked at and
3 maintained?

4 A. Well, you would think that through the
5 years, even though it's a drag strip, and I guess it
6 was lightly loaded, there would be some indication
7 that the pavement was giving. They ran a mower down
8 it, they ran a tractor down it, ran a bob truck down
9 it, you know. Or if the -- the swells seem to be
10 filling up with grass and they fill up with
11 settlement, you just got to clean them out. You got
12 to make sure that the water seems to be leeching out
13 or coming out of the sides of the -- of the pavement
14 section. It's just -- just normal smart
15 maintenance. Common sense.

16 Q. And in your opinion, this is a subgrade
17 problem that caused this whole mess?

18 A. I think basically it was.

19 Q. Okay. And --

20 A. The other thing that I wasn't particularly
21 excited about, but I understand it, the pavement
22 section was thin. 2 inches and 6 inches is a thin
23 pavement section if you expect to run any kind of
24 heavy traffic around on it. Light traffic, okay;

1 good drainage, okay. But it's a light pavement
2 section. Probably, today, it's not recommended at
3 all.

4 Q. And once you introduce heavy wheel loads,
5 then with this subgrade, you expected it to yield?

6 A. It'll pump. It'll yield, yes, sir.

7 Q. Now, I think Mr. Aaron Wa assisted you in
8 your investigation?

9 A. He -- I let him comment on it, yes, sir.

10 Q. Okay. And I -- I think when he went down
11 there first, do you recall that he -- he proof
12 rolled with a loaded dump truck on top of the
13 asphalt?

14 A. No. He didn't -- he didn't go down there.

15 Q. Whoever went down there?

16 A. Arthur went down there, one of my men.

17 Q. Okay.

18 A. Yes, sir.

19 Q. Did they proof roll --

20 A. Yes, sir.

21 Q. -- the pavement itself?

22 A. Yes, sir.

23 Q. And that caused severe rutting?

24 A. Yes, sir.

1 Q. And I guess --

2 A. Now, here -- let me -- let me -- let me try
3 and get back on that. There was several things that
4 had happened when we got there. They had removed
5 some of the pavement; they had paved an area. Some
6 of the base was removed. I assume that they had
7 been working on this for a week or two, I don't
8 know, several -- several days.

9 And so we proof rolled the base. It was
10 yielding. It was wet. We proof rolled some of the
11 new pavement, and that's where we got some of the
12 yielding. That really kind of upset you, you know.

13 Q. And in that -- and you put the heavy loads
14 on the pavement. I mean, that would make it crack
15 and break?

16 A. Yes, sir.

17 Q. All right.

18 A. Sustain loading, many -- repeated trips.

19 Q. Right. And so if we saw photographs where
20 it was cracked and broke, that may be from the
21 loading that y'all introduced to it; not the way it
22 was left as the paver left it?

23 A. We introduced some cracks.

24 Q. Okay. Now --

1 MR. CASHION: Your Honor, have we made this
2 an exhibit?

3 THE COURT: No, sir.

4 BY MR. CASHION:

5 Q. You've got your report?

6 A. Yes, sir.

7 Q. Let me hand to you an original so we can
8 make this an exhibit to your testimony. If you
9 could, just take a second and review that copy and
10 make sure that's -- that's your report.

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

13 A. (Witness reviewing document.)

14 Q. Yes, sir, this is it.

15 MR. CASHION: Your Honor, I move that
16 Exhibit 28.

17 THE COURT: So marked.

18 (WHEREUPON, THE ABOVE-MENTIONED
19 DOCUMENT WAS MARKED AS EXHIBIT NO. 28 TO THE
20 TESTIMONY OF THE WITNESS.) BY MR. CASHION:

21 Q. And if you look at that report, there's a
22 letter from Aaron Wa of June 20th, 2007. Do you see
23 that --

24 A. Yes, sir.

1 Q. -- to you? And he performed this
2 investigation under your watch and you --

3 A. Yeah. He was a consulting engineer on it,
4 yes, sir.

5 Q. And you adopted that as part of your
6 report?

7 A. Yes, sir.

8 Q. I think you said that you went back to the
9 project site -- or you went out to the project site
10 after this report, but before you wrote the report
11 just to confirm what you saw?

12 A. Yes, sir.

13 Q. Okay. And I think he had made the
14 observation that -- on the first page that the
15 subgrade is soft and wet in several areas. This
16 happened over a long period of time. In any case,
17 the soft subgrade conditions are conducive to
18 causing distress in pavement even with that light
19 traffic, correct?

20 A. Yes, sir.

21 Q. And then he goes and talks about the
22 drainage conditions being as fair to poor, and you
23 agree with that?

24 A. Yes, sir.

1 Q. And then I think, in the next section, in
2 light of the above, these are where you're giving
3 some recommendations?

4 A. Yes, sir.

5 Q. Okay. And first is to do something with
6 the existing drainage, correct?

7 A. Yes, sir, improve it.

8 Q. And then, about the middle of the ways
9 down, you say, the only way to improve the subgrade
10 condition would be to undercut the soft and wet
11 soils and replace them with engineered field?

12 A. Yes, sir, this is Aaron Wa saying that and
13 I agree with him, that's certainly one way. There
14 are a few other ways that I mentioned awhile ago.

15 Q. Right. This is not the only way, is it?

16 A. Not the only way.

17 Q. He says we recognize that this will involve
18 removing the existing pavement completely and
19 undercutting 2 1/2 to 3 feet of soft and wet soils;
20 however, there is no easy recourse to proving the
21 subgrade?

22 A. Yes.

23 Q. Okay. And that was one method to do it?

24 A. Just one method, yes.

1 Q. Scoop it out and put --

2 A. Dry it.

3 Q. -- or rock or something back in?

4 A. Yes.

5 Q. Now, were you consulted whenever Ford
6 Construction went up there and --

7 A. No.

8 Q. -- did that? Have you been back to the
9 racetrack?

10 A. No, sir.

11 Q. Would you be surprised to learn that the
12 owners never did anything with the drainage, they
13 left the drainage as it is?

14 A. Well, I would recommend they do something
15 with it. I mean, I don't care what they think,
16 drainage is drainage. It doesn't go away. The good
17 Lord made it, so I would recommend that they improve
18 it if they can.

19 I'm not asking them to -- it's not a major
20 thing. Just create a little more drainage, and if
21 they don't want to, fine, more power to them.

22 Q. But the -- your expectation of the useful
23 life of this track that's sitting up there now, what
24 would that be if the drainage is not repaired?

1 A. Well, I think this same thing will happen.
2 Now, as I understand that Ford stabilized the base
3 with soil cement.

4 Q. Right.

5 A. Soil cement is a -- is good -- really good.
6 It's -- it's certainly probably a little stronger
7 than what they had. I think, in my own opinion,
8 that it got some drying, which helped it, too. The
9 soil cement gave it more stability. I don't know
10 what kind of pavement they put back on it, what
11 thickness.

12 But Ford does a good job, working with them
13 right now on a job. And -- but I say this, I just
14 think that, for the long term, I would recommend
15 that they improve the drainage if they can. Soil
16 cement is not the best thing, it's not the -- I
17 mean, it's not the end-all, be-all.

18 It's not concrete. It is soil cement. And
19 so it'll last, but it'll crack. That's the one
20 thing you got to watch, it will crack. And if it
21 cracks, get busy and fill the crack, you know what
22 I'm saying?

23 MR. CASHION: Thank you. That's all the
24 questions I have.

1 THE WITNESS: Here's this.

2 REDIRECT EXAMINATION

3 BY MR. COBB:

4 Q. You didn't charge us for that, did you?
5 How much did you charge for this entire report,
6 Mr. Evans?

7 A. I have no idea, but I -- and I didn't even
8 bring it with me.

9 Q. About \$1,000?

10 A. Probably a hair more than that --

11 Q. And when you do --

12 A. -- by the time we got through.

13 Q. And when you do corings --

14 A. Yes, sir.

15 Q. -- that's even less expensive, isn't it?

16 A coring is not very expensive in this case
17 because we're only going 2 to 3 feet, and so that --
18 we can do it by hand is what I'm saying. You know,
19 and it doesn't require a drill rig, you know.

20 Q. If somebody was coring this property, and
21 when they pulled the core out, they saw water, is
22 that a bad sign?

23 A. Yeah.

24 Q. And why is that a bad sign?

1 A. You're coring the pavement area?

2 Q. Yeah. Well, where is the water going.

3 A. In other words, if it's sitting there, then
4 that's not good.

5 Q. Why is that not good?

6 A. Because it's going to create a problem.
7 It's going to soften your soils, and you -- you want
8 it to drain out, leech out, get out of there some
9 way.

10 Q. Now, if -- if you were advising a paving
11 contractor and as they started the process and
12 the -- the --

13 A. Go home.

14 Q. -- base -- go home?

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

16 Q. Would they at least want to call somebody
17 and find out what they're dealing with --

18 A.

19 Q. -- before they proceeded?

20 A. Yes.

21 Q. Would that be the reasonable thing to do?

22 A. Probably so. Now, I'm a testing man.

23 Q. Well, I understand.

24 A. I'm not a paving man, so you know what

1 point of view I'm coming from.

2 Q. Right.

3 A. But you can't -- you can't ask us to make a
4 recommendation without some data.

5 Q. Well, if they're paving without some data,
6 they got the same blind spot you do, don't they?

7 MR. CASHION: Your Honor, I'm going to
8 object. He's --

9 MR. COBB: I'll withdraw the question.

10 MR. CASHION: -- now going to...

11 MR. COBB: Thank you, Mr. Evans.

12 THE WITNESS: Yes, sir.

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

14 THE WITNESS: Yes, sir.

15 MR. COBB: Free to go. The Plaintiff
16 rests.

17 THE COURT: All right. Mr. Cashion?

18 MR. CASHION: Thanks, Your Honor. I'd like
19 to call Cory Todd -- no, I don't want you back,
20 Cory. John Taylor.

21 JOHN TAYLOR,

22 Having been first duly sworn, was examined
23 and testified as follows:

24 DIRECT EXAMINATION

1 BY MR. CASHION:

2 Q. Please state your name.

3 A. John Taylor.

4 Q. And Mr. Taylor, where do you live?

5 A. Paris, Tennessee.

6 Q. And let me have some of your background.

7 Where did you go to school?

8 A. College --

9 Q. Yes, sir.

10 A. -- or high school? College, I went to
11 Union University in Jackson, Tennessee.

12 Q. Okay. You got your degree in?

13 A. Biology.

14 Q. What was your work experience prior to
15 coming to work for Tennessee Asphalt?

16 A. I worked at -- in Dyersburg, Tennessee for
17 a while after high school. I worked at Dana
18 Corporation or Plumley in Paris, Tennessee, and then
19 that's when I went to work for -- I worked for Dana
20 about a year, and then I worked for Tennessee
21 Asphalt Company.

22 Q. And what year did you start for Tennessee
23 Asphalt?

24 A. '97.

1 Q. Okay. And what is your job title with
2 Tennessee Asphalt?

3 A. Estimator.

4 Q. Okay. Do you serve kind of as a salesman,
5 too, or --

6 A. Yes, sir.

7 Q. -- estimator salesman?

8 A. Yeah.

9 Q. And what kind of jobs do you look at in
10 your capacity as estimator and salesman for
11 Tennessee Asphalt?

12 A. Most of them are field measuring type jobs,
13 what I call call-ins, people call in to the office.
14 Sometimes I bid jobs off a set of plans that are
15 sent in from a general contractor, but -- but most
16 of it's field work, you know.

17 Q. Okay. And I guess, how does a -- a guy
18 with a biology degree sell asphalt and hazmats?

19 A. Well, of course, you know, they don't go
20 hand in hand, of course. I've just -- what do you
21 mean, how did I get to the point of selling asphalt?

22 Q. Yeah.

23 A. Well, I -- I got my degree in biology, and
24 I married a girl from Paris, Tennessee. So I moved

1 to Paris, and I was -- my previous boss or
2 superintendent was from Halls, Tennessee, which is
3 where I grew up. And I ran into him one day in
4 Paris, and he asked me what I was doing, you know.
5 I hadn't seen him in a while, and I told him.

6 And at that time, Tennessee Asphalt Company
7 was adding a estimator to do commercial work,
8 private work. And in talking with him, they were
9 looking for one. And that's how I went to work for
10 Tennessee Asphalt Company.

11 Q. At the time, you participated in this job,
12 you had been doing estimating for ten years; is that
13 about right?

14 A. From -- from being hired at Tennessee
15 Asphalt --

16 Q. Right.

17 A. -- until now? Or till...

18 Q. Until you did the job in '07 --

19 A. Yes, sir.

20 Q. -- for Tennessee Asphalt.

21 A. Yes, sir.

22 Q. And during that time, regardless of what
23 your undergraduate degree is in, you learned
24 business of estimating asphalt?

1 A. Yes, sir.

2 Q. Okay. And tell me, do you recognize an
3 asphalt surface that has subsurface problems or can
4 you?

5 A. I -- I can recognize it, yes, if it's from
6 a -- looking at the surface. You know, if it's what
7 I'm calling alligatored.

8 Q. All right. Explain alligatored for the
9 Court.

10 A. It's just a term that's used in -- in the
11 asphalt business is, of course, where I heard it.
12 If a asphalt pavement is -- I've heard of
13 spiderwebbed, I don't like that term. But, anyway,
14 spiderwebbed, alligatored, it's -- it's an area that
15 could be cracked, not a straight run crack or a --
16 anything, but a bunch of cracks in a certain area.

17 You know, could be a small area, could be a
18 large area. But it's a lot of cracks in -- in one
19 area.

20 Q. And what does that indicate to you as --
21 when you do a visual inspection?

22 A. Well, if it's -- if it's muddy water coming
23 up through it, which is possible, if you -- you
24 could even walk on it, and -- and it might do that.

1 That tells me that the base material below the
2 asphalt has an issue, and, you know, it's -- it's
3 failed for a reason. And -- and it could have been
4 soft subgrade or could have been the water in the --
5 the -- that's pumping up out of it.

6 Q. Okay. Now, if you were to see a condition
7 like that that had alligator cracking or water
8 oozing out of it, what would you do as an estimator;
9 would you bid that job?

10 A. No, sir, I mean, I wouldn't -- let's say
11 for an overlay, if a customer called me and wanted
12 an overlay of parking lot or a driveway or something
13 like that and I got to the property, and when I got
14 out of the truck, if I noticed it was alligatored,
15 water, muddy water pumping out, I mean, I
16 wouldn't -- I would not go ahead and measure it and
17 work up a quote and get to them because there's no
18 use in doing that.

19 Q. So you wouldn't even bid it?

20 A. No, sir.

21 Q. Would you say any size of subgrade issues,
22 you don't bid them, right?

23 A. Right.

24 Q. On the raceway project -- let's talk about

1 that.

2 A. Okay.

3 Q. I think you went out there in 2004?

4 A. Yes, sir.

5 Q. Okay. Tell me about your visit in 2004.

6 A. I went out -- I don't remember what month,
7 but 2004. I got a call from Cory about wanting me
8 to come give him an estimate on crack sealing.
9 There was a patch involved in that and restriping
10 the run -- the racetrack that was -- and I met with
11 Cory over there, and we looked at it.

12 We talked about that scope of work. I did
13 my field measurements, and then I came back and --
14 to the office and got him a price gathered and sent
15 to him.

16 Q. Okay. It was a price like \$4,000?

17 A. Yes, sir.

18 Q. Did he take you up on it?

19 A. No, sir.

20 Q. So three years go by, and 2007, you hear
21 here from Cory again?

22 A. Yes, sir.

23 Q. Go out to the job site?

24 A. Yes, sir. He wanted to look at paving.

1 Instead of the crack seal patch and restripe, he
2 wanted a quote for repaving the racetrack.

3 Q. When you went out to the job site, did it
4 look any different after three years?

5 A. No, sir. I -- I didn't see any difference
6 as far as -- no, sir. I mean, none that stood out
7 to me.

8 Q. Had he sealed it in the meantime, or he
9 didn't seal it?

10 A. No, sir, not that I'm aware. I don't
11 remember it being sealed.

12 Q. Had he repaired that area out there?

13 A. No, sir.

14 Q. That area was still unrepaired three years
15 later?

16 A. Yes, sir.

17 Q. Okay. And did you see any evidence at the
18 racetrack that would lead you to believe there was
19 some subgrade base stone problem?

20 A. No, sir.

21 Q. Did you ever notice any of the cracks over
22 three years had gotten larger to where they were of
23 any concern to you?

24 A. No, sir. I mean, like I said, I -- I

1 couldn't tell you if they were a little bigger, a
2 lot bigger -- I mean, they looked the same to me. I
3 mean, I'm --

4 Q. Okay. And you had no concern about the
5 subgrade?

6 A. No, sir.

7 Q. Okay. Now, did you and Mr. Todd discuss
8 scope? What was the best way to put pavement on his
9 track?

10 A. Well, we -- we talked about a 2-inch
11 overlay with hot mix asphalt.

12 Q. And that's -- now, let me make sure. A
13 2-inch overlay is where you're -- you're not taking
14 anything out, and you're going to lay 2 inches on
15 top of the existing asphalt?

16 A. Yes, sir.

17 Q. Okay. Was that your recommendation for the
18 best way to address this?

19 A. Yes, sir. I mean, that -- I don't think he
20 told me -- I won't -- so many inches. I believe I
21 came up with that.

22 Q. Okay. And what -- what was his response
23 when you said, okay, we're not going to mill it,
24 we're going to put 2 inches of asphalt on top of

1 what we've got right here?

2 A. Well, he was concerned about the concrete
3 starting area, which is concrete, and where the
4 asphalt starts -- asphalt portion of the racetrack
5 begins butts up next to the concrete.

6 Q. Right. They intersect or they're adjacent
7 at some point?

8 A. Correct. And the asphalt portion that was
9 butted up next to the concrete was above -- the
10 asphalt was above it.

11 Q. Already.

12 A. Already.

13 Q. There was a bump there?

14 A. It was a bump there.

15 Q. Uh-huh. (affirmative response.)

16 A. So I -- and Cory was -- told me that he was
17 concerned about that because that transition had to
18 be as smooth as possible for the race cars. If
19 they're starting out on concrete, you know, when
20 they hit that joint, it needs to be smooth, and --
21 and I understood that.

22 So I told Cory, I said, well, there's only
23 two things we can do then to my knowledge, would be
24 the raise the concrete or lower the asphalt.

1 Q. So if you go up 2 inches, raise the
2 concrete the same elevation, or leave the asphalt
3 where it is and --

4 A. Right.

5 Q. -- and drop it?

6 A. Right, and drop it.

7 Q. Right.

8 A. And -- and my -- well, I won't call it my
9 recommendation, my talk with Cory was to put 4
10 inches of concrete on the starting area, and let us,
11 Tennessee Asphalt Company, set the -- the screed on
12 the asphalt paver on that concrete, the new 4-inch
13 pour and take off down the runway from that point.

14 Q. But he didn't want to do it that way?

15 A. No, sir, he -- he told me that -- that that
16 was -- he looked into that, and it was too
17 expensive.

18 Q. And what happened next, what did he come up
19 with if he wasn't going to go with the 2-inch
20 overlay?

21 A. Well, if we weren't going to do that, we
22 had to make an -- an adjustment on the asphalt, so
23 we removed the existing asphalt was the next option
24 other than the concrete.

1 Q. So milling the asphalt?

2 A. Milling, yes, sir.

3 Q. And is milling a harder process on the
4 subgrade as opposed to just an overlay?

5 A. You mean harder for the subgrade?

6 Q. Right.

7 A. As opposed to the overlay?

8 Q. Right.

9 A. Yes, sir, I would say it is.

10 Q. Now, you then gave him a proposal; is that
11 correct?

12 A. Yes, sir.

13 Q. And he actually signed your proposal?

14 A. Yes, sir.

15 Q. Now, let me have you look at Exhibit 4 --
16 excuse me, Exhibit 7.

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

19 BY MR. CASHION:

20 Q. I think if you turn to Page 3, you'll see
21 the proposal. Are you with me?

22 A. Yes, sir.

23 Q. Okay. And who wrote this proposal up?

24 A. I did.

1 Q. And did you and Mr. Todd talk about this
2 proposal?

3 A. Well, I mean, I -- I typed it up based on
4 our meeting at the racetrack as far as scope of
5 work.

6 Q. Right.

7 A. I generated the -- the price, and I -- I
8 told him when we went with the removal option that
9 we could not be responsible for anything below the
10 existing asphalt.

11 Q. You told him that?

12 A. Yes, sir.

13 Q. And then you put it in your proposal of
14 No. 7?

15 A. Yes, sir.

16 Q. So you wrote that provision?

17 A. Yes, sir.

18 Q. Okay. And what are you saying in that
19 provision?

20 A. What I'm saying is that I had no way of
21 knowing how much gravel base is under -- or gravel
22 or stone base is under that existing asphalt. So
23 assuming that we could mill this 2 inches off and
24 the base material and the subgrade would hold up and

1 asphalt paver and the trucks necessary that, you
2 know, this is how much the contract price is.

3 And if it will not do that, then some, you
4 know, that -- we're not responsible for gravel, base
5 material, undercut, removal, replace.

6 Q. So you're telling them, verbally in this
7 contract, you're not responsible if anything goes
8 wrong below the bottom of the asphalt?

9 A. Yes, sir.

10 Q. And did you see any reason to go out and
11 start doing testing on the subgrade or anything like
12 that?

13 A. No, sir.

14 Q. Why not?

15 A. Well, we just -- we never do it. There
16 was no indication that it needed to be done, in my
17 opinion --

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

19 A. -- Number 1. Number 2, we -- we just
20 never do that. We do not -- in my years of being
21 there, I've never requested a test before I quoted a
22 job.

23 Q. So you've never recommended a subsurface
24 investigation in any type of driveway or a non-DOT

1 type of road?

2 A. No, sir.

3 Q. Now, on this case, I think there was a --
4 you wanted some coring work done?

5 A. Yes.

6 Q. Explain what you're talking about when you
7 say, cores taken of the asphalt.

8 A. Core is a -- it's a sample of asphalt.

9 Q. Uh-huh. (affirmative response).

10 A. And we take a core machine that's almost
11 like a drill press would be a good analogy, I think.
12 Instead of it being on a bench, it's on a pretty
13 tall -- like a dolly or a system. And what we do
14 with those, we've -- after we pave -- most of the
15 time on a State job that requires core sampling,
16 we'll go out and core the asphalt to check depth,
17 and then the lab will do a few things with it.
18 But...

19 Q. So why were you asking for a coring to
20 take that --

21 A. I wanted to check the asphalt depth.

22 Q. Okay. And were you there when the coring
23 took place?

24 A. No, sir.

1 Q. Okay. And then after the coring, did you
2 have a conversation -- I think Danny Wimberly took
3 the cores, correct?

4 A. Yes, sir. Danny --

5 Q. Did you have a conversation with him?

6 A. Yes, sir.

7 Q. And what did he tell you?

8 A. He told me that he took four cores, and I
9 asked him how -- how -- what were -- what was the
10 thickness of them, and he said an inch 7/8 to 3
11 inches, I do believe, in -- in depth. And he told
12 me that two of them had water in them.

13 Q. Now, did you -- did you know how the water
14 got there, or did you have any clues about that?

15 A. No, sir. Not at, you know -- no.

16 Q. And you recognize that water can be bad if
17 there's water in the top of the subgrade, I guess?

18 A. Yes, sir.

19 Q. Okay.

20 A. I would say that's correct.

21 Q. Well, did you -- did you evaluate that two
22 had water in it, or did you do anything with that?

23 A. No, sir.

24 Q. Was Danny Wimberly concerned about that?

1 A. He didn't imply to me he was concerned at
2 all about it.

3 Q. Was Austin Bateman, your engineer,
4 concerned about that?

5 A. No, sir.

6 Q. And you're not an engineer?

7 A. No, sir.

8 Q. You're not a technical guy working the
9 coring machine, and you've never operated the coring
10 machine, have you?

11 A. No, sir, I haven't.

12 Q. All right. Now, did you recognize, I
13 guess, that the coring machine uses water and the
14 water source could be the machine?

15 A. Yes, after the -- after Danny and I
16 talked, I did. I mean, I --

17 Q. That wasn't first on your mind?

18 A. No, sir.

19 Q. Okay.

20 A. I mean, it does, but I didn't think of
21 that.

22 Q. Right. So it's very possible that the --
23 the water --

24 MR. COBB: Object to leading, Your Honor.

1 THE COURT: Sustained.

2 BY MR. CASHION:

3 Q. Now, did you -- after you did the cores,
4 you saw the sample, there was nothing to report,
5 nothing unusual from the core depths or anything.

6 A. Not that concerned me, no, sir.

7 Q. Uh-huh. (affirmative response.) What
8 happened next? When were you -- is that when y'all
9 went out there, picked a date and started the work?

10 A. Yes, sir. I guess that -- the next step
11 would be milling, starting the milling process.

12 Q. Okay. And before he started the milling
13 process, did you ever tell anybody with the -- the
14 owner of Northwest Tennessee Motor Sports that you
15 were ever going to accept anything in responsibility
16 for what was below the asphalt?

17 A. No, sir.

18 Q. Is that pretty clear in your proposal?

19 A. I thought it was, yes, sir.

20 Q. And that was clear in your conversations
21 with Cory Todd?

22 A. Yes, sir.

23 Q. And you start the milling process. Kind
24 of explain that to the Court.

1 A. The process itself, it's a -- a machine
2 that's got a drum that's under -- under the machine,
3 it's got teeth on it. And it's got a belt on it,
4 what we call a belt. It's a conveyor belt
5 basically, and it will cut or remove depth of
6 asphalt, whatever you set it to, and it into a dump
7 truck.

8 Q. And how did it go, were you out there when
9 the milling process was going on? I think it's
10 April 30, Monday.

11 A. Yes, sir.

12 Q. Okay. How did that go?

13 A. I wasn't there the whole day, but what I
14 did see I thought was fairly well at -- at the
15 beginning. You know, it -- the -- kind of through
16 the process, some ground movement started occurring
17 or pumping or, you know, it became soft, the
18 subgrade.

19 Q. And when you observed it becoming soft,
20 what did you do?

21 A. I called Austin.

22 Q. So Mr. Bateman's the engineer, and you
23 wanted him to come out?

24 A. Yes, sir.

1 Q. Okay. When you saw after the milling -- I
2 guess at that point, you're not looking at asphalt,
3 you're looking at base stone.

4 A. Right.

5 Q. Was the base stone, did you see any free
6 water coming up or any wetness to the base stone?

7 A. Not on the milling process, no.

8 Q. All right. So there was no water on the
9 surface when you looked at it?

10 A. No, sir.

11 Q. Now, once Mr. Bateman came over and he had
12 started the proof rolled, correct?

13 A. Yes, sir.

14 Q. Okay. At that point in time with Mr. --
15 between you and Mr. Bateman, did Mr. Bateman pretty
16 much take over the decision-making at that point?

17 A. Yes, sir.

18 Q. Okay. So you were kind of relegated to
19 the backseat?

20 A. Right.

21 Q. Which you didn't mind being there?

22 A. No, sir.

23 Q. And do you recall any times where you
24 had -- you had warned Cory Todd of the problems with

1 the bad subgrade?

2 A. You mean after the milling or...

3 Q. Before or after, either one. But give me
4 a time frame.

5 A. Well, I mean, from the -- from the
6 original conversations, you know, that we had when
7 he approached -- or approached me about a -- a
8 removal of some kind, yes. I mean, we talked about
9 it then and...

10 Q. And then when you -- after the milling
11 process, did you talk -- was there more
12 conversations about --

13 A. Well, I'm sure --

14 Q. -- the risk of that?

15 A. I'm sure Cory and I talked some, but
16 you're talking about did I again repeat --

17 Q. Right.

18 A. -- that we're not responsible for this?

19 Q. Right.

20 A. Is that what -- yes, sir.

21 MR. CASHION: Your Honor, I have no further
22 questions.

23 THE COURT: Mr. Cobb?

24 CROSS-EXAMINATION

1 BY MR. COBB:

2 Q. Good afternoon, Mr. Taylor.

3 A. Hello.

4 Q. Good to see you again.

5 A. How are you, sir?

6 Q. Do you recall that you came to my office
7 in July of 2008 when we talked about this very
8 subject matter?

9 A. Yes, sir.

10 Q. And we went over some of the things that
11 Mr. Cashion had talked to you about, your
12 background, how you got from biology --

13 A. Yes, sir.

14 Q. -- to pay estimator?

15 A. Yes, sir.

16 Q. And you mentioned that you wrote up that
17 proposal?

18 A. Yes, sir.

19 Q. And Mr. Cashion has got it big enough
20 where we can look at it. And Item No. 7, is that
21 something that you typed up --

22 A. Yes, sir.

23 Q. -- for this job, or is that something you
24 put in every job?

1 A. That's -- that's something that I -- I'm
2 not going to say I put in every job, but if it's any
3 kind of removal or if I'm -- you know, I will put it
4 in there if we're going to remove some asphalt.

5 Q. But that's a standard phrase that you use
6 for removal contracts, right?

7 A. Pretty much, yes, sir.

8 Q. I mean, that's legal terms, you're not a
9 lawyer?

10 A. No, sir, I'm not.

11 Q. And you've -- you've talked to
12 Mr. Ratliff, you've talked to somebody who said
13 that's the language we put in removal contracts,
14 right?

15 A. Yes, sir.

16 Q. Now, you're thinking, if I have that in
17 there and something goes wrong, it's not our fault,
18 right?

19 A. Yes, sir.

20 Q. That's what you think today, too,
21 something happens, it's not my fault?

22 A. Yes, sir, I believe that.

23 Q. But that's not what it says, is it?

24 A. Well, --

1 Q. Let's go through the words.

2 A. Okay.

3 Q. It says, the bid is quoted, and that's the
4 price, right, assuming proper gravel base, right?

5 A. Yes, sir.

6 Q. What do you do when you find out there's
7 not a proper gravel base?

8 A. Go back to the owner and let him know.

9 Q. All right. Because if there's not a
10 proper gravel base, you can't perform the contract,
11 right?

12 A. Correct.

13 Q. All right. What do you do if you assume
14 that the base material is 6 inches, what do you base
15 that assumption on?

16 A. The 6 inches?

17 Q. Yeah.

18 A. That's the industry standard for base
19 material.

20 Q. All right. So that's just -- that's just
21 really kind of a -- a speculation, right, you don't
22 know that, right?

23 A. Right.

24 Q. You're just guessing that, right?

1 A. Well, it's --

2 Q. You're hoping that --

3 A. -- what I've always been told.

4 Q. Okay.

5 A. I mean, you know, it's...

6 Q. Is there an industry standard on drag race
7 strips?

8 A. Not that I know of. I don't know.

9 Q. All right. So this is based on
10 assumptions about roads, correct?

11 A. And commercial work.

12 Q. Right. And it says, the price does not
13 include gravel or base material, right?

14 A. Yes, sir.

15 Q. And if you milled it off and you needed
16 more base material, the price would be up, right?

17 A. Yes, sir.

18 Q. And undercutting or other subgrade work is
19 not included in that price, right?

20 A. Correct.

21 Q. But if it needed doing, y'all would do
22 that as well, right?

23 A. We would, yes, sir.

24 Q. All right. Who do you think has more

1 experience in paving, you or Cory?

2 A. Me.

3 Q. All right. And you said you made some
4 recommendations to him based on what he told you he
5 needed, right?

6 A. Yes, sir.

7 Q. And that's part of your job?

8 A. Yes, sir.

9 Q. And then down here it says price does not
10 include testing, right?

11 A. Correct.

12 Q. Now, let's see. We have Exhibit 4; do you
13 have that in front of you?

14 A. I've got something here.

15 MR. COBB: Let me -- if I may approach?

16 BY MR. COBB:

17 Q. In Exhibit 4, it looks like somebody faxed
18 from Tennessee Asphalt to Cory Todd a letter, and it
19 has your name on it. Did -- did you do that?

20 A. Yes, sir.

21 Q. And here you apologize for taking little
22 while, and you said these numbers are under the
23 assumption that we can mill and pave without
24 subgraded base issues, right?

1 A. Yes, sir.

2 Q. And, again, that was based on hope, not
3 knowledge?

4 A. Correct.

5 Q. You had no knowledge of whether you had
6 subbase issues, right?

7 A. Right, I had no idea.

8 Q. All right. But you would still like to
9 cut cores, correct?

10 A. Yes, sir.

11 Q. Because you were going to investigate a
12 little bit, right?

13 A. Uh-huh. (affirmative response) Yes, sir.

14 Q. You don't say I'm going to investigate
15 asphalt, do you?

16 A. No, sir, I don't.

17 Q. You don't say I'm not going to investigate
18 the -- the -- the prob- -- the issues that you
19 talked about with were subgrade and base, right?

20 A. Yes, sir, that's what it says.

21 Q. Okay. So you don't tell Cory, I'm -- I'm
22 concerned about these issues, but I'm going to core
23 on a different issue, do you, that's a little bit
24 misleading, isn't it?

1 A. Well, it might be mis- --

2 MR. CASHION: Objection on misleading.

3 A. It might --

4 MR. COBB: Just --

5 THE COURT: Just a minute. What's your
6 response, Mr. Cobb?

7 A. I don't consider it --

8 THE COURT: Just a minute, sir.

9 THE WITNESS: Oh, I'm sorry.

10 MR. COBB: I don't think it's misleading, I
11 think it's cross-examination.

12 THE COURT: Go ahead. I'll allow it. You
13 may ask your question.

14 BY MR. COBB:

15 Q. Well, I mean, you say, I'm concerned about
16 subbase and -- and whatever you -- what you said.
17 Don't you think it's reasonable to assume, if you're
18 going to do some coring, you're going to check on
19 those issues?

20 A. Based on what I typed here, you would think
21 that; but that's not what this intent was.

22 Q. I'm not saying you're a bad person. I'm
23 just saying somebody reading that could be --

24 A. Right.

1 Q. -- led to false --

2 A. I understand.

3 Q. That's fair, isn't it?

4 A. Well, it could be, yes, sir.

5 Q. All right.

6 A. I mean, I was just checking asphalt depth,
7 though.

8 Q. But that's not -- that's not what you
9 said?

10 A. Right. According to that, that's not what
11 that says.

12 Q. And you never wrote him and said, by the
13 way, I'm only checking asphalt depth, you never
14 wrote him that?

15 A. No, sir.

16 Q. And by -- you never wrote him and said, by
17 the way, I never checked the base, did you?

18 A. No, sir.

19 Q. And by the way, I never checked the -- the
20 subsoil?

21 A. Correct. I never wrote him.

22 Q. The only thing you said was, I have
23 concerns about these issues, I'm assuming they're
24 okay, and I'm going to do some coring, right?

1 A. Correct.

2 Q. All right. Now, in your mind, you're
3 thinking, if there's a problem, it's his problem,
4 right?

5 A. In -- in my mind, I'm thinking a couple of
6 different things. I'm thinking about the bud --
7 the -- the contract price because, you know, I -- I
8 wanted to give the customer -- you know, I don't
9 want to give a customer a \$40,000 price and -- and
10 go do the work and send them an \$80,000 bill.

11 Q. And the customer doesn't like that either,
12 right?

13 A. Right. So, I mean, I'm thinking about the
14 contract price, you know, I'm thinking about --
15 here, I'm not thinking about the subgrade and the
16 base stone.

17 Q. But -- but you are thinking about them
18 because you identified them as possible issues,
19 right, and you write it down?

20 A. Yes, sir.

21 Q. So you were thinking about it?

22 A. Well, I was thinking about it --

23 Q. All right.

24 A -- but not in process of an investigative

1 format.

2 Q. But you were thinking about it, but you
3 are weren't thinking about investigating them,
4 right?

5 A. Correct.

6 Q. When did you first think there might be
7 some subsoil problems with this tract?

8 A. Probably after the milling or for sure
9 after the -- the day we started paving.

10 Q. Didn't you think there were problems with
11 the subsoil when the coring was done?

12 A. No, sir, I -- I didn't.

13 Q. Let me ask you if I -- if -- if you gave
14 these answers to these questions --

15 A. Okay.

16 Q. -- back in July '08. And I said, all
17 right. And I was reading to you from some notes,
18 and if you --

19 MR. COBB: You want to catch up with me?

20 MR. CASHION: Yeah. Can you tell me the
21 page so I can look at that?

22 MR. COBB: I sure will. Page 27.

23 BY MR. COBB:

24 Q. All right. And I -- we were -- we were

1 looking at those field notes, and I asked -- I said
2 on Line 6, (as read) Why don't you read it because
3 it's upside down to me? And you said, depth range
4 from an inch and 7/8 to 3 inches. And I said, all
5 right. And you continued reading, cored on the
6 first part of April. Two of the four holes had
7 water present after removing cores. You read that,
8 didn't you?

9 A. Yes, sir.

10 Q. And I said, is that a good sign or a bad
11 sign. And your answer was what?

12 A. Water, bad.

13 Q. And I asked, why is that bad; and what did
14 you say?

15 A. It means there's water present in the
16 subgrade.

17 Q. And I said, is that good or bad; and what
18 did you say?

19 A. That's bad.

20 Q. So you suspected that there was water in
21 the subgrade in the first part of April, didn't you?

22 A. No, sir, I didn't necessarily think that,
23 I mean, because -- I mean, when Danny told me --
24 when I called him to find out about the cores, I was

1 on the phone, and I was just writing. And he said,
2 I cut four cores, and they range from this depth to
3 this depth, and there -- there's water in two holes.

4 Now, I'm not going to say I wasn't
5 concerned about it. I mean, I'm not going to sit
6 here and say I wasn't concerned about it.

7 Q. Okay.

8 A. But it -- it didn't -- it depends on how
9 much water. It depend -- you know, I didn't ask him
10 how much water was in the hole.

11 Q. Why wouldn't you ask him?

12 A. I just -- I wasn't concerned about it, I
13 mean...

14 Q. Well, okay. I can see why you -- maybe
15 why you may not be concerned. Did you call Cory
16 Todd and say, just found out there's water in two of
17 the four holes? That's a bad sign, it means that
18 there might be saturated soil under there, thought
19 you might you want to know?

20 A. No.

21 Q. You didn't call him, did you?

22 A. No, sir, I did not.

23 Q. Didn't write him, did you?

24 A. No, sir.

1 Q. You knew Monte Smith was the one that was
2 financing this, he and his wife, right?

3 A. I'm not sure that I knew that at that
4 point.

5 Q. All right. But the truth is, in April
6 2007, based on the report you got from Danny
7 Wimberly, you knew there was a possible problem with
8 water in the subsoil at that racetrack, correct?

9 A. Based on what he told me, I -- yes, sir.
10 There could have been a problem, but it depends on
11 how much water, and -- and I wasn't there to...

12 Q. But there was a problem, wasn't there,
13 isn't that why we're here?

14 A. After --

15 Q. There was a problem.

16 A. Yes, sir, after we've gotten -- after we
17 started paving and found out there was a problem.
18 But there was no way -- in my opinion, there -- you
19 know, there was no way to --

20 Q. Check?

21 A. -- determine off of the core holes --

22 Q. Right. You needed to do something else,
23 didn't you, you needed to take a core of the
24 subsoil, didn't you?

1 A. I -- I don't think so.

2 Q. Well, of course you did. Otherwise,
3 you're going to have a mess when you start paving,
4 aren't you?

5 A. Uh-huh. (affirmative response.) Well, I
6 don't think the two core holes would determine that.

7 Q. Well, something could determine it,
8 couldn't it?

9 A. Well, when we paved it, that determined
10 it. But the --

11 Q. Well, it's too late -- once you start
12 milling --

13 A. Right.

14 Q. -- and paving, it's too late to prevent
15 this disaster, isn't it?

16 A. Yes, sir. It's where we got to.

17 Q. You should have gotten some more testing
18 back in the first of April, shouldn't you?

19 A. I don't think based off two core holes, I
20 don't think so. No, sir.

21 Q. Well, how about based off your assumption
22 that there's moisture in the subsoil?

23 A. (No verbal response.)

24 Q. And I asked you on line 20, why is that

1 bad. What did you say?

2 A. Well, you just have saturated subgrade.

3 Q. And -- and what did they actually have out
4 there?

5 A. Poor subgrade.

6 Q. Saturated subgrade?

7 A. Yes, sir, and -- well --

8 Q. And you suspected in the first of April, a
9 month before they started paving, right?

10 A. No, sir, I can't say that I suspected poor
11 subgrade based on two core holes with water in it
12 based on what Danny was telling me.

13 Q. With all due respect, that's just what you
14 testified to two years ago.

15 A. Well, I understand. I understand that,
16 but that's --

17 Q. So you did suspect it?

18 A. I know what -- I -- I know what I told
19 you.

20 Q. Okay.

21 A. That's not -- I know -- that's not what I
22 meant. I mean, I did not mean based off two core
23 holes with a little bit of water in it or, you know,
24 however much -- I did not mean to, and if I did,

1 then, you know, I did. But I didn't mean to imply
2 that the whole racetrack was just saturated, ruined
3 with two core holes that had water in it.

4 Q. Well, I mean, half the racetrack is
5 saturated, half the holes had water, right?

6 A. Correct. Two of the four had water.

7 Q. Yeah. Since that time, you've been told,
8 oh, that doesn't really matter, hadn't you?

9 A. What do you mean?

10 Q. That -- that having water in the holes is
11 no big deal, right, you've since been told that,
12 haven't you?

13 A. Well, I talked to Danny about -- well, I
14 didn't talk to Danny. But Danny told me about it,
15 and he wasn't -- it didn't concern him. And when I
16 told Austin, it didn't concern him so it...

17 Q. Why wouldn't you tell Cory, give him the
18 benefit of your -- of your concerns?

19 A. I don't know. I -- I just didn't.

20 Q. And I asked you on Page 28 of your
21 deposition, I said, if your gravel base is not hard,
22 what happens? Page 28, line 8.

23 MR. COBB: I'm sorry, sir.

24 A. You could have base or subgrade failure

1 because it may be water in the subgrade as well.

2 BY MR. COBB:

3 Q. And my question was if you have subgrade or
4 base failure, what happens if you try to pave over
5 it. And what did you say?

6 A. It falls apart.

7 Q. And that's what happened out there, isn't
8 it?

9 A. Yes, sir.

10 Q. And I asked, did you ask an engineer to
11 take a look at that, and what did you say?

12 A. I said, no, sir.

13 Q. And I said, did you need an engineer to
14 tell you, or is that something everybody knows?

15 A. I said, I don't know if everyone knows it.

16 Q. And then I asked you on Page 29, Line 2 --

17 A. I don't have that, but go ahead.

18 MR. CASHION: I'll give it to him.

19 MR. COBB: Okay. I actually have another
20 deposition.

21 BY MR. COBB:

22 Q. Page 29, Line 2, after you got the cores
23 and noticed there was water in two of the four
24 holes, what did you do?

1 A. I don't think I did anything. I mean, I
2 didn't. I didn't do anything.

3 Q. Okay. And the reason was all you were
4 looking for was asphalt depth, right?

5 A. That's all that I wanted to core for.

6 Q. But you also knew that the asphalt is no
7 better than the ground under it, right?

8 A. Correct.

9 Q. And you knew that finding water in the
10 subsoil of pavement is like finding rotten wood
11 under a roof, right?

12 A. It could be comparable.

13 Q. And you said, if you had known that this
14 job was going to turn out the way it was, you would
15 have not bid it at all?

16 A. Correct.

17 Q. Because it was a disaster, wasn't it?

18 A. Yes, sir.

19 Q. And you thought that once the milling
20 started and they started to hit soft spot, they
21 should have stopped right then, didn't you?

22 A. I don't know that I would say we just
23 should have stopped right then, I mean...

24 Q. Should have done some testing, shouldn't

1 you?

2 A. I don't think so on our part, no, sir.

3 Q. Who should've done the testing?

4 A. I don't know, I mean...

5 Q. Well, who's in the testing -- who --
6 who -- who's in the testing business, I mean, y'all
7 do testing, right?

8 A. In Paris, we don't do testing on subgrade
9 and gravel base. We do --

10 Q. Well, you have people that do --

11 A. -- we do asphalt testing in the lab.

12 Q. -- But you have people who do testing for
13 you. You have a contractual relationship with
14 testers, right?

15 A. Well, I could get somebody, yes, sir.

16 Q. But you didn't expect Cory to go out and
17 do the testing, did you?

18 A. I don't want to say I didn't expect him
19 to, but I don't -- I don't know that we should have
20 either.

21 Q. Now, you testified today that milling this
22 asphalt is -- puts a lot of stress on it, but didn't
23 you testify in your deposition that, in my
24 opinion --

1 MR. COBB: I'm sorry. Page 89 starting at
2 Line 8 -- I'm sorry.

3 BY MR. COBB:

4 Q. The question is on Line 30, now -- I'm
5 sorry. Look at me when you're ready to go.

6 A. I'm ready.

7 Q. Now, you say that you understood that when
8 you milled that asphalt, if there was a subsurface
9 problem, they would get worse with less asphalt you
10 have because you got less structural integrity. And
11 you said, I don't know if they would get any worse
12 because, like I said earlier, 2 inches of asphalt,
13 whether it's 2 inches of asphalt after milling or
14 none after milling, that's not going to -- in my
15 opinion, that's not going to affect the condition of
16 the subgrade.

17 Did you testify to that?

18 A. Yes, sir. That's what I said.

19 Q. Do you -- do you feel differently today?

20 A. Well, what I was trying to say there was
21 that 2 inches of asphalt on a hard subgrade or a
22 soft subgrade, you know, it -- it's a light-duty
23 pavement, 2 inches. So I don't know that I implied
24 that here, but that's what I meant to say.

1 Q. And isn't it true, with the benefit of
2 hindsight, the prudent thing to have done was when
3 you suspected moisture, stop and test first, and
4 pave later?

5 A. Well, I -- I think what we did was the
6 proper thing to do. When we realized it with -- we
7 had a subgrade issue, I called Austin, brought him
8 over, and then he gave Monte and Cory some options
9 on -- I'm not sure if he said y'all need to test
10 this, but I know he gave them some options on some
11 different scenarios to try to get it paved.

12 Q. Well, in your deposition, Page 90, Line
13 18, I asked --

14 MR. CASHION: Wait. What.

15 MR. COBB: I'm sorry.

16 MR. CASHION: I think -- Your Honor, I'm
17 going to object. I think he has to ask a question.

18 MR. COBB: I'm going to ask a question.

19 BY MR. COBB:

20 Q. Did you say this in response to that
21 question on Page 90, Line 18?

22 A. Yes, sir. I remember you asking me that.
23 We're going -- where are we, sir?

24 Q. Page 80.

1 A. Okay.

2 Q. I'm sorry.

3 A. Okay. 90?

4 Q. Page 90, Line 18.

5 A. Okay.

6 Q. Did you ever suggest to Cory, that would
7 be one way to buy a little insurance to make sure
8 that we had a site that was suitable for paving is
9 to do some coring or some -- some analysis? And
10 your answer was: I can't say that we said, you
11 know, distinctly said, why don't we get some
12 construction material people? No, sir.

13 Question: Well, with the benefit of
14 hindsight, that would have been the prudent thing to
15 do, wouldn't it? And -- and I said, you can go
16 ahead and answer. Said, yes, sir, you would have.
17 And that's true, wouldn't it, that would have been
18 the prudent thing to do?

19 A. In hindsight, it probably would have been
20 a good idea for -- to have it tested. But, again, I
21 feel like that based on the original proposal that
22 we should not test it.

23 Q. Do you check the depth of asphalt on most
24 of your jobs where you're doing milling and