

VOL. VII

FILED
ELAINE B. BEFLER
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2002 AUG 21 PM 3:45

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

3 AMERICAN EXCAVATORS, LLC, BOOK _____ PAGE _____

4 Plaintiff,

5 vs. NO. 27213

6 RCR BUILDING CORPORATION
7 and FIREMAN'S FUND
INSURANCE COMPANY,

8 Defendant/
9 Third-Party Plaintiff,

10 vs.

11 WILLIAMSON COUNTY,
12 TENNESSEE,

13 Third-Party Defendant.

M2002-01757

FILED
OCT 11 2002
Clerk of the Courts

VOLUME I

15 TRANSCRIPT OF PROCEEDINGS

16 Taken before the
17 Hon. Robert E. Lee Davies, Chancellor
18 January 30, 2002

22 -----
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PROCEEDINGS

THE COURT: Good morning everyone. I want to tell you, after yesterday's domestic case, I'm really looking forward to hearing you all today. I really am. So we can talk about dirt all you want to.

I thought before we get started we might ought to kind of talk about how we want to run the day and the trial and things like that. We can go all day today until 5:30, 6:00. How does that sound to you all? Is that all right? Tomorrow I'm coaching the BGA team.

MS. CARSON: Shame on you, Your Honor.

THE COURT: So I need to stop a little before 3:30 so I can get out there for practice. We have Friday set aside if we need it. We can certainly use Friday. Friday is our bar lunch and one of my fellow judges, Judge Ash from Murfreesboro, is coming in to talk and I want to be sure we go listen to him -- judicial ethics. Do you all see any problem finishing it up Friday

1 afternoon?

2 MR. CASHION: I think we can.

3 THE COURT: That's all I had to
4 say preliminarily. Anybody else have
5 anything that's on their mind that they want
6 to talk about before we get started?

7 MR. CASHION: I have one
8 preliminary matter, Judge. It is one of
9 those things where we're reviewing the
10 pleadings and we discovered that we did not
11 file a counterclaim for the attorney's fees
12 and the geotech fees.

13 What happened with respect to the
14 attorney's fees is, when Mr. Panther filed
15 his lawsuit, we were holding \$46,000 to
16 offset the attorney's fees. We came to an
17 agreement in June to effectuate it until
18 September. We gave them the money and they,
19 in turn, gave us security for the attorney's
20 fees but I did not go back and file a
21 counterclaim to get an affirmative relief
22 since I turned the money over.

23 I would at this time move the
24 Court to allow us to amend the answer and
25 file a counterclaim for the attorney's fees

1 and the geotech fees which is \$547.28. That
2 was discussed but that was not ever
3 formalized in a pleading either. That's my
4 oral motion to amend.

5 THE COURT: Who are you seeking
6 these fees against? Which party or both?

7 MR. CASHION: The plaintiff. We
8 have more defendants over here. I didn't
9 want to throw you here.

10 THE COURT: I've never
11 distinguished a plaintiff or defendant table
12 here.

13 MR. CASHION: Defendants are over
14 here. Plaintiff is here, and it's against
15 the plaintiff.

16 THE COURT: I always wanted to
17 sit at this side no matter what. I don't
18 know why. I always lost on that side. Don't
19 worry about it. That's just me.

20 MR. CASHION: We're seeking that
21 against the plaintiff, the attorney's fees.

22 THE COURT: There is a lady in
23 the back of the courtroom who has a
24 question.

25 (Off-the-record discussion.)

1 MR. CASHION: That's my oral
2 motion to amend.

3 THE COURT: All right. Mr.
4 Panther?

5 MR. PANTHER: Although I would
6 like to oppose it given the late date that
7 the motion is made, in all candor, I'm not
8 going to oppose the motion. I'm not going to
9 quibble over \$550 and I'm not concerned about
10 the attorney's fees either. I've not
11 refrained from doing something that I
12 otherwise would have done or done something
13 that I otherwise would not have done, so I
14 don't oppose the motion. I would rather try
15 the case today and finish it this week than
16 to continue the case so that RCR can get the
17 pleadings in the shape they should have been
18 before today.

19 THE COURT: All right. Granted.

20 Now, anybody else? Are we ready
21 to start? Mr. Panther, you have the floor.

22 MR. PANTHER: Thank you. Well,
23 Your Honor, I appreciate your comments about
24 looking forward to this dirt case. I suspect
25 that you'll reconsider your views around

1 about tomorrow at 3:00. My name, for
2 purposes of the record, is Todd Panther. I
3 represent American Excavators. With me is
4 Marvin Parker. Mr. Parker is the chief
5 member of American Excavators.

6 May it please the Court, I don't
7 think that this is going to be a difficult
8 case from American Excavators' perspective.
9 I think what the proof is going to show is
10 that American Excavators had a contract with
11 the general contractor, RCR, which provided
12 for a price to remove and replace unsuitable
13 material. American Excavators was directed
14 to do the work. American Excavators did the
15 work and all it's asking to be paid for is
16 the price that was agreed upon in the
17 subcontract.

18 The project, just to give you a
19 little background, is the Williamson County
20 community services building. The owner, as
21 the name suggests, is Williamson County. The
22 general contractor is RCR.

23 RCR hired American Excavators to
24 do the excavation and grading portion of the
25 contract. I've got a diagram up here that

1 might help because we're going to be bandying
2 about terms that are familiar in the dirt
3 business that I want Your Honor to be
4 familiar with as well.

5 Just in very basic -- and this is
6 my drawing and it is very basic but it will
7 help illustrate what we're talking about.
8 American Excavators' grading and excavation
9 subcontract really provided for it to take
10 the site that it was in in its natural state
11 before any work began, which I've termed
12 natural grade. They were to strip the
13 topsoil, take this topsoil off the top, and
14 then as with any site naturally, it is going
15 to have certain peaks and valleys in it.

16 When the designers, the engineers
17 and the architects draw this thing out, they
18 have in their mind at what elevation they
19 want buildings and parking lots to be built
20 on, and that's called a subgrade.

21 What American Excavators was
22 charged to do is to remove the topsoil and
23 then these areas that are above the subgrade,
24 the peaks, if you will, were cut and then
25 there are areas that were below subgrade

1 where they would have to fill those areas.
2 With any excavation contractor, what they
3 determined is how much of this material in
4 the cut section can they push over into the
5 fill section and if there is anything left
6 over, which way is it going.

7 Now, also in construction and
8 when you're getting into excavation and
9 grading, sometimes what you run into is
10 material that's not suitable to use as fill.
11 It's either topsoil or it's too plastic or
12 it's too rocky for a variety of reasons or
13 it's trash. So, when you run into those
14 areas, what the excavation contractor has to
15 do is to remove that unsuitable material
16 until it gets down to acceptable base
17 material and then bring in fill to build it
18 up to subgrade so that buildings and parking
19 lots and structures can be built on it. The
20 term we use for having to go below subgrade
21 and remove it is undercut. Now, the
22 terminology for the area above subgrade is
23 cleverly called above subgrade and the area
24 below subgrade is called below subgrade.
25 That's what we're going to be referring to.

1 THE COURT: Now, the unsuitable
2 materials would be things like rotting logs,
3 something like that, that you feel
4 uncomfortable putting a structure on?

5 MR. PANTHER: It can be a variety
6 of things. Unsuitable material can be pipes
7 that are left in the ground that have to be
8 removed that you can't build upon; organics
9 such as tree trunks and limbs and things that
10 can decompose and cause the soil to settle.
11 It can be a type of soil that doesn't compact
12 very well like topsoil or it can be soil
13 that's too plastic that, when it gets wet, it
14 dissolves and doesn't hold its form. So it
15 can be a variety of different types of
16 materials that would make it unsuitable.

17 The idea is, what eventually you
18 want to do is you want to be able to have
19 this subgrade in such a fashion that the
20 material beneath the subgrade is stable
21 material so it is solid so that over the
22 course of time that subgrade material isn't
23 settling and causing foundation footings to
24 collapse or causing parking lots to heave and
25 bubble and ripple.

1 What the excavation contractor is
2 charged with doing is removing the unsuitable
3 material and grading it to subgrade as the
4 designers asked it to do so that, when you
5 get to subgrade, it's acceptable to build
6 on.

7 THE COURT: Got it.

8 MR. PANTHER: Now, there are a
9 couple of components with American
10 Excavators' subcontract. In the construction
11 business, there are types of contracts which
12 are called lump sum contracts which provides
13 for a guaranteed maximum but then there is a
14 method for contractors to bid price work so
15 that the price can vary depending upon what
16 site conditions you encounter, and American
17 Excavators did a combination of both.

18 For certain aspects of the
19 excavation grading work, American Excavators
20 priced that work at \$233,940 -- 233,940 --
21 but what they included in their bid and then
22 in their subcontract was that any unsuitable
23 material that it had to remove, it would be
24 paid for that at \$12.50 a cubic yard so that
25 the risk of encountering unsuitable material

1 was shifted from American Excavators to the
2 general contractor with whom it contracted,
3 RCR. So whatever unsuitable material it
4 would encounter, it would pay for that
5 material at the unit rate.

6 The purpose of doing that is to
7 guard against unforeseen conditions. What
8 you're going to hear is that there were
9 unforeseen conditions. The first unforeseen
10 condition is that there was a design bust
11 where the property lines that were supposed
12 to be staked out correctly were not staked
13 out correctly. So, American Excavators had
14 to clear and grub additional soil, additional
15 land that, at first, was not shown in the
16 plans.

17 Remember, I told you that some
18 unsuitable materials could be pipes or
19 conduit. There was a reinforced concrete
20 pipe 24 inches in diameter, 400 linear feet
21 long that the engineers didn't find. They
22 had to remove that. But the unforeseen
23 condition that you're going to hear most
24 about has to do with the soil conditions.

25 What you'll hear is that before

1 any work began, the owner, the county, hired
2 a geotech company by the name of GT&E and
3 they did a soils report. That will be in
4 evidence. The soils report showed that the
5 topsoil was, on average, a depth of six
6 inches. Remember what I said. Before you
7 can build on anything, you have to strip the
8 topsoil because you can't build on topsoil.
9 What the soils report also shows --

10 THE COURT: I'm just curious.
11 Topsoil is just too loose?

12 MR. PANTHER: Too skooshy
13 (phonetic). It doesn't compress well. If
14 you build on it, over time if it is not
15 compressed correctly and the moisture isn't
16 removed, then you have the potential for
17 later settlement.

18 THE COURT: Okay.

19 MR. PANTHER: The soils report
20 did show one area of unsuitable material but,
21 in large part, the soils report indicated
22 that most of the site was suitable. Most of
23 the site was suitable.

24 Now, from American Excavators'
25 perspective, since it priced its work at a

1 unit price, it sort of took that out of the
2 equation. So, whatever unsuitable they ran
3 into, they would be paid for.

4 THE COURT: They weren't worried
5 about it?

6 MR. PANTHER: They weren't
7 worried about that. What happened, though,
8 on site was that when American Excavators got
9 into it, what they found in terms of soil
10 conditions is that the depth of topsoil was
11 much greater than what was shown in the GT&E
12 report. The result of that, Your Honor, is
13 that they were removing more topsoil which
14 means they would be bringing in more fill to
15 make up for the extra topsoil that they were
16 having to push aside.

17 What they also encountered was
18 that areas that were supposed to be suitable
19 were not suitable. They were running into
20 pockets, ribbons of topsoil at very peculiar
21 configurations where there would be topsoil
22 beneath clay and it was layered in there.

23 As an aside, this site was
24 formerly the location for the Battle of
25 Franklin in the Civil War and the site also

1 was an area where a lot of dumping had
2 occurred.

3 When American Excavators learned
4 that there were these site conditions that
5 were different than what was expected, what
6 the proof is going to show is that American
7 Excavators' project superintendent, a
8 gentleman who will testify by the name of
9 Ricky Tipper, brought those matters to the
10 attention of RCR's superintendent, a
11 gentleman by the name of Anthony Orange, to
12 seek direction on what to do.

13 Now, early on -- this has to do
14 with the PSI issue that Mr. Cashion moved to
15 amend his pleadings about. Early on,
16 American Excavators had in their subcontract
17 that they were going to provide geotechnical
18 services like PSI. When they first ran into
19 these unsuitable conditions, American
20 Excavators' geotech, a company by the name of
21 Southern Consulting --

22 THE COURT: This would have been
23 after the first geotech survey?

24 MR. PANTHER: That's right.

25 THE COURT: Who commissioned

1 that? The county?

2 MR. PANTHER: The county did.
3 The county hired GT&E to do the initial soils
4 report. When American Excavators ran into
5 unsuitable soils, American Excavators
6 contacted RCR, Anthony Orange, about it.
7 American Excavators brought in Southern
8 Consulting. Southern Consulting said it's
9 unsuitable; it's got to be removed and
10 replaced.

11 At that point, for lack of a
12 better word, a fight broke out where Southern
13 Consulting was saying it was unsuitable and I
14 think GT&E, you'll hear, was resisting and
15 saying, no, it's not unsuitable. So, what
16 was agreed is that Southern Consulting would
17 be dismissed. GT&E would be dismissed and,
18 instead, RCR would bring in a brand new
19 independent soils consultant, which was PSI.
20 RCR paid PSI.

21 Now, at this early stage before
22 anybody had any idea as to the magnitude of
23 the unsuitable material that would be
24 encountered, another witness who you'll hear,
25 Harley Ezell, which was American Excavators'

1 project manager, met out at the site with PSI
2 to try to estimate this one area where they
3 had found these unsuitable materials, and he
4 did. Brought it to their attention that we
5 have these areas; brought it to their
6 attention that I need PSI or RCR to be out
7 there and gave an estimate of how much
8 unsuitable material they had encountered up
9 to that point in time that they hadn't
10 charged for and how much unsuitable material
11 was in this particular location.

12 That was not all that they ended
13 up running into. What you're going to hear
14 is that, as this job progressed, there was
15 unsuitable material above subgrade. There
16 was unsuitable material below subgrade. It
17 was everywhere, but Mr. Tipper is going to
18 testify to --

19 THE COURT: Let me ask you a
20 question on that.

21 MR. PANTHER: Sure.

22 THE COURT: If it had been
23 suitable material above subgrade, it was
24 going to be removed anyway and put in as fill
25 on the other side?

1 MR. PANTHER: Right.

2 THE COURT: Which would have been
3 okay?

4 MR. PANTHER: It would have been
5 pushed from one side of the site in the cut
6 section to another side of the site in the
7 fill section. That's right.

8 THE COURT: Okay.

9 MR. PANTHER: As American
10 Excavators ran into unsuitable material first
11 in the fill section where the building pad
12 was, they notified Anthony Orange about it --
13 Ricky Tipper did; got direction on what to do
14 about it.

15 Now, at that point RCR had some
16 options. They could have called PSI to the
17 site and said, We want you to test it, We
18 want you to quantify it, We want you to
19 dimension it and tell us what needs to be
20 removed and what doesn't, but they didn't do
21 that.

22 The proof that you're going to
23 hear is that time and time and time again,
24 when Ricky Tipper brought the unsuitable
25 material to Anthony Orange/RCR's attention,

1 what Mr. Orange told him to do was to remove
2 it and replace it with suitable fill, which
3 they did. What Mr. Orange further told Mr.
4 Tipper to do is to keep track of how many
5 loads of fill you have to bring in and to
6 submit them and they will be paid for them.
7 That's what American Excavators did. That's
8 what Ricky Tipper did.

9 THE COURT: I take it you would
10 do it that way rather than keep track of how
11 many loads you're taking out because some
12 loads you take out might be used for fill; it
13 is only when you have to bring it in that
14 it's going to be the additional cost? Am I
15 right about that? Or is that too simple?

16 MR. PANTHER: No, that's true.
17 There are a variety of methods that could
18 have been employed to ascertain the
19 quantities that were having to be removed.
20 For example, you could have stockpiled it and
21 taken measurements of how big the stockpile
22 was and determine what the volume was. You
23 could have brought PSI in there to take
24 measurements and to take a survey as to how
25 much it is and to quantify it that way. You

1 could have counted the trucks coming out.
2 There were any number of ways that you could
3 have done it, but counting the trucks going
4 in with suitable material at least at that
5 time was a suitable way to do it because you
6 know you were bringing that fill to the
7 site. You knew it was being used on site.

8 The proof for these loads and
9 these trucks is in two or three forms
10 actually. First, Mr. Tipper is going to
11 testify that he was on site every day. His
12 job was to keep track of how many loads of
13 fill were brought in. He also kept daily
14 reports. He also kept all the truck tickets
15 and either he signed off on them or somebody
16 under him signed off on all the truck tickets
17 after determining that the loads were
18 accurate. So you have a great deal of
19 information where American Excavators was
20 keeping track of the loads. Two reasons for
21 doing that: Number one, to make sure that it
22 got paid from RCR but, number two, you see,
23 these trucks that were bringing in all this
24 fill, they weren't American Excavators'
25 trucks. They were rented trucks and so the

1 trucking companies would be sending an
2 invoice to American Excavators expecting to
3 be paid for their number of loads or the
4 number of hours that was spent. So, American
5 Excavators wanted good records on the
6 trucks.

7 One other area that I need to
8 tell you about, and this has to do with the
9 cut section. Remember, I said that as far as
10 American Excavators is concerned, since it
11 priced unsuitable material at a unit price,
12 all it was doing was informing RCR, getting
13 direction from RCR as to what to do about the
14 unsuitable material and then quantifying it
15 by the truck count.

16 The project first started over
17 here in the building pad. The reason for
18 that is obvious. The other contractors want
19 the building pad first so that they can put
20 in foundations and start building. So they
21 started there. As they got to the cut
22 section, they found that what was supposed to
23 be suitable material was unsuitable
24 material. Again, Mr. Tipper brought it to
25 Mr. Orange's attention.

1 At that point what the proof is
2 going to show is that Mr. Orange and his
3 boss, Don Stover, talked to Harley Ezell, the
4 project manager for American Excavators, and
5 said, Look, rather than 12.50 a yard that's
6 in your contract for this cut material, we
7 want you to charge less than that. We only
8 want you to charge \$10 a yard in this area.

9 The reason for that, Your Honor,
10 is because the rationale was, Well, in your
11 contract you're going to have to move it
12 anyway. You planned to move it from cut
13 section to fill section so you don't have the
14 added expense of having a compactor or
15 somebody smashing it out. We want you to
16 give us a break of \$2.50 a yard. Harley
17 Ezell talked to Marvin Parker about it.
18 Marvin Parker agreed. We'll only charge you
19 \$10 a yard.

20 Now, that wasn't American
21 Excavators going to RCR and saying, Well, you
22 know, we'll give you a break on this. RCR
23 asked them for a break. I think that's
24 important for Your Honor to remember that it
25 was RCR asking for a break in the cut

1 section.

2 Everything was going along fine.
3 One thing that was another unforeseen
4 condition that you'll hear about is that
5 because this was the former location for the
6 Battle of Franklin, Anthony Orange was
7 interested in trying to find Civil War
8 relics, and what he did was, after the site
9 was shut down, he would take equipment,
10 backhoes, and dig deep pits, dig trenches to
11 try to find Civil War relics and would tell
12 Ricky Tipper, When you get to that area, just
13 fill it in with suitable fill and keep track
14 of the trucks, and he did. That's exactly
15 what he did.

16 American Excavators sent Pay
17 Application No. 1. I've got a summary. This
18 will be admitted into evidence as well. It
19 is entitled Summary of Amount Due, that I've
20 shared with counsel. Can Your Honor see that
21 from that distance or would it be helpful to
22 move it forward?

23 THE COURT: Better move it
24 forward. That's good.

25 MR. PANTHER: Here's the contract

1 amount, 233,940. American Excavators sent
2 its first pay application and it had a change
3 order in there for 8,000. That change order
4 dealt with the clearing and grubbing of
5 additional trees and brush. It also dealt
6 with removing that reinforced concrete pipe,
7 what's called RCP in the business. RCR paid
8 it without any problem.

9 American Excavators sent its
10 second pay application, and in the second pay
11 application, it had attached to it Change
12 Order No. 2 and Change Order No. 3. Change
13 Order No. 2, the 28,980, that dealt with the
14 unsuitable material in the cut section. On
15 the change order, you'll see \$10 a cubic
16 yard. RCR paid it. Change Order No. 3, this
17 16,000, that dealt with the areas that PSI
18 had identified and quantified and measured.
19 RCR paid it.

20 THE COURT: Where were those?
21 All over the site?

22 MR. PANTHER: You'll see a
23 drawing of different areas where those
24 sections were located. There's some in the
25 driveway. There's some near the building

1 pad. You'll see a drawing that will identify
2 them. They were scattered.

3 THE COURT: Is that PCI or PSI?

4 MR. PANTHER: PSI. American
5 Excavators sent its third pay application,
6 and this is when the difficulty arose.
7 Rather than pay it, RCR deducted the amounts
8 that it had previously paid from American
9 Excavators' third pay application and paid it
10 the rest.

11 THE COURT: So they deducted
12 Change Orders 1, 2 and 3? The amounts, I
13 mean?

14 MR. PANTHER: They deducted a
15 portion of Change Order No. 1. I think they
16 deducted all of Change Order No. 2 and all of
17 Change Order No. 3. The proof will bear me
18 out on that because you'll see a document
19 where RCR showed what they deducted.

20 THE COURT: And then paid the
21 balance, what is it, 80- or 90-something
22 thousand?

23 MR. PANTHER: Right. The change
24 order was in the range of, I think -- the pay
25 application, I think, was in the range of

1 about 50-, \$60,000. They shorted American
2 Excavators -- well, here it is. The change
3 order was in the amount -- the pay
4 application was in the amount of \$46,114.60.
5 That was the amount for Change Order No. 3.
6 They actually paid them \$1,857, shorting them
7 44,257.

8 THE COURT: I guess I was
9 confused. I thought you were talking about
10 Change Order No. 4?

11 MR. PANTHER: Not yet. I haven't
12 gotten to Change Order No. 4 yet.

13 THE COURT: Okay. So Change
14 Order 1 was paid. Change Order 2 was paid.

15 MR. PANTHER: And Change Order 3
16 was paid but then they later deducted.

17 THE COURT: They later deducted?

18 MR. PANTHER: The step that I may
19 have missed, you see American Excavators
20 submitted their first pay application, their
21 request for payment. That included Change
22 Order No. 1. In their second pay
23 application, that included Change Order No. 2
24 and Change Order No. 3. When they submitted
25 their third pay application, no change orders

1 now but just a request to be paid for the
2 work that they did, that's when they deducted
3 amounts that had been previously paid.

4 THE COURT: The third pay
5 application?

6 MR. PANTHER: Right. Third pay
7 application but no change orders attached to
8 it.

9 Now, at that point is when
10 American Excavators tries to find out what's
11 going on, why they're deducting these
12 amounts, and at that point what we find RCR
13 doing is really scrambling at that point.
14 What the proof is going to show is that the
15 first attack that they used was to ignore Mr.
16 Parker when he was trying to call and discuss
17 it.

18 Second, after they couldn't
19 ignore him any longer, Don Stover with RCR
20 scheduled a meeting with the county and at
21 that meeting, they then started claiming --
22 RCR started claiming, Oh, your contract
23 doesn't entitle you to be paid extra for
24 unsuitable material, when it did.

25 Then, in this litigation, they

1 started saying, Well, you waived it. They
2 were here on the motion for summary judgment
3 saying you waived it. You didn't get a
4 change order. You shouldn't have listened to
5 us when we told you to remove it and keep
6 track of the truck tickets. Your Honor asked
7 the question, Is there any doubt that all
8 this fill was brought to the site, and I
9 think the answer was, no, there's no doubt
10 about that. They may raise that today. I
11 don't know.

12 But we see these differing
13 answers that RCR has given to try to keep
14 from paying American Excavators. The fact of
15 matter is they did the work. They did what
16 they were told to do. They charged what they
17 agreed to charge and they should be paid for
18 their work. I don't think that's going to be
19 a difficult question for you to answer.

20 I think the more difficult
21 question for you to answer is what you do
22 between RCR and the county. You see, RCR
23 likes to call itself the traffic cop. You
24 heard Mr. Cashion call them the traffic cop
25 when we were here on the motion for summary

1 judgment. They'll probably call RCR the
2 traffic cop this morning. But the thing
3 about a traffic cop is that the traffic cop
4 has got to be consistent.

5 In this case, what I think you're
6 going to find is that RCR was not
7 consistent. Where American Excavators had a
8 contract provision that entitled it to
9 unsuitable material, RCR didn't have that
10 same provision vis-a-vis the county. Where
11 RCR, to extend the traffic cop metaphor, was
12 waving American Excavators through the
13 intersection and saying bring on the fill,
14 RCR was not making sure that its path was
15 clear to go to the county.

16 The whole reason we have this is
17 because RCR apparently was not notifying the
18 county of what was happening on site and
19 they're now surprised that American
20 Excavators performed --

21 THE COURT: "They" being the
22 county?

23 MR. PANTHER: The county is now
24 surprised that RCR is asking them to pay for
25 unsuitable material that RCR was telling

1 American Excavators to take out and replace.
2 They didn't know anything about it.

3 There is no question from
4 American Excavators' standpoint that all of
5 this fill that they brought to the site was a
6 benefit. No question about it. It was a
7 benefit to the county. Without bringing in
8 the fill, this structure could not be built.
9 Parking lots could not be built. So, from
10 that perspective, there is no question that
11 we conferred a benefit upon the county.

12 But there are other reasons why
13 American Excavators is entitled to be paid
14 vis-a-vis RCR and that is from its contract,
15 from the estoppel, from all those legal
16 reasons that we set out in our pre-trial
17 brief.

18 American Excavators is entitled
19 to the amount that it asks for. That amount
20 is set out in this summary. The total
21 principal amount is 153,555. It is entitled
22 to interest. I've tried to set out the
23 interest so that there wouldn't be any double
24 dipping, and that totals \$190,192.10.

25 THE COURT: Is the interest

1 calculated pursuant to the legal rate or to a
2 contractual rate?

3 MR. PANTHER: It's 10 percent,
4 yes, sir. And so we submit that American
5 Excavators is entitled to all of that amount
6 against RCR. Whether RCR is entitled to all
7 of that amount against the county, I think,
8 is going to be a tough question. Thank you.

9 THE COURT: Mr. Cashion?

10 MR. CASHION: Greg Cashion of the
11 Nashville Bar. With me today and who will be
12 assisting me at trial will be Trajan Carney
13 with my firm and with me also is Steve
14 Yokley, vice president with RCR.

15 Let me start by saying I guess
16 when we went through the summary judgment and
17 when you read their pre-trial brief, you get
18 the expectation that this is going to be a
19 very legal case. We've got notice, waiver,
20 estoppel, a lot of legal theories going on
21 here.

22 I would submit on opening
23 statement, this is going to be a very factual
24 case. What you're going to be wrestling with
25 is what are the contract requirements for

1 American Excavators. You're going to have to
2 look at their contract, look at the
3 specifications that they agreed to and
4 determine what are their obligations on this
5 job. Once you get a firm grasp on what
6 they're supposed to do out there, you're
7 going to have to square that with their
8 conduct, how they went about performing this
9 work.

10 I think when you boil it down,
11 you're really going to be wrestling with the
12 contract, the requirements and what they were
13 doing out there.

14 To make a few points, first on
15 the diagram of Mr. Panther, one point that I
16 wanted to show you -- this is crude but it
17 will make the point -- when you talk about
18 stripping the topsoil, another term you need
19 to realize is when you strip that topsoil and
20 you strip your cut, you've got to proof roll
21 this.

22 THE COURT: You've got to do what?

23 MR. CASHION: Proof roll. Two
24 words, proof roll, R-O-L-L. And the contract
25 -- we'll go through the contract. It says

1 when you get to that material that you're
2 going to start building on, bring it up from
3 there, you've got to proof roll it.

4 I will also tell you when you
5 proof roll it, you've got to have a geotech
6 engineer there. You can't just proof roll
7 with a bunch of contractors looking at it
8 because what you are looking for is if you
9 have any soft spots. You're supposed to
10 proof roll them with a tandem dump truck
11 fully loaded. You have to have a lot of
12 weight and you watch to see if the soil is
13 pumping up and down. If it is pumping, it is
14 bad soil. You've got to get it out.

15 The way you start this process is
16 you cut off your topsoil and you proof roll
17 under the direction and observation of a
18 geotechnical engineer so you'll have somebody
19 there that can say take it out, leave it in,
20 do something with it.

21 That's one concept that you're
22 going to find in this particular case was
23 skipped because what the proof is going to
24 show is when they cut this stuff out, they
25 just cut it out. They didn't tell anybody.

1 They didn't proof roll it, and then all of a
2 sudden Harley Ezell comes out there and goes,
3 Whoa, you've taken off two feet of materials.
4 Instead of six inches, you've got two feet.
5 Nobody knew what they were doing. I doubt
6 they knew what they were doing when they just
7 stripped the whole site of what they thought
8 was topsoil.

9 That's going to be another thing
10 you're going to have to listen to the proof
11 on, is what is topsoil. It's our impression
12 that they think topsoil is any dark soil,
13 period.

14 What the inspectors from GT&E
15 will tell you is you have topsoil -- and the
16 reason you don't use topsoil in fill is it
17 has a lot of organic content and that stuff
18 is going to decay over time and that's what's
19 going to make it settle, is the organics in
20 it. Organics is what you don't want in your
21 fill.

22 But below the topsoil in this
23 area is what was called a dark brown clay
24 silt material and it looks the same color as
25 topsoil. You're going to have to listen to

1 see what these guys were doing when they went
2 in there and stripped off a couple of feet or
3 more of material because the soils report
4 would describe for you that you've got this
5 other stuff down there that you can use to
6 build on, that you're supposed to use to
7 build on, and they strip it.

8 That's why we say one point is
9 they had a lot of truck tickets. We all
10 agree they had a lot of truck tickets on
11 there, a lot of materials being moved around
12 on this site. We agree with that. But
13 you've got to look and see what their
14 operation is doing.

15 Let me tell the story from a
16 little different perspective. Whenever
17 American Excavators found out that they had
18 removed all of this material, they did have a
19 meeting. They had a meeting on 6-23 and a
20 week later on 6-30 they had a second
21 meeting. That's when Harley Ezell, the
22 project estimator for American Excavators,
23 established what he was going to do.

24 Mr. Ezell will testify that he
25 was the one that came out to the job site and

1 realized that Ricky Tipper had stripped a lot
2 of material off there. He knows what the
3 contract says. He knows if he wants to get
4 paid for undercutting, he's got to get the
5 geotech out there. He's got to get him to
6 evaluate the material. He's got to get the
7 geotech to say it is unsuitable material.
8 He's got to get him to measure the material
9 once he goes out so he can get paid for it.
10 The contract is very specific on what you
11 have to do if you want this 12.50 per cubic
12 yard.

13 Mr. Panther is in error in the
14 way he characterized that. American
15 Excavators has a clause in its contract that
16 says additional undercutting will be paid at
17 12.50 a cubic yard. You'll read that, and
18 focus on those words.

19 For one thing, we don't have a
20 unit price in our contract with the county.
21 We don't have 12.50 a cubic yard but the
22 contract, the specifications that you read,
23 it contemplates that RCR will be paid by the
24 county for undercut material. The architect
25 will say, yes, if you undercut, if you are in

1 this below subgrade down here and you have to
2 take it out because the geotech says it's got
3 to come out, you get paid for it. The only
4 thing we don't have is a unit price.

5 There is no issue that if they
6 prove to the satisfaction of the geotech
7 engineer that they've cut out material below
8 subgrade, they get paid; we get paid. No
9 issue.

10 But as Mr. Tipper -- as Mr. Ezell
11 realized when Mr. Tipper stripped the site of
12 all this material, he had to get something
13 set up to get paid. That's why he says, I
14 have removed approximately 600 cubic yards of
15 unsuitable material which I did not seek a
16 change order. That's good because nobody
17 knew he was removing it. His superintendent
18 took too much out. He said, I'm saving the
19 county.

20 At this time I thought the extent
21 of material was proofed wrong. So from this
22 date, July 1, American Excavators -- the
23 contemporaneous correspondence says we know
24 we took out material that, maybe we could
25 have asked for a change order, was

1 unsuitable. We know we did that. We're not
2 claiming it. Today they're claiming it.
3 Today, they're going back to every truck
4 ticket they ever had and claiming it, but the
5 contemporaneous correspondence says we made a
6 mistake; we took it out; we gave the county
7 some money. Good cheer for us.

8 What happens next is he says --
9 after he and PSI looked at it, Mr. Ezell
10 evaluates what unsuitable material below
11 subgrade needs to come out. He says, The
12 final depths of the undercut to my
13 understanding will be determined by PSI. PSI
14 is the entity that will determine the
15 undercut. So he knows PSI has got to approve
16 it. He goes on and says what his contract
17 price is. We agree with the contract price.
18 It is for undercut. He says what the range
19 is based on 1000 to 1700 cubic yards which
20 will be 12,000 to 21,000.

21 So on this date, we've got this
22 problem handled. We know the previous stuff
23 we're not going to worry about it. That was
24 their problem. They didn't do it right under
25 the contract. They didn't have it proof

1 rolled. They didn't have the geotech look at
2 it. They didn't have it measured. They
3 didn't do anything, but we're over that now
4 and we're moving forward from July 1 out.
5 That's what the proof will show happened on
6 the site.

7 Now, the next thing that the
8 proof will show is that they did submit --
9 they went and did all the work. This work
10 was finished on, I think, the first day of
11 August or the last day of July. So all these
12 truck tickets you're going to hear, all the
13 truck tickets are over with. After that
14 date -- he doesn't tell us the date but I
15 think it is August 16, he submits these two
16 change orders.

17 THE COURT: 2 and 3?

18 MR. CASHION: 2 and 3. I
19 submitted this one on the one in July. These
20 two come in in August. After all this work
21 is complete, the contemporaneous
22 correspondence on the job site is I want to
23 be paid \$28,000 and I want to be paid
24 \$16,000.

25 What we have said in this is,

1 yes, you're entitled now -- I won't tell you
2 about the huge screw-up. You heard that
3 story once before but I'll get there.
4 Today's position and what we've paid them for
5 is the 16,375. You won't determine that
6 issue. That's paid. It's a good change
7 order. They've got the money. We're over
8 that. That change order is for undercutting
9 and it is what PSI approved. As we come to
10 court today, this one is paid. No issue
11 there.

12 This one is reduced by \$1100.
13 I'll let you catch the proof on that. This
14 one is in dispute, Change Order No. 2.

15 Now, in their brief and when Mr.
16 Panther was talking about unsuitable
17 material, you've got to draw a line between
18 unsuitable material and undercut. They're
19 not the same thing. You've got to read their
20 contract for 12.50. It doesn't say we get
21 paid 12.50 for all unsuitable material. It
22 says for undercut of unsuitable material.
23 You've got to figure out if it is below or
24 above the subgrade.

25 Now, the 28,000 that they want,

1 28,980, is all above subgrade. None of it is
2 undercut. So, first, if they want money
3 above subgrade, they don't have a contract
4 provision for it because that just applies to
5 undercut which we all agree is below
6 subgrade.

7 Now, on the cut section itself,
8 the contract is very specific on this. Let
9 me show you a chart -- let me ask you, Your
10 Honor, do you want me to put letters on these
11 charts? I've got a smaller version I can
12 give you. How do you want to keep up with
13 this stuff?

14 THE COURT: You mean for exhibit
15 purposes?

16 MR. CASHION: This will not be an
17 exhibit to the trial. This is a
18 demonstrative aid that has some information.
19 Some of my charts have argument on them and
20 some of them are summary charts. I didn't
21 know if you wanted to just letter them and I
22 can give you a smaller version and you can
23 keep up with it. How do you want to manage
24 it?

25 THE COURT: Are you really

1 talking about for purposes of the record on
2 appeal so it makes sense? Is that what
3 you're worried about?

4 MR. CASHION: So if somebody
5 knows -- I'd just as soon letter them and
6 give them as an aid that doesn't go up on
7 appeal.

8 THE COURT: It doesn't go up on
9 appeal?

10 MR. CASHION: Right, but at least
11 it is clear if you want to send it but it is
12 not going to be an exhibit. You'll have this
13 material.

14 THE COURT: As an exhibit?

15 MR. CASHION: As an exhibit
16 somewhere else. I'm summarizing material for
17 you. How do you want to address it?

18 THE COURT: Do we need to label
19 it at all, I guess is my thought? Just start
20 talking about it and don't worry about it.

21 MR. CASHION: What it is, it is.

22 THE COURT: What it is, it is.

23 MR. CASHION: Okay.

24 THE COURT: I thought you were
25 worried about the record. If you're not

1 worried about the record, don't worry about
2 it.

3 MR. CASHION: If I get to a chart
4 that I want to be made an exhibit to the
5 trial, we'll mark it. If I'm up here and
6 talking about this, we'll just be talking.

7 THE COURT: Okay.

8 MR. CASHION: I have a small one.
9 Let me hand this to you. That would help.

10 THE COURT: It just helps me.

11 MR. CASHION: Right.

12 THE COURT: Tell me what you're
13 showing me.

14 MR. CASHION: This is an excerpt
15 from the specifications. 2300 is earth work
16 specifications. So when you get the county's
17 big book of specs, you will look for 2300-1
18 as a page number and that will tell you --
19 this will have this information on here. So,
20 the book of specifications is where this
21 comes from.

22 THE COURT: These are the
23 county's specs?

24 MR. CASHION: Right. It is a
25 part of the RCR/county contract and 2300 is

1 specifically referenced in the RCR/American
2 Excavators' subcontract.

3 The point of this is when they
4 start talking about cut material, number one,
5 it is called unclassified. The definition of
6 unclassified is it doesn't matter what this
7 stuff is. If it's rock, boulders, all
8 topsoil, suitable, unsuitable, you're taking
9 it out. Unclassified material, you don't get
10 anything. If it is different than what they
11 thought it was, it is coming out
12 unclassified.

13 But they deal with it more
14 directly on Page 2300-2. They say,
15 Unsatisfactory soils: On-site material
16 encountered which cannot be stabilized by
17 compaction or where in the opinion of the
18 geotechnical engineer attempting
19 stabilization by compaction would be
20 unsuccessful or unacceptable.

21 And then they say, Unsatisfactory
22 soil shall be removed from the site and
23 disposed of by the contractor. If the
24 unsatisfactory soil is in a cut section, it
25 shall be removed from the site and disposed

1 of by the contractor at the contractor's
2 expense.

3 THE COURT: We're talking about,
4 the contractor in this case would be RCR?

5 MR. CASHION: Correct.
6 Contractor is RCR and this specification goes
7 down to American Excavators and so if they're
8 the contractor doing this particular work, it
9 flows down to them. But this is from the
10 owner/contractor document which is
11 incorporated in the contractor/subcontractor
12 document.

13 THE COURT: Okay.

14 MR. CASHION: Here, it is
15 undisputable that it's removed from the site
16 at the contractor's expense, which in this
17 case would be RCR which would flow down to
18 American Excavators. If you take this stuff
19 off and you can't use it, it goes out. No
20 change order, no extra money. That's what
21 we've told them. This goes out.

22 Now --

23 THE COURT: Are you talking about
24 the cut which is above subgrade?

25 MR. CASHION: Correct.

1 THE COURT: I'm on top of it.

2 MR. CASHION: You're there. This
3 is a belt and suspenders argument. First,
4 you have a contract. You don't get paid for
5 it. American Excavators we're not going to
6 pay your \$28,000 change order. We're not
7 going to pay you now or later. We hope you
8 say don't pay it. That's the belt.

9 The suspenders is we're not aware
10 of anybody that's going to testify this is
11 unsuitable material. The PSI guy will
12 testify that this is suitable material. So
13 there's going to be a factual dispute
14 underlying the legal dispute as to
15 entitlement. So the suspenders of it is
16 let's wait and see if anybody gets up there,
17 geotechnical engineer, and says this is
18 unsuitable material.

19 We don't think they can get over
20 that hurdle much less to make it over the
21 legal hurdle. Those are your two issues you
22 will watch for on the \$28,000 change order.

23 THE COURT: First, is it
24 unsuitable?

25 MR. CASHION: Right.

1 THE COURT: Second --

2 MR. CASHION: Legally would they
3 be entitled to it under the contract language
4 that I've shown you.

5 Now, you have to address Change
6 Order No. 4 which is the big one that we're
7 here about today. What we've done to try to
8 assist us and the Court, I guess, in mapping
9 out the wealth of information you will have
10 piled up on your desk, let me hand to you
11 another chart which is demonstrative only.

12 The source of the information of
13 this chart is that we took the trucks
14 referenced in Mr. Parker's affidavit who he
15 said he hauled with and you can see there
16 were some errors in his affidavit which I
17 think we're showing and Mr. Panther will
18 clean that up. We took that information as a
19 summary. We took Mr. Tipper's daily reports
20 and we've been selective on this. We haven't
21 put everything that he has in his daily
22 report. So we've taken excerpts from his
23 daily report that we want to bring to your
24 attention. You'll have all the complete
25 daily reports. And then we take Mr.

1 Orange's, who is the RCR superintendent, and
2 the excerpts from his daily reports about
3 what's going on on the site. That way, you
4 can look at the site, the truck tickets, you
5 know what Mr. Tipper said, you know what Mr.
6 Orange said at one glance.

7 Now, what is interesting when you
8 do it like this -- we've highlighted where it
9 references a party or a name just so that
10 will come out at you. When you put all this
11 information down and you realize their whole
12 theory, the linchpin of their case is somehow
13 our people, Don Stover and Anthony Orange,
14 told these people to take out like over
15 8,000, 9,000 cubic yards, and PSI just told
16 them to take out 1300.

17 So you're thinking, okay, this is
18 a big representation coming from RCR, but
19 when you look at the daily reports, you start
20 to realize that when they talk about
21 undercut, they're talking about PSI.

22 It is just like Mr. Ezell's
23 letter. They acknowledge PSI is the referee
24 for undercut. They don't have in here an
25 entry that says Anthony Orange told us to

1 take out all of the undercut. I'm concerned
2 because PSI didn't look at it or he's telling
3 me a lot of undercut.

4 You're not going to find what
5 they're alleging in this lawsuit today in any
6 of their daily reports that they're making
7 those types of representations. Our people
8 would deny those representations are made.
9 So, you're going to have credibility dispute
10 over what one party says.

11 Take out everything. Keep up
12 with the truck tickets. The other party
13 comes in and says didn't happen. We're
14 looking at PSI. That's going to smash as a
15 factual dispute for you when you look at
16 that.

17 What I'm trying to show by
18 organizing the daily reports is their
19 allegation will not be proven in this trial
20 through anything they were writing at the
21 time. This was an evolution theory that
22 wasn't set at the time.

23 I told you, when they completed
24 the job, they gave us two change orders. We
25 know what both of those change orders are

1 for. One is for above the subgrade. One is
2 for below. You don't get this \$123,000
3 change order coming until April of the next
4 year. Almost nine or ten months later, you
5 get the monster change order that we have to
6 deal with in court today, and you don't get
7 any indication that it's out there in the
8 contemporaneous documentation.

9 As you evaluate the factual
10 issue, we want to keep focused on what was
11 said at the time, not what spin is being made
12 in their testimony today.

13 To that extent, we went back on
14 this chart -- and, again, this is
15 demonstrative only. The daily reports of
16 Ricky Tipper, we pulled out every time we
17 found that he talked about undercut just to,
18 I guess, make the point that he did not have
19 contemporaneous documentation that there was
20 8,000 more cubic yards of undercut that
21 wasn't being accounted for. So this just is
22 where he talks about undercut in his daily
23 reports.

24 From that point -- before I move
25 off that, let me make two points that Mr.

1 Panther had said. He's correct that there's
2 one area that the specifications talk about.
3 It is called the garden area and everybody
4 that bid the job knew the garden area was
5 going to have to be undercut. It says it in
6 the specifications. So there is one area
7 that we all know is going to be undercut.

8 The rest of it is, if they find
9 bad material, then they've got to go -- this
10 was interesting. If you've ever pulled into
11 the Carter House back parking lot, you would
12 look over this and back there used to be a
13 rather large garden. The soils report tells
14 you -- when they went out to look at the
15 site, you can see this big garden area. It's
16 dark with plow zone. They knew from the
17 start that they had to address that garden
18 area. Whatever undercut occurred would be in
19 their price and that's what they told us.

20 The second point that I want to
21 address is this Civil War relic hunting.
22 We'll put Anthony Orange on. He'll tell you
23 his side of it. They were both looking for
24 Civil War relics. Everybody was out there
25 looking for Civil War -- this was the battle

1 trench.

2 THE COURT: Oh, I'm on the Carter
3 House board. So, my question was: If they
4 found these relics, don't they go to the
5 Carter House? Wasn't it on their land anyway?

6 MR. CASHION: I don't know whose
7 land is behind there. You know better than
8 I.

9 THE COURT: Or a finder's keepers
10 type thing?

11 MR. CASHION: They kept trying to
12 run people off.

13 THE COURT: Carter House did?

14 MR. CASHION: People would come
15 there on the weekends while they were
16 excavating. It was a hot area. I think
17 they're exaggerating now to say this was
18 something that required all these truck loads
19 to be drawn back in. They were looking for
20 souvenirs. Anthony Orange was in the pit
21 looking for some. But it wasn't a disruption
22 or a quantification they can't quantify what
23 they're talking about. It is just a little
24 story, what they hear.

25 THE COURT: I need to ask you one

1 thing because I want to be sure I understand
2 it. You say that the plaintiff's contract on
3 the 12.50 per cubic yard that needs to be
4 paid is only for undercut?

5 MR. CASHION: Correct.

6 THE COURT: Undercut only, below
7 subgrade?

8 MR. CASHION: Undercut only,
9 below subgrade. That's it. That is the
10 12.50. If I had the contract, I'd read you
11 the exact language. You'll get there.

12 THE COURT: Not for "unsuitable
13 materials" wherever they're found?

14 MR. CASHION: Only unsuitable
15 materials that are undercut below subgrade.
16 Those are the terms that describe what that
17 12.50 is paid for.

18 You may remember this from
19 summary judgment. This is not our finest day
20 for RCR in processing change orders. Change
21 Order 1 comes in with a pay application. We
22 pay the pay application with that amount on
23 it. That's where they take the liberty of
24 saying we paid Change Order No. 1 because it
25 was on a pay application that was paid.

1 Change Orders 2 and 3, 8-17-99, those are on
2 Pay Application No. 2. We approve and pay
3 Pay Application No. 2. Again, they say you
4 paid the change orders because it was on that
5 pay application and we do not take objection
6 to it.

7 THE COURT: That's true; right?

8 MR. CASHION: That's true. What
9 Don Stover will say in his testimony to you
10 is that he evaluates the work in progress and
11 if the total amount of the pay estimate looks
12 reasonable, he's going to pay it. He does
13 not acknowledge a change order until it is
14 signed. Obviously, you have to have signed
15 change orders in this process. Because
16 they're pending, he doesn't evaluate that.
17 Whether that's good, bad, that's the way he
18 looked at the pay applications and paid
19 them.

20 When they hit Pay Application No.
21 3 and asked for a bunch more money, \$47,000,
22 he looked at the status of the contract and
23 at that point the contract is complete for
24 the earth work. He says, Wait a minute,
25 guys; I can't pay you the rest of the money

1 because we have not signed actually these
2 three change orders. I don't know if they
3 were submitted at the time but the owner has
4 to approve them. You have to have them
5 signed. I'm not going to pay you this pay
6 application because you just bumped out of
7 the contract amount into what you would have
8 to have for an approved change order.

9 That's what happened on our pay
10 application process to them. Of course, we
11 don't believe just because a pay ap was paid
12 that that equals a signed change order to
13 bind us.

14 Now, that's not all the
15 less-than-careful paperwork we did on this
16 project.

17 THE COURT: Which change orders
18 were not signed? 2 and 3?

19 MR. CASHION: None of them. Not
20 a single one of them. We paid Change Order 3
21 and we paid \$6800 on Change Order 1. So
22 those have been paid but there's no signed
23 change order. We just paid that in September
24 of last year to clean up the money part. So,
25 that's how we were addressing that.

1 Now, what we did, which is
2 another mistake, is we took Change Order No.
3 2 and submitted it to Williamson County to be
4 paid. We also submitted Change Order No. 1
5 to be paid. Williamson County paid \$6200 of
6 Change Order No. 1 and Williamson County paid
7 \$28,000 of Change Order No. 2. So we
8 received that money from Williamson County.
9 This was like January of 2000.

10 We get that money. We go back to
11 American Excavators with a change order.
12 We're saying we're going to pay you the \$6200
13 we got paid plus we added our profit and
14 overhead of 10 percent so it comes out to
15 \$6,820. Don Stover said he thought they were
16 probably entitled to the full eight but he
17 paid them 10 percent to give them some extra
18 money. I'm going to pay you that and I'm
19 going to pay you the 28,000 that I got paid
20 by the county. American Excavators says, No,
21 we want all of it or we don't want any of
22 it.

23 So, they did not sign our change
24 order that referenced the amounts we had been
25 paid by Williamson County. That's the change

1 order process that we have, and Williamson
2 County knows now that they overpaid us on the
3 change order because this is the change order
4 that should have been paid that had the PSI
5 reference and not this one which was the cut
6 above subgrade.

7 When they started talking about
8 this in April of 2000, Al Thomas will say
9 that he thought he paid the PSI and he wasn't
10 going to pay for anything above subgrade.
11 Everybody had it backwards in their mind
12 about what they had done on this project.

13 As the lawsuit came up and we
14 unraveled, we realized that these two were
15 backwards. That's our mistake.

16 THE COURT: Is the way -- so the
17 way a change order is supposed to work, as I
18 understand it, the subcontractor submits it
19 to the contractor who submits it to the
20 owner?

21 MR. CASHION: Right.

22 THE COURT: The owner decides if
23 he wants to do it and pay it all or pay a
24 portion of it, signs it, sends it back down
25 the ladder. It gets down to the sub. He

1 either can sign off on it and says I agree
2 with that and will do it for that or he says,
3 okay, I'm not going to do it. Is that the
4 way it is supposed to work?

5 MR. CASHION: That's the way it
6 is supposed to work. When the wrong change
7 order was approved, we pushed back the wrong
8 change order and he didn't sign it. We were
9 consistent in our mistake. It is not like we
10 got 28,000 and we're going to pay him 16. We
11 thought we were doing the right thing. Now
12 we've got to undo what we got paid from
13 Williamson County.

14 The way we give you the payment
15 summary is we pay the contract price; paid
16 Change Order No. 1, that amount of the 8,000.
17 So you still have \$1180 to deal with. We pay
18 all of Change Order No. 3. We pay the 257,
19 and they acknowledge they've been paid that
20 money.

21 The only thing that happened
22 really that -- we didn't put the dates on the
23 checks, but this check for 46,000 is the one
24 that came in September of last year 2001.
25 This is a very late check that came off the

1 initiation of the lawsuit to pay them down.

2 Let me address the truck tickets
3 and I'll try to sit down so I can give Ms.
4 Carson some time. The truck tickets drive
5 this misunderstanding. They say the truck
6 tickets was all the material they brought to
7 the site. We say you've got a lot of truck
8 tickets that was hauling material that has to
9 be accounted for. This will become very
10 obvious in the cross-examination. Those
11 truck tickets that brought material to the
12 site for the most part, almost totally, are
13 not for undercut to be paid for in their
14 contract.

15 So, we can talk about what
16 materials are brought to the site but they've
17 got to make the linchpin, number one, it made
18 it to the site and, number two, that it's for
19 undercut because they're asking this court to
20 pay the 12.50 per cubic yard for all of it.
21 To get that 12.50, it has to be undercut
22 below subgrade. That's where they're going
23 to have the problem.

24 THE COURT: So that was an
25 important question for you when I asked Mr.

1 Panther would it matter whether it came in or
2 whether it was going out?

3 MR. CASHION: Right.

4 THE COURT: He takes the position
5 it doesn't matter. It's what's coming in
6 that's important to him. You say no, no, no,
7 it matters what went out.

8 MR. CASHION: There's a little
9 more to it but that's one of the points. Let
10 me put this chart up for summation. The
11 direction of the trucks, that's what we're
12 talking about. Now, this is a moving
13 target.

14 In his deposition, I asked Marvin
15 Parker, What were these tickets? Tell me
16 about the tickets, because when they gave us
17 the change order for \$123,000, they didn't
18 have any tickets. They didn't have any
19 back-up. It was just a piece of paper.
20 Marvin says the first time, Hauling
21 unsuitable soils off the site. Page 66. He
22 told me that several times. "I told Anthony
23 to keep up with unsuitable materials going
24 off the site." So, we're thinking the whole
25 time that this represents material going

1 off. We're saying, okay, this is everything
2 going off the site. Let's try to handle it
3 from that.

4 Then, when he gave his affidavit
5 on 11-8, Mr. Parker says, According to the
6 documents attached as Exhibit 1, which were
7 all the truck tickets, American Excavators
8 brought 1,090 truck loads of suitable
9 material to the site. Mr. Parker has not
10 been consistent on what his truck tickets
11 meant to him. He's told us both things under
12 oath and we're having trouble figuring out
13 what he's really talking about.

14 Now, the other part of my chart
15 is documentation of undercut removed per
16 Ricky Tipper. If you look at my colorful
17 chart, Mr. Tipper tells us when undercut
18 leaves the job. If you see, we've
19 highlighted that in kind of a reddish color.
20 It is going off the site. I added them up.
21 I said, okay, this is all the undercut that's
22 going off the site and it comes up to 1,296
23 cubic yards. Change Order No. 3 which we've
24 paid for, which we agree with, is 1,110 cubic
25 yards. At that point it looks pretty even.

1 He's documented that much going off and he's
2 got that much that he's asked to be paid to
3 go in. We look good.

4 The problem is they're asking for
5 8,000 more cubic yards. Change Order No. 4,
6 if you took the 13,500, subtracted this,
7 subtracted this, you get 8,000. We've
8 already taken care of this. Where did this
9 material go? You don't bring in 8,000 cubic
10 yards and put it on that site and not have
11 some truck tickets, something leaving the
12 job.

13 The question is: Does this
14 represent everything going in the job or is
15 it possible this represents in and out
16 because with the way their documentation
17 stops, it represents only this much going out
18 and you've got topsoil -- we're not talking
19 about topsoil. Topsoil is not in any of
20 these numbers here. It's separate but they
21 did reference topsoil going off. It is not
22 in the numbers.

23 Geometrically, you can't dump
24 8,000 cubic yards on the site unless you
25 account for where it is going. If you dug

1 the material out, if you made a hole, you
2 better show me where you're hauling off and
3 why did he show this if it didn't show the
4 other. That's where we have a hard time with
5 the truck tickets. They clearly represent
6 material being hauled.

7 THE COURT: That question has
8 haunted you throughout this lawsuit?

9 MR. CASHION: It has. He's told
10 me everything. I'm chasing trucks off the
11 site. I'm chasing trucks into the site. I'm
12 haunted by it.

13 THE COURT: All right.

14 MR. CASHION: I want to find
15 these trucks. That's the problem that they
16 will have in this, is trying to make their
17 assumptions on the truck tickets match.

18 At the end of the trial, we think
19 that we will prove that Mr. Parker never
20 understood the truck tickets. He didn't have
21 enough documentation on them. He didn't know
22 whether they were going in or out. He
23 doesn't understand. He just knows that he
24 paid money for it.

25 We think they have problems with

1 their bid. They're not aware of the problems
2 with their bid. They didn't bid this job
3 correctly, we don't think. They don't
4 realize how they mismanaged the job. Let me
5 just touch on that.

6 Mr. Panther said correctly that
7 they started filling because everybody wanted
8 the pad up. What's funny is they didn't
9 start filling with the material on site.
10 Most contractors who know what they're doing
11 will cut this and fill with it so they don't
12 have to bring as much stuff in. They didn't
13 cut it. They left it there and then when
14 they got -- they cut the retainage or the
15 detention pond last. We think they took the
16 material off because the pad was up.

17 They mismanaged this and part of
18 the mismanagement goes to the fact that this
19 was their superintendent's first grading pad
20 job. Mr. Tipper is not a grading foreman.
21 He's a utility foreman. He does pipe work.
22 They put him out here and he mismanaged it
23 and that's where a lot of Mr. Parker's soil
24 went to. It went off the job site instead of
25 trying to be used on the job side.

1 My final analysis, we think the
2 plaintiffs are entitled to zero. We're
3 entitled to our fees and in the off chance
4 you think they supplied a benefit to the
5 firm, then we look to Williamson County for
6 that money. Thank you.

7 THE COURT: Ms. Carson, would you
8 like a break?

9 MS. CARSON: I would, Your
10 Honor. Thank you.

11 THE COURT: Why don't we do
12 that.

13 (Brief recess observed.)

14 MS. CARSON: Good morning, Your
15 Honor. For the record, my name is Lisa
16 Carson of the Williamson County bar. Despite
17 my shock and horror discovering the Court is
18 going to be assisting Franklin High School's
19 biggest rival, I'll try to carry on.

20 I'm representing Williamson
21 County today along with my associate and Mr.
22 Al Ritter, the Williamson County property
23 manager, is also here today on behalf of
24 Williamson County.

25 Your Honor, we've listened to

1 some hour and twenty minutes or so of opening
2 statements so far and there has been very
3 little said about Williamson County, and the
4 reason for this is because Williamson County
5 had very little involvement in the decisions
6 that were made with regard to the extra work
7 done on this project.

8 As to the extra work that
9 Williamson County did discuss, Williamson
10 County fulfilled every obligation it
11 committed itself to. I believe the testimony
12 of RCR's own witness will establish that the
13 contract provisions for changes in the work
14 under their contract with Williamson County
15 were not followed.

16 The contract is very specific
17 about what's recoverable with regard to
18 excavation procedures. The contract says
19 that unclassified excavation includes all
20 materials encountered except the undercutting
21 of unsuitable soils. So the lump sum
22 contract covers all of that other excavation
23 anything above subgrade.

24 In fact, the contract goes
25 further to say that materials removed from a

1 cut section are the contractor's
2 responsibility and at the contractor's
3 expense. It goes on to say specifically that
4 undercutting does not include stripping of
5 topsoil to the depth encountered and it goes
6 on to say that soil that would be removed by
7 utility trenches also is not covered.

8 So, the contract is very clear
9 through a variety of terms that the only soil
10 that Williamson County is going to pay extra
11 for removal and replacement of is soil that
12 is unsatisfactory and that is below subgrade
13 and which must be undercut.

14 But the contract goes even
15 further than that, Your Honor. It
16 specifically states that the geotechnical
17 engineer must be the one to determine that
18 that soil is unsatisfactory and then the
19 geotechnical engineer must also verify and
20 quantify that soil that is to be removed.
21 That's what the contract between RCR and the
22 county provides with regard to undercutting.

23 Your Honor, I don't think anybody
24 here is going to dispute that RCR did not
25 comply with the strict terms of the contract

1 with regard to any of these changes in the
2 work. There were never any signed change
3 orders before this work was done.

4 However, the county did commit
5 itself to pay under the contract for the
6 limited extra work that was undercutting
7 below subgrade verified and quantified by the
8 geotechnical engineer and, in fact, because
9 of the mistake which Mr. Cashion has already
10 described in the way the change orders were
11 submitted, the county has already erroneously
12 paid for more than that. They paid a larger
13 change order than what they actually thought
14 they were paying.

15 Your Honor, the only claim
16 against the county is brought by RCR. There
17 is no claim by American Excavators against
18 the county.

19 Your Honor, it is our belief that
20 that is going to prevent, among other things,
21 any kind of recovery under the equitable
22 theories. I think what RCR is trying to do
23 is boot strap and to say, Well, if the Court
24 finds that RCR somehow led American
25 Excavators to believe they were obligated to

1 do this extra work and thereby American
2 Excavators conferred benefit on the county,
3 then the county under some theory of quantum
4 meruit or one of these other equitable claims
5 would have to reimburse RCR for whatever they
6 have to pay American Excavators.

7 Well, Your Honor, what these
8 equitable theories say is if a party through
9 action or words misleads another party into
10 taking action to his or her detriment and
11 then an unfair benefit is conferred, at that
12 point there may be a quantum meruitable
13 claim.

14 RCR is going to admit that the
15 county never gave them any impression that
16 the county was going to pay for anything
17 except for exactly what it paid for.
18 American Excavators, I believe, will also say
19 the county never made any promises and that
20 the county never directed American Excavators
21 to do any of this extra work.

22 If a benefit was conferred, it
23 was not conferred by the entity that is suing
24 the county. If anyone was misled, they were
25 not misled by the county. All of those

1 elements would have to be present, Your
2 Honor, and we don't believe that the proof is
3 going to show that they are.

4 I know that's a little bit more
5 law than we usually like to argue in an
6 opening statement but to lay out what the
7 facts are going to show with regard to
8 Williamson County, I think that's got to be
9 before the Court.

10 THE COURT: What you're saying,
11 the course of dealing, to run on an equitable
12 theory, would really have to be between the
13 plaintiff and the county?

14 MS. CARSON: That's correct, Your
15 Honor. If American Excavators were claiming
16 they conferred a benefit based upon a
17 representation by the county, maybe there
18 would be a quantum meruit theory stated here,
19 but here what we're trying to do is piecemeal
20 all the different elements when there are
21 different parties that this affects.

22 THE COURT: You say just because
23 you happen to be a party to the lawsuit is
24 not enough?

25 MS. CARSON: That's correct, Your

1 Honor. That's our contention. I think
2 American Excavators has made it clear on more
3 than one occasion that they're not seeking to
4 recover from the county and they don't
5 necessarily think the county has done
6 anything to entitle them to that. They've
7 made very clear that their contract with RCR
8 is a separate entity.

9 THE COURT: Okay.

10 MS. CARSON: Your Honor, with
11 regard to public entities, the standard is
12 even higher. There's got to be an
13 affirmative action by Williamson County that
14 misled these folks.

15 THE COURT: So your associate
16 pointed out.

17 MS. CARSON: I'm sure she did
18 quite well, Your Honor.

19 THE COURT: She did, and I had to
20 kind of concede that in the order.

21 MS. CARSON: Your Honor, we think
22 the proof is going to be undisputed that that
23 didn't happen. In fact, we think the proof
24 is going to be undisputed that the county
25 made its position crystal clear from Day One

1 all the way through this process. There
2 could not have been regardless on what
3 reliance there was between these two
4 parties. We don't have a dog in that fight.
5 We don't have any idea what their
6 conversations were, but we do know the county
7 wasn't a party to most of the conversations.
8 Made its theories and its beliefs very clear.

9 THE COURT: You said the county
10 was not a party?

11 MS. CARSON: Not a party to most
12 of those conversations. There were a couple
13 of conversations that the party was in on and
14 I'll talk about those and what I believe the
15 proof will show.

16 The first thing that happened,
17 Your Honor, is Harley Ezell went out to the
18 site. Harley Ezell was the superintendent on
19 the project for American Excavators and he
20 found -- I can't think of his title. It was
21 estimator and something else, but he was, I
22 guess, the project manager over the
23 superintendent, Ricky Tipper. He went out to
24 the site at one point and discovered he
25 already stripped two or two and a half feet

1 of what they designated as topsoil.

2 The proof is going to show, Your
3 Honor, that up until that point, the county
4 had no idea that was going on. In fact, I
5 believe the proof is going to show the
6 contractor didn't even know what was going
7 on. In fact, the project manager for the
8 subcontractor didn't even know it was going
9 on. There was certainly no way that the
10 county could have taken any action to induce
11 anybody to remove those materials. Those
12 materials were also above subgrade.

13 As the county's contract says,
14 removal of topsoil and above subgrade is not
15 compensable as an extra under this contract.
16 When Mr. Ezell discovered this was going
17 on -- oh, my gosh, the soils report was all
18 wrong; there's more than six inches of
19 topsoil. Your Honor, the proof is going to
20 show whether there was more than six inches
21 of topsoil or not.

22 GT&E was the geotechnical
23 engineer that had been retained by the county
24 before the contract was ever bid. GT&E went
25 back out to the site, tested the materials

1 and said, This isn't topsoil. It's brown
2 silty clay. At that point in time, there was
3 a dispute between GT&E and Southern, which
4 was the soil folks who worked for American
5 Excavators.

6 Even though the county could have
7 stuck by its contractual rights and said,
8 This is suitable soil, you use it -- RCR,
9 there is a dispute; if you all want to bring
10 in your independent soils folks, you do that
11 and we'll let them decide what we're going to
12 do about those soils -- the county had
13 already told RCR through the terms of the
14 contract that GT&E soils report was for the
15 use of the county. It was for informational
16 purposes. It was not to be relied upon and
17 was not a warranty of the soils conditions.

18 So anybody that says that they
19 bid this project based on what GT&E did did
20 that at their own risk because it was
21 directly contrary to what the contract terms
22 said.

23 GT&E says it is suitable soil.
24 PSI goes out and PSI tests the soil and also
25 says it is not unsuitable in the sense that

1 it doesn't have more than 5 percent organic
2 material. It is not topsoil. It's brown
3 silty clay. But there are some areas where,
4 when you get to subgrade, let's do some proof
5 rolling, there may be some compaction
6 problems. If there are, let's remove that
7 soil and let's replace it with other fill
8 material.

9 There was a meeting at that point
10 between representatives for PSI, American
11 Excavators, RCR, Williamson County and the
12 architect. The architect also under the
13 contract is a representative for the county
14 for contract purposes.

15 All of those folks met; talked
16 about what they were going to do. This is on
17 June 30, Your Honor, and what came out of
18 that meeting was that the county would
19 evaluate -- even at this point, there wasn't
20 a specific agreement to pay but the county
21 will evaluate payment for those soils
22 designated by PSI as unsuitable -- they're
23 below subgrade -- if they're verified and
24 quantified by PSI.

25 All the parties at that meeting

1 agreed that that's how they were going to get
2 paid. We believe Mr. Ezell and Mr. Stover
3 for RCR and everyone else who testifies will
4 acknowledge that they understood that that
5 was the county's position about how to get
6 paid for removal of soils below subgrade.

7 Not only that, after this June 30
8 meeting, the architect immediately drafted up
9 some meeting notes and sent them around to
10 everybody that attended the meeting and
11 included in those meeting notes, Please
12 review these and notify us of any
13 corrections. Future decisions will be based
14 on the content of this meeting.

15 Nobody ever notified the
16 architect that they disagreed with anything
17 in those meeting notes and Your Honor will
18 see that they specifically set out this
19 agreement among the parties. That's what the
20 county agreed to do.

21 Eight days later, after a
22 telephone conversation with a representative
23 of RCR, the architect sent another letter and
24 said, Just so there will be no
25 misunderstanding, our agreement to pay for

1 PSI-verified soils does not include anything
2 above subgrade. And then the architect cited
3 in this letter numerous references to the
4 contract about why that would not be
5 recoverable.

6 So, there is no question that
7 everybody understood what the county's
8 position was with regard to this. I believe
9 that everybody who testifies will acknowledge
10 that.

11 As of that June 30 meeting,
12 that's the first time that the county had
13 ever agreed to pay for anything.

14 THE COURT: Extra?

15 MS. CARSON: Anything extra,
16 correct, Your Honor. In fact, that's
17 consistent with Mr. Ezell's letter back to
18 RCR that says, As of this date, July 1, I
19 have removed 600 yards for which I did not
20 seek a change order, and even states the
21 money that he's saving the county. Everybody
22 had every reason to believe that before July
23 1, not only was the county not going to be
24 charged for anything, but RCR wasn't going to
25 be charged for any removal of those soils.

1 PSI goes out there on four
2 separate occasions -- not necessarily on four
3 separate occasions. Well, they did go out on
4 four separate occasions, Your Honor, and they
5 designated four separate areas where there
6 was some soil that they felt was non-
7 compactable. The way they did that was
8 through the proof roll process. When they
9 did that, it was removed. PSI measured it
10 and verified it. And that is what the county
11 agreed to pay for.

12 Now, they did end up getting into
13 a little bit of confusion about what exactly
14 the county was going to pay for because of
15 the change order process. Your Honor, the
16 timing is pretty significant here. Although
17 these change orders were submitted to RCR
18 back in the summer of '99, none of the change
19 orders were submitted to the county until
20 January of 2000. So the first that the
21 county saw of actual written change orders
22 were these two which were submitted to the
23 county in January of 2000 by Don Stover of
24 RCR.

25 Just to make these change order

1 numbers a little more confusing, RCR
2 presented these change orders under cover of
3 a separate RCR request for change order which
4 was going to become Change Order No. 3 to the
5 contract between the county and RCR. Their
6 change order request, not the same as this
7 Change Order 3, Change Order 3 between the
8 county and RCR, was to cover these two
9 changes, 1 and 2.

10 The first change order request
11 was \$8,000 and it was described on RCR's
12 request as 6200 for clearing and grubbing of
13 trees and then 1800 for removal of some RCP
14 pipe and replacement of that with fill. The
15 architect recommended that the county pay the
16 6200 for the clearing and grubbing of trees
17 because there is a dispute over where the
18 tree line was on the plans and then
19 recommended that the county not pay the 1800
20 because that was for fill that was not
21 covered as an extra under the contract.

22 Change Order No. 2 is where it
23 gets confusing. That was the 2,898 cubic
24 yards that American Excavators says they
25 removed above subgrade but on RCR's request

1 for change order to the county, RCR
2 designates this amount as material removed
3 per the direction of the geotechnical
4 engineer PSI.

5 So, when the county approved this
6 change order, it clearly did that in reliance
7 upon RCR's mistaken representation -- and
8 nobody is suggesting that RCR was anything
9 but mistaken about that -- mistaken
10 representation that that was for PSI-approved
11 materials.

12 That's going to be borne out not
13 only by RCR's documentation but by a letter,
14 contemporaneous letter, from the architect
15 about this Change Order No. 3 for \$16,000,
16 because when this Change Order No. 3 came
17 around -- and we're not even certain that the
18 actual change order was ever submitted to the
19 county, but the issue was submitted to the
20 county by RCR. The architect wrote a letter
21 saying we're not paying for this because it
22 is soil above subgrade and we told you back
23 in July that we're not paying for soils above
24 subgrade. The county in this case ought to
25 have a claim for \$12,000 against RCR because

1 they simply paid too much.

2 Change Order No. 4 was not even
3 presented to RCR until April of 2000. RCR
4 will be very candid in saying they never
5 submitted this change order to the county
6 because they didn't feel like it was a just,
7 final change order. They didn't see they
8 could justify to the owner removal of all
9 this additional soil when they couldn't even
10 tell the owner where it was removed from, why
11 it was removed or anything else about it.

12 That's where most of the money at
13 issue comes in, Your Honor, in this Change
14 Order No. 4 that was submitted inexplicably
15 eight months after the excavation work was
16 done.

17 Change Order Nos. 2 and 3, Your
18 Honor, were submitted by American Excavators
19 to RCR in August of '99 after they had
20 finished this portion of the job. Maybe
21 we'll get an explanation during the course of
22 this trial about why eight months later they
23 suddenly discovered they had removed another
24 8- or 9,000 cubic yards of dirt, but I
25 haven't heard an explanation for that as of

1 this point.

2 Needless to say, by this time,
3 that soil was long gone and one of the things
4 the proof will show is that some of that soil
5 was being sold by American Excavators. Some
6 of that soil was going to another subdivision
7 that Mr. Parker himself was developing. This
8 soil wasn't just being wasted. Some of the
9 soil taken off the county's property was
10 being sold by American Excavators and
11 utilized for other projects.

12 But at any rate, it was long
13 gone. The county certainly had no ability to
14 find out was this undercutting at all; if it
15 was undercutting, was it necessary; were
16 these soils really unsuitable, because
17 everybody acknowledges there wasn't ever a
18 soils engineer who went out and made any of
19 those determinations.

20 So, the county is faced with this
21 new giant bill and really no explanation
22 other than these truck tickets for what
23 happened.

24 Your Honor, we've been presented
25 with a set of truck tickets that show hauling

1 of materials. We don't dispute that
2 materials were hauled somewhere or even
3 somehow in connection with this job. But the
4 county vigorously disputes these truck
5 tickets all reflect soils being hauled off
6 the job. We think the proof will show
7 otherwise. We think logic shows otherwise.
8 At some point, there had to be some hauling
9 off.

10 If we had been presented with
11 American Excavators' entire set of truck
12 tickets as we've been told we have, where are
13 those reflected if, in fact, this reflects
14 removal of undercutting? As Mr. Cashion has
15 already pointed out, a lot of it is for
16 material above subgrade but we can't quantify
17 how much of it because neither the county nor
18 PSI had an opportunity to go out there and
19 verify and measure and determine what was
20 undercut.

21 The county certainly does dispute
22 whether all of this work was done but, more
23 importantly, the county disputes and
24 questions, therefore, whether it was
25 necessary and, therefore, whether it was a

1 benefit to the county.

2 Our soils people are going to say
3 these soils are suitable. You'll hear from
4 them and they'll explain exactly what an
5 unsuitable soil is. They'll also explain
6 some of these soils would have required a
7 little work to make them compactable, more
8 work on American Excavators' part than just
9 dragging the materials off, selling them or
10 using them in your development and then
11 sending RCR a bill for replacement.

12 We believe that's what the Court
13 is going to hear with regard to whether a
14 benefit was actually conferred to the
15 county. We don't believe that it will be
16 clear that there was one. We certainly think
17 the proof will show that it was not an unfair
18 benefit because the county did nothing to
19 mislead anybody about what its intentions
20 were in this regard.

21 Your Honor, certainly the county
22 should not be charged for such things as
23 folks out there digging for Civil War
24 relics. The contract and the course of
25 performance between the parties is going to

1 indicate that the county shouldn't be charged
2 for anything above subgrade.

3 The agreements about PSI
4 confirmation are going to show the Court that
5 the county shouldn't be charged for anything
6 other than what PSI identified. The county
7 has already paid for that. The witnesses for
8 all three parties will show that this narrow
9 exception is all that the county ever agreed
10 to.

11 Your Honor, we're not making a
12 technical argument based on the contract as
13 was basically the scope of our summary
14 judgment motion as to the undisputed fact.
15 There is no dispute that RCR didn't follow
16 the contract, but despite that fact, when
17 there was a change order that reflected work
18 that the county had verbally committed to
19 cover, the county felt obligated to cover,
20 the county did so, and they've never deviated
21 from that position.

22 Your Honor, whatever the Court
23 decides about RCR's contract with American
24 Excavators, the county wasn't a party to that
25 contract, wasn't aware of what the terms were

1 in that contract and certainly didn't agree
2 to be bound by it. We believe that the proof
3 will establish that under the contract and
4 under the equitable theories, RCR is not
5 entitled to recover from the county.

6 THE COURT: Thank you. All
7 right. Those were long opening statements
8 but probably very worthwhile. So are we
9 ready to call our first witness, Mr.
10 Panther?

11 MR. PANTHER: Yes, please.
12 Marvin Parker.

13
14 MARVIN PARKER
15 was called as a witness on behalf of the
16 Plaintiff and, having been first duly sworn,
17 testified as follows:

18
19 DIRECT EXAMINATION

20 QUESTIONS BY MR. PANTHER:

21 Q. What's your name?

22 A. Marvin Parker.

23 Q. Mr. Parker, tell us what your
24 education is and what your business
25 background is.

1 A. I'm a high school graduate from
2 Cascade High in Bell Buckle. Business
3 background has basically always been
4 construction work.

5 Q. Tell us just generally how your
6 construction background has developed over
7 the years.

8 A. My father and grandfather were both
9 masonry contractors and we grew up working
10 for them in the masonry business and then
11 later went into home building and development
12 and site work and utility work.

13 Q. Focus a little bit more for us on the
14 subdivision site work and development work
15 that you have done over the years.

16 A. Basically just consisted of putting in
17 all the infrastructure, getting the project
18 engineered, performing the infrastructure,
19 the water, the sewer, the roads, paving, so
20 forth to county specs.

21 Q. How much did that involve excavation
22 and grading work?

23 A. It was probably 50 percent of the
24 project.

25 Q. Over the years before, say, American

1 Excavators was formed, did the companies that
2 you were associated with do their own
3 excavation grading work or did you hire that
4 out?

5 A. We self-performed most, if not all, of
6 it.

7 Q. How many years would you say that you
8 have been involved in some aspect of your
9 construction career with excavation and
10 grading work?

11 A. Somewhere since -- where I was really
12 hands-on with it since the mid '80s.

13 Q. About when was American Excavators
14 formed?

15 A. Approximately three to four years ago.

16 Q. Why did you form it?

17 A. We were -- I was performing more and
18 more work for municipalities, cities and we
19 were doing it under our current license which
20 was the building and development company. It
21 was growing more and more and our bonding
22 company asked us to separate the two
23 companies. That's primarily why American
24 Excavators was formed.

25 Q. What niche or what area of

1 construction did American Excavators
2 concentrate in?

3 A. Water, sewer, dirt work, fiberoptic.

4 Q. When American Excavators was formed,
5 did it have a general contractor's license
6 with the State of Tennessee?

7 A. Yes.

8 Q. Describe for us a little bit how
9 American Excavators grew over the few short
10 years that it had been in business.

11 A. Due to the economy and our work, we
12 had -- it was pretty well doubling in size
13 every year.

14 Q. Let's start talking about this
15 particular project. First of all, what's
16 your position with American Excavators?

17 A. I'm the chief manager.

18 Q. Okay. How did American Excavators
19 become involved in the Williamson County
20 community services building?

21 A. It was probably through one of two
22 methods. It was either a publicly advertised
23 job or the contractor solicited it for bids.

24 Q. Did American Excavators end up
25 submitting a bid for a portion of the work?

1 A. Correct.

2 Q. What portion of the work did American
3 Excavators submit a bid for?

4 A. To install the utilities such as
5 water, sewer and site work.

6 Q. Assume we know nothing about this area
7 of the business. What documents did American
8 Excavators gather together to help it prepare
9 its bid?

10 A. It would have been the plans,
11 specifications and soils report.

12 Q. Let's first talk about the plans and
13 specifications. What information off of the
14 plans and specifications was important for
15 American Excavators to develop its bid?

16 A. It would have been, first of all, the
17 natural grades that existed there, the sheet
18 that provided the existing topography and
19 then the sheet that provided the proposed
20 topography. Then, of course, in the specs,
21 we would have, in order to evaluate and bid
22 the project, we would have used the soils
23 report.

24 Q. Let's talk about the soils report.
25 What information did you gather out of the

1 soils report that went into preparing your
2 bid?

3 A. We took the borings that the company
4 did and used those to identify what type of
5 material we had there, whether it would be
6 suitable, unsuitable, topsoil, and to
7 calculate the quantities.

8 Q. Mr. Parker, I'm going to pass you a
9 document and ask if you can identify that as
10 the soils report that you obtained?

11 A. Yes, correct.

12 MR. PANTHER: Your Honor, we move
13 the soils report into evidence as Exhibit No.
14 1, please.

15 MR. CASHION: No objection.

16 MS. CARSON: No objection.

17 MR. PANTHER: Your Honor, I have
18 an extra copy for you to follow along if
19 that's helpful.

20 THE COURT: That will work.

21 (Exhibit No. 1 was marked.)

22 BY MR. PANTHER:

23 Q. Now, when you were reviewing the soils
24 report in leading up to submitting your bid,
25 did the soils report indicate that there

1 might be some areas of unsuitable soils?

2 A. I believe so.

3 Q. Now, give us what your approach is.
4 When you're about to submit a bid that
5 involves excavation and grading work, what
6 approach do you take in dealing with
7 unsuitable soils and unsuitable material?

8 A. We always qualify the bid with a
9 qualifier as to the amount we will be
10 charging for the unsuitable materials we
11 encounter.

12 Q. Why do you do that?

13 A. Well, actually, you know, the risk
14 would be too great to assume -- you could
15 assume it and we could give a bid with a
16 non-qualifier but, of course, we would have
17 presumed the worst. That's just the way we
18 chose to bid the project.

19 Q. Did American Excavators have someone
20 in its company who took the lead in preparing
21 the bid?

22 A. Yes, sir.

23 Q. Who is that?

24 A. Harley Ezell.

25 Q. Okay. Now, before Mr. Ezell submitted

1 his bid, did he discuss it and review it with
2 you?

3 A. Correct.

4 Q. What process did Mr. Ezell go through
5 to determine how much material was cut, how
6 much material was fill? What process did he
7 undertake?

8 MR. CASHION: I object. I'm not
9 sure if Mr. Ezell is -- if he bid the job, we
10 want to hear from him but I object to the
11 hearsay of Harley Ezell's process. I think
12 it's inappropriate for him to testify to
13 that.

14 MR. PANTHER: I'm asking him to
15 testify of his own knowledge. If you like, I
16 can ask some preliminary questions to find
17 out if he has knowledge as to what Mr. Ezell
18 went through, what documents he, himself,
19 reviewed.

20 THE COURT: The way I'm
21 understanding the question is, Mr. Parker, I
22 assume you know the process that your bid man
23 goes through; is that correct? Do you know
24 what he does?

25 THE WITNESS: Yes, sir.

1 THE COURT: All right. And Mr.
2 Panther is asking you to describe that
3 process. I'll overrule the objection.
4 BY MR. PANTHER:
5 Q. Go ahead. Describe the process that
6 is followed in preparing a bid such as this.
7 A. Okay. I always take the plans and we
8 use a program, software program, called
9 Agtech, which is pretty common in the
10 industry. I enter in all of my current -- I
11 mean, the natural topography that exists at
12 the time. Then we layer it with a layer of
13 proposed topography that they're asking for.
14 Then we enter our strata layers according to
15 the soils report, is the three steps that we
16 commonly take.
17 Q. When that information is input into
18 the Agtech program, does it generate
19 information concerning different square
20 footages and volumes of the site?
21 A. Yes, it does.
22 Q. Did you review that document before
23 the bid was submitted?
24 A. Yes.
25 Q. I've passed you a document. It's

1 headed at the top Harley's Take-off, Original
2 Bid Take-off. Can you identify that as the
3 Agtech report that you reviewed prior to
4 preparing your bid?

5 A. Yes, sir, it is.

6 MR. PANTHER: Your Honor, I move
7 that into evidence as Exhibit No. 2.

8 MR. CASHION: No objection.

9 THE COURT: All right.

10 (Exhibit No. 2 was marked.)

11 BY MR. PANTHER:

12 Q. Let's go through it just very
13 generally. Does this Exhibit No. 2 identify
14 what the total site area is?

15 A. Yes, sir.

16 Q. What does it show?

17 A. I believe it is 245,935 square feet.

18 Q. Does the report also generate what
19 volume there is in the cut section?

20 A. Yes, it does.

21 Q. What does your Agtech show the total
22 volume of the cut section to be?

23 A. 2898 cubic yards.

24 THE COURT: Can we put the little
25 drawing on there so I can keep track of the

1 terms?

2 MR. PANTHER: Absolutely. Maybe
3 it might be better to introduce it as an
4 exhibit. We've got it up as just a diagram,
5 a depiction.

6 THE COURT: Is there any
7 objection to introducing the diagram to
8 explain the terms that we're going to be
9 talking about by anybody? I'm not taking it
10 as anything indicating the site, just for the
11 explanation of the terms.

12 MR. CASHION: That's fine.

13 MS. CARSON: We have no
14 objection.

15 (Exhibit No. 3 was marked.)

16 BY MR. PANTHER:

17 Q. The Agtech report, did it generate a
18 volume for the total cut?

19 A. Yes, it did.

20 Q. Repeat that. I know you've said it
21 before. What is the volume?

22 A. 2,898 cubic yards after stripping.

23 Q. Does it also show the total volume of
24 the fill?

25 A. Yes, it does.

1 Q. What's that?

2 A. 5,840 yards.

3 Q. Now, ahead of these figures on the

4 top, it says Stripping Region. Do you see

5 that at the very top of the document?

6 A. Yes, I do.

7 Q. That shows a depth of .5. Do you see

8 that?

9 A. Yes.

10 Q. What does that indicate?

11 A. Half a foot, six inches.

12 Q. Where did American Excavators get that

13 information to input into the Agtech report?

14 A. From the soils report.

15 Q. All right. Another area that I want

16 to ask about, here we have the site area

17 245,935 square footage. Below that is

18 Unspecified, 87,874. Do you see that?

19 A. Yes, I do.

20 Q. Tell us what that 87,000 unspecified

21 signifies or indicates?

22 A. I believe that is the area -- there

23 were areas of the project that weren't

24 affected at all.

25 Q. Now, does this report also generate

1 the difference between the cut and the fill
2 at the very bottom right-hand corner?

3 A. Yes, it does. It is 2,942.

4 Q. All right. That number is in
5 parenthesis. What does that indicate?

6 A. That is the amount of import to the
7 job.

8 Q. Let's define that term. When you in
9 the business refer to a job being an import
10 job, what does that mean?

11 A. That we're going to have to bring in
12 material -- that much material to replace the
13 fills.

14 Q. What's the opposite of an import job?

15 A. Export.

16 Q. I take it that's having to bring
17 material to the site -- excuse me, removing
18 material from the site on an export job?

19 A. Yeah, exporting.

20 Q. I'm sorry. In looking at the cut and
21 fill volumes, Mr. Parker, what did the soils
22 report indicate concerning the suitability of
23 the material in the cut section?

24 A. That it would be suitable to use.

25 Q. Okay. What was American Excavators'

1 plan for how it would use the cut material?

2 A. We would have just moved it from the
3 cut area over to a fill area.

4 Q. Okay. Now, after taking all of this
5 information, did American Excavators submit a
6 bid for this project?

7 A. Yes, it did.

8 Q. I'm going to hand you a document, Mr.
9 Parker. Mr. Parker, I've handed you a
10 document. It is headed at the top Proposal
11 dated May 25, '99 -- excuse me, March 25, '99
12 from American Excavators. Although this copy
13 is unsigned, can you identify that as the bid
14 you submitted on this project?

15 A. Yes, I do.

16 MR. PANTHER: Your Honor, we move
17 that into evidence as Exhibit No. 4.

18 MR. CASHION: No objection, Your
19 Honor.

20 (Exhibit No. 4 was marked.)

21 BY MR. PANTHER:

22 Q. Now, before Mr. Ezell submitted this
23 bid, did you review and approve of it?

24 A. Yes, I did.

25 Q. I want to direct your attention to the

1 area above the signature line which reads as
2 follows, "Areas in parking lot are three foot
3 below building that do not proof roll and
4 require additional undercutting; will be
5 undercut and replaced at 12.50 per cubic
6 yard." Do you see where I read that there?

7 A. Yes, I do.

8 Q. In just layman's terms, tell us what
9 it is that you were specifying in your bid
10 with that terminology.

11 A. That any unsuitable material we
12 encountered would be charged at a rate of
13 12.50 per yard.

14 Q. This refers to three foot below
15 building pad. Do you see that there?

16 A. Uh-huh.

17 Q. How is that taken into account in your
18 bid take-off?

19 A. We would have digitized that area and
20 accounted for that.

21 Q. Now, after submitting your bid, you
22 were awarded the contract?

23 A. Correct.

24 Q. Did you participate in negotiating or
25 discussing the contract with representatives

1 of RCR?

2 A. I think primarily my conversations
3 were with Harley Ezell.

4 Q. I'm going to pass you a document and
5 see if you can identify this as a copy of the
6 subcontract agreement.

7 A. Yes, I do.

8 MR. PANTHER: Your Honor, we move
9 that into evidence as Exhibit No. 5, please.

10 (Exhibit No. 5 was marked.)

11 BY MR. PANTHER:

12 Q. Now, Mr. Parker, does the subcontract
13 between American Excavators and RCR contain a
14 provision that provides for removal and
15 replacement of unsuitable material?

16 A. Yes, it does. I think we had modified
17 it slightly to the wording on it at that time.

18 Q. Before we get to that -- and I'll ask
19 you about that -- turn to Paragraph 20 of the
20 document, Exhibit 5, and ask if that's the
21 paragraph?

22 A. Yes, sir.

23 Q. All right. Now, you were telling me
24 that you had some discussions with
25 representatives of RCR about this provision?

1 A. Yes.

2 Q. Okay. First of all, who were you
3 dealing with at RCR?

4 A. I was thinking it was a guy named Fred
5 Lepore.

6 Q. Was he the contact person at the
7 bidding stage of this project?

8 A. I believe at the contract stage.

9 Q. In that case, tell us what your
10 discussions with Mr. Lepore were concerning
11 this provision.

12 A. That it needed a little further
13 clarifying from what the bid was. I think
14 the original draft came and I caught it on
15 the second time through reading it that I
16 wanted a little more clarification from it.
17 It didn't get clarified all the way. We
18 required a field meeting later to clarify
19 it. I wanted it clarified that any
20 additional undercutting would be paid 12.50 a
21 yard and any additional refilling we would be
22 paid 12.50 a yard.

23 Q. Is that how the provision ended up
24 being worded to include the word "refilling"?

25 A. Yes.

1 Q. Now, you've heard in opening
2 statements that there is some dispute in
3 RCR's mind about whether this applies to
4 above grade or below grade. You heard that,
5 didn't you?

6 A. Correct.

7 Q. Does this provision apply to the
8 unsuitable material that you encounter both
9 below subgrade and above subgrade?

10 A. Yes.

11 Q. What terminology is it in this
12 provision that you looked to in saying that
13 you're entitled, American Excavators is
14 entitled to 12.50 a cubic yard for unsuitable
15 material above subgrade?

16 A. The fact that it was unsuitable
17 material and we would have to refill it,
18 replace it with suitable material.

19 Q. Now, you also heard Mr. Cashion in his
20 opening statement say that whatever
21 provisions were in their contract with the
22 county all flowed down to you. You heard him
23 say words to that effect?

24 A. Yes.

25 Q. Is there something in the subcontract

1 that you're aware of where the terms in it
2 take precedent over any inconsistencies with
3 RCR's contract with the owner?

4 A. Yes, I believe it is.

5 Q. Take a look at Paragraph 25. It is
6 toward the back. It is right before the
7 signature page. Tell me when you're there.

8 A. I'm there.

9 Q. What sentence is it that you're
10 relying upon for your statement that you're
11 not bound by all of the provisions in RCR's
12 contract with the county?

13 A. Particularly the last sentence.

14 Q. Go ahead and read it for us.

15 A. "If there shall be any inconsistency
16 between any provision of the contract
17 documents between the owner and the
18 contractor in this subcontract agreement,
19 then this subcontract agreement shall
20 govern."

21 Q. Now, once the job started, did you
22 become aware of some unforeseen conditions
23 that you were not aware of at the time that
24 you bid and entered into this subcontract?

25 A. Yes, I did.

1 Q. What was the very first thing that
2 happened that was unforeseen?

3 A. The first thing I can recall, I
4 believe it was the inaccuracy of the survey,
5 matching the plans. It seemed like one of
6 the four boundaries was off, incorrectly done.

7 Q. What effect did that have on the job?

8 A. It shut it down for a while.

9 Q. In terms of the amount of work that
10 American Excavators had to do, what effect
11 did it have?

12 A. I think we had to go in and remove
13 some additional trees, refrigerators, car
14 bumpers and stuff like that that was in the
15 area.

16 Q. What was the next occasion that
17 happened where there was some unforeseen
18 material that you encountered?

19 A. Right after we started the job, Harley
20 had -- I talked to Harley and we had run into
21 an area -- when he started stripping, he
22 noticed that the topsoil was deeper than six
23 inches.

24 Q. How about before that? Was there an
25 occasion where you ran into any pipe that was

1 not shown?

2 A. Yeah. I'm not real clear which one
3 preceded the other, but there was an occasion
4 where there was some pipe discovered that the
5 design engineer had missed being located in
6 the ground.

7 Q. What ended up happening with regard to
8 that pipe?

9 A. We excavated it, removed it and
10 disposed of it.

11 Q. Now, the conversations that were
12 occurring on site, were you participating in
13 those conversations?

14 A. Not the majority of them.

15 Q. All right. You had mentioned that you
16 had run into topsoil that was deeper than six
17 inches. Without repeating what Mr. Ezell
18 told you, just what information did you have
19 in terms of what you were aware of regarding
20 that issue?

21 A. That the soils report was differing
22 drastically from the actual conditions
23 encountered on the site.

24 Q. What did American Excavators have to
25 do in terms of its work as a result of those

1 conditions?

2 A. I didn't understand the question.

3 Q. That was a poor question. That was my
4 fault. How did having greater than six
5 inches of topsoil affect what work American
6 Excavators had to do?

7 A. Well, it was going to cause more to
8 have to be replaced, more import brought into
9 the job.

10 Q. Did American Excavators develop a
11 procedure for how it would keep track of the
12 amount of fill that was brought to the site?

13 A. Yes.

14 Q. What was that procedure?

15 A. We were -- repeat that again.

16 Q. What was the procedure? What was the
17 procedure that American Excavators followed
18 to keep track of the amount of fill that was
19 brought to the site?

20 A. We kept up with it by the truck loads
21 that was being brought in of chirt material.

22 Q. Now, with regard to keeping track of
23 truck loads and keeping truck tickets, how
24 common is that in the business of an
25 excavation grading contractor to keep records

1 on truck tickets?

2 A. It is common. It is one of the
3 approaches to use especially in the situation
4 we were involved in there. That's probably
5 why they chose that. It was the most
6 practical method to use.

7 Q. Not only this job but other jobs, does
8 American Excavators use the truck tickets in
9 some fashion to make payments?

10 A. Yes.

11 Q. Describe for us how the truck tickets
12 are important in order to determine who and
13 what to pay.

14 A. We would naturally want to verify that
15 every truck load was brought in and that the
16 ticket was signed off by a representative of
17 the company and it matched the trucking
18 company's invoice for that driver that
19 brought the material in.

20 Q. Do you follow that procedure not only
21 on this job but other jobs?

22 A. Yes.

23 Q. Now, did you have somebody on this job
24 whose duty it was to keep daily records of
25 what was occurring on site?

1 A. Yes, I did.

2 Q. Who was that person?

3 A. Ricky Tipper.

4 Q. At the time that Mr. Tipper would fill
5 out the daily report, would Mr. Tipper have
6 actual knowledge of what occurred on site
7 that he was recording in his daily report?

8 A. Yes.

9 Q. Did Mr. Tipper have a business duty to
10 record information in his daily reports
11 accurately?

12 A. Yes, sir.

13 Q. When he would complete his daily
14 reports, would he then turn them in to the
15 company office to keep?

16 A. Yes. At some point at the end of the
17 week, he would turn them in, or the following
18 Monday, is what I think we were doing.

19 Q. And then were the daily records kept
20 in American Excavators' regular course and
21 scope of its business?

22 A. Yes, sir.

23 Q. Is it a practice, a regular practice,
24 of American Excavators to keep such daily
25 reports?

1 A. Yes, it is.

2 Q. And did it follow that practice on
3 this job?

4 A. Yes, sir.

5 Q. Now, in addition to the daily reports,
6 was there somebody that American Excavators
7 had on site whose job it was to keep track of
8 the number of loads of fill that were being
9 brought in?

10 A. Yes, sir, there was.

11 Q. What procedure did American Excavators
12 have in place for that on-site person to
13 verify that the truck tickets were accurate?

14 A. For every time they brought a truck
15 in, he had to sign off on the ticket, verify
16 that it was brought to the job and that it
17 was accurate.

18 Q. Would the person who signed the truck
19 ticket have actual knowledge, the person for
20 American Excavators have actual knowledge of
21 the correct number of loads that were brought
22 in for that particular company?

23 A. Yes.

24 Q. Did the person signing the truck
25 ticket have a business duty to verify

1 accurately the number of loads?

2 A. Yes, he did.

3 Q. And then were those truck tickets that
4 had been signed by American Excavators
5 representatives turned in to the company,
6 your company?

7 A. Yes.

8 Q. Were those truck tickets kept and
9 maintained in the regular course and scope of
10 your business?

11 A. Yes.

12 Q. And do you have a regular practice of
13 keeping those truck tickets?

14 A. Yes.

15 Q. And you followed that in this
16 instance, didn't you?

17 A. Correct.

18 Q. Now, how does American Excavators rely
19 upon the accuracy of the truck tickets in
20 fulfilling its business objectives?

21 A. We match those up with the invoice
22 that comes in from the contractor, match it
23 up to the daily logs that are brought in and
24 make sure every ticket is signed and we pay
25 the vendor.

1 Q. Did American Excavators do that in
2 this case?

3 A. Yes.

4 Q. Did American Excavators pay all of the
5 vendors who hauled fill to this project?

6 A. Yes.

7 Q. I'm going to pass you a collection of
8 documents, Mr. Parker. This is a spiral-
9 bound document with date tabs to the side of
10 it. Mr. Parker, have you reviewed these
11 prior to trial and can you identify them as
12 the daily reports and the truck tickets that
13 were kept and maintained on this project in
14 the regular course and scope of American
15 Excavators' business?

16 A. Yes.

17 MR. PANTHER: Your Honor, we move
18 those into evidence as Exhibit No. 6.

19 MS. CARSON: We have no objection
20 to the admission of the daily reports which
21 we do believe are business records, but as to
22 the truck tickets, our contention is those
23 are records of trucking companies. They do
24 not comply with the rule of admission through
25 this witness. This witness is not able to

1 testify with regard to their accuracy. He
2 was not present on the site. Not only that,
3 his testimony in his deposition was that they
4 reflected something entirely different than
5 what they're saying they reflect which I
6 realize he can be cross-examined about, Your
7 Honor, but the trucking company custodian of
8 record should be the one to testify as to the
9 authenticity of these tickets.

10 MR. PANTHER: May I respond?

11 THE COURT: Yes, sir.

12 MR. PANTHER: Your Honor,
13 although they may have been prepared in first
14 instance by the trucking companies, Mr.
15 Parker's testimony is clear that
16 representatives of his company verified the
17 accuracy of the truck tickets and that they
18 signed the truck tickets verifying them to be
19 accurate and that those signed truck tickets,
20 which you have before you, were kept and
21 maintained in the regular course and scope of
22 the business to accurately determine the
23 truck count and that those signed truck
24 tickets which at that point, by adoption,
25 became records of American Excavators were

1 kept and maintained in the course and scope
2 of the company's business. That's the very
3 purpose of the business records exception.

4 THE COURT: Let me think about
5 this one. Does anybody happen to know the
6 sub number this comes under?

7 MS. CARSON: I believe it is
8 subsection 6 of 803.

9 THE COURT: Ordinarily, I would
10 agree with Ms. Carson. What I am having
11 trouble with is this extra twist where he
12 signs on the ticket.

13 MR. PANTHER: Let me speak to
14 that, Your Honor, because I think that it is
15 that twist that distinguishes Ms. Carson's
16 objection from admissible evidence. Had it
17 been only records of trucking companies, then
18 I might be inclined to agree with Ms. Carson
19 but the fact that representatives of this
20 company with a business duty signed off on
21 each one and then the company kept that
22 record, that signed record, they then become
23 business records of American Excavators.

24 MS. CARSON: Your Honor, if I
25 could be heard just briefly on that. What

1 the rule requires is that the individual who
2 authenticates a record be a custodian or
3 other qualified witness and that that witness
4 be able to testify that the record was
5 prepared consistent with all of these
6 business duties.

7 Well, while Mr. Parker may be
8 able to testify that Mr. Tipper's signature
9 was done in conjunction with his business
10 duties, he certainly can't testify that these
11 records were prepared consistent with the
12 business duties of the trucking companies.

13 In addition, Your Honor, the rule
14 specifically provides that if the source of
15 information or method or circumstances may
16 indicate lack of trustworthiness, then the
17 business records exception should not apply.

18 Your Honor, these truck tickets
19 are essential to the arguments of both RCR
20 and the county. We do not believe that they
21 are trustworthy and reflecting what they are
22 purported by American Excavators to reflect.
23 We believe that we should be entitled to be
24 able to cross-examine the custodian of the
25 trucking companies as to those matters.

1 THE COURT: All right. Is she
2 right on that, Mr. Panther, that this is a
3 critical part of evidence in your case that
4 you need to get in?

5 MR. PANTHER: It is. We intend
6 to introduce the truck tickets. They are and
7 did become business records of American
8 Excavators. They paid the trucking companies
9 based upon their on-site representative's
10 verification that they are accurate and, yes,
11 it is a critical piece of evidence.

12 THE COURT: All right. I better
13 think about it over lunch.

14 MS. CARSON: Your Honor --

15 THE COURT: We can talk about it
16 some more.

17 MS. CARSON: I wanted to point
18 out one other thing for the Court's
19 reflection over what might have otherwise
20 been a pleasant lunch. As to the
21 trustworthiness issue, Your Honor, the
22 business records of American Excavators, the
23 daily reports, are not consistent with the
24 truck tickets which is another reason why we
25 believe these indicate lack of

1 trustworthiness as a business record of
2 American Excavators.

3 THE COURT: Business records of
4 the plaintiff? What kind of business records
5 are you talking about?

6 MS. CARSON: The daily logs which
7 are part of this exhibit. They actually
8 reflect some of the materials hauled on and
9 off site and they are, we would submit, the
10 records which Ricky Tipper had a business
11 duty to. They do not match the truck
12 tickets. We would suggest that there is some
13 indicia of lack of trustworthiness as both of
14 those being business records of American
15 Excavators.

16 MR. PANTHER: Your Honor, what
17 Ms. Carson points out, she and Mr. Cashion
18 are free to cross-examine. Mr. Tipper is
19 here. He'll be testifying. She's free to
20 quiz him on why there's a difference between
21 the truck tickets that he and people on the
22 site signed off on and his daily reports, but
23 that area of cross-examination doesn't make
24 the truck tickets inadmissible.

25 The fact of the matter is that --

1 and I'm repeating myself -- as Mr. Parker
2 testified, these people had a business duty
3 to transmit information that he's testified,
4 as he's permitted to do, that they complied
5 with and signed off on the truck tickets and
6 so complied. The fact that there are areas
7 that they wish to cross-examine on, they're
8 free to do that but it doesn't make them
9 inadmissible.

10 THE COURT: Why don't you ask him
11 a little bit on the procedure of the truck
12 tickets and signing off and why is that
13 required. Is it required? What if he
14 doesn't sign off on it? What happens there?
15 What if he doesn't want to pay for it? Let's
16 explore that a little bit.

17 MR. PANTHER: Be glad to.

18 BY MR. PANTHER:

19 Q. Describe for us, if you would, please
20 what the procedure was for when these trucks
21 would come to the site, deliver their loads
22 of material and eventually a representative
23 of American Excavators would sign off on
24 them. Describe that procedure for us.

25 A. My understanding of what was occurring

1 was the driver at the end of the day would --
2 this is prepared by the driver of each one of
3 these.

4 THE COURT: The truck driver?

5 THE WITNESS: Yes, sir, the truck
6 driver would prepare this. If I'm not wrong,
7 they had like duplicate and triplicate copies
8 or whatever. He would hand it to Mr. Tipper,
9 is what I would expect. It would be handed
10 to Mr. Tipper. Mr. Tipper would check it
11 with his to make sure that it is verifiable.

12 BY MR. PANTHER:

13 Q. Now, is that the practice that you
14 have in place not only for this job but for
15 any jobs where you have to keep track of your
16 truck loads?

17 A. Correct.

18 THE COURT: When you say Mr.
19 Tipper checks it with his, checks it with his
20 what?

21 THE WITNESS: Where he's been
22 keeping count daily with the trucks coming
23 into the site bringing chirt.

24 THE COURT: Mr. Tipper has some
25 record, personal record, that he's keeping

1 count of trucks?

2 THE WITNESS: Correct.

3 THE COURT: Are we going to see
4 that document?

5 MR. PANTHER: It was not
6 written. We have the daily reports but other
7 than the daily reports, he doesn't have a
8 written record of the truck counts. The way
9 he was doing it was -- I'm sorry. I'll ask
10 the witness.

11 THE COURT: Do you understand
12 what I'm asking you here? You said Mr.
13 Tipper was checking it with his and I said
14 his what and you said Mr. Tipper had a
15 record. What kind of record did he have?

16 THE WITNESS: That was his daily
17 report that he filled out at the end of the
18 day.

19 THE COURT: That's his daily
20 report, which you've got here in this spiral
21 notebook?

22 THE WITNESS: Yes, sir.

23 THE COURT: Now go ahead, Mr.
24 Panther.

25 BY MR. PANTHER:

1 Q. Was Mr. Tipper also responsible for
2 keeping up, maybe not in writing but also of
3 his own knowledge, concerning the number of
4 trucks that were arriving on site?

5 A. Yes.

6 Q. Now, rather than put check marks or
7 jot something down while the trucks were
8 coming in, did he use the truck tickets in
9 some way to verify that the loads were
10 accurate?

11 A. I apologize, but I missed that.

12 Q. Did Mr. Tipper check his -- was he
13 required to check his own memory against the
14 loads shown in the truck tickets?

15 A. Yes, of course.

16 Q. And then if the truck ticket load
17 complied with what he knew of his own
18 knowledge regarding the number of loads, how
19 would he indicate that that was accurate?

20 A. He would sign off on the ticket at
21 that point.

22 Q. Now --

23 THE COURT: What if it wasn't?
24 What if he disagreed? Then, what would
25 happen?

1 THE WITNESS: Him and the driver
2 would confer. If there was any disagreement,
3 go back and recount and check to make sure it
4 was accurate. I don't think we had hardly
5 any discrepancies on those ends. It never
6 was brought to my attention that there was a
7 driver out there -- you know, every day it is
8 a constant thing -- that his ticket is one
9 load off or two loads off or whatever. They
10 were very accurate.

11 BY MR. PANTHER:

12 Q. And then when the truck tickets were
13 signed, what did American Excavators -- how
14 did American Excavators use that information
15 in determining what to pay the trucking
16 company?

17 A. Sometime later on, usually the next
18 month or whenever the trucking company,
19 whatever their billing cycle is like, we
20 would receive an invoice and it would include
21 the amount and we would have to go back and
22 pull the tickets and verify those loads were
23 indeed checked by a representative of our
24 company and that it was ready to be paid and
25 a check was sent out.

1 Q. If there was a truck ticket that was
2 not signed or that you otherwise couldn't
3 verify was accurate, would American
4 Excavators pay it?

5 A. Not at that point, no.

6 THE COURT: Like you said, these
7 were duplicate or triplicate. So the haulers
8 had your man's signature, too; right? They
9 had a copy of the signature?

10 THE WITNESS: Correct.

11 THE COURT: And you had one?

12 THE WITNESS: That's my
13 understanding. I remember ours, most of
14 them, were yellow that they had.

15 THE COURT: And you kept the pink
16 one or the white one?

17 THE WITNESS: White one, yeah.

18 MR. PANTHER: Your Honor, I move
19 them into evidence. I'm certain they are
20 business records of American Excavators
21 having signed them.

22 THE COURT: While I've got you
23 all here, let me keep you here for just a
24 minute. Are each one of these tickets signed
25 by Mr. Tipper?

1 MR. PANTHER: No, 90 percent of
2 them are signed by Mr. Tipper. The other --
3 maybe even 95 percent. But the balance is
4 signed by another on-site representative of
5 American Excavators, yes. But they are all
6 of them --

7 THE COURT: Is that right?

8 THE WITNESS: Correct.

9 THE COURT: Okay. In order for
10 these tickets to come in, they have to be
11 drafted or executed by a person with
12 knowledge who has a business duty to execute
13 these documents and who does so in some kind
14 of regularly-conducted activity.

15 In this case, the ticket
16 originates from some third party and comes
17 onto American Excavators' site or project.
18 At that point, according to the testimony,
19 their regular practice, if they're going to
20 later pay this invoice, is to review that
21 invoice with their own log and memory. If
22 they accept it, then they sign off on it and,
23 in fact, adopt that invoice. At that point
24 they don't have a reason not to pay.

25 I find that that action makes

1 these truck tickets admissible because these
2 truck tickets are now more than just an
3 invoice or a bill from the hauler. They
4 actually have now become an internal record
5 of American Excavators because they then rely
6 on those signed tickets to pay or not to pay
7 the invoice at a later date when it is sent
8 to them. I respectfully overrule it. It is
9 a close call, but that's the way I'm going to
10 go with it.

11 Now, lunch, 1:15.

12 I'm going to go ahead and mark
13 this as Exhibit 6.

14 (Exhibit No. 6 was marked.)

15 (Luncheon recess observed.)

16 MR. PANTHER: Judge, while Mr.
17 Parker takes the stand, I am sort of guarding
18 against an adverse ruling on the truck
19 tickets. I went ahead and subpoenaed some of
20 these custodians of records of these trucking
21 companies. I don't need them but I have
22 subpoenas out for them. I have spoken with
23 counsel. So with Your Honor's permission, I
24 would like to release them from the
25 subpoenas. I've never quite known whether I

1 need court permission and counsel's
2 permission to do that. Just out of an
3 abundance of caution, I'd like Your Honor's
4 permission to go ahead and release them.

5 MS. CARSON: Your Honor, I'm not
6 sure we're entitled to object to Mr. Panther
7 releasing his own witnesses from their
8 subpoenas. We are in the process of
9 attempting to subpoena a couple of those
10 folks as rebuttal witnesses, and it might be
11 administratively more simple to leave them
12 under subpoena. I think that's entirely his
13 prerogative. I don't think that he's
14 required to keep them under subpoena because
15 we want him to. I don't want to say we don't
16 object but I acknowledge that I don't think
17 we have any right to.

18 THE COURT: Here's my thought. I
19 released them. That's it. I never did ask
20 the Court so you don't have to.

21 MR. PANTHER: I withdraw my
22 request then.

23 THE COURT: You do what you need
24 to do.

25 MR. PANTHER: Thank you.

1 BY MR. PANTHER:

2 Q. Mr. Parker, when we left off, I
3 realized that I forgot to ask you a couple of
4 questions. I want to mop up a little bit.
5 When American Excavators took on this job,
6 how big or how important a job was this for
7 it?

8 A. As far as how big, do you mean --

9 THE COURT: Did you make a lot of
10 money? That's what he meant probably.

11 THE WITNESS: As far as
12 size-wise, it was probably one of the smaller
13 jobs we had ever done.

14 BY MR. PANTHER:

15 Q. Okay. How long did you plan to be in
16 and be out?

17 A. Like a month at the maximum.

18 Q. Now, your contract included not just
19 grading and excavation; there were other
20 parts of it, weren't there?

21 A. Correct.

22 Q. What?

23 A. Water and -- I believe it was water
24 and sewer. Primarily, water and sewer.

25 Q. When you took on the job, did you view

1 it more as an excavation job or more as a
2 utility job?

3 A. When we took the job, it would have
4 been more really of a utility job.

5 Q. Okay. Let's go back to where we were
6 before. While the job was underway, how long
7 did you visit the site?

8 A. How often?

9 Q. Yeah, how often?

10 A. I can't really say. Maybe different
11 times different amounts. I might be out
12 there twice in one week or I may not be out
13 there for three weeks.

14 Q. As far as conversations on site with
15 representatives of RCR, who within American
16 Excavators was having most of those
17 conversations?

18 A. I would say Ricky Tipper had the
19 majority of them, probably 95 percent.
20 Harley probably had the rest, most of the
21 rest, if not all.

22 Q. Then I'll wait and we'll ask him those
23 questions. One thing I want to ask you
24 about, though, is: Did there come a point in
25 time when Harley Ezell came to you with

1 information that RCR wanted an adjustment on
2 your unit price?

3 A. Only on the cut was the only place
4 they asked for an adjustment.

5 Q. Just for purposes of notice, tell us
6 what Harley Ezell came to you to say that you
7 had to make a decision on?

8 MR. CASHION: Your Honor, I
9 object. This is hearsay of what Harley Ezell
10 came to him and said. He qualified it with
11 notice but I still think you're going to get
12 all the hearsay.

13 MR. PANTHER: Let me respond.
14 What Harley informed Mr. Parker about is not
15 intended and is not offered for the truth of
16 the matter but it is merely to form what
17 occurred that he responded to. What Harley
18 Ezell tells Mr. Parker is not offered for the
19 truth of the matter. That would be offered
20 into evidence at a later point. I do need
21 him to say that so he can give context as to
22 his reply.

23 THE WITNESS: Mr. Ezell is the
24 employee of whom --

25 MR. PANTHER: Mr. Ezell is the

1 project manager for American Excavators.

2 THE COURT: Oh, okay. His own
3 employee?

4 MR. PANTHER: Right, right. As I
5 said, what he told Mr. Parker, if it was
6 offered for the truth of the matter, it would
7 be hearsay, but it's not.

8 THE COURT: You're offering it
9 for the purpose of showing what Mr. Parker
10 did or didn't do after he was given this
11 information?

12 MR. PANTHER: Yes, sir.

13 MR. CASHION: If he wants, he
14 could phrase the question, Harley Ezell told
15 you of some price difference. What was your
16 response? We're still talking about two
17 parties' conversation. What was your
18 position? That's the conversation between
19 two employees of the same company that I am
20 objecting to coming into evidence.

21 THE COURT: Can you get to it by
22 just asking it that way? After you were told
23 about the price difference, what was your
24 response? Is there any reason --

25 MR. PANTHER: Let me ask this

1 question and see if Mr. Cashion objects to
2 it.

3 BY MR. PANTHER:

4 Q. Did Mr. Ezell come to you at some
5 point to say that RCR wanted a reduction in
6 the unit price from 12.50 to \$10 a cubic yard
7 in the cut section?

8 MR. CASHION: That goes from
9 hearsay to leading.

10 THE COURT: That is leading but
11 do you have any problem with it?

12 MR. CASHION: I think we just
13 need to go on, Your Honor. You understand
14 the problem with the conversation and we'll
15 just allow you to sift through the hearsay.
16 I don't want to belabor the point.

17 THE COURT: Can you answer? Did
18 he come to you and say they want a reduction?

19 THE WITNESS: Yes.

20 BY MR. PANTHER:

21 Q. Did you agree to it?

22 A. Yes.

23 Q. Tell us why you agreed to drop your
24 price in the cut section from 12.50 to \$10 a
25 cubic yard.

1 A. The proposal I was presented with and
2 thought about, Harley presented me with --
3 and I asked his opinion over what he thought
4 was right to do. We talked about it and he
5 said, yes. I said, Didn't you have that
6 included in your price that you gave them
7 originally?

8 Q. Didn't you have what?

9 A. To cut the material anyway. He said,
10 yeah, in all honesty. What I recall, he went
11 through the papers and he showed me -- we
12 looked at the dozer he had set up and looked
13 at the yardage and he did figure on cutting
14 that and that was included in the base price.

15 Q. I don't want to confuse our terms. We
16 used the term "cut" to refer to the area
17 above subgrade. When you say that he planned
18 to cut it, how are you using that term?

19 A. In order to --

20 Q. In other words, can you use another
21 word other than "cut" to describe what you're
22 telling us?

23 A. Remove.

24 Q. Okay. Go ahead.

25 A. We would have had to have removed that

1 soil and placed it as fill anyway. In all
2 fairness, even though the contract and what
3 we had agreed on, you know, called for 12.50
4 a yard, I agreed on that area only, to reduce
5 it to \$10 per yard.

6 THE COURT: And that area was the
7 what?

8 THE WITNESS: Any of the above
9 subgrade material.

10 THE COURT: The cut?

11 THE WITNESS: Yes.

12 BY MR. PANTHER:

13 Q. Let me ask you to look at a document.
14 I've handed you what's labeled Pay Request
15 No. 1. It's got a place for you to sign at
16 the bottom there, American Excavators' chief
17 member. Can you identify this as the Pay
18 Application No. 1 that American Excavators
19 sent RCR on this job?

20 A. Yes, I believe it is.

21 Q. Attached to it, is that a copy of
22 Change Order No. 1 that was submitted along
23 with it?

24 A. Yes, sir.

25 MR. PANTHER: Your Honor, we move

1 that into evidence as Exhibit No. 7.

2 (Exhibit No. 7 was marked.)

3 BY MR. PANTHER:

4 Q. Now, did you play a role, Mr. Parker,
5 in reviewing and approving this pay
6 application before it went out?

7 A. I believe I did.

8 Q. Turn over to the change order which is
9 the last page. This is Change Order No. 1.
10 It contains two items. The first is, Clear
11 and grub additional trees for \$6200. What
12 was this for?

13 A. That was where we had to -- when the
14 survey was discovered to be off and these
15 additional trees and materials had to be
16 removed. That was the cost to remove those.

17 Q. And then the next item, Remove and
18 replace with structural fill approximately
19 400 linear feet of 24 inch RCP. What's that
20 all about?

21 A. That's the second issue. The design
22 engineer didn't see the pipe below the ground
23 and we had to remove it. It wasn't shown on
24 the plans as bid.

25 Q. Okay. How did you price that second

1 item, that removing the RCP; do you remember?

2 A. I remember me and Harley going through
3 it and determining what the value of it
4 should be.

5 Q. Did that include any of the fill
6 necessary to refill the trench that you took
7 the RCP out of?

8 A. I don't think it did.

9 Q. Did RCR pay American Excavators in
10 full for this pay application?

11 A. I can't remember at that time if they
12 paid it at that time and then later took back
13 part of it.

14 Q. Okay. Let me ask you to look at Pay
15 Application No. 2. Mr. Parker, I have handed
16 you a document that's a collection of
17 documents. Can you identify these as the pay
18 application and the back-up documents that
19 were submitted with your Pay Application No.
20 2?

21 A. Yes.

22 MR. PANTHER: Your Honor, we move
23 that into evidence as Exhibit No. 8.

24 (Exhibit No. 8 was marked.)

25 BY MR. PANTHER:

1 Q. Turn back two pages until you come to
2 Change Order No. 2. Are you with me?
3 A. Yes, sir.
4 Q. By the time that this change order was
5 submitted, August 17, 1999, what knowledge,
6 what information did you have concerning the
7 magnitude of unsuitable material that you
8 were running into and replacing?
9 A. That it was going to be -- seemed to
10 be substantial.
11 Q. How did the total amount of unsuitable
12 material that you were running into and
13 refilling compare with what you were asking
14 to be paid for in this Pay Application No. 2?
15 A. It was actually more.
16 Q. As of August 17, 1999, at what stage
17 was American Excavators in completing the
18 excavation portion of its subcontract?
19 A. On August 17?
20 Q. Yes, sir.
21 A. I wouldn't know without looking at the
22 chart.
23 Q. Which chart do you want to look at?
24 A. The timetable of the job.
25 Q. Let me ask you, did you prepare or did

1 you review a summary of the truck tickets and
2 daily logs that I prepared to determine
3 whether my summary was accurate and a correct
4 reflection of what's in the truck tickets and
5 daily logs?

6 A. Yes.

7 Q. Let me ask you to review that
8 summary. Mr. Parker, I've handed you what's
9 titled Summary of Truck Tickets and Daily
10 Logs. Is that a document that you've
11 reviewed at my request to determine whether
12 it accurately reflects a summary of the truck
13 tickets and daily logs?

14 A. Yes, it is.

15 MR. PANTHER: Your Honor, we move
16 that into evidence as Exhibit No. 9.

17 MR. CASHION: No objection.

18 (Exhibit No. 9 was marked.)

19 BY MR. PANTHER:

20 Q. Before admitting Exhibit 9 into
21 evidence, the question that I had asked you
22 was: By August 17, had American Excavators
23 pretty much finished its excavation and
24 grading portion of the subcontract?

25 A. Not the utilities. As far as the

1 excavation, we would have been primarily
2 finished other than respreading the topsoil.
3 Q. Okay. Why is it, if you were largely
4 finished with the excavation and grading
5 portion, did you not submit all of the truck
6 tickets that had been generated up to the
7 point in time that this change order was
8 submitted, August 17?

9 A. Okay. The date on here is August 17.
10 I don't know if that's after it went back and
11 forth between our office and RCR's. Also,
12 most of the trucking tickets, some of them
13 were pretty prompt. Most people want to be
14 paid promptly. Some of them would come in
15 the following month. Maybe they sent their
16 bills out on the 30th and our billing cycle
17 with RCR might have been the 25th. I'm not
18 sure why there would have been any
19 difference. We wouldn't have had complete
20 records at that time.

21 Q. What check were you making at the time
22 that this change order and Pay Application
23 No. 2 was submitted as to the total
24 quantities of unsuitable material that you
25 had removed and fill that you brought in?

1 What check were you making?

2 A. As I recall, at this pay application
3 it seemed like I remember going over it with
4 Barbara.

5 Q. Who is she?

6 A. She would have been our secretary,
7 accounts receivable. I was going over them
8 with her and I think what I remember, we
9 pulled the file and noticed -- we knew we had
10 way more than what we were billing for. We
11 were way, way, way past that. I said, Just
12 go on and bill for this only for cash flow at
13 that time. Just go on and bill. You know, I
14 knew we were at least five or six times
15 further down the road than that.

16 Q. Now, let's go back and look at Change
17 Order No. 2. This is a \$28,980 change
18 order. What was this change order for?

19 A. That was for unsuitable materials due
20 to the soils report being invalid when the
21 site was opened up. Actually, it was for the
22 cut material that was classified as suitable.

23 Q. How did you determine what rate to
24 charge?

25 A. What I recall doing on this --

1 Q. Was the rate \$10 a cubic yard?

2 A. That was where we had agreed upon -- I

3 agreed to the concession of \$2.50 a yard.

4 Q. How did you determine what the

5 quantity was to charge them for in this

6 change order?

7 A. What I done on that was we looked at

8 the Agtech report. What I remember, we

9 looked at the Agtech report and I wanted to

10 give them the benefit of the doubt and I gave

11 them full credit -- it was either going to be

12 billed at \$10 or 12.50. Due to the way we

13 were keeping up with it by the truck load, we

14 went on and gave them, you know, not erred in

15 their favor but gave them the full credit for

16 all of the cut material. We just said, Hey,

17 look. Let's just say it's all unsuitable.

18 We'll give you full credit and not charge

19 12.50 for part of it and \$10. I'm just going

20 to give you full credit in your favor for

21 that.

22 Q. If the yardage that you charged \$10 a

23 yard for was not charged at \$10 a yard, what

24 would that yardage have been charged for?

25 A. At the contract price of 12.50 per

1 cubic yard.

2 MR. PANTHER: Your Honor, could
3 he be passed Exhibit No. 2? This is the
4 take-off.

5 THE COURT: I believe he's got
6 them all.

7 BY MR. PANTHER:

8 Q. Do you have Exhibit No. 2 in front of
9 you? It is the bid take-off?

10 A. Sir?

11 Q. Do you have the bid take-off in front
12 of you as well?

13 A. Yeah.

14 Q. Having Exhibit No. 2 in front of you,
15 tell us how you had come up with the 2898
16 cubic yards of material that you charged \$10
17 a cubic yard for in this second change
18 order.

19 A. That was on the take-off whenever we
20 prepared it using Agtech. That was the
21 amount of cut, suitable cut, that the program
22 estimated.

23 Q. All right. Let's look at Change Order
24 No. 3, the next page. What was this for?

25 A. This would have been for unsuitable

1 materials undercut.

2 Q. Meaning above or below subgrade?

3 A. I get it mixed up all the time. Below

4 subgrade.

5 Q. Okay. Where did these precise

6 quantities come from?

7 A. Okay. I think -- yeah, this was

8 prepared at the same time the change order

9 right before was, and we didn't have complete

10 tickets in so we had -- there was four major

11 areas that was questionable on the site that

12 they did have a question.

13 Q. "They" meaning who?

14 A. RCR had a question about whether it

15 was suitable or unsuitable so they called PSI

16 out to look at it. When we got ready to --

17 these were the four major areas that there

18 was disputes on from what I remember.

19 Q. Turn over one page. Is that sort of a

20 depiction of the general area where these

21 four areas were found in?

22 A. Generally, yes.

23 Q. Now, once PSI came to the site, whose

24 responsibility was it to contact PSI to

25 determine whether to contact PSI or not?

1 Whose responsibility was that?

2 A. RCR's responsibility, if they question

3 -- a lot of the soils they didn't question.

4 Anybody could see that they were unsuitable.

5 Q. Well, with you as the subcontractor,

6 who are you supposed to take your direction

7 from?

8 A. RCR.

9 Q. Okay. If you have a question about

10 any aspect of the job, who are you supposed

11 to take your question to?

12 A. RCR.

13 Q. Did you, American Excavators, once PSI

14 came on the scene, have any ability to call

15 PSI up and say, Hey, we need you to come out

16 here and look at this material?

17 MR. CASHION: Objection, leading,

18 Your Honor.

19 THE COURT: Overruled.

20 THE WITNESS: That was RCR's

21 responsibility.

22 BY MR. PANTHER:

23 Q. Did RCR pay Pay Application No. 2?

24 A. Yes.

25 THE COURT: Now, the Change Order

1 No. 3 for the undercut was approved by PSI;
2 is that correct, Mr. Parker? Change Order
3 No. 3?

4 THE WITNESS: I think it was. It
5 was. That's the areas they called PSI on.

6 BY MR. PANTHER:

7 Q. I want to go to an area before we get
8 to Pay Application No. 3 because this goes to
9 a question His Honor asked in opening
10 statements. Mr. Cashion, you remember,
11 described what the change order procedure was
12 where you submit it to RCR. RCR submits it
13 to the county. The county brings it down to
14 RCR and back down to American Excavators,
15 something to that effect. You heard that,
16 didn't you?

17 A. Correct.

18 Q. You've been in this business for a
19 number of years. How many jobs have you seen
20 where that pinpoint precision procedure was
21 used on a fast track project like this?

22 A. How many times have I seen it?

23 Q. Followed the way that Mr. Cashion
24 described is supposed to be followed?

25 A. Well, seldom according to the way that

1 job was going.

2 Q. Pardon me?

3 A. It would be seldomly (sic) used
4 according to that way.

5 Q. Several what?

6 THE COURT: Seldom.

7 BY MR. PANTHER:

8 Q. I'm sorry. What would have happened
9 if you had to stop to get a change order
10 before you removed unsuitable material?

11 A. And had it to go to the county and
12 back and forth?

13 Q. If you followed that procedure, what
14 would the effect have been?

15 A. We would have still been out there
16 building a parking lot.

17 Q. Typically and on this job, what was
18 the procedure that was followed?

19 A. If we run into unsuitable soils, Ricky
20 consulted with RCR. If RCR questioned it,
21 they called PSI out. If they didn't, they
22 would order it removed and fill brought back
23 in.

24 Q. Mr. Parker, I've handed you a
25 document. Can you identify this as Pay

1 Application No. 3 that American Excavators
2 submitted?

3 A. Yes.

4 MR. PANTHER: Your Honor, we move
5 that into evidence as Exhibit No. 10, I
6 believe.

7 MR. CASHION: No objection.

8 (Exhibit No. 10 was marked.)

9 THE COURT: This is the third
10 application?

11 MR. PANTHER: Yes, sir.

12 BY MR. PANTHER:

13 Q. What happened after you submitted this
14 pay application?

15 A. I believe this is the one where they
16 deducted what they had already paid us.

17 Q. Okay. When they did that, what did
18 you do to try to figure out what was going on?

19 A. I attempted to call Don Stover at RCR.

20 Q. Just tell us what happened. Tell us
21 what effort you made and what response you
22 received.

23 A. I would regularly call. Of course, we
24 were busy and I could have called every day
25 but sometimes I called twice a week,

1 sometimes once, sometimes four or five times
2 a week and leave messages on his voice mail.
3 I couldn't get him to return the calls or
4 give us any explanation of what was going on.
5 Q. Just tell us how it progressed. What
6 did you do next?
7 A. By that time, all the truck tickets --
8 we was getting further along. All the truck
9 tickets were coming in. We were checking it
10 out and we were having a problem with this
11 pay application. Not only was I wanting to
12 get this resolved, I was wanting to move
13 forward with the final application and kept
14 trying to call Mr. Stover. It seemed like I
15 got one return phone call and he was very
16 angry and said I had threatened him. From
17 what I remember, I apologized and was just
18 trying to get to the bottom of the matter.
19 He told me to call back, to let him get
20 everything rounded up, I think. It was just
21 a put-off. I know now that it was. I called
22 back later but he never would return my phone
23 call again.
24 Finally, I had been as patient as I
25 could be with it. I think legally I knew we

1 were getting close to it being 90 days from
2 the time we had last worked on the job. I
3 think at that time I called -- if I'm not
4 wrong, I called somebody from the county and
5 somebody from the engineering firm and told
6 them about the trouble I was having getting
7 any response, that we were still owed this
8 amount of money and I can't get a response
9 from the general contractor. I wanted to
10 make sure they knew about it and made them
11 aware of it. I can't remember if it was the
12 county or the engineer but one of them made
13 the comment, I'll get their attention.

14 Q. What happened next?

15 A. Don Stover called.

16 Q. What did he say?

17 A. I don't remember what the run-around
18 was. It was just fast talk. Anyway, it
19 ended up we set up a meeting with the county.
20 I think the county was present and the
21 engineer was and Don Stover and Anthony
22 Orange was.

23 Q. What position was Mr. Stover and Mr.
24 Orange -- well, between Mr. Stover and Mr.
25 Orange, who between the two of them was

1 taking the lead for RCR?

2 A. As far as I remember, Don Stover was.

3 Q. What was his position at the meeting?

4 What was he saying ought to happen?

5 A. At that particular time, their comment

6 was --

7 Q. "Their" meaning --?

8 A. RCR. Don Stover's comment was, You

9 should have qualified your bid. You should

10 have had a qualifier in it for unsuitable

11 material. I made the comment to Don, I said,

12 Don, it did. He said, No, it didn't. I

13 said, Well, I haven't looked at it here

14 lately but I know the proposal had it. I

15 said, If you didn't put it in the contract,

16 you just plain beat me out of -- you're

17 trying to beat me out of something. I said,

18 What about our conversations, you know, in

19 the field to pay this undercut and

20 everything? All I can tell you, son, is you

21 get paid what your contract says you will.

22 You should have had a qualifier in there.

23 Q. After the meeting, did you go back and

24 examine your subcontract?

25 A. Yeah, I went back to the office late

1 that afternoon and examined it and they
2 hadn't left it out of there. There was a
3 qualifier in it. I tried to call Mr. Stover
4 back. I don't think he was in that
5 afternoon. I called him back the following
6 day and got him on the phone. I told him,
7 Mr. Stover, there was a qualifier. Not only
8 was it in our proposal, it is in our
9 contract. He just wouldn't say anything
10 else. That was it.

11 Q. At that point, did you go ahead and
12 submit what was your last application for
13 payment?

14 A. Yeah. At that point, I figured out
15 he's not going to sit down with me and go
16 through these tickets and go through the
17 procedure and that I might as well, you know,
18 go on and go through the motions with it.

19 THE COURT: Can you give me some
20 estimate on dates these applications were
21 being submitted? I see the period of time
22 it's covering but I'm not sure when you're
23 actually presenting them for payment. Maybe
24 it's down here. Exhibit 8, Application No.
25 2, has a jurat, I guess, by the notary public

1 August 19. What does that mean?

2 THE WITNESS: As I said earlier,
3 we usually start preparing these -- depending
4 on which municipality or contractor we work
5 for, they all have different cut-off dates.
6 It may be the 25th you have to have it in to
7 be paid the following month. We usually
8 start working on them the 20th through the
9 25th, let's say, and we submit it. A lot of
10 times they'll send it back saying I need this
11 correction made, this correction. At that
12 point is probably when they finally got all
13 the paperwork through for the last time as
14 far as the application.

15 THE COURT: The Application No.
16 2, this one?

17 THE WITNESS: Probably. That
18 seems like what 90 percent of them look
19 like.

20 THE COURT: Your feeling is it
21 was submitted sometime latter part of August?

22 THE WITNESS: Yes.

23 MR. PANTHER: I'm sorry to
24 interrupt you, Your Honor, but if I may,
25 later on, Your Honor, we'll get into evidence

1 the RCR copies of these pay applications that
2 have their approval stamps on there. We'll
3 get that evidence in at a later point.

4 THE COURT: Okay.

5 MR. CASHION: As well as the
6 check that paid for it.

7 MR. PANTHER: I just can't do
8 that with this witness.

9 THE COURT: That's fine.

10 BY MR. PANTHER:

11 Q. Do you have in front of you, Mr.
12 Parker, American Excavators' fourth
13 application for payment?

14 A. Yes.

15 Q. Now, attached to it, do you have the
16 Change Order No. 4?

17 A. Correct.

18 Q. Now, at the bottom of this Change
19 Order No. 4, it's got a date on there of
20 April 12, 2000. Do you see that there?

21 A. Yes.

22 MR. PANTHER: Before I forget, I
23 move Pay Application No. 4 into evidence as
24 Exhibit No. 11.

25 THE COURT: Okay.

1 (Exhibit No. 11 was marked.)

2 BY MR. PANTHER:

3 Q. Do you have Pay Application No. 4 in

4 front of you?

5 A. Yes.

6 Q. In both the county and RCR's opening

7 statement, they criticize American Excavators

8 for waiting until April to submit this pay

9 application. You heard that, didn't you?

10 A. Correct.

11 Q. Tell us why it was, if you finished

12 your excavation portion of this job in late

13 July, early August, why is it that you

14 submitted this largest pay application in

15 April of 2000?

16 A. Okay. Let me correct something. The

17 actual excavation was finished whenever we go

18 back and respread the topsoil. That's one of

19 the very last things we did, which was like

20 late January. It would have had to have been

21 three months before this. It was just a job

22 on the books, and it was actively discussed

23 at our meetings all the way through January,

24 whenever the last day we worked on the job

25 was.

1 Ask me the question again.

2 Q. Why did it take as long as it did to
3 submit this last pay application?

4 A. Primarily it was due to the inability
5 to get any response from the general
6 contractor on it.

7 Q. If Mr. Stover had not ignored you or
8 not behaved the way that you described, what
9 was your intention to do with Mr. Stover
10 regarding the amount of unsuitable material
11 that you removed and replaced and were asking
12 to be paid for? If he called you back, what
13 would you have done, in other words?

14 A. Like I told him, I would like to sit
15 down with him and go over it and get the
16 final billing done and make sure they were in
17 agreement with it and send it right on
18 through.

19 Q. Let's look at Change Order No. 4. Do
20 you have that?

21 A. Yes.

22 Q. It also may be helpful for you to have
23 Exhibit No. 9 in front of you as well.

24 That's the summary.

25 A. Okay.

1 Q. Now, this change order is in the
2 amount of 123,395?

3 A. Correct.

4 Q. How did you determine the amount of
5 unsuitable materials, 13,500 cubic yards,
6 that you have on that change order?

7 A. Okay. I took -- of course, there
8 again I was forced to sit down and do it by
9 myself. I took all the loads that we had
10 imported in and multiplied them times \$15 per
11 cubic yard.

12 Q. Hold on just a minute. I have put up
13 a board of what we've introduced as Exhibit
14 No. 9. Now when you said you took the total
15 truck loads, what is it that you took? What
16 number?

17 A. 1,132.

18 Q. And then you said you multiplied it by
19 a number. How did you convert the truck
20 loads to cubic yardage?

21 A. By using an accepted number of 15
22 yards per load on a standard triaxle. I
23 think it is 12 on a -- yeah, these were
24 triaxles, so it was 15 yards per load.

25 Q. What's the capacity of a triaxle

1 truck, though?

2 A. That's pretty well the capacity. I
3 mean, it actually holds more yardage. That's
4 the compacted yardage.

5 Q. So when you multiply 1,132 loads by 15
6 cubic yards per load -- I know you don't have
7 a calculator in front of you -- what did you
8 come up with?

9 A. It seems like it come up to like
10 16,000 -- I don't really know what the number
11 is. I'd be guessing if I said.

12 MR. PANTHER: Your Honor, let me
13 give him a calculator so I have a clear
14 record.

15 BY MR. PANTHER:

16 Q. Do the math for me.

17 A. I got 16,980.

18 Q. Now, from 16,980, where did you go
19 from there? What's the next step you took to
20 get down to this \$13,500 number?

21 A. Originally it was about a 2900, almost
22 3,000 yard import job that I had to bring in
23 to start with. So out of that --

24 Q. Let me stop you right there. Take a
25 look at Exhibit No. 2, the take-off. Do you

1 have it?

2 A. Yes.

3 Q. Tell us why you deducted 3,000 cubic
4 yards off of that 16,000 cubic yard figure
5 that you just came up with on the
6 calculator.

7 A. Okay. Originally, according to the
8 soils report and the plans we were supplied
9 and using Agtech, I understood upfront that
10 we were going to be importing 3,000 yards of
11 material. I didn't want to charge for that
12 because that was included in the base bid.

13 Q. So you deducted 3,000 cubic yards off
14 of the 16,900 cubic yard figure. And then
15 what did you do?

16 A. And then I rounded down to 13,500.

17 Q. By using 15 cubic yards as opposed to
18 18 cubic yards, whose side were you giving
19 the benefit of the doubt?

20 A. RCR's.

21 Q. Again by rounding down as opposed to
22 rounding up, whose side were you giving the
23 benefit of the doubt?

24 A. To RCR.

25 Q. Now, tell us, when you come up with --

1 well, let me ask it a different way. After
2 you came up with this 13,500 cubic yards,
3 what's the next step that you took in
4 computing the amount of this change order?

5 A. Multiplied it times the 12.50 per
6 cubic yard and come up with a total of
7 168,750 and then subtracted the amounts of
8 Change Order Nos. 2 and 3.

9 Q. Early on when you were describing
10 Change Order No. 2, you had talked about
11 giving RCR full credit for the total amount
12 of cut that there was. Do you remember
13 talking about that?

14 A. Yes.

15 Q. How did you do that in this Change
16 Order No. 4? You have that in front of you.

17 A. I didn't.

18 Q. Pardon me?

19 A. There is no credit given for that. It
20 was all billed at 12.50.

21 Q. But you deducted from that what?

22 A. Oh, your Change Order No. 2.

23 Q. Had you charged RCR for less
24 unsuitable material in the cut section, how
25 would that have changed the number that you

1 were asking for in Change Order No. 4?

2 A. It would have raised the price by 2.50

3 per yard, approximately 25 percent more.

4 Q. Now, as of April 12, 2000, does this

5 Change Order No. 4 reflect what the total

6 amount that you were owed was as of that date?

7 A. I believe so.

8 Q. Excluding interest?

9 A. Correct.

10 Q. You were not paid this amount, were

11 you?

12 A. No.

13 Q. Have you reviewed a summary of the

14 amount that American Excavators claims is due

15 that I've prepared?

16 A. Yes, I have.

17 Q. Does that accurately reflect the

18 components of what you claim is due?

19 A. Yes, it does.

20 Q. Mr. Parker, I have handed you a

21 document titled Summary of Amount Due. Does

22 that truly and accurately reflect the

23 components of the amount that American

24 Excavators contends is due in this case?

25 A. Yes, it does.

1 MR. PANTHER: Your Honor, we move
2 that into evidence as Exhibit No. 12.

3 THE COURT: All right.

4 (Exhibit No. 12 was marked.)

5 BY MR. PANTHER:

6 Q. Now, during this litigation, Mr.
7 Parker, did RCR make a payment to you?

8 A. Yes.

9 Q. Is that reflected here in the Interest
10 Due section of Exhibit No. 12?

11 A. Yes.

12 Q. How much did they pay you?

13 A. If I'm correct, it is \$46,589.

14 Q. What's the total balance that you're
15 asking for this court to award American
16 Excavators in this case?

17 A. It is \$190,192.10.

18 MR. PANTHER: Your Honor, if I
19 may, I'd like to review my notes real
20 quickly. I'm near the finish.

21 THE COURT: All right.

22 BY MR. PANTHER:

23 Q. By the way, during the entire time
24 that you were involved in this project, did
25 anyone from RCR ever inform you that if you

1 expected to get paid for this unsuitable
2 material, you were going to have to contact
3 PSI yourself? Did they ever take that
4 position?

5 A. Did anybody what?

6 Q. Ever tell you, from RCR, that if you
7 expected to get paid for this material, you
8 were going to have to contact PSI and bring
9 them to the site?

10 A. And bring them where?

11 Q. To the site?

12 A. Not that I'm aware of, no.

13 Q. Did anyone at RCR ever tell you that
14 in order to be paid you're going to have to
15 get a change order for all this material in
16 advance?

17 A. No.

18 Q. If RCR wanted to stop you and bring
19 PSI in for every bucketful of unsuitable
20 material that you encountered, would you have
21 any problem with them doing that?

22 A. No.

23 Q. Is there any doubt in your mind that
24 the removal of the unsuitable material and
25 the fill that you brought in was of benefit

1 to this project?

2 MR. CASHION: Objection, leading,
3 Your Honor.

4 THE COURT: Sustained.

5 BY MR. PANTHER:

6 Q. What benefit did American Excavators
7 confer upon the county and RCR by doing this
8 work?

9 A. I mean, the work had to be done in
10 order for the building to be built. It just
11 couldn't have been built on what was out
12 there.

13 Q. There was discussion -- at some point
14 did Mr. Stover or Mr. Orange come to you and
15 present you with a change order that they
16 wanted you to sign?

17 A. Not that I'm aware of. Let me
18 rephrase that. There might have been, you
19 know -- when they sent it, it would have been
20 at the billing process, not in the field.
21 They might have asked to get it signed, you
22 know, after the bill was submitted.

23 Q. Were there any change orders that you
24 refused to sign that RCR had presented to you
25 or to somebody in your company?

1 A. Yes.

2 Q. Tell us about that.

3 A. I can't remember which one it was but
4 it was the one where they deducted the
5 amounts from our pay request, you know,
6 without calling or anything. We just
7 received the check and it was short. Later
8 on, they mailed it into the office, I think,
9 and wanted me to sign it.

10 Q. Why did you decline to sign it?

11 A. I mean, it wasn't right. That's not
12 what we agreed to.

13 MR. PANTHER: Thank you, Mr.
14 Parker.

15

16 CROSS-EXAMINATION

17 QUESTIONS BY MR. CASHION:

18 Q. Mr. Parker, my name is Greg Cashion.
19 We've met. I took your deposition back in
20 April of last year. I have a few questions
21 for you. First, if I understand correctly,
22 you're primarily a home builder; is that
23 correct?

24 A. What's that, Mr. Cashion?

25 Q. You're primarily a home builder?

1 A. I can't answer that.

2 Q. Is American Excavators still in
3 business?

4 A. No.

5 Q. When did they go out of business?

6 A. It's been in the process of the last
7 year and a half, somewhere along in there.

8 Q. If I understood you correctly, you
9 assisted Harley Ezell in bidding this job;
10 right?

11 A. Yes. I would call it assisting, yes.

12 Q. Are you familiar with how to bid
13 excavation jobs?

14 A. In what sense?

15 Q. Do you know how to make a take-off in
16 order to find quantities on a site plan?

17 A. Yes.

18 Q. And do you understand soils reports
19 when you read them?

20 A. Yes.

21 Q. Now, let me first ask you to look at
22 the Agtech program, which is Exhibit No. 2.
23 Do you have that?

24 A. Yes, sir.

25 Q. Now, that program, you plan a total

1 cut of 2,898 cubic yards; correct?

2 A. Correct.

3 Q. And you also planned to import 2,942
4 cubic yards; correct?

5 A. Correct.

6 Q. Is there any factor -- this is not
7 exact. I mean, when you get out in the
8 field, it is going to be more or less, isn't
9 it, with earth, dirt? Do you agree with
10 that?

11 A. What do you mean by "more or less"?

12 Q. If your computer program says 2,898
13 cubic yards, that's within a range. That's
14 not going to be the dead-on number; right?

15 A. No. It's got probably 1 to 2 percent.

16 Q. You think it's that close?

17 A. Yeah, I'd say so. Within three max.
18 With the information provided by the design
19 engineer, it is.

20 THE COURT: Mr. Cashion, let me
21 be sure. I got the part on the import. What
22 was the number you said was the export?

23 MR. CASHION: There was no
24 export. The number of yards for cut that
25 would be using fill under this scenario was

1 2,898.

2 THE COURT: All right. What did
3 you say before that one?

4 MR. CASHION: That was the first
5 number. The import to bring into the job was
6 2,942.

7 THE COURT: Okay.

8 MR. CASHION: Your Honor, I have
9 a blow-up of it. The cut is 2,898 dollars
10 (sic).

11 THE WITNESS: Yards.

12 MR. CASHION: The import is 2,942
13 dollars -- yards.

14 BY MR. CASHION:

15 Q. And that's what you planned on to do
16 the job; right?

17 A. Correct.

18 Q. Now, let's look at the soils report
19 which is Exhibit No. 1. Do you see that?

20 A. Yes.

21 Q. And you read this soils report?

22 A. Yes, sir.

23 Q. You reviewed it?

24 A. Yes.

25 Q. And you based your estimate on it?

1 A. We used it in preparing an estimate,
2 yes, sir.

3 Q. If you would, turn to Page 2 of the
4 soils report. Let's talk about the garden
5 area. Do you see the second paragraph,
6 second line?

7 There is a triangular shaped garden
8 area near the center of the site which is
9 approximately one acre in size.

10 Do you see that?

11 A. Yes, sir.

12 THE COURT: I don't.

13 BY MR. CASHION:

14 Q. Do you see that?

15 A. Yes, sir.

16 Q. Did you go out to the site and look at
17 this before you bid the job?

18 A. I didn't. Let me take that back.
19 Yes, I did but I didn't specifically look at
20 the garden area.

21 Q. Isn't it true that the garden area was
22 obvious when you looked at the job? You
23 could see the garden, the plowed zone, on
24 that site?

25 A. From what I remember, yes. I think it

1 was actually covered with grass at the time
2 or something.

3 Q. And that says it is going to be one
4 acre so that's going to be about 43,560
5 square feet?

6 A. Correct.

7 Q. Now, look on Page 4 of the report. It
8 says the first condition which may adversely
9 impact -- second paragraph -- proposed
10 construction is the presence of an existing
11 garden at the site. Do you see that?

12 A. Yes.

13 Q. The hand auger probe encountered
14 approximately one foot of topsoil materials;
15 right?

16 A. Correct.

17 Q. Below the topsoil, the probe
18 encountered dark brown to dark brown clay
19 silt materials to 2.5 feet?

20 A. Correct.

21 Q. These materials within the plow zone
22 are relatively soft and yielding. Do you see
23 that?

24 A. Yes.

25 Q. GT&E recommends that this area be

1 undercut to the naked soil and backfilled
2 with properly placed and properly compacted
3 fill material?

4 A. Correct.

5 Q. The topsoil will be unacceptable for
6 reuse as fill. However, the clay silt should
7 be suitable for use of fill if compacted at
8 or near optimum moisture content. Do you see
9 that?

10 A. Correct.

11 Q. You knew that when you were bidding
12 this job; right?

13 A. Yes.

14 Q. How much material are we talking about
15 if we have a triangular area of 43,560 square
16 feet, two and a half feet deep?

17 A. How much --?

18 Q. Volume?

19 A. Do you want me to multiply it?

20 Q. Sure.

21 A. I have a calculator here.

22 Q. Tell me what you're multiplying.

23 A. What's that?

24 Q. Tell me what you're multiplying.

25 A. You want the cubic foot or yard?

1 Q. Cubic yards.

2 A. I've got 4,033.

3 Q. You multiply it by two and a half feet

4 and divide by 27 and you get 4,033?

5 A. .3333, yes.

6 Q. 4,033 cubic yards for that garden

7 area; right?

8 A. Correct.

9 Q. Now, in your bid --

10 THE COURT: That's to fill the

11 garden area?

12 MR. CASHION: That's what you

13 have to cut out in the garden area and then

14 bring back up.

15 BY MR. CASHION:

16 Q. So, this is telling you that when you

17 start on the garden area, you've got to

18 undercut approximately 4,033 cubic yards;

19 right?

20 A. Correct.

21 Q. And then you can reuse the material,

22 this dark --

23 THE COURT: How are you using

24 that term "undercut"? You mean remove or

25 are you talking about undercut as we have

1 defined it?

2 MR. CASHION: Undercut as we've
3 defined it because we're going down.

4 THE COURT: Below subgrade?

5 MR. CASHION: Below subgrade.

6 BY MR. CASHION:

7 Q. Correct? Do you remember this was in
8 the fill area of the site so it is not a cut
9 area? It is a fill area; correct?

10 A. Yes.

11 Q. So it is going to be below subgrade;
12 correct?

13 A. Yes.

14 Q. So when you're going to address the
15 garden area, you've got to undercut it 4,033
16 cubic yards; correct? You have to take that
17 much out?

18 A. You could have to. They're saying at
19 worst conditions, yeah, maybe.

20 Q. Okay. Once you do that, you've got to
21 save the first foot. You have to stockpile
22 the topsoil; right? You're not going to use
23 that as fill?

24 A. Correct.

25 Q. And you have to save the next foot and

1 a half to put back in there after you rework
2 it and get it to optimum moisture content;
3 right?

4 A. If after it was opened up, if it was
5 unsuitable -- repeat that, Greg -- Mr.
6 Cashion. I'm sorry.

7 Q. What you've got to figure in your bid
8 before you open it up is that you have to
9 take out 4,033 cubic yards. The first foot
10 is going to be stockpiled as topsoil and the
11 next one and a half feet is going to be
12 reworked and put back in assuming it's what
13 they say it is and that is that it's
14 suitable?

15 A. That's a risk, yes, that we assumed.

16 Q. And you had that in your bid, correct,
17 your proposal to RCR to do all that?

18 A. I believe I did, correct.

19 THE COURT: That was a lump sum
20 bid?

21 MR. CASHION: Right.

22 BY MR. CASHION:

23 Q. Let me ask you to look at Exhibit 4,
24 which is your proposal to RCR. Do you see
25 that?

1 A. Yes.

2 Q. Under Excavates Site to Proposed
3 Subgrade, do you see that line I am looking
4 at under Site Prep?

5 A. Yes.

6 Q. It says, Includes three foot buff
7 under pad, garden area, undercut per soils
8 report. Do you see that?

9 A. Correct.

10 Q. So that's a part of your lump sum
11 number; right?

12 A. We assumed the risk under that if it
13 occurs.

14 Q. Now, when I look at your Agtech
15 program, which is Exhibit 2 -- do you see
16 that?

17 A. Yes, sir.

18 Q. -- I don't see any numbers for the
19 garden area as far as undercut or excavation
20 or anything; right?

21 A. Correct.

22 Q. Because you did that on a separate
23 worksheet, I suppose; right?

24 A. I'm not sure.

25 Q. But you do not take -- these numbers

1 do not include the undercut for the garden
2 area?

3 A. I don't believe they do, no, sir.

4 Q. So in addition to these quantities,
5 you would have to include in your price the
6 undercut or, as you say, the potential
7 undercut of 4,033 cubic yards for the garden
8 area?

9 A. Yeah, we were assuming that risk.

10 Q. Did you talk to Ricky Tipper when he
11 went out there to start excavating?

12 A. When he started excavating?

13 Q. Yes, sir.

14 A. I usually have a conversation with
15 Ricky pretty well every day.

16 Q. Did you tell him what he had to do in
17 the garden area?

18 A. I think me and Harley both discussed
19 the garden area, if we encountered those
20 soils, what to do.

21 Q. Did you tell Ricky Tipper, Ricky, when
22 you go out there to strip, instead of six
23 inches, you're going to take a foot and the
24 next one and a half feet is going to be dark
25 brown clay silt material that you've got to

1 harvest or stockpile and put back in there?
2 Did you tell him that he was going to have to
3 do that?

4 A. No. At some point, yes, we discussed
5 that. As far as when he first went to the
6 site -- it might have been two weeks before.
7 It might have been whenever but, yeah, he was
8 informed that was what he was to do.

9 Q. Isn't it the fact of the matter that
10 Ricky Tipper just started stripping and
11 stockpiling; he never distinguished between
12 brown clay silt or topsoil? If it was dark,
13 he was moving it off?

14 A. I can't remember which area he was in
15 but he did have a problem. When he first
16 went out there, he started stripping an area
17 somewhere that was deeper but I think it was
18 going to have to be cut anyway from what I
19 understand. There was a problem. Harley
20 wanted him to go in a different direction
21 with it at that point but I can't say what
22 area it was in. I don't think it was the
23 garden area. It could have been. I don't
24 know.

25 Q. You knew the garden area had to be

1 addressed. That's at least 4,000 cubic
2 yards, pretty much in the middle of the site,
3 isn't it; do you remember?

4 A. I think it was kind of towards the --
5 I was thinking it was more towards the left
6 back side but it was close to it.

7 Q. Your proposal, when you look at it,
8 which is Exhibit No. 4 -- do you see your
9 proposal?

10 A. Yes.

11 Q. And you say, Areas in parking lot are
12 three foot below building pad that do not
13 proof roll and require additional
14 undercutting. Do you see that additional
15 undercutting?

16 A. Yes, sir.

17 Q. That's in addition to your garden area
18 undercut; correct?

19 A. Yes, sir.

20 Q. And then in your contract, Exhibit
21 5 -- it is the third page of the exhibit.

22 THE COURT: Paragraph 20?

23 MR. CASHION: Paragraph 20.

24 BY MR. CASHION:

25 Q. It says, Any additional undercutting

1 and refilling. Do you see that?

2 A. Yes, sir.

3 Q. We're talking about additional in
4 addition to the garden area; correct?

5 A. Any additional undercutting, yes.

6 Q. Because you've already given a price
7 -- you can't read your price on your Exhibit
8 4. It is the same price of your contract,
9 isn't it?

10 A. \$233,940 on Exhibit 4.

11 THE COURT: 233,940?

12 MR. CASHION: Can you read that
13 in there, Judge?

14 THE COURT: I can.

15 MR. CASHION: It wasn't clear.

16 BY MR. CASHION:

17 Q. Now, when you were testifying for Mr.
18 Panther, if I understood you correctly, it is
19 your position that in a cut area -- to make
20 sure we're both on the right page -- in a cut
21 area, you believe Article 20 of the
22 subcontract says if the cut area is
23 unsuitable, you get paid 12.50 a cubic yard?

24 A. That was our agreement.

25 Q. And the reason you say that's what

1 this Paragraph 20 says is because it has the
2 word "refilling"?

3 A. No. I'm saying it primarily because
4 the conversation we had later addressing this
5 very item we're discussing. The very wording
6 of this in the field was discussed. That's
7 what I based the \$10 on. That's what Harley
8 agreed to in the field with Don Stover, to
9 clarify these very words on here.

10 Q. This is not your agreement. You don't
11 have any knowledge of the agreement, do you,
12 in the field?

13 A. Yes. Well, yeah. I was asked to
14 accept it or decline it.

15 Q. You didn't listen to what Don Stover
16 said. You didn't listen to what Harley said
17 to Don Stover, did you? You weren't a part
18 of that conversation?

19 A. No, huh-uh.

20 Q. But you were a part of this contract;
21 right? What I want to make sure I understand
22 is it is your position to the judge that if
23 it says any additional undercutting and
24 refilling of any area due to unsuitable
25 areas, you're saying that refilling means if

1 it's unsuitable in the cut section? That's
2 your interpretation?

3 A. Refilling of -- any refilling or
4 replacing where we have to replace that fill
5 material.

6 Q. You're saying this is inconsistent
7 with the plans and specifications so,
8 therefore, this should control, is what I was
9 gathering?

10 A. Yes.

11 Q. Isn't it true that when you say
12 undercutting and refilling, you're talking
13 about taking out the bad material,
14 undercutting and refilling that material
15 back?

16 A. That's not what I meant by it.

17 Q. Isn't it true that's how the industry
18 typically describes undercutting and
19 refilling or undercutting and replacing?

20 A. I wouldn't say it's standard.

21 Q. But it is your testimony that this
22 language is inconsistent with the
23 specifications and, therefore, you're asking
24 the judge to pay you for all of the
25 unsuitable material you say you found in the

1 cut sections?

2 A. I'm not asking him. That's what our
3 proposal was and our agreement was and that's
4 what RCR agreed to pay us. I'm asking them
5 to pay us, not the judge.

6 Q. I understand he's not going to pay
7 you, but he's going to decide how much you
8 get paid.

9 Let's look through the specifications
10 to see if this is inconsistent with the
11 terminology. First, let me introduce into
12 evidence as Exhibit No. 12 what is called the
13 Williamson County Community Service Building
14 Project Manual -- Exhibit 13.

15 (Exhibit No. 13 was marked.)

16 MS. CARSON: For ease of
17 reference, we have marked these with Bates
18 stamp numbers because there are a million
19 Page 1s and 2s but they're Bates stamped
20 sequentially throughout the document.

21 THE COURT: All right. I
22 appreciate that.

23 BY MR. CASHION:

24 Q. Mr. Parker, can you identify that as
25 the project specifications for this job?

1 A. Yes, I believe it is.

2 MR. CASHION: I move that into
3 evidence as Exhibit No. 13, Your Honor.

4 THE COURT: All right.

5 BY MR. CASHION:

6 Q. What I'm going to do, rather than
7 having everyone thumb through and try to
8 figure out what page I'm on, I'm going to
9 hand you a sheet from there and I will
10 identify it by Bates stamp number so we can
11 keep up with it. I'm not going to put those
12 in as evidence.

13 THE COURT: Do I need this red
14 book or not? Are you going to hand me every
15 page I need to look at?

16 MS. CARSON: Your Honor, when we
17 begin, you'll need the red book so you might
18 as well keep it.

19 MR. CASHION: When I'm doing
20 this, you don't need the red book.

21 MS. CARSON: We're spending
22 taxpayers dollars so we make as few copies as
23 possible.

24 THE COURT: Okay.

25 BY MR. CASHION:

1 Q. First, I'm going to refer you to
2 Section 02221 of the specifications. Do you
3 see that at the bottom of the page?
4 A. Yes.
5 Q. And 02221 is the excavating, back-
6 filling and compacting for structures section
7 of the specifications. Before I ask you that
8 question, would you look at your contract,
9 Exhibit No. 5? Do you see that on Page 2 of
10 that contract?
11 A. Yes, sir.
12 Q. Isn't it true that under contract
13 provision 10(c) that this section is a part
14 of your contract?
15 A. Correct.
16 Q. Okay. If you look at the page that I
17 have given you -- and I have highlighted two
18 portions of it -- did you realize that the
19 excavation shall be considered unclassified?
20 A. Yes, that's why we asked for -- I
21 mean, that's why we insisted on a qualifier.
22 Q. You realized that if the excavation is
23 unclassified, that means it doesn't matter
24 what's in the excavation, you've got to take
25 it out. If you can reuse it, fine. If you

1 can't, fine. Right? That's unclassified?

2 A. Yes, that's what this says.

3 Q. Right. What you're saying is you

4 believe that Article 20 of the subcontract

5 qualifies unclassified excavation, is what

6 you're telling the Court?

7 A. Correct.

8 Q. Now, if you look at Paragraph (d), did

9 you realize and appreciate that the extent of

10 the undercutting should be verified by the

11 structural and testing or inspection agency?

12 A. Correct.

13 Q. Next let me hand to you a page from

14 the specifications which is Bates stamp No.

15 148. I guess, first, Mr. Parker, if you

16 will, look on your Exhibit No. 5, 10(f).

17 10(f) says 2300 earth work. That's in your

18 contract; right?

19 A. Correct.

20 Q. So this is part of your subcontract;

21 correct?

22 A. Correct.

23 Q. On here, it states that the

24 unsatisfactory soil -- and I'm reading from

25 Section C; I'm going to keep to the second

1 sentence -- shall be removed from the site
2 and disposed of by the contractor. Do you
3 see that?

4 A. Correct.

5 Q. Since this is a part of your work,
6 contractor, as far as between you and RCR, is
7 American Excavators; right?

8 A. We're the subcontractor.

9 Q. Right. It says, If unsatisfactory
10 soil is in a cut section, it shall be removed
11 from the site and disposed of by the
12 contractor at the contractor's expense;
13 correct?

14 A. Correct.

15 Q. The way this reads, if you find
16 unsatisfactory or unsuitable material in a
17 cut section, you have to dispose of it at
18 your expense; correct?

19 A. Yes. I mean, I didn't agree to those
20 terms but that's what this article says.

21 Q. I believe you testified on this cut
22 section that you believed that the cut was
23 unsatisfactory or unsuitable?

24 A. That was the information I received.

25 Q. Now, you realize, setting aside what

1 the contract says, that you disagree because
2 you think Paragraph 20 gets you out of it.
3 Setting that aside, the reason you're asking
4 for a change order for the cut is because you
5 believe it's unsuitable material; right?
6 A. I didn't observe the soil. I relied
7 upon RCR.
8 Q. Well, then, are you aware of anyone
9 from a testing agency that's going to testify
10 that the material in the cut was
11 unsatisfactory?
12 A. Am I aware of anybody?
13 Q. Right.
14 A. No, I don't know of anybody.
15 Q. Do you have a letter from a testing
16 agency that says all the material in the cut
17 is unsatisfactory?
18 A. I don't know. I don't know.
19 Q. Well, you said the reason you asked
20 for all this -- you realize the soils report
21 says you can use this material in the cut;
22 right? That's your testimony this morning?
23 A. I'm not sure. If it's what it says,
24 that's correct.
25 Q. You said, The soils report said I

1 could use it, and your words were, The soils
2 report was invalid. That's what I wrote
3 down. That's what you were saying; right?

4 A. Okay, yes. In areas, they were.

5 Q. Under your testimony, all of the
6 cut -- because you've billed us for every
7 yard of cut that you planned to take out
8 under your Agtech program; right?

9 A. Correct. That was in your favor.

10 Q. I won't argue with you, but let's go
11 from there. If you used some of that cut as
12 fill, that would reduce the amount of your
13 claim; correct?

14 A. It would reduce the \$10 amount but it
15 would increase the 12.50 amount because we
16 had imported the same number of trucks. You
17 know, our bill was based on what was imported
18 into that job. If you'd like, I'd like to
19 change it all to 12.50 a yard if there is a
20 dispute.

21 Q. We're going to go through that in a
22 minute on Change Order No. 4. We'll get
23 there, but what I'm saying is: Is your
24 assumption for Change Order No. 2 that every
25 cubic yard of cut that you figured on the job

1 is unsuitable?

2 A. No, that's not my assumption. That
3 was just me giving on RCR's side.

4 Q. But then you acknowledge that you used
5 the cut in your fill areas?

6 A. I would think we used some of it, yes,
7 definitely.

8 Q. When I asked you in your deposition
9 how much of this was used in the fill areas,
10 because you again acknowledged some of it
11 was, you said you haven't calculated; right?

12 A. Huh-uh.

13 Q. You can't tell the Court today how
14 much of that 2,890 cubic yards was actually
15 used in the fill sections, can you?

16 A. No, because RCR didn't ask PSI to come
17 out or measure or verify it.

18 Q. You knew at the time they weren't
19 going to pay you for the cut sections when
20 they showed you the architect's record,
21 didn't you? They showed his letter, We don't
22 pay anything unsuitable in the cut?

23 A. I think that was addressed to the --
24 my agreement with RCR was it was supposed to
25 be 12.50 per yard and I did agree to a \$2.50

1 concession.

2 Q. When you had that agreement, did you
3 write a letter or anything that we can look
4 at or is it just because you put \$10 on your
5 change order?

6 A. No. I really had no reason to write
7 it because usually the person being protected
8 by that would write a letter. I would have
9 expected to have gotten a letter from RCR
10 saying you are just going to charge us \$10
11 instead of 12.50. I was going to do whatever
12 I said I was going to do and I didn't need a
13 -- if RCR would have requested a letter, I
14 think they should have initiated the letter
15 asking for that.

16 Q. But you realized under your contract
17 that the cut, if it was unsuitable, you were
18 not going to be paid for it?

19 A. According to my contract and our
20 agreement, they agreed to pay it.

21 Q. Under that Paragraph 20?

22 A. Yes, and the field conversation.

23 Q. And you realize that with the way
24 undercut is used, any time it is an undercut,
25 it is below subgrade; correct?

1 A. Let me say this, sir. I don't want to
2 get hung up on these words. Barbara typed
3 most of these. By the time it goes down the
4 chain by cut, undercut, fill, replace,
5 remove, that's what required these
6 additional -- you know, from the proposal to
7 the contract, that very issue was addressed
8 and then from the contract to the field, it
9 was addressed a second time, a clarification
10 of it to make sure what we had agreed to.
11 During our proposal, there was a clear
12 understanding. We did leave some room for
13 clarification in there and it was clarified
14 three times from the proposal through the
15 field.

16 Q. Are you talking about oral
17 clarification? Is that what you were saying?

18 A. Once it was written in here. If you
19 notice the proposal, it didn't get -- it left
20 some room for misunderstanding it. When we
21 got down to the contract stage, I said, no,
22 that's not what we bid this job at, and they
23 redone the contract and sent it to us.

24 Q. We'll let the judge look at what
25 Paragraph 20 says.

1 A. Okay.

2 Q. Let's talk about --

3 THE COURT: Let me make sure I
4 understand what he's telling me on the 12.50
5 and the \$10 and undercut and refilling.
6 You're saying if you charged Change Order No.
7 2 as undercut, it would be 12.50?

8 THE WITNESS: That's correct.

9 THE COURT: You charged him \$10
10 because it was refilling rather than
11 undercutting?

12 THE WITNESS: What we done at the
13 time was we charged \$10 and I gave them full
14 credit for all the undercut. I said, Let's
15 just assume all the undercut -- I get my
16 words mixed up, all the cut material is
17 unsuitable. I'm just going to give you full
18 credit over it instead of arguing. You
19 didn't keep PSI out there and document it
20 like you were supposed to. We have no way of
21 telling. Instead of arguing over it, just
22 give it to them. I'll give full credit for
23 all the undercut. It is to my advantage to
24 say we used it. We used all of it. It would
25 change the bill. It only increased my bill

1 to you that's owed if I had done that.

2 BY MR. CASHION:

3 Q. If you used it, it would be in the
4 fill; you wouldn't have brought as much
5 material in?

6 A. No, we would have. I mean, we brought
7 the same amount of material in regardless of
8 how that's accounted for. That doesn't
9 change the truck tickets that was imported
10 in. They're going to be the same. That's
11 what it took to do that job. No matter how
12 you twist it and turn it, that's what it took
13 to do the job. Now whether it was used --
14 maybe I'm not good at explaining it.

15 THE COURT: Let me see if I can
16 ask you this. You've kind of confused me a
17 little bit. Forget about what really
18 happened. I'm just talking so I can
19 understand it. If you were working on the
20 cut out there, the hump, and you didn't haul
21 it off, instead you pushed it over and used
22 it as fill, you would not need to import as
23 much dirt for fill; correct?

24 THE WITNESS: That's correct,
25 yes, sir.

1 THE COURT: I think that's what
2 Mr. Cashion was trying to get at. That's
3 just logical because you're just moving one
4 piece of dirt over to another piece of the
5 property so you don't need to add any more
6 new dirt to the project -- as much new dirt.

7 THE WITNESS: Correct.

8 THE COURT: So now back to trying
9 to figure out the deal that you were giving
10 them, the 10 as opposed to the 12.50,
11 explain that one more time.

12 THE WITNESS: Let me see if I
13 can.

14 THE COURT: Isn't that what we're
15 talking about, this concept of whether you
16 hauled it off or pushed it over? Isn't that
17 the difference between the 12.50 and the 10?
18 Isn't that what's going on here?

19 THE WITNESS: That's correct.

20 THE COURT: Take me through that
21 again.

22 THE WITNESS: Let me try to
23 explain it another way. More than likely,
24 Barbara was asking me -- she's getting ready
25 to prepare it and I was talking back and

1 forth to Harley saying how much of this --

2 THE COURT: What's Harley's last
3 name?

4 THE WITNESS: Ezell, Mr. Ezell.
5 How much of it was used and how much of it
6 wasn't. About that same time, that's when
7 that agreement come in. We entered into an
8 agreement and said, We will give you a credit
9 of \$2.50 per yard. I said, Did they get PSI
10 out there to measure it? They said no.
11 Nobody measured it. It wasn't all -- they
12 didn't measure it and quantify it. I said,
13 Well, for the sake of argument, what I want
14 to do is I know we brought this fill material
15 in. I'm going to go on and give them full
16 credit for that and say we didn't use, you
17 know, any of the undercut. Give them full
18 credit for it. I didn't overbill them and I
19 didn't overcharge them by doing that because
20 when it gets down to it, when you look at the
21 final result of what was brought in there,
22 1,132 trucks were brought in. Whenever you
23 look at it like that, I'm supposed to be paid
24 12.50 per yard. What I said is let's go back
25 and give them full credit for that full

1 amount of that cut instead of saying half of
2 it. We'll just presume out of that 1,132
3 that that was used to replace the cut. What
4 it's doing is giving them full credit because
5 they didn't keep up with it.

6 THE COURT: Let me see if I can
7 put it where I can understand what you're
8 telling me. What you're saying was we
9 probably used some of that cut as fill so it
10 wouldn't be fair to charge them 12.50 because
11 we didn't remove every piece of dirt out
12 there and import yard for yard. We probably
13 used some of it, so it wouldn't be fair to
14 charge them 12.50 a square foot. We'll
15 charge them \$10 a square foot. That will
16 take into consideration the fact that we
17 probably used some of that cut as fill. Do
18 you agree with that?

19 THE WITNESS: Correct.

20 THE COURT: Have I said it right?

21 THE WITNESS: Correct.

22 THE COURT: That's what your
23 thinking was?

24 THE WITNESS: Yeah, I just
25 couldn't say it.

1 THE COURT: I got what he's
2 saying.
3 BY MR. CASHION:
4 Q. Now, are you aware of any cut that a
5 geotechnical engineer has said was
6 unsuitable? Are you personally aware?
7 A. No, it's been so long ago, Mr.
8 Cashion, I don't.
9 Q. And your assumption on the change
10 order for all of the cut is that, if it's
11 unsuitable, you have to prove that first;
12 right?
13 A. Well, I disagree.
14 Q. Why are we going to pay you extra if
15 it's suitable material?
16 A. Oh, it definitely was that much
17 unsuitable. At that time we were already up
18 to that much unsuitable material.
19 Q. So you're saying all the cut was
20 unsuitable. That's why you tied it to a
21 change order; right?
22 A. No, that's not what I'm saying. What
23 I'm saying is I gave you full benefit. Since
24 you didn't have anybody out there to separate
25 the two between cut and fill, I gave you full

1 credit for it. That's what I'm saying in
2 that bill.

3 Q. But the underlying basis is, under
4 your interpretation, the vast majority of the
5 cut was unsuitable?

6 A. No.

7 Q. How much was unsuitable?

8 A. We don't know. You didn't -- PSI
9 wasn't called. You would have had to keep
10 PSI out there on that particular job -- and
11 RCR knows this as well as I do. You would
12 have had to have kept PSI out there around
13 the clock. It was a very unusual site unlike
14 a lot of them where you can come out and
15 measure a site and quantify how much material
16 it was. It was so pocketed, layered and
17 stratified that you would have had to keep
18 them out there from -- we was working 60
19 hours a week, 70, to get that job done for
20 you all. You would have kept them out there
21 the whole time. That's why I presume they
22 didn't -- in a lot of the situations, there
23 was no need to call PSI. I mean, anybody
24 could -- whenever you've got a truck buried
25 in an area up to the axles already, why do

1 you want to go get another truck to proof
2 roll it? I'm getting ahead of myself here.

3 THE COURT: We're right now
4 talking about Change Order No. 2 and the cut
5 as opposed to any other piece of the
6 property.

7 MR. CASHION: Right.

8 BY MR. CASHION:

9 Q. I guess you don't know, you don't
10 agree that the basis for you asking for
11 Change Order No. 2 for the cut area is that
12 it's unsuitable? You're unclear on that?

13 A. Yes, I do know that. I'm thinking
14 through it. I do agree that, yes, we're
15 asking for unsuitable material. Correct.

16 Q. And you don't have any proof from a
17 geotech that that material on site -- because
18 you said the soil borings was invalid, you
19 don't have any proof from a geotech that it's
20 unsuitable, do you?

21 A. I'm unsure of that, Mr. Cashion.

22 Q. Let's move on. Part of your rationale
23 for saying that Paragraph 20, any additional
24 undercutting and refilling encompasses
25 refilling as the cut area is that this is

1 inconsistent with the specifications;
2 correct? That's what you said on direct?
3 A. Yes, it would be inconsistent with the
4 specs.

5 Q. Now, let me hand to you Bates stamp
6 No. 140 from the project specifications.
7 This page which we've already discussed,
8 02221, is a part of your subcontract;
9 correct?

10 A. Correct.

11 Q. It talks about proof rolling. Were
12 you aware that you stripped six inches of the
13 topsoil off and then proof rolled it? Do you
14 even know that now?

15 A. What's that now?

16 Q. Are you aware that you stripped six
17 inches of topsoil and then proof rolled to
18 see if you had any unsuitable material under
19 there?

20 A. If that's requested, that's what we
21 do.

22 Q. That's what you say Ricky Tipper did;
23 right?

24 A. Correct.

25 Q. Now, it says on (b), Areas found to be

1 soft or pumping shall have the soft soil
2 removed and replaced as structural fill. Do
3 you see that?

4 A. Correct, yes, sir.

5 Q. Is that the same as undercutting,
6 undercut and refill, if you say remove and
7 replace, or are they inconsistent in your
8 mind?

9 A. Repeat it again, Mr. Cashion.

10 Q. Are the words "undercut" and "refill"
11 the same as removed and replaced?

12 A. Are the words "undercut" and "refill"
13 the same as --

14 Q. Removed and replaced? Isn't that the
15 same thing?

16 A. I apologize. I just can't think
17 through it.

18 THE COURT: Here's what we'll
19 do. Take a look at Paragraph 20. Did you
20 find Paragraph 20 in the subcontract?

21 THE WITNESS: Okay. There are
22 two Paragraph 20s here.

23 THE COURT: I think it is the
24 third page of your contract.

25 THE WITNESS: Yeah.

1 THE COURT: Do you see that's
2 where it uses the words "undercutting" and
3 "refilling" of areas?

4 THE WITNESS: Correct.

5 THE COURT: Now, what Mr. Cashion
6 is asking you to do is compare that to the
7 language on that page from the county
8 contract where it talks about soft soil being
9 removed and replaced. Take a look at that.

10 THE WITNESS: Okay.

11 THE COURT: Okay, Mr. Cashion.

12 BY MR. CASHION:

13 Q. Are those the same thing -- saying the
14 same thing?

15 A. Not in my mind, no.

16 Q. Please explain the distinction between
17 those two words "removed" and "replaced" and
18 "undercut" and "refill" in your mind.

19 A. Let me say this. Whenever I looked at
20 these contract documents, they go on and on a
21 lot of times. I am confused with them. Just
22 to clarify things, that's why I asked for the
23 qualifier in the contract and why I wanted it
24 redone. It wasn't right at this time and
25 that's why we had to have a third meeting in

1 the field.

2 When we started this job, in my mind
3 -- this is what I tried to convey and tried
4 to get in writing to where it was acceptable
5 to me before I signed it. I wouldn't sign
6 the contract originally the way they sent
7 it.

8 These words don't convey what we
9 discussed verbally. I said, to put it in a
10 nutshell, we're going to go out there and do
11 the job according to this Agtech report and
12 if there is any unsuitable material, we're
13 going to be paid 12.50 a yard for it. That's
14 what I wanted to be in writing. That's what
15 I thought I was getting, but it did have to
16 be clarified from time to time.

17 Q. You didn't say any unsuitable material
18 to be 12.50 a yard, did you? Where did you
19 ever say that?

20 A. It says, Due to unsuitable soils.

21 Q. It says, Any additional undercutting
22 and refilling due to unsuitable soils. Do
23 you see the difference we're talking about?
24 Are you comprehending that the difference
25 between undercutting which is below subgrade

1 and unsuitable soils and taking out something
2 above subgrade in a cut section, that's
3 unsuitable?

4 A. Correct.

5 Q. Okay. What you said is undercutting.
6 You said that in your contract and you said
7 that in your proposal, didn't you?

8 A. Yes, sir.

9 Q. The word "undercutting"?

10 A. Yes, sir.

11 Q. So you didn't say in your proposal any
12 unsuitable soil I'm going to be paid 12.50 a
13 cubic yard, did you?

14 A. That's what No. 20 was supposed to
15 convey. We were supposed to be paid if it
16 was refilled and if it was undercut.

17 Q. If you take out the cut, you're not
18 refilling anything; you're just moving it off
19 the side? There is no refilling activity, is
20 there?

21 A. Refill it, replace it.

22 Q. If it is in a cut section and you
23 don't use it in the fill, you just go away
24 with it, there is no refilling?

25 A. Yeah. If it is suitable material, it

1 goes to the fill.

2 Q. So you think those words are
3 different, "remove" and "replace" than
4 "undercut" and "refill"?

5 A. I just relied on what we had in our
6 contract, is what I relied on.

7 Q. Okay. Let me hand to you Bates stamp
8 No. 150 which is in 2300 of the contract. On
9 this, did you recognize that you had an
10 obligation to notify the geotechnical
11 engineer when the excavations had reached
12 subgrade?

13 A. That's correct.

14 Q. When you stripped, as you say, the six
15 inches off the soil, did you notify the
16 geotechnical engineer?

17 A. I'm not sure what time Harley notified
18 them. It was right at the start of the job.
19 That's when we had the first dispute
20 between -- from what I recall, that was the
21 first dispute they had in the field, the
22 classification of the soils.

23 Q. It says here you determined
24 unsatisfactory soils are present below
25 subgrade; continue excavation upon approval

1 of the owner and replace.

2 Are you saying "excavation" and
3 "replace" is different than "undercut" and
4 "refill"?

5 A. Repeat that again.

6 Q. Do you see where I am reading on (b)?
7 It says, Continue excavation upon approval of
8 the owner and replace. Is that different
9 than "undercut" and "refill"?

10 A. I don't know how to answer that. I
11 apologize. I ran through this same thing
12 when we were looking at the job, you know. A
13 lot of times I have a hard time understanding
14 these. That's why I wanted this clarified.

15 I guess what I was saying through our
16 disclaimer, our qualifier, was I don't
17 understand exactly what you're saying over
18 here. All I'm saying is I'm going to do the
19 job. If there are any unsuitable soils, I
20 will pay you 12.50 a yard. Regardless of
21 what this says, our contract takes
22 precedence. I guess that's why I
23 disassociate these to the point that I feel
24 like our contract took precedence over what
25 we had here.

1 Q. And did you understand from reading
2 this that undercutting without the owner's
3 approval is at contractor's risk? Did you
4 know that?

5 A. That's what this says.

6 Q. Again, it says additional excavation
7 and replacement of material. Again it is
8 your testimony that that's different than
9 "undercut" and "refill"?

10 A. Repeat that again, Greg.

11 Q. No. 1, additional excavation and
12 replacement.

13 A. You're on (b) 1?

14 Q. (b) 1, Undercutting below subgrade
15 within a cut section, additional excavation,
16 replacement material. Do you see that?

17 A. Correct.

18 Q. It is your testimony that's different
19 than undercut and refill?

20 A. That's different from what I was
21 claiming we were doing with the Paragraph 20.

22 Q. And then the next sentence talks about
23 measurement for payment of unsuitable
24 material will be by the average-in method for
25 the volume of unsuitable material excavated

1 below design depths.

2 A. Correct.

3 Q. Isn't that exactly how you submitted
4 Change Order No. 3 to RCR? You did the
5 average-in method of volume that was mapped
6 out by PSI?

7 A. I don't think so. I don't know if we
8 got that from -- if they supplied it from
9 PSI. Somebody had measured those four major
10 questionable -- the ones that they had a
11 question with. I think that's what those
12 four areas are in those change orders, are
13 those four questionable areas.

14 Q. That was not a truck count; correct?
15 The Change Order No. 3 is not a truck count?

16 A. I've got 1 and 4.

17 Q. I think it was Exhibit 8, what you're
18 looking for.

19 A. What's that?

20 Q. Exhibit 8.

21 A. Change Order No. --

22 Q. 3.

23 A. It looks like, to me, that's how it
24 was calculated.

25 Q. Right.

1 THE COURT: The average-in
2 method?

3 THE WITNESS: I'm not sure if it
4 is the average-in method. What I remember,
5 more than likely, Barbara called PSI or
6 whoever they had to measure the area and get
7 those measurements, you know.

8 BY MR. CASHION:

9 Q. You think PSI gave you these
10 measurements? If they calculated by
11 average-in, that's --

12 A. I don't think she could have
13 calculated it.

14 Q. Did you draft up this change order?

15 A. Barbara did.

16 Q. Did you draw the unsuitable areas, the
17 little diagram behind there?

18 A. It looks like it is computer generated
19 but I recall taking those measurements or
20 something and tried to sketch off a plat of
21 it. It is not in my writing but I do recall
22 working on that or discussing it anyway.

23 Q. And you realized from reading these
24 specifications that truck loads were not an
25 acceptable method to pay for undercut

1 material?

2 A. At that time I didn't know that at the
3 time, no.

4 Q. You know now that truck loads is not
5 an acceptable method under these
6 specifications that were part of your
7 contract to pay for unsuitable materials?

8 A. That was the contract RCR has with the
9 county, correct.

10 Q. But 2300 is in your contract, isn't it?

11 A. That's correct.

12 Q. And if you look down there at
13 Paragraph (c), the last sentence says, Any
14 areas exhibiting significant deflection in
15 the opinion of the geotechnical engineer
16 shall be undercut as directed by the
17 geotechnical engineer and replaced with
18 compacted engineer fill. Do you see that?

19 A. Yes, sir.

20 Q. Do you believe it's different when it
21 says "undercut" and "replace" as opposed to
22 "undercut" and "refill"?

23 A. Yes.

24 Q. Now, let me hand to you Bates stamp

25 No. --

1 THE COURT: Let me make sure I'm
2 with you again, Mr. Cashion.

3 MR. CASHION: Yes, sir.

4 THE COURT: Mr. Parker, according
5 to the sheet here from the big county
6 contract, it looks like if you had gone to
7 ask for additional payment for unsuitable
8 materials, you were supposed to use this
9 average-in area method; is that right?

10 THE WITNESS: That's correct.

11 THE COURT: Is there anything in
12 your specific contract with RCR that
13 addresses this issue, how you calculate the
14 volume of unsuitable materials?

15 THE WITNESS: No. I think
16 there's nothing specifically in writing. I
17 think that evolved as we got into those
18 layers. The way the soils was, I think --
19 and I accepted doing that. We would roll on
20 over into -- I mean, I think they started out
21 that's what they wanted to do. I think
22 that's what RCR's intentions was to use PSI.
23 Nobody really expected to get any kind of bad
24 soil at all.

25 I think the way this thing was

1 drafted from the start, when I first started
2 the job, I was under the impression that that
3 would probably be one of the methods. It
4 would probably be the method they would use,
5 and I think they tried to use it when we
6 first started and got into some of the major
7 areas.

8 As time went on, it got into -- I
9 think they avoided getting PSI to do those
10 methods and calculations due to the expense
11 of keeping PSI out there the whole time. It
12 would have literally been -- I mean, I know
13 it sounds like an exaggeration. I really
14 believe we would have been sitting there
15 today.

16 It wasn't like it was just three
17 or four little pockets. It was just
18 constantly every day. We had to have PSI out
19 there four and five times a day back and
20 forth in that time period. I guess I'm
21 presuming. I am presuming that's why RCR
22 rolled into not calling PSI out to do that
23 average-in method.

24 We sent them a letter. We
25 encountered these soils. We want a

1 representative of RCR out there, and PSI.
2 We're going to let you all handle that and
3 they accepted that. They wanted PSI out
4 there to measure it. If there was a dispute,
5 they got them out there. That clearly wasn't
6 my place to call them anymore. That
7 responsibility became theirs.

8 THE COURT: Is that letter you
9 referred to the one I've seen around here,
10 the July 1st? Is that the letter you're
11 talking about?

12 THE WITNESS: I think it is.

13 THE COURT: Who wrote that one?

14 THE WITNESS: If I'm not wrong,
15 Harley Ezell did. I would have preferred
16 looking back at it. Now, we wouldn't have
17 been up here going through this if they would
18 have got PSI out there and done the
19 average-in. It would have come up probably
20 within 3 to 5 percent -- I tell you what. I
21 would have guaranteed it would probably come
22 up 5 to 10 percent over. I know I rounded
23 down everything in there. I do round down.
24 I would bet everything. I know beyond a
25 shadow of a doubt if they would have got PSI

1 out there, it would have come up at least 5
2 percent more than what they're billed for. I
3 wish they had. That would have simplified
4 things if they would have addressed that.

5 BY MR. CASHION:

6 Q. On that comment there, you admit that
7 you calculated in Change Order No. 3 the four
8 major areas; right?

9 A. That was the four major areas that
10 there was a question about. There were a lot
11 of other questions with other soil out there.

12 Q. Let me hand to you what is Bates
13 stamped 149, which is Page 2300-3. On here,
14 it says, Undercutting of unsuitable material
15 shall consist of removing and disposing of
16 unsatisfactory material below grade and cut
17 from areas upon which embankments are to be
18 placed.

19 So this is both for the cut sections
20 and the fill sections; right?

21 THE COURT: Say that again.

22 BY MR. CASHION:

23 Q. Undercutting of unsuitable soils can
24 occur below grade in the cut section or where
25 the fill section is to be placed. It is not

1 a big point, but in a cut section, it is
2 below the grade and in a fill section, it's
3 below where the fill is going to be placed.
4 Do you see what they're saying?

5 A. You say the cut section is below
6 subgrade?

7 Q. Below subgrade.

8 THE COURT: It looks, to me, like
9 the cut section is above the subgrade.

10 BY MR. CASHION:

11 Q. In a cut section, if you have a cut,
12 the undercut will be below subgrade. That
13 stuff is not undercut. It is just below
14 subgrade. Do you see that? Do you agree
15 with that? You cut it down so far, you get
16 to subgrade. If you go any further, it is
17 undercutting?

18 A. I'd still call it cutting. You could
19 call it undercut. It is confusing.

20 Q. Undercut is below subgrade, is what
21 they're saying?

22 A. Okay.

23 Q. In a fill section, the grade may be
24 here but they're saying in a fill, it is
25 where you start filling from to get to

1 grade. Do you see that?

2 A. Correct.

3 Q. Now, was it your impression that the
4 topsoil was greater than six inches?

5 A. I think in places. That's the report
6 I got that, yes, it was greater than six
7 inches.

8 Q. Did you ever see the soil when it was
9 stripped to where you would have personal
10 knowledge of whether the topsoil was six
11 inches, a foot, two foot?

12 A. I've seen it at various times while it
13 was stripped.

14 Q. Do you have an opinion as to whether
15 the topsoil was a six inch uniform depth?

16 A. No, it definitely wasn't. There
17 wasn't anything uniform with this job
18 including the topsoil.

19 Q. Is part of your claim for topsoil that
20 is greater than six inches?

21 A. I guess you could twist it like that.
22 Our claim is for unsuitable material and,
23 yes, topsoil would have been unsuitable
24 regardless of the depth it was.

25 Q. The specifications say undercutting

1 does not include the stripping of topsoil to
2 the depth encountered. Were you aware of
3 that? If you had to strip two feet of
4 topsoil, that's not undercutting. Did you
5 realize that?

6 A. That it's not -- I mean, it would have
7 definitely been unsuitable material. You're
8 saying we wouldn't have cut it or it wouldn't
9 have been undercut?

10 Q. It wouldn't be considered undercutting
11 if you're stripping topsoil, is the way I'm
12 reading it, and I'm asking if that's your
13 understanding of this?

14 A. We have always went in and stripped
15 the top six inches of topsoil and then proof
16 rolled it. You usually proof roll it
17 actually as you're stripping it, if you're
18 doing it with a pan. That whole site was --
19 by the time we went over to get the six
20 inches off according to the soils report,
21 there were places we had to dig out to get
22 the machines unhung, you know, where they
23 buried up.

24 Q. If you had stripped the topsoil, say,
25 two feet down, that's more material you have

1 to bring in to bring it back up to grade,
2 correct, if it's in a fill section?

3 A. Yeah. You definitely have to bring it
4 back in if it's unsuitable.

5 Q. So if you have a thick topsoil
6 section, you have to strip it out, get it out
7 of there. Therefore, you have to bring in
8 more fill to get back to grade; right?

9 A. Correct.

10 Q. Okay. What the specifications are
11 saying is if you're stripping topsoil to the
12 depth encountered, that's not undercutting;
13 right? That's what it says?

14 A. I haven't read that.

15 Q. So did you make any attempt to see
16 what your actual depth of topsoil that you
17 were taking out was on this site?

18 A. They had to get PSI out. I think we
19 got them out or got one of the engineers out.
20 We were classifying it as unsuitable
21 materials. From what I remember, there was a
22 dispute between the engineers on what was
23 topsoil and what wasn't.

24 Q. Isn't it true you were looking in on
25 the project maybe once a week at most?

1 THE COURT: Once a week.
2 Sometimes he would let two or three weeks go
3 by and then he would be out there twice a
4 week.

5 THE WITNESS: It varied.

6 BY MR. CASHION:

7 Q. Were you at a meeting on June 23rd
8 when the soils engineer was there with RCR?

9 A. No.

10 Q. Were you at the meeting on June 30th
11 that's referenced in Harley Ezell's letter?

12 A. No, I wasn't. No, I wasn't at the
13 meeting. I had been out there but I don't
14 think I was there at the meeting.

15 THE COURT: I tell you what. I
16 know he's a tough guy, but let's take a
17 little break.

18 (Brief recess observed.)

19 BY MR. CASHION:

20 Q. Mr. Parker, continuing on our cross-
21 examination, you recall the July 1 letter of
22 Mr. Ezell?

23 A. Yes, sir.

24 Q. And you didn't have a problem with Mr.
25 Ezell writing that letter, did you?

1 A. I didn't find anything wrong with the
2 letter.

3 Q. Isn't it true that at this time, when
4 your unsuitable material that he's talking
5 about was discovered prior to July 1 or
6 August 30 that no notice was given of that
7 and it was not the intent of American
8 Excavators to ask for compensation?

9 MR. PANTHER: Let me object to
10 the form of that question. I think Mr.
11 Cashion asked a couple of questions there and
12 I'd like him to break it down.

13 THE COURT: Good idea because I
14 kind of got lost. Start again.

15 BY MR. CASHION:

16 Q. Prior to the meeting of June 30, there
17 had been no notice given about the unsuitable
18 material that had been excavated; correct?

19 A. I don't think so.

20 Q. Prior to that time, June 30, 1999, it
21 was not the intent of American Excavators to
22 ask for compensation for that unsuitable
23 material you had taken out; correct?

24 A. I believe what he's addressing in the
25 letter is a good example of how the time was

1 flowing. The very first day on the job we
2 gave notice there were problems.

3 As far as a summary of our job, on
4 6-16-99, it says the soils man is coming in
5 the morning. The very first day on the job
6 we notified the soils man. This is in regard
7 to -- you know, this is addressing that.
8 That's why, you know, we have RCR out there
9 saying, Give us the pad, Give us the pad.
10 That's why even before we got this, we were
11 directed to keep removing.

12 If you look at the notes on there, it
13 says the very next day, Soils man came to
14 site; said to undercut unsuitable soil. RCR
15 gave go-ahead on the undercut.

16 That was the second day on the job
17 which was way before this. This was just
18 trying to -- I think that's why RCR adopted
19 the new policy of what they were doing in
20 order to keep this job moving. They had to
21 for the county.

22 You know, we notified the very first
23 day on the job -- the soils man was notified
24 there's a problem here. By the second day,
25 we were given an okay by RCR and the soil

1 scientist to remove it. It had to be
2 removed. What we were trying to say is that
3 first day we encountered this but we were
4 told at the end of that first day, the next
5 morning, to continue on. We've got to have
6 the pad.

7 Q. Let's take it in two parts. That
8 first day, what you're saying is June 16;
9 right?

10 A. According to what --

11 Q. Looking at the summary of daily
12 reports until June 30 when they had the
13 meeting, you took out unsuitable soil in your
14 opinion; right?

15 A. No. We got into -- what I recall and
16 according to these events is we had got into
17 in the topsoil stripping. We noticed -- we
18 already had a question with it so let's bring
19 the soils man in. What we continued to do
20 was to work on the pad. If you look on here,
21 we were waiting on all this to go through.
22 We started on the pad and had the pad
23 finished six days later.

24 Q. My question is: From the time you got
25 on the job until June 30 as Mr. Ezell is

1 telling RCR, we've undercut some unsuitable
2 soils in our opinion, but you did not have
3 the intent to charge anybody for that
4 unsuitable soils at that time; correct?

5 A. Yeah, that was that first day of
6 undercutting.

7 THE COURT: That's the 600 yards
8 he's referring to?

9 THE WITNESS: Yeah.

10 BY MR. CASHION:

11 Q. You, yourself, have no idea how the
12 600 yards was calculated, do you?

13 A. Harley went out to the job and
14 measured it. That's the report he gave me.
15 It was approximately 6- or 700 yards. On
16 that one day, let's just give them that, but
17 from this day forward, just like this letter
18 says, we've got to charge for unsuitable
19 material, not undercut or refill or any of
20 the words you're twisting it with. Our
21 letter says per contract price of 12.50 per
22 yard for unsuitable material.

23 Q. So, in this trial, are you still
24 saying that for any unsuitable material up
25 until June 30, it is not your intent to

1 charge for it, or have you changed your
2 position?

3 A. No. I think it says approximately 6-
4 to 700 yards of material that we did agree
5 to.

6 Q. You recognize as of June 30 you're not
7 making a claim for any unsuitable material
8 you may have taken out of the site?

9 A. The letter says we're not making a
10 claim for the 6- to 700 yards of that. It
11 probably took a week to get the county out
12 there to have this meeting.

13 I mean, that's what we keep trying to
14 stress. We run into problems that day. We
15 called the soils -- the county wouldn't come
16 out the next day, or the engineer wouldn't.
17 It probably took until the 30th until they
18 could gather everybody up to make a decision
19 on this. I think that's when the verbal in
20 the field come about for the cut material,
21 for the deduction to be given on that.

22 MR. CASHION: Let me hand you
23 the letter. I just realized this letter has
24 not been made an exhibit yet.

25 THE COURT: It's attached to

1 Exhibit 8. You can certainly make it an
2 exhibit.

3 MR. CASHION: Let's make it the
4 next exhibit which will be, I think, 14.
5 Just so we have a clear record, that's the
6 July 1 letter that we're speaking of.

7 (Exhibit No. 14 was marked.)

8 THE COURT: Mr. Parker, from what
9 I understand, I think you're saying but I
10 want to be sure, as of July 1, June 30, it
11 looks like your man Ezell is saying we've
12 removed about 600 yards of unsuitable
13 material. And he's saying if we have to
14 remove any more unsuitable material after
15 this date, then we want to be paid extra for
16 it at the rate of \$12.50. Is that the way
17 you read this?

18 THE WITNESS: My understanding is
19 that's all -- they were working two different
20 areas. They started stripping the topsoil
21 and that's where the questionable area came
22 up and they got right over on the pad and
23 started it. So we didn't remove any more
24 that I know of, any more unsuitable material
25 until we got the soil scientist out. He came

1 out the next day and said it's got to be
2 removed and RCR said to remove it.

3 THE COURT: You're talking about
4 the next day being what date?

5 THE WITNESS: The 17th is the day
6 they gave us a directive to remove the soil,
7 keep this job moving.

8 THE COURT: The 17th of June or
9 July?

10 THE WITNESS: June.

11 THE COURT: All right. And did
12 you remove some soil after the 17th of June?

13 THE WITNESS: I don't know if we
14 did or not, from the 17th through the 30th.
15 According to the daily logs, it looked like
16 we concentrated on the pad only. It had to
17 be filled and that's what we were already
18 starting to import. I think as soon as we
19 got all that worked out and RCR took over the
20 testing and contacted PSI, then we went back
21 to working in our cut areas.

22 THE COURT: That makes sense from
23 a business standpoint. It looks like until
24 you have worked this out, in your mind, you
25 wouldn't want to remove any more soil; is

1 that right?

2 THE WITNESS: That's correct,
3 unless we were given the directive to go
4 ahead by the contractor, which is RCR.
5 According to the notes, you know, we made the
6 report the first day we was on the job that
7 there were soils problems.

8 THE COURT: Did you have a
9 directive to go forward prior to this letter,
10 July 1?

11 THE WITNESS: Yes.

12 THE COURT: And that directive
13 was under what terms?

14 THE WITNESS: The reports I
15 received from the field was the soils man
16 came to the site and said to remove
17 unsuitable soil. RCR gave the go-ahead on
18 undercut but I think we let, if I'm not
19 wrong -- you'll have to ask the field people
20 that. It was set there. They were really
21 pushing for this pad. Get this pad ready.
22 According to this log, six days later, I
23 think, we gave them the pad.

24 We worked on that and then went
25 back to all this cutting. We were still

1 hauling in material at that time because we
2 had to have 3,000 yards. We knew, if
3 everything was perfect out there, we were
4 going to have 3,000 yards. We were hauling
5 every day stockpiling that trying to get the
6 pad ready to go. I think that's where some
7 of the confusion may be, too. We did notify
8 them. I get the impression Mr. Cashion is
9 trying to say we didn't notify nobody. The
10 very first day on the job we done what we
11 were supposed to have done.

12 BY MR. CASHION:

13 Q. Let me ask you this: Did you notify
14 anybody when you stripped the topsoil that
15 you were taking two foot of topsoil out of
16 there, or did you even know that you were
17 taking two foot?

18 A. When Ricky first started that one area
19 out there?

20 Q. First area before June 17, right, when
21 he's stripping topsoil?

22 A. I think it would have been June 16,
23 was probably the day that we started it.

24 Q. When he started stripping, did he
25 notify anybody, I'm taking two feet out,

1 I've got a problem?

2 A. It says he notified the soils man and
3 he definitely told Anthony Orange what was
4 going on. That was the soils, from what I
5 understand, where they came out and
6 distinguished -- where they had the dispute
7 about whether it was suitable or unsuitable.

8 Q. Let's go with what your knowledge is.
9 You don't know how much topsoil he's stripped
10 until he notified the soils man, do you?

11 A. I had seen the area that he had
12 stripped, yes.

13 Q. And are you claiming today to go back
14 and pick up all the undercut that was made
15 prior to, let's say, the meeting of June 30
16 or the letter of July 1?

17 A. No. What I did -- that's one of the
18 reasons I rounded.

19 Q. Is that a yes or a no? Are you
20 claiming that?

21 A. Repeat that.

22 Q. Are you claiming to the Court today
23 that you want to be paid for whatever
24 material you undercut on that site prior to
25 July 1, 1999?

1 A. No.

2 Q. Okay. Let me talk a little bit about

3 Change Order -- let me hit this just a

4 second. We've got that small claim of the

5 testing credit we wanted from you; do you

6 remember that?

7 A. Correct.

8 Q. Isn't it true, if you look at Pay Ap

9 No. 4 -- do you have that one in front of

10 you?

11 A. Yes, sir

12 Q. Exhibit No. 11. Do you see that one?

13 A. Yes, sir.

14 Q. If you look on the second sheet of

15 that -- turn to the second sheet -- go down

16 about a little more midway where it says Soil

17 Testing. Do you see that?

18 A. Yes, sir.

19 Q. You've got \$2,000. Do you see that?

20 A. Correct.

21 Q. And you want to be paid 100 percent of

22 your \$2,000 on this pay application, don't

23 you?

24 A. That looks like what Barbara typed,

25 yes, sir.

1 Q. You recognize from Harley's letter
2 that you didn't incur all the testing because
3 RCR took it over; right?

4 A. We didn't incur -- I don't dispute
5 that. We really incurred very little, if
6 any, of the testing. That should be refunded
7 to them.

8 Q. So, really, instead of what we paid,
9 we should get a refund on most of the 2,000
10 because you incurred very little?

11 A. Yeah. I mean, I think that decision
12 was made almost at the very start that that
13 was...

14 Q. Now, on Change Order No. 1, do you
15 recognize that when you refilled the area
16 that was taken out by the RCP, the piping
17 there, you're not claiming that as part of
18 your import, are you?

19 A. No.

20 Q. Just let me make sure the Court
21 understands what I'm saying. If you look at
22 Ricky Tipper's daily reports here, you hauled
23 off the RCP and hauled in the shot rock,
24 proof rolled for trench backfill. You're not
25 claiming any truck tickets for that; right?

1 A. I think that was another area where we
2 didn't -- any of the trucks that we -- we had
3 one truck on the job and we used it. If we
4 had an extra guy not doing anything, that's
5 what he would do. He would haul in loads.
6 Ricky estimated that to be a minimum of 100
7 loads that we're not even charging for that
8 we brought in in our own trucks.

9 Q. That's in Change Order No. 1, the
10 \$1800 that you're asking for?

11 A. Correct.

12 Q. Now, on Change Order No. 2 -- I've
13 talked about this; I want to make sure that
14 we're clear -- of the 2,890 cubic yards that
15 you estimated for cut, if you moved that to
16 the fill area, that's in your base contract
17 price; right?

18 A. Which one, Greg -- Mr. Cashion?

19 Q. Change Order No. 2, which is a part of
20 Exhibit 8.

21 THE COURT: What was the
22 question?

23 BY MR. CASHION:

24 Q. The question is: If the material is
25 suitable, then you move that material at no

1 cost, no extra cost, to RCR because it is a
2 part of your contract; right?

3 A. If it is suitable.

4 Q. Right.

5 A. Correct.

6 Q. Now, in your direct testimony Mr.
7 Panther asked you that when you submitted
8 Change Orders 2 and 3 on or about August 17,
9 '99, he asked you why you did not analyze
10 your truck tickets. If I recall, your answer
11 was not all the truck tickets were in and you
12 were still looking at it. Is that generally
13 correct?

14 A. That would have been one of the
15 reasons, correct.

16 Q. Also, when Mr. Panther asked you in
17 order to get them as a business record
18 exception, you said that they were all signed
19 contemporaneously on the job site each and
20 every day?

21 A. That's my understanding.

22 Q. So isn't it true that as of your last
23 truck ticket, which according to this chart
24 would have been July 30, you should have had
25 every truck ticket that you're claiming in

1 your possession to where you could have made
2 your calculation at that point?

3 A. If we knew that was the end of it. We
4 still weren't sure that we weren't going to
5 bring in more or remove more at that stage.

6 Q. The excavation is complete, isn't it?
7 You've got everything up to --

8 A. Yes. It ended up being complete but
9 I'm just saying at that time there still
10 would have been that question of what more
11 have we got to do, you know. It is not
12 complete until it's complete.

13 Q. I guess my question is: It's not
14 accurate to say the reason you didn't analyze
15 your truck tickets was because you didn't
16 have them because, in fact, you had every one
17 of them the last day they were there; right?

18 A. We should have had most all the
19 tickets if Ricky had turned them in at that
20 time, if he was turning them in weekly.
21 Sometimes he kept his monthly and went over
22 them with Barbara monthly, but you'll have to
23 ask Mr. Tipper that.

24 Q. Did you see fit when you turned in
25 your two change orders on August 17 to even

1 notify RCR that you had something more
2 coming, that this was incomplete, this was
3 not the full value of the undercut?

4 A. Yeah, I think they knew it. That's
5 what my phone calls was, trying to get Mr.
6 Stover to -- he wanted to finalize this when
7 we got down to the completion of it.

8 Q. How many conversations did you have
9 with Mr. Stover in the field? Not phone
10 calls after the fact but in the field?

11 A. In the field?

12 Q. Yeah.

13 A. And you're counting like if I had one
14 early in the morning and that afternoon as
15 two conversations?

16 Q. Right. When did you see him and have
17 conversations with him? Were you
18 communicating with him on a regular basis on
19 this job?

20 A. He wasn't on the job on a regular
21 basis.

22 Q. And you weren't either?

23 A. Well, no, huh-uh. No, huh-uh, I
24 wasn't.

25 Q. Isn't it true when you approached the

1 county in either late March or early April
2 you were requesting at that time payment of
3 only the three change orders, 1, 2 and 3, for
4 approximately \$54,000?

5 A. No. Why I contacted them was I
6 contacted them and told them I couldn't get
7 any response from RCR's representative and we
8 still have unpaid bills out there. At that
9 time, I don't think I had even billed it yet
10 because I was still trying to get them -- to
11 force Don Stover or somebody to acknowledge
12 there was a problem out there and sit down
13 and let's analyze this and get to the bottom
14 of it.

15 Q. Isn't it true that when you met with
16 them, you were only talking about the \$54,000
17 that you had in outstanding change orders 1,
18 2 and 3?

19 A. That's all it was at that time.

20 Q. And then within a week, you decide to
21 send Change Order No. 4 for \$123,000; right?

22 A. That's correct.

23 Q. Okay. When you sent this change order
24 in, this is all you sent in, wasn't it? You
25 didn't send truck tickets? You didn't give

1 them an analysis of how you came up with that
2 number? You didn't do anything but send one
3 sheet of paper with -- that sheet of paper to
4 them; right?

5 A. That's correct. I believe it to be
6 correct.

7 Q. You keep telling us that you're giving
8 us this great credit on the 2.50 but isn't it
9 true that you're charging 12.50 for every
10 cubic yard of material that you've counted
11 out there?

12 A. On that line item, but the credit is
13 given down in Change Order No. 2 or 3. I
14 believe it was No. 2, if I'm not wrong.
15 Instead of that -- that change order for
16 28,980 versus 12.50 a yard. That's why the
17 credit is given right there.

18 Q. If you charge us every cubic yard for
19 12.50 and then you deduct out payments,
20 you're still charging us every cubic yard for
21 12.50. So what you've actually done is
22 changed this up by 2.50; do you understand?

23 A. You may be right.

24 Q. Think it through. If you start with
25 12.50 at 13,500, you get 168,750. It doesn't

1 matter how much these amounts are. They're
2 just amounts of money because you're
3 ultimately charging us 12.50 for every cubic
4 yard because you just subtract dollars out.
5 Do you see that?

6 A. I'm under the impression that when she
7 done that, she was under the assumption she
8 was giving a credit. I'm still not agreeing
9 with you. I'm under the impression the
10 credit is given on Change Order No. 2.

11 Q. I agree that Change Order No. 2
12 reflects \$10 a cubic yard. When you do this
13 type of math and you charge them all for
14 12.50, your net number is you're charging
15 12.50. You've taken away the credit that you
16 kept talking about in direct. Do you see
17 what I'm talking about?

18 A. I'm sure I will tonight when I get in
19 and let it soak in a while.

20 THE COURT: I think he's got you
21 on that one.

22 THE WITNESS: It is. It's owed.
23 It's owed.

24 THE COURT: I want you to
25 understand what he's talking about. What

1 he's saying there is you see you got your
2 bill there of 168,750. What the problem is,
3 when you took out Change Order No. 2 where
4 you gave him the credit, really to give him
5 credit, you would have had to have charged
6 him 15 or \$16 because the way it is working
7 -- the way you've set it up, you've just
8 given him the bill at \$28,000 and that was
9 calculated at the 10.50 but you're
10 subtracting it from the \$12.50 calculation.

11 THE WITNESS: Yes, sir.

12 THE COURT: I know what you meant
13 to do. You meant to give him a credit.

14 THE WITNESS: What I meant to do
15 is what Barbara -- she was instructed to give
16 them credit for that. I'm sure she thought
17 she was giving them a credit, and I was until
18 he pointed it out. If that's the case, then
19 a credit needs to be issued for the whole
20 amount times 2.50 -- are you saying \$5?

21 THE COURT: You need to add
22 another 2.50 to the calculation on Change
23 Order No. 2.

24 MR. CASHION: To take out what it
25 would have been.

1 THE COURT: To subtract it.

2 MR. CASHION: Right.

3 THE WITNESS: I apologize.

4 That's nothing intentional.

5 THE COURT: No, no, no. That
6 wasn't intentional.

7 BY MR. CASHION:

8 Q. You kept saying giving credit. I
9 wanted to make sure we weren't confused.

10 A. Up until that point, I thought we had
11 gave you credit but I'm wrong.

12 Q. We don't even think you're entitled
13 to the 10, so this is a minor issue. Let's
14 talk about what math you did to get to this
15 great number of 13,500.

16 Today in court you've testified under
17 oath that you used 15 cubic yards per truck;
18 is that true?

19 A. That's correct.

20 Q. Isn't it true that you've changed your
21 testimony in order to get more cubic yards up
22 in the last -- I don't know -- week, last
23 night? When?

24 A. I realized that I was thinking about
25 the tandem axle trucks. I read my deposition

1 and I caught that. You know, I caught it
2 myself. I did use \$12. That is absolutely
3 correct -- I mean, I used 12 yards in my
4 deposition, is what I used, but that's not
5 what I used to calculate that.

6 Q. Wait a minute now. I want to make
7 sure we understand. In your deposition, you
8 testified under oath that this number,
9 13,500, was calculated with 12 yards per
10 load?

11 A. That's correct, but that was a
12 mistake. If we would have multiplied it out
13 that day, we would have caught it then.

14 Q. We don't catch it at all. Let's
15 multiply it out. Do you have your calculator
16 up there?

17 A. Yeah.

18 Q. Let's take the total number of yards
19 you're claiming. Let's take 11,132 cubic
20 yards times 12 yards per load -- 1,132 loads
21 times 12 yards per load and what do we get?

22 A. 133- --

23 Q. No. It's real simple. 1,132 times
24 12?

25 A. I got 13,584.

1 Q. So you've got 13,584 and you charged
2 us for 13,500. So you're in the right area
3 when you were telling us the math in your
4 deposition, weren't you?

5 A. No, sir, because whenever you take out
6 the -- if I use that to do it, I would have
7 come up with --

8 Q. But in your deposition, you never
9 acknowledged that you were supposed to take
10 out the import, did you?

11 A. Yeah, as far as I'm concerned. If I
12 didn't, it is a mistake.

13 Q. That's another mistake. In your
14 deposition, didn't you testify under oath
15 that that yardage -- the trucks were all
16 hauling material out?

17 A. No. I testified -- well, there is a
18 statement in there but right up above it I
19 stated they were coming in. You done a good
20 job that day of twisting and turning things,
21 though. I give you credit for that.

22 Q. Let me read your deposition testimony
23 to you. I asked you on Page 40 of your
24 deposition: "Did you instruct Mr. Tipper to
25 log all the undercut that he hauled off this

1 job?"

2 MR. PANTHER: If you're going to
3 read his deposition, he needs to have a copy
4 of it.

5 BY MR. CASHION:

6 Q. It is Page 10 if you have the
7 condensed version and I'm on Page 40 of that.
8 Are you with me, Mr. Parker?

9 A. No. I don't think I am. You're on
10 Page 40?

11 Q. Yeah, but it's Page 10 under the
12 scrunch version -- it is Page 40 -- because
13 there are four pages per page.

14 A. Where do you want me to read at?

15 Q. You verify that I'm reading it
16 correctly. I said: "Did you instruct Mr.
17 Tipper to log all the undercut that he hauled
18 off this job?"

19 Do you see that question?

20 A. Correct.

21 Q. And you say: "Yes, sir."

22 I said: "Do you believe that he did
23 follow your instructions and account for the
24 loads that left the job as undercut
25 material?"

1 And you say: "Yes, sir."
2 Do you see that?
3 A. Yes, sir.
4 Q. Turn over to Page 17 of your
5 deposition.
6 A. Okay.
7 Q. I say on Line 12: "You can't tell
8 from these tickets, can you?"
9 MR. PANTHER: What page?
10 MR. CASHION: Page 65, excuse
11 me. Page 17 of the scrunch, Page 65 of the
12 deposition.
13 MR. PANTHER: Line 2?
14 MR. CASHION: Line 12.
15 BY MR. CASHION:
16 Q. I asked you: "You can't tell from
17 these tickets, can you? They don't tell you
18 what they're hauling."
19 And you say: "I was told."
20 "By?"
21 You say: "Ricky Tipper."
22 I said: "That the loads of unsuitable
23 material were hauled out and replaced?"
24 "That was the loads."
25 I say: "Okay. How do we know?"

1 "I've got just another example.
2 "Is that not Williamson County?
3 "Yeah.
4 "Carter House job?
5 "Yeah. Some drivers wrote that on
6 there. It is right behind the Carter House.
7 "So, this is, to the truck drivers,
8 the Carter House job?
9 "Yeah."
10 Then I go down and I ask: "How am I
11 supposed to know if these are tickets where
12 you're hauling your topsoil off your
13 subdivision?
14 "They are included."
15 So I asked you: "So, it is your
16 testimony that every one of these tickets
17 that you hauled included -- that you included
18 is hauling unsuitable soils off the job?"
19 And you say: "Yes, sir."
20 Do you see that?
21 A. I'm looking right up above it where I
22 say those aren't included in there.
23 Q. I was talking about the topsoil. You
24 said the topsoil is not included and then
25 later you said right.

1 "It is your testimony that every one
2 of these tickets that you included is hauling
3 unsuitable soils off the site?"

4 And you say: "Yes, sir."

5 A. You had me confused that day, I'll
6 admit that. I think I expressed it up there
7 when I paused. I think if you read the whole
8 deposition, you know -- there are times you
9 asked me up there if these truck tickets are
10 hauling in fill material and I said correct.

11 Q. Right.

12 A. I think you knew that day I had
13 trouble with words whenever you threw four or
14 five out there at one time. You know, I had
15 trouble that day with it, and I expressed
16 that.

17 Q. Were you on medication that day?

18 A. No. I had just been up all night. We
19 had buried somebody in the family the day
20 before, I think.

21 Q. Okay. But at that time you were
22 saying that the truck tickets represented
23 soils going off the job site. Would you
24 agree with that even though it might have
25 been a mistake?

1 A. I don't think of the -- none of the
2 tickets we charged for, none of the tickets
3 we charged for was soils going -- I mean, it
4 was all for material coming into the site.
5 Q. You understand that you did testify
6 that they were 12 cubic yards per load,
7 right, in that deposition?
8 A. Yes, sir.
9 Q. And do you also understand that later
10 in your affidavit that your attorney
11 submitted -- did you write the affidavit or
12 did your attorney write it and give it to you
13 to sign?
14 A. I'm not sure. More than likely -- I
15 don't know if Todd drafted it or not. I
16 presume Todd did.
17 Q. The Court already has this in his
18 files. It was part of the summary judgment.
19 Read into the record Paragraph No. 5.
20 A. (Pause.)
21 Q. Just read it out loud.
22 A. It says, "According to the documents
23 attached hereto as Exhibit 1 American
24 Excavators brought 1,090 truck loads of
25 suitable fill to the site. As each truck had

1 a capacity of 18 cubic yards, I
2 conservatively estimated that each truck
3 hauled 12 yards of suitable fill to the
4 site.

5 Q. So, on that day in November, several
6 months later, you're still saying it's 12
7 yards per truck; correct?

8 A. I did sign it. I should have read it
9 more carefully and should have caught it.

10 Q. Well, let's look at the exhibit then.
11 Let's look at Exhibit 2 to your affidavit.
12 I'm going to show it. I have pulled it out.
13 Look at Exhibit 2. Is that your handwriting?

14 A. Correct. I believe it to be, yes.

15 Q. Look at the bottom where you total the
16 load count. What number do you write down to
17 multiply those loads in order to get cubic
18 yards?

19 A. 12 yards.

20 Q. So it is not like Mr. Panther made a
21 typo in the affidavit, is it?

22 A. Well, it is a typo. He was only doing
23 what I had said. That's what I said.

24 Q. But that's not a typo, Exhibit 2?

25 A. No, it is not. This is where I done a

1 rough calculation of it. We're so used to --
2 let me explain. We didn't own any triaxle
3 trucks. Everything we had was tandem axle.
4 That's what we were used to. Basically,
5 everything we had that was roadworthy was
6 tandem axle. Every time I do mine for my
7 subdivisions and everything, I'm used to
8 using our trucks. For most of it that I do I
9 use 12 yards, and I did. That's my
10 handwriting. I did do it.

11 Q. Now, when did you decide after telling
12 me in April at the deposition and swearing to
13 it in November for your affidavit that maybe
14 you ought to be plugging in 15 cubic yards?
15 When did you make that calculation, sir?

16 A. I don't know what time. Whenever I
17 discovered that. You know, this right here
18 is when I caught it. Like, I've got 13,080
19 yards. When you subtract off the 3,000 yards
20 for what we had to bring in anyway, if this
21 was the numbers I was going to use, I would
22 have used -- I would have billed you for
23 10,000 cubic yards versus 13-five.

24 Q. Isn't it true whenever you submitted
25 that bill in April that you again forgot

1 about the import on the job and you were just
2 doing a calculation for 12 cubic yards per
3 truck versus the load tickets?

4 A. At this point that's what I did. I
5 used 12 yards per truck which is a tandem
6 axle load.

7 Q. What I'm saying is, when you did this
8 document as well, you're doing 12 yards per
9 cubic yard?

10 A. That was at 15 yards.

11 Q. You didn't submit any documentation
12 under this paper. We cannot verify what
13 you're telling the Court today for the first
14 time, can we?

15 THE COURT: You're referring to
16 Change Order No. 4?

17 MR. CASHION: Yes, sir.

18 THE WITNESS: I prepared No. 4.
19 I sent it in. That's what I sent in with it.

20 BY MR. CASHION:

21 Q. We can't verify your story now that
22 you were using 15, can we, because you didn't
23 put any detail to it?

24 A. If I am using triaxle dump trucks, I
25 use 15. If I am using tandems, I use 12.

1 Q. Okay.

2 THE COURT: I need to ask you
3 something, Mr. Parker. I assume that you did
4 submit supporting documentation when you sent
5 in Change Orders 1, 2 and 3?

6 THE WITNESS: Huh-uh.

7 THE COURT: You did not?

8 THE WITNESS: No, huh-uh. The
9 reason I didn't was I knew we were actually
10 underbilling them and they wouldn't dispute
11 -- you know, there was no doubt about that.
12 We were already way past that point when I
13 sent those.

14 BY MR. CASHION:

15 Q. Let's go to a different subject. On
16 your bid, did you figure that you would have
17 to pay any funds to borrow soil to bring back
18 in on this import job?

19 A. No.

20 Q. Why was that?

21 A. Harley had checked with the -- the
22 county was building a road through one of the
23 bypasses and they were trying to get rid of
24 some of the chirt material. Instead of
25 having to haul it off, they were giving it to

1 various contractors. That's one reason they
2 probably didn't go out and measure the pit
3 because there were just too many people out
4 there in it. That was one way they could
5 have determined the amount which would have
6 been better if they would have went out and
7 measured the pit prior to us starting the job
8 instead of measuring it afterwards. Just
9 about everybody I knew was out there dipping
10 in it. They had a massive amount of dirt
11 they were trying to get rid of.

12 Q. So you knew that at the time you bid
13 the job?

14 A. Correct.

15 Q. Did you know you had a place to dump
16 for the county when you bid the job?

17 A. I'm not sure on that. I don't know if
18 Harley had those details worked out or not.
19 Our primary concern was for the import.

20 Q. Did you sell a lot of loads of topsoil
21 on this job?

22 A. I think it seemed like they sold Logan
23 some and then it seemed like Civil came by.
24 There was a church project down the road and
25 we gave five to the church. The rest of it,

1 I hauled off to the subdivision.

2 Q. Did you realize -- did you ever ask
3 the county for permission to sell its dirt
4 out there?

5 A. No, I can't say that I did. It was
6 under our understanding that we were to get
7 rid of all of it by whatever means we had to
8 do.

9 Q. Let me hand you the specifications
10 that are part of your contract, Section 0023,
11 Bates No. 143. Look at C-3. It says,
12 Surplus topsoil shall not be sold or removed
13 from site without owner's permission.

14 Did you know that when you bid the
15 job?

16 A. That's usually the case on most jobs.

17 Q. Did you ever seek permission from the
18 county to sell it?

19 A. We didn't deal directly with the
20 county. We dealt with RCR.

21 Q. Did you ever seek permission from RCR
22 to sell it?

23 A. I would presume we did. RCR kept
24 quite a bit of it to use on their other
25 projects.

1 Q. With respect to the garden area, do
2 you know how much material you took out of
3 the garden area?

4 A. My understanding is that was one of
5 the places that, again, the soils report was
6 totally erroneous, that we didn't have --
7 from my understanding, we hauled very
8 little. I don't think we hauled anything out
9 other than like six inches, if that much, of
10 topsoil off of that garden area.

11 Q. You think that whole garden area that
12 they say is two and a half foot deep because
13 it's been a garden for years and a plow zone,
14 it is your testimony on the stand today that
15 you only took six inches off that area and
16 that was fine?

17 A. That's what I remember Mr. Tipper and
18 Harley Ezell telling me.

19 Q. How big is that garden area?

20 A. I think it is approximately -- it said
21 one acre but you need to ask them. I mean, I
22 cannot tell you.

23 Q. It was approximately what? I didn't
24 hear the answer.

25 THE COURT: One acre.

1 BY MR. CASHION:

2 Q. And you're saying that garden area was
3 just great stuff under that six inches?

4 A. From what I remember Mr. Tipper and
5 Harley Ezell talking about it. That's one of
6 the reasons we thought since the survey was
7 off probably the borings were all off. Where
8 they were showing unsuitable soil, we found
9 good soil. Where they showed suitable soil,
10 we were finding unsuitable. I think their
11 boring logs generally were measured wrong.

12 Q. That garden area, when you're standing
13 on the site, you can see that? It's obvious?

14 A. That's correct.

15 Q. You're saying it was six inches of
16 topsoil and the rest was good?

17 A. Like I said, I'm not saying that's
18 what it was. That's what I remember being
19 told by Mr. Tipper and Mr. Ezell.

20 Q. But what you also said was your bid
21 included taking out two and a half feet of
22 it, reconditioning the last foot and a half
23 and putting it back in. Was that a big
24 windfall for you? You made a lot of money
25 because you only had to strip six inches off?

1 A. Our bid, as I said earlier, we did
2 agree to assume that risk and, yes, we did.
3 I mean, it could have went but I assumed that
4 risk going in, that I may have to do that and
5 we may not have to do it. Luckily, we didn't
6 have to.

7 Q. So that risk that you assumed on your
8 price, you're telling the Court you only took
9 six inches off?

10 A. That's what I remember being told,
11 correct.

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

14 MS. CARSON: Your Honor, I'm
15 doing my best to not replot the same ground.
16 I may be skipping around a little bit so that
17 I don't repeat everything that Mr. Cashion
18 has just gone through. I'll try not to read
19 the same specifications and bore us all with
20 the same contract language. I apologize if I
21 have some overlap.

22
23 CROSS-EXAMINATION

24 QUESTIONS BY MS. CARSON:

25 Q. Mr. Parker, I'm Lisa Carson. I

1 represent Williamson County. You have not
2 made a claim against Williamson County?

3 A. That's correct. I don't think we
4 have, no, ma'am.

5 Q. Your dispute is with RCR based on the
6 contract that you have with RCR; is that
7 right?

8 A. Correct.

9 Q. Now, you were aware that your contract
10 with RCR was to be performed in accordance
11 with the county specifications as long as
12 there wasn't a conflict between your
13 subcontract and the county contract; is that
14 right?

15 A. Correct.

16 Q. And I think you indicated that you
17 reviewed some of the specifications either
18 before doing the job or at the time that you
19 were involved in this job; is that right?

20 A. Correct.

21 Q. As you reviewed those specifications,
22 didn't you become aware that the county
23 through the specifications had made it clear
24 that the soils report was provided for
25 convenience only and was not to be relied

1 upon as a representation of the condition of
2 the site?

3 A. That's what prompted us to put a
4 qualifier in the bid. We didn't accept those
5 terms.

6 Q. So you were clearly aware that the
7 county was not asking you to rely on that
8 soils report and, in fact, was telling you
9 specifically do not rely on this soils
10 report?

11 A. The county was relying on RCR. I
12 don't know if they qualified their bid or
13 not. I mean, we didn't accept those terms --
14 I didn't.

15 Q. You knew those terms were there and
16 that's why you put the qualifier in your
17 contract?

18 A. More than likely, yes. I can't say
19 that I actually -- it is just about something
20 on every job. I wouldn't want to do a dirt
21 job without that qualifier. I'd pass on it
22 before I would assume those risks.

23 Q. Do you acknowledge that the county
24 told RCR and told everybody who read these
25 specs, our soils report is not a warranty of

1 the condition of this site?

2 A. Was I aware or did I at some time
3 become aware?

4 Q. Were you aware, sir, of that provision
5 in the specifications?

6 A. At what point?

7 Q. When you bid the contract?

8 A. I'm not sure on that. I'm really not.

9 Q. First, you said that's why you put
10 your disclaimer in. Now you're saying you
11 don't know whether you knew it was there or
12 not?

13 A. I can't tell you I knew of exactly the
14 words you had in there. We had reviewed the
15 specs enough to know and Harley had mentioned
16 -- I told Harley we wouldn't do anything
17 without a qualifier being in it. We couldn't
18 accept those terms.

19 Q. When you developed your bid on the
20 project, you knew that you couldn't rely on
21 the soils report as being a warranty of the
22 condition of the site?

23 A. Yes, Harley informed of me of that.

24 Q. So you were clear on that regardless
25 of what you saw in the contract?

1 A. Yes.

2 MS. CARSON: Your Honor, if the
3 witness could be passed Exhibit 13 which is
4 the big project manual.

5 BY MS. CARSON:

6 Q. Turn to Bates Page 138 of that
7 document. It's going to be the stamped
8 numbers at the bottom.

9 A. Okay.

10 Q. Do you see on Page 138 the subsection
11 108(a)?

12 A. Yes, ma'am.

13 Q. Do you see there where it reads:
14 Copies of a subsurface investigation of the
15 site will be made available upon request.
16 The data is not intended as a representation
17 or warranty of the continuity of such
18 conditions. Owner will not be responsible
19 for interpretation or conclusions drawn
20 therefrom by the contractor. The data is
21 made available for the convenience of the
22 contractor and is not guaranteed to represent
23 all conditions that may be encountered.

24 Do you see that?

25 A. Yes, I see it.

1 Q. And you said Mr. Ezell made you aware
2 that there was a provision to that effect in
3 the contract?

4 A. You lost me on that. I mean, he made
5 me aware that -- he prompted me to ask for a
6 qualifier.

7 Q. Okay. Were you also aware that the
8 contractor, RCR, had the opportunity to make
9 its own subsurface explorations if it chose
10 to do so?

11 A. At that time?

12 Q. Yes, sir.

13 A. I don't know. I'm aware of it now.

14 Q. Were you aware that you, as the
15 subcontractor, had that right?

16 A. Yes, ma'am.

17 Q. In fact, you had a soils person that
18 did some work for you, didn't you?

19 A. He done the testing afterwards. He
20 didn't do any of the borings.

21 Q. He could have done that had you chosen
22 to have him do that, couldn't you?

23 A. Yes, we could have but we elected not
24 to and to instead use a qualifier.

25 Q. All right. Now, I want to go back and

1 -- I take that back, Your Honor; I really
2 don't want to go back and do this but I feel
3 like I have to -- and ask you about this cut
4 section one more time because I want to make
5 sure I'm clear because I got real confused
6 when you were talking about this \$10 that you
7 were charging RCR.

8 First of all, I want to make sure this
9 whole \$10 negotiation that was going on, that
10 was with RCR; correct?

11 A. Correct.

12 Q. You're not here to tell this court
13 that the county ever told you that they were
14 going to pay \$10 a cubic yard for this
15 material?

16 A. No, ma'am, they never did.

17 Q. Now, this cut section, you said that
18 you did your bid assuming that all of this
19 would be suitable soil and could be kicked
20 over here and filled?

21 A. Yes, ma'am. If the soils report said
22 it was suitable, we did.

23 Q. And if it had been suitable fill, you
24 wouldn't have been paid anything extra for
25 removing any of this; correct?

1 A. If it would have all been --
2 Q. And you could have moved it over here,
3 no money at all; right?
4 A. No. We would have had to haul in less
5 material, that's correct.
6 Q. You wouldn't have gotten 12.50. You
7 wouldn't have gotten \$10. You wouldn't have
8 gotten anything?
9 A. If it was usable?
10 Q. Correct.
11 A. That's correct.
12 Q. You admit that there were some
13 material in this cut section that was usable,
14 don't you?
15 A. There probably was.
16 Q. And you can't tell us how much, can
17 you?
18 A. No. They didn't have anybody out
19 there to measure it.
20 Q. So, when you billed RCR for every
21 single cubic yard of this, you were billing
22 them \$10 a cubic yard for some things you
23 shouldn't have been paid a cubic yard; is
24 that correct?
25 A. In the end, we should have been paid

1 for it, yes.

2 Q. In the end, you should have been paid
3 for removal of suitable soils in this cut
4 section?

5 A. No. If it was suitable but we didn't
6 bill anybody -- in essence, we have not
7 billed anybody for the theory.

8 Q. You billed RCR for every cubic yard in
9 this cut section, didn't you, in Change Order
10 2?

11 A. That's correct.

12 Q. And you admit that there is some
13 suitable soil in this cut section?

14 A. There could have been. I don't know
15 what amounts was. I don't know. I said I
16 assumed that there would be. There should be
17 at least something in there, 1 percent or
18 maybe even 50 or there could have been more.

19 Q. You have absolutely no idea if it was
20 90 percent, 80, percent, 20 percent or 1
21 percent, do you?

22 A. I don't. Mr. Tipper would have a
23 better idea.

24 Q. You don't. You admit at least there
25 was one cubic yard in theory that you charged

1 RCR for that you shouldn't have?

2 A. I admit there could have been.

3 Q. In fact, isn't it true that there was

4 even a dispute between PSI and American

5 Excavators about whether that material was

6 suitable?

7 A. There was a dispute at some time about

8 that. That's what originated the change in

9 contract where we let go of providing a

10 geotech and RCR assumed that responsibility.

11 Q. And RCR's independent company was PSI,

12 wasn't it?

13 A. What's that?

14 Q. RCR's independent company was PSI,

15 wasn't it?

16 A. I know PSI was out there. I believe

17 that was theirs.

18 Q. And American Excavators disputed with

19 PSI whether that cut section should be

20 removed -- not whether it should have been

21 removed but whether it was unsuitable or

22 suitable?

23 A. And I do remember Harley saying, Hey,

24 if you want us to use it, get us a letter

25 saying it is suitable material; we'll stick

1 it in there. We're telling you -- we never
2 could get a letter. From what I remember, it
3 was determined to be unsuitable. There again
4 that part would need to be asked of Mr. Ezell
5 or Ricky Tipper.

6 Q. Now, you referred a little bit to Mr.
7 Ezell's letter, the letter dated, I believe,
8 July 1 of 1999. Do you recall that
9 testimony?

10 A. Yes, ma'am.

11 Q. Now, his letter refers to a meeting on
12 June 30 of 1999 and he actually discusses the
13 fact that the meeting occurred with the
14 county, Thomas Miller. Thomas Miller was the
15 architect, wasn't he?

16 A. Yes, ma'am.

17 Q. PSI was the soils engineers at that
18 time?

19 A. Yes, ma'am.

20 Q. And then obviously American Excavators
21 also participated in that meeting; is that
22 right?

23 A. Correct.

24 Q. And RCR also participated in that
25 meeting?

1 A. Yes.

2 Q. You were not in attendance at that
3 June 30 meeting, were you?

4 A. No, ma'am.

5 Q. As a result of this meeting, Mr. Ezell
6 has written this letter to RCR and has
7 indicated that he believes that the final
8 depths of undercut will be determined by
9 PSI. Do you see that?

10 A. Correct.

11 Q. As of this point in time, was it your
12 understanding as well that the final depths
13 of undercut and the extent of undercut were
14 going to be determined by PSI?

15 A. That's who I assumed they were going
16 to -- according to what we had agreed on,
17 they were going to use PSI at their
18 discretion to do what they wanted to do. As
19 a matter of fact, the letter in there states
20 that we would like for a representative of
21 them to be there at all times.

22 Q. To be present?

23 A. That's correct.

24 Q. Did Mr. Ezell give you any
25 understanding of what had been discussed at

1 the particular meeting that he had with the
2 county and the architect and RCR?

3 A. He did, yes.

4 Q. Was it clear to you that the county
5 had made clear that that's what they
6 expected, that PSI was going to do that
7 measuring?

8 A. No. What I gathered from him was it
9 was determined that PSI was going to be the
10 new -- I mean, that's who was going to be RCR
11 -- that we weren't responsible for it
12 anymore. I think it goes on to say in the
13 letter, since PSI would be taking over as the
14 testing agency, I will issue RCR a credit for
15 any unused portion of it.

16 Q. It says final depths of undercut will
17 be determined by PSI?

18 A. That was my understanding that's who
19 he was going to use.

20 Q. Do you have any reason to disagree
21 with Mr. Ezell's understanding as of that
22 time?

23 A. No.

24 Q. Now, you have testified that after
25 that date, RCR gave you some authorization or

1 gave American Excavators some authorization
2 to deviate from that plan and to take out
3 some other soils?

4 A. Actually before that, they gave us
5 authorization. They gave us a command to --
6 after the soil scientist come out the second
7 day on the job, they directed us to remove
8 the material.

9 Q. Did the county ever direct you to
10 remove any material other than what PSI
11 authorized?

12 A. No, ma'am.

13 Q. Did the architect ever direct you to
14 remove any material other than what PSI
15 authorized?

16 A. Not that I'm aware of, no, ma'am.

17 Q. You've talked about what -- and I
18 believe you testified that RCR told you to go
19 ahead and remove it, but then you went to do
20 some work with the building pad?

21 A. That's my understanding, but I think
22 that's a question to go to Mr. Tipper or Mr.
23 Ezell.

24 Q. At whatever point, whether it was
25 before or after or in between, you say that

1 RCR authorized removal of additional soils
2 beyond what PSI verified and agreed; is that
3 correct?

4 A. I'm not sure if it was PSI. That
5 second day on the job, it says the soil
6 scientist came by and said to remove it. I'm
7 not sure if that's PSI or who RCR was relying
8 on. I'd be wrong if I said that. I'm just
9 saying on the second day -- we complained on
10 the first day of the job, notified everybody
11 and our soil scientist came by, consulted
12 with RCR and said remove it.

13 Q. I think you're looking for a trick in
14 my question that's not there. I'll make it a
15 little bit broader so you'll be clear on it.
16 My question is: Isn't it your testimony that
17 RCR at some point authorized removal of soils
18 that had not been verified by any soil
19 scientist or geotechnical engineer as
20 unsuitable?

21 A. Oh, yeah, all the time.

22 Q. To your knowledge, did anybody either
23 with American Excavators or RCR ever tell the
24 county that that was going on?

25 A. No, ma'am. I didn't have any

1 conversation, hardly any, with the county. I
2 didn't feel like that was proper. I didn't
3 even like having to call the county to get
4 Don -- to get RCR to respond to me.

5 Q. As far as you knew, nobody with the
6 county had any concept that the PSI removal
7 was going on? When I say the PSI removal,
8 I'm talking about what they authorized.

9 A. I honestly at that time probably
10 figured you did have knowledge. I would have
11 thought RCR -- our job was to answer to RCR
12 and RCR would have answered to the county.

13 Q. But that was purely your assumption?

14 A. Correct.

15 Q. You don't have any independent
16 information that anybody at the county had
17 that knowledge?

18 A. No, ma'am.

19 Q. Now, at that time Mr. Ezell estimated
20 that he was going to have to remove another
21 1,000 to 1700 cubic yards; is that correct?

22 A. In that particular area, yes, ma'am.

23 Q. Do you know of any other estimate that
24 came from American Excavators to either RCR
25 or to the county that at any point during

1 this process put the county or RCR on notice
2 that all of a sudden this 1,000 to 1700 was
3 going to go up to 13,000?

4 A. As far as the county being on notice,
5 I can't answer that. Did you ask me if RCR
6 was ever put on notice?

7 Q. Yes.

8 A. Yeah, every time we encountered --
9 they had a full-time project manager -- I
10 think his name was Anthony Orange -- on the
11 job.

12 Q. So the verbal discussions out in the
13 field with Mr. Orange is what you're
14 referring to there?

15 A. Mr. Orange had been around long
16 enough. There were things -- I mean you, if
17 you were out there, you'd would know you
18 can't use that material. Anthony made the
19 decisions when he could and when he couldn't,
20 he consulted with PSI.

21 Q. But as far as you know, nobody ever
22 notified the county of that, that that 1,000
23 to 1700 was suddenly much more than that?

24 A. No, I can't say that I know that.

25 Q. You've talked about the truck tickets

1 and the fact that you now claim that all of
2 those truck tickets reflect materials brought
3 onto the site; is that correct?

4 A. All those that were presented with the
5 bill, yes, ma'am. If he noted otherwise, he
6 would note otherwise, if something was taken
7 out, and that wasn't included.

8 Q. Is it your testimony then that RCR was
9 not billed anything by any of these trucking
10 companies for removal of material from the
11 site?

12 A. That RCR wasn't?

13 Q. Excuse me, American Excavators. I
14 apologize.

15 A. What's that now?

16 Q. Is it your testimony that American
17 Excavators was never charged by any trucking
18 company for removal of any materials from
19 this site?

20 A. It wouldn't have been in the bill.
21 All those tickets that we used to prepare the
22 bill was for incoming chirt.

23 Q. Did you receive truck tickets for
24 outgoing?

25 A. Whenever later, you know, we had to

1 clean up all the material that was left over
2 off the job. RCR wanted enough material to
3 put back around the building, and from what I
4 remember Ricky saying, they wanted them to
5 leave about twice to three times that much,
6 that they had some other projects that could
7 use the topsoil. We had to remove all the
8 spoil. It gets a little mixed up. You're
9 saying topsoil. It was considered spoil. I
10 was able to use it as topsoil. That's
11 correct.

12 Q. I'm not even down to what you have
13 used yet. I'm asking you about whether or
14 not American Excavators on this project ever
15 had to pay any of these trucking companies to
16 remove any materials off site?

17 A. Yes, ma'am.

18 Q. You're aware, are you not, that we
19 requested in discovery every truck ticket on
20 this job?

21 A. I'm not aware.

22 Q. You don't know one way or another?

23 A. Well, I would presume, yeah, that you
24 -- well, no, I wouldn't presume you did. I
25 don't know what was...

1 Q. Have you provided every truck ticket
2 that you had on this job?

3 A. As far as I know.

4 Q. Yet, it is your testimony that every
5 truck ticket that you've submitted into
6 evidence reflects hauling onto the site,
7 isn't it?

8 A. Every one we submitted for the bill
9 that we billed for did. I think that's what
10 you have. You have only the copies of the
11 incoming chirt. Let me correct that, too.
12 There were some shot rock that was brought
13 in. That's very little, but it was mostly
14 chirt.

15 Q. Last week when Ms. Goodson contacted
16 your attorney and said we want to confirm
17 that we have all the truck tickets -- I don't
18 guess I can ask you. Did you provide him any
19 additional truck tickets?

20 A. I've been out of town up until
21 yesterday.

22 Q. Are you aware we were sent another set
23 of truck tickets that contains only those
24 that are included in your exhibit and
25 included in your bill?

1 A. I'm trying to think which company paid
2 for the topsoil being -- but there is
3 tickets. There are separate invoices for
4 material. If we paid a trucker to haul
5 anything out, that was a different set of
6 tickets.

7 Q. And, to your knowledge, you haven't
8 produced those in discovery even though
9 they've been requested on even more than one
10 occasion?

11 A. I can't answer that. I don't know if
12 they've been -- I'm kind of stumped.

13 MS. CARSON: Your Honor, I don't
14 know any other way to get at it.

15 THE COURT: Maybe Mr. Panther can
16 help with that.

17 THE WITNESS: I know after the
18 deposition it was asked --

19 THE COURT: He doesn't know what
20 you requested. All he can answer is what
21 he's produced.

22 BY MS. CARSON:

23 Q. And what you've produced here today,
24 you purport to be every single one of these
25 loads that was hauled into the job?

1 A. On incoming chirt or shot rock that
2 was used, that's the only invoices you have
3 that I know of. I mean, that's the only
4 thing that the bill consists of. You weren't
5 billed for anything that went out of the
6 site.

7 Q. But you also have then in your
8 business records and files truck tickets and
9 invoices which would reflect the materials
10 hauled off this site; is that correct?

11 A. Yes. I think we would, yes.

12 Q. Well, you would have to because, as
13 you testified under oath earlier, that's what
14 you rely on to pay those invoices, isn't it?

15 A. That's correct. I can't remember if
16 we actually -- I'm trying to think. Ricky
17 left the job. Ricky got it to that point and
18 he left it and he didn't keep up from that
19 point forward. He kept up with it until it
20 was all imported, if I'm not wrong. I'm not
21 sure if our trucks hauled it. That's
22 something I think you need to ask Harley or
23 Ricky. I can't remember if our trucks hauled
24 all of it or if we hired additional trucks.
25 More than likely, I would have tried to haul

1 all of it I could myself. If I would have
2 been asked that before, I would have -- I
3 know it come up at depositions.

4 MR. PANTHER: Let me interrupt,
5 if you don't mind. I'm looking at American
6 Excavators' responses to Williamson County's
7 first request for interrogatories and
8 production of documents and nowhere in there
9 do they ask for truck tickets of outgoing
10 materials. I object to counsel's implication
11 that this was even asked for.

12 MS. CARSON: Your Honor, I wasn't
13 going to get into it, but if I need to
14 respond, I certainly want to. There was a
15 very general request made and Ms. Goodson
16 went and reviewed the documents and copied
17 all the truck tickets that were provided for
18 inspection, and some of those tickets were
19 provided.

20 In preparation for trial, a
21 question was raised in our mind about why do
22 we only have truck tickets that purport to be
23 for incoming materials. So a letter was sent
24 to Mr. Panther on January 23 saying please
25 verify whether these truck tickets are all of

1 the truck tickets collected for material
2 either to or from the site.

3 Mr. Panther sent us back a
4 handwritten note saying he didn't have time
5 to match those up, but we could certainly
6 look and then he provided us another copy
7 which matched exactly what we already had and
8 matched exactly what was in this exhibit that
9 was introduced today.

10 Your Honor, if there are other
11 truck tickets, we're entitled to them.

12 THE COURT: Well, not
13 necessarily. That's subject to a motion to
14 compel, which should have been handled before
15 today.

16 MS. CARSON: I agree with that
17 but unfortunately until today we didn't
18 realize the representation that had been made
19 to us was inaccurate. We've been told --

20 THE COURT: I'd have to look at
21 the question first to see.

22 MS. CARSON: I'll acknowledge,
23 Your Honor, the question in the
24 interrogatories is extremely broad. The
25 question in the interrogatories is kind of

1 everything that relates to your claim or
2 something of that nature. But having gone
3 back to clarify, we certainly would have
4 expected that we would have either been told,
5 no, we're not going to clarify but certainly
6 not that we would receive another set that
7 counsel would represent that it was the
8 entire set and that we would be told today
9 for the first time, no, there are more.

10 THE COURT: The way I would take
11 that question is everything that supports
12 your claim. The outgoing tickets don't
13 support his claim. He's not relying on them
14 so that's why I wouldn't have given them to
15 you if I had been him because it didn't have
16 anything to do with his claim.

17 MS. CARSON: I agree, Your Honor.

18 THE COURT: What you really did
19 is ask him another discovery question without
20 providing a formal request.

21 MS. CARSON: I'm not sure that's
22 true, Your Honor. I think probably the
23 language of the interrogatory was good
24 enough. Nonetheless, I guess what's kind of
25 gotten my blood pressure up is perhaps

1 counsel would have said last week I'm not
2 going to answer that question because you
3 didn't ask it before, but once you take the
4 position that, yes, now I'm providing them to
5 you, then that ought to be it.

6 THE COURT: Is that the position
7 he took or he just wrote you back and said he
8 didn't have time to mess with it?

9 MS. CARSON: I can allow her to
10 address that. He had some conversations with
11 Ms. Goodson. I don't think it is going to
12 get us anywhere, quite frankly. I don't
13 think there are any and I don't think they're
14 going to be produced. I think we're beating
15 a dead horse. I'm perfectly willing to just
16 move along at this point.

17 THE COURT: Let's do that. We
18 were talking about truck tickets reflecting
19 loads brought on the site.

20 BY MS. CARSON:

21 Q. So, it is your testimony then in the
22 regular course of your business you would
23 have retained all of those tickets just like
24 you retained the tickets for incoming?

25 A. On jobs we would have to pay our -- if

1 we used outside help to bring that in, we
2 would definitely have it and I have the
3 tickets.

4 Q. If there are any?

5 A. If we used an outside trucking firm on
6 that particular job, we would have, yes. If
7 we paid them anything, we would have had to
8 have had an invoice on it.

9 Q. You can't tell this court sitting here
10 today where all this unsuitable material was
11 removed from on the site, can you?

12 A. As I said earlier, it was removed --
13 that's the complexity of it. If I could go
14 out there and identify it that RCR would have
15 probably used that average-in method, they
16 could have went out there and laid their hand
17 on -- you know, it was like it was within any
18 cut. There may be -- this is something you
19 need to ask Mr. Tipper. The reports I got
20 there may be five, six, seven layers of where
21 that was a trash dump before. It would be
22 usable material for seven inches, topsoil for
23 nine. It would be hard even for PSI to sit
24 here -- if they sat out there on the job
25 around the clock, they would have had a hard

1 time. It would have been a very complex
2 thing. Let me say that.

3 Q. Is your answer to my question, no, you
4 can't tell me from where on the site these
5 materials were removed?

6 A. No, ma'am, I can't. It was from all
7 over.

8 Q. Again, you acknowledge that, to the
9 best of your knowledge, all the county knew
10 about is what PSI was approving?

11 A. That's all I have knowledge of, yes,
12 ma'am.

13 Q. Let me go back and ask you about a
14 couple of these change orders, in particular
15 Change Order No. 2 which I believe is Exhibit
16 8, Mr. Parker. I believe that's Pay
17 Application No. 2 with the change order
18 attached to it. Do you have that in front of
19 you?

20 A. Yes, ma'am.

21 Q. Again, it is your testimony that all
22 of this \$28,980 was for the materials removed
23 above subgrade; is that right?

24 A. That's what this bill reflects.

25 Q. All right. And this was submitted to

1 RCR on August 17 of 1999; correct?

2 A. I don't know if that was the first
3 time it was submitted. It may have been --
4 that's what the date of this one is.

5 Q. That's the date on this document?

6 A. Yes, ma'am.

7 Q. Do you have any knowledge of when it
8 was submitted to Williamson County?

9 A. No, ma'am.

10 Q. The only method that you used for
11 calculating this particular removal was by
12 the truck load; is that right?

13 A. What's that?

14 Q. Did you calculate this by the truck
15 load or was there another method that you
16 used to calculate Change Order --

17 A. On this particular No. 2?

18 Q. Yes.

19 A. There again, to totally bend the
20 opposite way and be fair, I gave them a total
21 credit. That's how I figured that. I knew
22 we were probably three times deeper into
23 actual tickets that were going to be coming
24 in that we were going to sit down and analyze
25 at a later date.

1 Q. Let me ask about that again. You said
2 again about tickets that this was 17 days
3 after you all had finished the last day of
4 digging; correct?

5 A. That's correct. That's what this date
6 on here reflects.

7 Q. You were getting those truck tickets
8 on a daily basis at the site; right?

9 A. That's one side. We don't just take
10 the tickets only. We have to get his -- we
11 have to get their invoice in. We have to get
12 Ricky's daily reports. All three have to
13 match up before a check is released out of
14 receivables.

15 Q. Ricky worked for you; right?

16 A. Correct.

17 Q. So you could easily get the truck
18 tickets in Ricky's possession and Ricky's
19 daily reports; correct?

20 A. Yeah, he turned it in on a volunteer
21 basis to Barbara.

22 Q. And then the invoices is what you
23 would be waiting for?

24 A. To pay the truck to finalize it and
25 make sure I was 100 percent correct before I

1 -- you know, I wanted to analyze all the
2 tickets, all the supporting documents before
3 I billed somebody.

4 Q. Now, Change Order No. 3 which I
5 believe is just the next page in that same
6 exhibit, this is the one that reflects what
7 PSI verified; is that correct?

8 A. That's correct.

9 Q. Now, you said earlier that you didn't
10 submit documentation with all of these but,
11 in fact, with Change Order No. 3 you did
12 submit documentation. You submitted the
13 drawing and then you submitted all PSI's
14 reports, didn't you?

15 A. I'm not sure. I didn't look at it
16 that close but, yeah, there is supporting --
17 that might have been something they asked
18 Barbara for at the time. It seems like the
19 county -- I mean, RCR had called her back
20 wanting something, you know, any type of
21 drawings we had or anything at that time,
22 that they had lost them in their file or
23 whatever.

24 Q. So you submitted those PSI reports
25 again to support your Change Order No. 3?

1 A. I don't know if we submitted them or
2 if that's something that RCR had. It says,
3 Tested for Don Stover. I don't know if this
4 is something RCR added to it. I really can't
5 say we submitted it in that.

6 Q. Can you look at the fax sheet that's
7 on the front of the PSI reports?

8 A. Yes, ma'am.

9 Q. See where it says, To Marvin?

10 A. Yes, ma'am.

11 Q. Would that be you?

12 A. That would be correct.

13 Q. All right. So at some point PSI sent
14 these to you and then somehow they got to RCR
15 attached to this change order?

16 A. As I said earlier, I'm not sure how
17 Barbara prepared this or what order it went
18 in or when it went in. If you're saying it
19 was with it when they got it, I'm not
20 disputing that.

21 Q. It was faxed to you on the day before
22 you submitted the change order, wasn't it?

23 A. 8-18. That might have been why there
24 was a delay on this. This bill should have
25 been in on like the 25th, is usually when we

1 submitted them. That may have been why. She
2 had to get that for them or something. I
3 really don't know.

4 Q. Let's look at the PSI reports very
5 quickly. PSI reports show that it was on
6 that site on July 27. Do you see that report?

7 A. Yes, ma'am.

8 Q. They observed some proof rolling on
9 July 27 and recommended and verified some
10 undercutting?

11 A. Yes, ma'am.

12 Q. On June 20, they were on the site. Do
13 you see that report?

14 A. Is it on another page?

15 THE COURT: July 27 and July 20?

16 MS. CARSON: July 20 is what I
17 was referring to.

18 THE WITNESS: That's on the
19 following page?

20 BY MS. CARSON:

21 Q. Yes, sir. They observed proof rolling
22 in the parkway and roadway and recommended
23 undercutting and verified the quantity?

24 A. Yes, ma'am.

25 Q. In reverse chronological order, July

1 6, PSI was also out on the site; is that
2 correct? Look at the next report.

3 A. I believe so, yes, ma'am.

4 Q. On that day, they observed proof
5 rolling and recommended undercutting?

6 A. Yes. It looked like Don had requested
7 that.

8 Q. The last report, if you will look,
9 that's June 23, is that correct, very back
10 page?

11 A. Yes, ma'am.

12 Q. To your knowledge, is that the first
13 visit that PSI made to the site?

14 A. Was you asking me a question?

15 Q. To your knowledge, was that the first
16 visit that PSI made to the site?

17 A. No. I can't say that it is or it
18 isn't. It is the earliest. It looks like it
19 is the earliest time RCR -- as far as these
20 bills, that's the earliest one in here that
21 RCR had requested.

22 Q. When they went out there on June 23,
23 what they recommended was this proof rolling
24 process and then the determination about
25 undercutting be made; is that right?

1 A. Yes, ma'am.

2 Q. That's the same process that Mr. Ezell
3 then discusses in his July 1 letter; is that
4 correct?

5 A. I'm not sure.

6 Q. You don't know?

7 A. No, ma'am.

8 Q. Is it accurate that Change Order No. 3
9 reflects everything that PSI verified that
10 was brought out at that site that you're
11 requesting to be compensated for?

12 A. It looks like to me that that reflects
13 everything that RCR had requested PSI to come
14 out and verify.

15 Q. And that's all PSI ever came out and
16 verified to your knowledge, isn't it?

17 A. That's all they sent. I mean, I don't
18 know. I can't tell you how many times RCR
19 got them out there. They got them out there
20 at their discretion.

21 Q. I understand that it is your testimony
22 that it was RCR's responsibility to do that.
23 I'm just asking you: Are those the only PSI-
24 approved soil removals that you are here
25 today asking to recover for?

1 A. That's all that was asked for that
2 appears to be in Change Order No. 3.

3 Q. Now, when you didn't receive payment
4 for those first three change orders, you
5 called the county. Do you remember who you
6 talked to at the county?

7 A. We did receive payment for them to
8 start with.

9 Q. I'm sorry. When you received the
10 offset from RCR where they took it back and
11 you started trying to contact Mr. Stover, I
12 believe you testified that finally you called
13 somebody at the county?

14 A. That's correct.

15 Q. Who did you talk to at the county?

16 A. I'm not sure. It seemed like there
17 were a couple of Als involved in it. I'm not
18 going to say because you didn't ask me to
19 guess at it.

20 Q. I don't want you to guess. You talked
21 to someone at the county and I believe your
22 testimony was they said something to the
23 effect of, We'll get their attention?

24 A. I said I didn't know if it was
25 somebody from the county or it was actually

1 the engineering firm.

2 Q. The architectural firm?

3 A. Yes, the architectural firm, but one
4 of the two told me that they knew how to get
5 their attention, is what I remember the
6 conversation being. Evidently, they did
7 because he did finally call me.

8 Q. Whoever that individual was didn't
9 make you any promises about what would
10 happen; they just said they'd get RCR's
11 attention?

12 A. That's correct. They didn't realize
13 -- I think I do know they didn't realize I
14 hadn't been paid on it and was down to the
15 point I had to file a lien or notify the
16 bonding company. They did know that at that
17 time.

18 Q. Now, you attended that meeting at the
19 county with, again, some of the same
20 participants: RCR, soils engineers, American
21 Excavators, county architect. Do you
22 remember that?

23 A. Yes, ma'am.

24 Q. Do you remember that that meeting was
25 on April 7 of 2000?

1 A. I don't remember the exact date, no,
2 ma'am.

3 Q. You don't have any reason to dispute
4 that that's the date?

5 A. No, ma'am.

6 Q. Do you recall that at that meeting
7 what the county basically said was the county
8 is not obligated to pay anything additional;
9 what's between you RCR and is between you and
10 RCR?

11 A. Yeah, I basically remember that was
12 said or they said it appeared -- I don't know
13 if it was the engineer architect or whatever.
14 Somebody had said it appears really the
15 problem is between, you know -- your contract
16 is with RCR. It seems the problem lies
17 between you all two parties and we're going
18 to leave you all here in the room; give you
19 all this room to use to try to resolve it
20 between yourselves.

21 Q. And you agreed with that assessment,
22 didn't you? You agreed it was between RCR
23 and American Excavators?

24 A. I don't know if I necessarily agreed.
25 I wasn't really thinking about it. I mean, I

1 respected their authority and if that's what
2 they said do, that's what I tried to do.

3 Q. Now, just a few days after this
4 meeting where you talked about those first
5 three change orders, that's when you submit
6 the big change order?

7 A. That's correct.

8 Q. At that meeting there was no
9 discussion that, gosh, in another week
10 there's going to be another 100-some-thousand
11 dollars that we're going to be asking for?

12 A. I don't know if the county was
13 informed of that, you know. The primary
14 thing -- the topic of the discussion -- it
15 seemed like it got hung up on and was hung up
16 too long and too hard was the fact about the
17 \$10 versus the 12.50. That seemed to be
18 like -- the county and the engineer and
19 everybody, that was the big topic of
20 discussion when we left there. But RCR was
21 very well aware of what -- I mean, I've been
22 trying to notify them for months that we
23 needed to sit down and go over these.

24 Q. But what the engineer or the architect
25 and the owner were talking about was do we

1 owe this money for above subgrade or do we
2 just owe for the below subgrade that PSI
3 documented; isn't that correct?

4 A. I think they realized there was an
5 issue, that there was above grade and below
6 grade material. I mean, they knew that we
7 hadn't been paid. There was an outstanding
8 bill and it was substantial.

9 Q. And they told you that was between you
10 and RCR; the county didn't owe it?

11 A. They said that was their assessment of
12 it.

13 Q. Now, your opinion about the amount of
14 material that was removed from this site and
15 then fill brought in to replace it, that is
16 based solely on the truck tickets and what
17 Ricky Tipper has told you, isn't it?

18 A. Yes, ma'am.

19 Q. And although the truck tickets may
20 track certain amounts of soil, Ricky Tipper's
21 daily reports don't track anywhere near
22 13,000 cubic yards of soil being brought on
23 that site, do they?

24 A. I think they do. They matched up with
25 the trucking tickets, yes.

1 Q. It is your testimony that Ricky
2 Tipper's daily reports match up with the
3 number on the truck tickets?

4 A. I've been under the impression they
5 have all along. We've been through this two
6 or three times.

7 Q. Did you review those and make a
8 calculation on your own to determine whether
9 they matched up?

10 A. I think I did. I'm still under the
11 impression that they do. I stand to be
12 corrected. I honestly believe her.

13 Q. And certainly you would expect your
14 job superintendent to have documented on his
15 daily reports the number of trucks, wouldn't
16 you?

17 A. Yeah, I mean, that was one of the
18 things that we require. I wanted to check
19 his daily report to make sure it coincided
20 with the two other pieces of evidence.

21 Q. That gives you the three different
22 documents to match up against each other to
23 make sure they're accurate?

24 A. That's correct.

25 Q. And that's why sitting here today you

1 believe that the truck tickets match Ricky's
2 daily reports because you would have expected
3 Ricky to make sure that those were accurate?

4 A. Yes, ma'am.

5 Q. Now, all of the unsuitable soils that
6 you're claiming compensation for were removed
7 and replaced in June and July of 1999; is
8 that right?

9 A. Yes, I think that's correct.

10 Q. And your final change order was not
11 submitted until eight months later?

12 A. That's correct.

13 Q. Did it take you that long to get the
14 invoices from the trucking companies?

15 A. No, it took that long to get Don
16 Stover to respond to me. I waited -- I was
17 as patient as I could be with it.

18 Q. Did you need Don Stover's permission
19 to send him a change order in the mail?

20 A. He was already refusing -- he was
21 already going back on what we had agreed on
22 and he wasn't paying me for the two before.
23 I could have -- yeah, I guess maybe I
24 shouldn't have wasted the time and sent him
25 one. I thought we could sit down and get

1 this resolved before, and I kept believing
2 him.

3 Q. At some point between August of 1999
4 and April of 2000, you did realize you had
5 all this extra unsuitable soil?

6 A. Yes, that's correct.

7 Q. Now, we talked a little bit about
8 removal of soil from the site. There was a
9 fairly substantial amount of material that
10 was moved to your subdivision in Pimpkin
11 Hills, wasn't there?

12 A. That's correct.

13 Q. Do you know how much?

14 A. I was thinking that was brought up in
15 depositions. I know in depositions that was
16 asked. That's why it surprised me earlier.
17 I'm thinking -- I'm going to say in the 3- to
18 400 load range.

19 Q. 3- to 400 loads on these 12 to 15
20 cubic yard trucks?

21 A. If we haul them on our tandem axles,
22 it would have been 12 yards a load. Most
23 everybody that we hired had the newer triaxle
24 dump trucks and theirs would have been 15.

25 THE COURT: How many hundreds,

1 did he say?

2 BY MS. CARSON:

3 Q. How many hundreds did you say?

4 A. The last time I looked at it -- it was
5 brought up during depositions. You-all asked
6 me those questions. You-all kept saying --
7 you just brought it up today. It was brought
8 up during depositions, you know, where did
9 this material go to and I told you where it
10 went to. RCR got part of it. The church got
11 part of it. We hauled some to my
12 subdivision.

13 Q. That's what I was referring to just
14 being brought up today, was about the truck
15 tickets. I acknowledge that you gave all
16 that testimony about all the other places it
17 went. I was just trying to get at whether
18 you had to pay to have any of it hauled. You
19 didn't have to pay to have what you sold
20 hauled away because the people who bought it
21 hauled it away?

22 A. That's correct.

23 Q. What you took to your subdivision, did
24 you use your trucks for that?

25 A. I'm thinking we hauled most all of

1 it. I'm almost sure that we hauled most of
2 it.

3 Q. What about the little bit that went to
4 the church?

5 A. I think Civil Contractors -- actually,
6 the church come down and wanted the dirt, a
7 representative of the church did. Ricky
8 called me and said the church is wanting four
9 or five loads. What are you going to charge
10 them? Let them have it. Do they have
11 somebody to haul it? They said, Yes, Civil
12 Contractors.

13 Q. Somebody else did it. You didn't have
14 to pay for it?

15 A. No, ma'am.

16 Q. Now, the borrowed material that you
17 used to replace this material that you all
18 hauled out was provided free of charge by the
19 county?

20 A. Yes, they did honor that.

21 Q. And you said earlier that that was
22 something that you were aware of when you bid
23 the project, but isn't it true that Mr.
24 Ritter didn't make you aware that that was
25 available until after you had already bid the

1 project?

2 A. Harley from the very start said that
3 the material, we had the material -- from my
4 understanding of it, we had the material from
5 Day One.

6 Q. When did you first discuss that with
7 Harley?

8 A. I'm not sure of the exact date.
9 During the bidding process -- let me back up
10 and say something here. My interpretation
11 was he had some free dirt worked out
12 somewhere. I would just presume that's where
13 he was getting at. It seemed like he got it
14 at first at a rock quarry, is where we got it
15 at, or the county rock's quarry. That may
16 have been where he first had it worked out
17 and then it shifted over to the county's --
18 from what I recall of it, he had that worked
19 out. That's why the bid is as reasonable as
20 it was.

21 THE COURT: This was the fill?

22 THE WITNESS: Yeah, all the
23 imported fill. As I recall it, Harley had
24 that worked out before the bid.

25 BY MS. CARSON:

1 Q. That's based on what Harley told you?

2 A. It is based on what I recall Harley
3 telling me.

4 THE COURT: Is it covered in the
5 contract?

6 MS. CARSON: Your Honor, there is
7 no provision in the contract that free fill
8 would be provided. There's also no provision
9 that a free place to dump the material would
10 be provided. Both of those were provided.

11 BY MS. CARSON:

12 Q. Your testimony is based on your
13 recollection of your conversation with Mr.
14 Ezell?

15 A. Correct.

16 Q. It is not based on any conversation
17 that you personally had with anybody at the
18 county?

19 A. No, ma'am.

20 Q. Now, given the fact that you didn't
21 send Change Order No. 4 until on into April
22 of 2000, by that point, the county had wanted
23 to find out whether the soils that were
24 removed were unsuitable and it had no way of
25 doing that, did it?

1 A. Actually, as far as the job went, they
2 would have had no way without RCR keeping PSI
3 out there and doing detailed drawings. There
4 would have been no way they could have at any
5 point basically determined that.

6 Q. But that's what the county's
7 expectations were, weren't they, that PSI
8 would be out there?

9 A. Well, evidently, that's what RCR had
10 represented to them. We were under the
11 assumption that -- not just under the
12 assumption. It is clearly in writing that
13 that was RCR's responsibility. We were going
14 to shift it -- not shift it, but they wanted
15 to take that responsibility. They wanted a
16 refund and we agreed to it.

17 Q. And all those specifications that Mr.
18 Cashion went through with you specifically
19 say that's how unsuitable material will be
20 removed, under the supervision of the soils
21 engineer; correct?

22 A. That's correct.

23 Q. Now, you testified several hours ago
24 that you believed you had conferred a benefit
25 on the county -- American Excavators had by

1 virtue of this work; do you remember that
2 testimony?

3 A. I said what now?

4 Q. Do you remember testifying that you
5 believed that American Excavators by virtue
6 of doing this work had conferred a benefit on
7 the county?

8 A. I mean, the county definitely
9 benefited in a couple of ways. They got
10 their material hauled off from the site that
11 they were trying to get -- that they would
12 have had to have hauled off. Not just us but
13 other people bestowed that benefit on them if
14 you want to call it a benefit. Yeah, they
15 benefited from, you know, if they wanted the
16 building built, this work had to be done.

17 Q. What geotechnical engineer told you
18 that this work had to be done if they wanted
19 the building built?

20 A. The ones that RCR was using, whoever
21 they -- RCR was using. I think they were
22 using PSI, is who they relied on.

23 Q. They told you about 1300 cubic yards
24 had to be removed instead of --

25 A. There's four distinct areas that I

1 know RCR called them on.

2 Q. PSI never told you that anything else
3 had to be removed?

4 A. I think you need to ask Mr. Tipper or
5 Harley Ezell that. I think they were back
6 out there just to observe at times. Maybe it
7 wasn't large enough to measure. I don't
8 know. I don't know if they took -- I really
9 don't know. That's the four definite times
10 that I can say that I believe RCR had sent
11 PSI out to verify their quantities by
12 whatever method they were supposed to give
13 them to the county.

14 Q. So the determination about the
15 unsuitability of all the rest of those soils
16 was made by, according to your testimony,
17 Anthony Orange and Harley Ezell and Ricky
18 Tipper?

19 A. He can't make it on his own. Ricky
20 Tipper didn't. He had to use RCR -- we
21 wanted RCR or PSI to make that determination.

22 Q. The fact of the matter is the
23 specifications are very clear that the
24 geotechnical engineer makes it and that none
25 of those individuals can make that decision

1 on their own?

2 A. That's right, as far as RCR's
3 responsibility to you. That's what I
4 understand now by reading these but now our
5 agreement was -- there again, I'm not
6 agreeing that I took on those terms. I done
7 exactly what RCR instructed us to do.

8 Q. I understand.

9 MS. CARSON: I don't have
10 anything further, Your Honor.

11 THE COURT: Mr. Panther, where
12 are we on redirect?

13 MR. PANTHER: I think Ms. Carson
14 mopped up most of the areas that I was going
15 to get into.

16 THE COURT: Want to take a minute
17 to look at your notes?

18 MR. PANTHER: Let me do that,
19 please, sir. I don't expect to be very long
20 with Mr. Parker. Do you want to get into
21 this \$10 and 12.50 issue?

22 THE COURT: Let's take just a
23 five minutes.

24 (Brief recess observed.)

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REDIRECT EXAMINATION

QUESTIONS BY MR. PANTHER:

Q. I want to review briefly Harley Ezell's July 1, 1999 letter. Mr. Cashion and Ms. Carson had reviewed this with you and they highlighted the sentence that says, Final depths to undercut to my understanding will be determined by PSI. Do you see that there?

A. Yes, sir.

Q. Now, my question to you is this: What was your understanding as to who would notify PSI, bring them on site to verify final depths?

A. It was no question that RCR was to do that. They assumed the responsibility of the testing.

Q. Okay. Although they highlight this sentence here about final depths to be undercut will be determined by PSI, they didn't highlight this sentence where Mr. Ezell writes, To verify actual quantities removed, I would like a representative of PSI or RCR to be present at the time this work is performed.

1 Did you care whether RCR directed you
2 to remove it or PSI directed you to remove
3 it?

4 A. Even if PSI did, I would still want
5 RCR. I mean, that's who we relied on to --
6 we were working for RCR, not PSI.

7 Q. Okay. Mr. Cashion asked you, do you
8 have any proof from a geotechnical engineer
9 that the cut was unsuitable. Do you remember
10 him asking a question like that?

11 THE COURT: I believe she also
12 asked him.

13 THE WITNESS: About the
14 particular or about all the cut?

15 BY MR. PANTHER:

16 Q. Do you have any proof from a geotech
17 that the cut was unsuitable, and I believe
18 you said you don't. That's right, isn't it?

19 A. I thought they were talking about all
20 the cuts.

21 Q. Let me ask you this, Mr. Parker. What
22 reason did you have to believe when you were
23 on this job working that you were going to be
24 sitting in here in a trial and them asking
25 you if the cut was suitable or unsuitable at

1 the time you were doing this work?

2 A. Did I what?

3 Q. What reason did you have to believe at
4 the time that you were doing this work that
5 somebody was going to ask you at this time
6 whether the cut was suitable or unsuitable?

7 A. I'm sorry, Todd. My mind is -- I'm
8 very tired.

9 Q. Did you have any reason to get a
10 geotech out there to test whether the cut was
11 suitable or unsuitable?

12 A. At this point?

13 Q. At the time that the job was underway?

14 A. That responsibility was RCR's to get a
15 geotech out.

16 Q. In response to a question that Mr.
17 Cashion asked you when he was throwing these
18 specifications out, he talked about an
19 obligation to notify a geotechnical engineer
20 once the site was to subgrade; do you
21 remember that?

22 A. Correct.

23 Q. Whose responsibility was it to bring a
24 geotech to proof roll or do whatever the heck
25 they wanted to do once the site was in

1 subgrade?

2 A. Originally, we were going to.

3 Q. As it turned out?

4 A. Yeah, on the very start, you know,
5 after we had that first confrontation with
6 the disagreement on the soils for the first
7 day probably, we were then. After that, RCR
8 hired PSI to do it.

9 Q. So if any testing of the subgrade was
10 to be performed, whose responsibility was
11 that?

12 A. RCR's.

13 Q. Now, Mr. Cashion was asking you about
14 the material, that unsuitable material, that
15 you removed before July 1, 1999. Is the
16 amount of material that you were giving the
17 county and RCR credit for set out in Mr.
18 Ezell's letter?

19 A. Yes.

20 Q. Which is what? How much were you
21 giving away?

22 A. He estimated it to be approximately
23 600 yards of unsuitable material.

24 Q. Before July 1, where was most of your
25 operation concentrated?

1 A. On the building pad.

2 Q. Let me take a crack at your testimony
3 concerning how you gave full credit for the
4 material in the cut section if I can go at it
5 this way. What is the total amount -- take a
6 look at Change Order No. 4. Do you have
7 that?

8 A. Yes.

9 Q. What is the total amount cubic yardage
10 of unsuitable material that American
11 Excavators is asking to be paid for?

12 A. Total amount is 13,500 cubic yards.

13 Q. Okay. Of that 13,500 cubic yards, how
14 many cubic yards of it are you charging them
15 \$10 a cubic yard for?

16 A. Approximately I think 2,900 --

17 Q. Take a look at Change Order No. -- you
18 can still look at Change Order No. 4. It's
19 in there. If it is \$10 a yard, how many
20 yards is it that you were asking to be paid
21 for \$10 a cubic yard?

22 A. That would be 2,898.

23 Q. 2,898. Absent an accounting error,
24 your intention was to deduct 2,898 cubic
25 yards of this total and only charge \$10 a

1 cubic yard for the 2898; isn't that right?

2 A. That's what I thought she had done. I

3 thought she gave them credit. She did but I

4 think Mr. Cashion is right. I think she

5 thought she was doing that and I thought she

6 was, but I think they're owed a credit for

7 that yardage.

8 Q. Okay. This is at \$10. Use your

9 calculator there and subtract these two

10 numbers: 13-five and 2898.

11 A. 10,602 yards.

12 Q. 602?

13 A. Yes, sir.

14 Q. So your intention, since you removed a

15 total of 13,500 cubic yards, was to force

16 this number at \$10 a cubic yard thereby

17 reducing that number; isn't that right?

18 A. That's correct.

19 Q. Because if you didn't use 2898 and you

20 used something less than that, that would do

21 what to this number at \$12 a cubic yard?

22 A. Increase it.

23 Q. Yes, sir.

24 A. Did I make a mistake or not?

25 Q. You may have made the mistake in the

1 accounting of it, but I think your heart was
2 in the right place.

3 THE COURT: I think it was, too,
4 on that issue.

5 BY MR. PANTHER:

6 Q. You've made a claim against RCR's
7 bonding company?

8 A. That's correct.

9 Q. I'm going to ask you to take a look at
10 the labor and material bond and the
11 performance bond that RCR had on this job and
12 ask if you can identify it. Can you identify
13 the labor and material bond as that labor and
14 material bond that RCR had on this project?

15 A. I believe it to be, yes, sir.

16 MR. PANTHER: Your Honor, we move
17 that into evidence as Exhibit No. 15.

18 THE COURT: All right.

19 (Exhibit No. 15 was marked.)

20 BY MR. PANTHER:

21 Q. Can you identify the performance bond
22 as the performance bond that RCR had on its
23 job?

24 A. Yes, sir.

25 MR. PANTHER: We move that into

1 evidence as Exhibit 16.

2 THE COURT: All right, sir.

3 (Exhibit No. 16 was marked.)

4 MR. PANTHER: Thank you, Your
5 Honor. Thank you, Mr. Parker. I have
6 nothing further.

7 MR. CASHION: I won't be very
8 long, Your Honor, if you'll give me just a
9 few minutes.

10 THE COURT: All right.

11

12 RECROSS-EXAMINATION

13 QUESTIONS BY MR. CASHION:

14 Q. We've got four points to visit with
15 you, Mr. Parker. The first point is going
16 back to your changing your testimony from 12
17 cubic yards per load to 15 cubic yards per
18 load.

19 Now, is it your testimony -- when you
20 are thinking 12 cubic yards per load, you
21 were thinking of a tandem truck and you
22 should have been thinking 15 cubic yards for
23 a triaxle truck?

24 A. I would credit that for -- I mean,
25 that's what I commonly use on my -- I'm more

1 used to 12 than I am the 15.

2 Q. So, it is your testimony 12 yards a
3 tandem, 15 yards a triaxle; that's your sworn
4 testimony?

5 A. Yeah, that's what I -- on a triaxle,
6 15 and on a tandem, 12.

7 Q. Let's say the triaxle, 15 cubic yards
8 capacity, that's loose dirt; right?

9 A. From my understanding -- actually
10 loose, you'd have to take 18 loose yards --
11 15 compacted yards out of the ground is what
12 that truck will hold.

13 Q. Okay. Let me have you turn back to
14 your deposition so we can read to the Court
15 what you said the first time. I want to ask
16 you to turn in your deposition to scrunch
17 Page 9, Page 35 of your deposition.

18 A. Which page, Mr. Cashion?

19 Q. 35.

20 A. Okay.

21 Q. Line 6: "How many cubic yards do you
22 get in a truck?

23 "Answer: I estimate twelve.

24 "What kind of trucks have you got?

25 "Triaxle.

1 "So you're hauling that or is that the
2 capacity of the truck?

3 "That's the compacted volume.

4 "Well, you're not compacting your dirt
5 in the truck, are you? Isn't that loose?

6 "It's loose.

7 "Question: But you still estimate on
8 compacted volume and not loose volume?

9 "Answer: Twelve.

10 "Okay. And that's the total capacity
11 of that truck volume?

12 "12 yards of compacted, 15 yards --
13 approximately 15 yards disturbed."

14 Do you remember that testimony now?
15 Isn't that what you said, sir?

16 A. That's exactly what it says. That's
17 what she wrote.

18 Q. So back in the deposition you were
19 testifying then it was 12 yards of compacted
20 for a triaxle truck, weren't you?

21 A. Yeah. That's what I believed that day
22 or what I was thinking.

23 Q. And today you're testifying that it's
24 15 cubic yards for a triaxle truck?

25 A. That's correct.

1 Q. So you were incorrect and the reason
2 you missed it the first time was because you
3 were thinking of a tandem truck when actually
4 you were testifying about a triaxle truck?

5 A. I was thinking about that's what they
6 use but I agree that that part there is in
7 error, and that's how I discovered that it
8 was -- that I used the wrong number to do the
9 estimate.

10 Q. And the reason you discovered you used
11 the wrong number is because you realized
12 since you are now saying it is yards going
13 in, you had to account for another 3,000 that
14 you were obligated to put in under the
15 contract? That's when you realized your
16 mistake; right?

17 A. No, I can't say that. No, sir.

18 Q. Now, you've testified a lot today but
19 isn't it true that you had very few
20 conversations with Don Stover and Anthony
21 Orange during June and July on this project?

22 A. I had what would have been typical for
23 a job like that.

24 Q. Isn't it true that Anthony Orange and
25 Don Stover never represented to you anything

1 about keeping up with the trucks or where to
2 do undercut, did they?

3 A. No. I mean, they represented that all
4 the time. I mean, that's whose direction --
5 we were working for RCR.

6 Q. It wasn't the direction you were
7 receiving. They weren't talking to you, were
8 they, on those issues?

9 A. No, sir.

10 Q. So everything that you've testified
11 about, you're just saying what you heard from
12 Harley or Ricky or somebody else; right?

13 A. That's what was discussed at our
14 meetings, yes.

15 Q. Mr. Panther said, Okay, we'll give you
16 600 yards on the Exhibit 14, the July 1
17 letter; do you remember that?

18 A. Correct.

19 Q. You said in your testimony to me that
20 you would not make a claim for anything prior
21 to July 1, 1999; correct?

22 A. Repeat that, Mr. Cashion.

23 Q. Your testimony on my
24 cross-examination, you said that you were not
25 asking the Court for any undercut whether it

1 be -- for any unsuitable soil replacement
2 prior to July 1, 1999?

3 A. I think I recall on that, I corrected
4 you on that. What I said was I wouldn't ask
5 for that 600 yards, is what I recall saying.

6 Q. What about if your 600 yards is wrong
7 and you took out a lot more when you went in
8 there and stripped that than what you should
9 have and the 600 is a bad estimate in his
10 letter? Are you asking us for all of that
11 material that you replaced prior to July 1
12 less 600 dollars (sic)? You want the
13 difference?

14 THE COURT: 600 cubic yards.

15 THE WITNESS: I'm relying on
16 Harley estimated it to be 600 yards. He sent
17 the letter and, of course, the engineers
18 looked at the same thing he looked at.
19 Nobody disputed it.

20 BY MR. CASHION:

21 Q. What I'm asking you is, we've got the
22 600 cubic yards out of the way. If you
23 undercut that site because you thought or
24 Ricky thought it was a lot of topsoil, about
25 two feet, he was only supposed to be cutting

1 six inches. If he undercut a lot more than
2 600 yards, are you asking the Court to give
3 that money to you?

4 THE COURT: During that period of
5 time prior to July 1?

6 MR. CASHION: Yes, sir.

7 BY MR. CASHION:

8 Q. Are you asking for that?

9 A. Most definitely, which I know
10 according to the notes that it was directed
11 either by the soil scientist -- not just by
12 them but RCR in conjunction with the soil
13 scientist.

14 Q. So you are asking for anything above
15 600 yards prior to July 1, 1999?

16 A. That's my understanding, correct. We
17 were given orders before that to remove
18 additional soil.

19 THE COURT: Can you quantify that
20 in any way for me? In other words, as I hear
21 you, you're saying there probably was more
22 than 600 cubic yards removed from this site
23 prior to July 1, and if there was, you're
24 asking to be paid for it?

25 THE WITNESS: I'm saying there

1 could have been. As I testified earlier, I
2 don't think -- I think they shifted their --
3 while we waited for the county to come out,
4 we shifted our focus over to the pad and all
5 the cut was left alone.

6 THE COURT: What if your man's
7 estimate of 600 yards is way off?

8 THE WITNESS: Okay. If it was --
9 I don't think it was because they looked at
10 it. Also, if it was off, I think they
11 determined that soil that was taken off to be
12 unsuitable, it would have had to have been
13 removed. Let's just say he did remove an
14 extra 1,000 yards. I don't think he did. I
15 thought somebody would have caught it if it
16 was more than 600 yards. They came out and
17 looked at the soil he removed and said that
18 it's unsuitable. It would have had to have
19 been removed anyway.

20 THE COURT: Is there any way
21 today you can quantify any amount over and
22 above 600 yards that was removed prior to
23 July 1?

24 THE WITNESS: No, I couldn't.

25 THE COURT: Anybody in your

1 company?

2 THE WITNESS: I believe Mr. Ezell
3 and Mr. Tipper could if that did occur.

4 THE COURT: All right. Go
5 ahead.

6 BY MR. CASHION:

7 Q. But you believe the 600 is a good
8 number; right?

9 A. What's that?

10 Q. You believe his letter is accurate;
11 right?

12 A. Correct.

13 Q. You believe his letter is accurate on
14 his other calculation of 1,000 to 1700 cubic
15 yards undercutting he's going to get paid
16 for?

17 A. No. I think he even states on there
18 that it was -- I think the exact wording says
19 it is just a rough estimate. I don't think
20 he went into detail. I think he even said it
21 could be more or it could be less.

22 Q. Let's talk about that cut section for
23 just one minute. You recognize that you
24 hauled off most all the cut in this site,
25 don't you?

1 A. I wouldn't know -- I couldn't answer
2 that to say we hauled off most of it or not.
3 I'd have to sit down and really look at some
4 numbers and work with them.

5 Q. If you hauled off cut that was good
6 material, you still want to get paid for
7 hauling it all off and replacing it with
8 borrowed material; right?

9 A. If we were directed to remove
10 unsuitable materials, yes, that's what I'm
11 asking for.

12 Q. Answer my question. For the cut
13 material, do you know if you hauled off most
14 of it?

15 A. The cut material?

16 Q. Yes, sir. I'm not talking about
17 undercut. I'm talking about above subgrade
18 cut.

19 A. I can't say whether we hauled it off
20 or if it was respread around the county
21 building or if RCR used it on another job or
22 if it went to the church. I can't tell you
23 where it went.

24 Q. Do you even know when you cut the cut
25 sections out? Do you even know?

1 A. I don't know personally without
2 looking at the job records.

3 Q. But if you hauled off the cut
4 sections, which is what you're claiming --
5 you're claiming all of it. I understood you
6 hauled off most of it. Isn't it true that
7 part of that material was likely good
8 material?

9 A. When you say "good," you mean --?

10 Q. Usable, suitable, engineer PSI said
11 there's not a problem with it.

12 A. No. We would have used any
13 material -- if it was suitable, we used it.
14 If it wasn't, we didn't.

15 Q. So you're saying all that cut was
16 unsuitable material that you hauled off?

17 A. No. I think --

18 Q. You're saying that all the cut that
19 you hauled off was unsuitable?

20 A. All the cut that we hauled off, yes,
21 should have been -- they probably classified
22 it as unsuitable.

23 Q. And who classified it?

24 A. From what I understand, from my
25 understanding -- and we've been over this and

1 over this, but RCR hired PSI.

2 Q. You're relying on PSI saying the cut
3 sections are unsuitable material and,
4 therefore, you're entitled to --

5 A. We're relying on -- primarily RCR is
6 the person -- that's the company we were
7 working for, not PSI.

8 MR. CASHION: I don't have any
9 other questions, Your Honor.

10 THE COURT: I know he's worn
11 out.

12 MS. CARSON: I wasn't even going
13 to think about it, Your Honor.

14 THE COURT: What I hear him
15 saying is that he was relying on somebody
16 from RCR telling him to haul off this dirt.

17 MR. CASHION: I was just making
18 sure that RCR wasn't telling him either.

19 THE COURT: Not him. I used
20 "him" wrong. Telling his people.

21 THE WITNESS: Telling the company.

22 THE COURT: His people and that
23 would be a bone of contention.

24 MR. CASHION: One of several.

25 THE COURT: Ms. Carson?

1 MS. CARSON: I wouldn't even
2 think of it, Your Honor. Nothing further.

3 THE COURT: Well, Mr. Parker,
4 what do you think? It's been a long day.

5 THE WITNESS: Been a long one but
6 it's got to be done.

7 THE COURT: I agree. I learned a
8 lot today.

9 (Witness excused.)

10 THE COURT: What time would you
11 all like to come back tomorrow?

12 MR. PANTHER: Our next witness is
13 Harley Ezell, and I've told him to be here
14 right at 9:00. We'll get started with him
15 out of the box. If Your Honor wants to start
16 earlier, I can try to raise him on the mobile
17 or try to get ahold of him and see if he'll
18 start earlier. He would probably be thrilled
19 if you wanted to start earlier, Your Honor.

20 MR. CASHION: 8:30 would be fine,
21 Your Honor.

22 THE COURT: All right. Let's
23 shoot for 8:30 then. I won't hold that
24 against anybody if we don't get started at
25 8:30, but that's what we're shooting for.

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(The proceedings were adjourned
at approximately 6:00 p.m.)

VOL. VIII

FILED

ELAINE B. BEELER
CLERK & MASTER

2002 AUG 21 PM 3:46

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

ENTERED _____

3 AMERICAN EXCAVATORS, LLC,)

BOOK _____ PAGE _____

4 Plaintiff,)

5 vs.)

NO. 27213

6 RCR BUILDING CORPORATION)
7 and FIREMAN'S FUND)
8 INSURANCE COMPANY,)

M2002-01757

FILED

OCT 11 2002

Clerk of the Courts

8 Defendant/)
9 Third-Party Plaintiff,)

10 vs.)

11 WILLIAMSON COUNTY,)
12 TENNESSEE,)

13 Third-Party Defendant.)
14 -----)

VOLUME II

15 TRANSCRIPT OF PROCEEDINGS

16 Taken before the
17 Hon. Robert E. Lee Davies, Chancellor
18 January 31, 2002
19
20
21

22 -----
23 VOWELL & JENNINGS COURT REPORTING
24 Washington Square Building
25 222 Second Avenue North, Suite 328
Nashville, Tennessee 37201
(615) 256-1935

VOWELL & JENNINGS, INC.

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PROCEEDINGS

THE COURT: Good morning. All right. Anybody need to say anything before we get started?

(No response.)

THE COURT: Okay. Mr. Panther?

MR. PANTHER: We're ready to proceed. We call Mr. Harley Ezell.

HARLEY EZELL

was called as a witness on behalf of the Plaintiff and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PANTHER:

Q. Would you please state your name and what you do for a living?

A. Harley Ezell. I'm a land surveyor, construction superintendent.

Q. Who do you work for?

A. Currently work for Smith Trucking Excavating in Columbia, Tennessee.

Q. About how long have you worked for Smith Trucking?

1 A. Overall, probably about seven or eight
2 years but I've been back with them this time
3 since probably September.

4 Q. If you would, give us just a brief
5 summary of what your work history has been
6 over the years.

7 A. I've been involved in surveying for
8 approximately 15, 16 years as a land
9 surveyor, construction surveyor. I've been
10 in the construction part, actually a
11 superintendent, for probably five years. On
12 a utility company excavating company, for
13 approximately two years.

14 Q. At one point were you employed by
15 American Excavators?

16 A. Yes.

17 Q. Can you give us the approximate dates
18 of when you worked for American Excavators?

19 A. Okay.

20 Q. Let's do it this way. Maybe I can
21 help you a bit. Let's take the end date.
22 About when did you stop working for American
23 Excavators?

24 A. '98 or '99. Like I say, I would have
25 to look.

1 Q. In front of us is a July 1, 1999
2 letter that you wrote?

3 A. So, it was '99.

4 Q. Using that as sort of a refresher,
5 about what month in 1999 did you stop working
6 for them?

7 A. August, September.

8 Q. Okay. About when did you start
9 working for them?

10 A. That winter. I'm thinking it was
11 after the first of the year in '99. I'm
12 thinking around January or February.

13 Q. Okay. What was your position with
14 American Excavators?

15 A. Estimator and project manager.

16 Q. Tell us what your duties and
17 responsibilities were as estimator and
18 project manager.

19 A. To bid projects to different general
20 contractors, look for work, quote the project.

21 Q. And as project manager, what were your
22 duties and responsibilities?

23 A. To ensure that we had the proper
24 equipment, material on the project; make sure
25 everything was running smooth.

1 Q. Did you have that position concerning
2 the Williamson County community services
3 building?
4 A. Yes.
5 Q. Did your duties with this project
6 include preparing American Excavators' bid?
7 A. Yes.
8 Q. We discussed a lot of this yesterday
9 so I just want to touch on it with you, Mr.
10 Ezell. What documents did you obtain and
11 review in the preparation of American
12 Excavators' bid?
13 A. A set of drawings, soils report, spec
14 book, and I'm not sure if there were any
15 addendums associated with this project.
16 Q. If you need to see a copy of the soils
17 report, let me know.
18 A. Okay.
19 Q. Generally, what information did you
20 use out of the soils report that went into
21 preparing the bid?
22 A. The boring logs and locations, the
23 soils tech recommendations. That's really
24 about it.
25 Q. Do you remember if the soils report

1 gave any indication of possibly encountering
2 adverse conditions?

3 A. Yes.

4 Q. I'm going to go ahead and pass a copy
5 to you anyway. This is Exhibit No. 1. Mr.
6 Ezell, I've had passed to you Exhibit No. 1
7 which is the report from GT&E. What adverse
8 conditions do you remember the soils report
9 pointing out?

10 A. There was an area that they had
11 questioned in the proposed gymnasium area and
12 the garden area on the site.

13 Q. Okay. This may help. I'm showing you
14 a blow-up of what I think is the grading and
15 excavation plan for this project. Can you
16 identify that?

17 A. Correct. Yes, it is.

18 MR. PANTHER: Let me ask counsel
19 a question. This is my only copy. I don't
20 have a paper copy. If you all have a paper
21 copy that you would like to put into
22 evidence, we can use that so the record isn't
23 so bulky.

24 MR. CASHION: You've had that one
25 reduced. Use that one. We just mounted it.

1 That's what we're going to put into
2 evidence. That's the paper copy glued to a
3 poster board.

4 MR. PANTHER: Your Honor, we move
5 this grading and excavation plan into
6 evidence as the next-numbered exhibit,
7 Exhibit 17, I believe.

8 THE COURT: All right.

9 (Exhibit No. 17 was marked.)

10 BY MR. PANTHER:

11 Q. I'm going to give you a laser pointer
12 that may help you. Don't point it at
13 anybody's eyes or the back of their head.

14 MR. PANTHER: Judge, can you see
15 that where I have positioned it?

16 THE COURT: Yeah.

17 BY MR. PANTHER:

18 Q. Can you see that from where you are?

19 A. Yes.

20 Q. Now, looking at Exhibit No. 17, this
21 grading plan, can you indicate for us
22 approximately where the garden area was?

23 A. In about the southwest section, in
24 this area right in here.

25 Q. So, it was in the building pad area?

1 A. Yes. The majority of it was in the
2 building pad area with a little bit
3 encroaching in the parking area, the parking
4 spots.

5 Q. And then you mentioned there was
6 another area in the gymnasium area. About
7 where was that?

8 A. They had the design of the gymnasium
9 area, if I ain't mistaken -- I would have to
10 look at the soils report, but I believe they
11 show the building somewhere in this area in
12 here.

13 Q. Did the grading -- did the soils
14 report also indicate what the depth of the
15 topsoil was?

16 A. Yes.

17 Q. What do you remember it saying?

18 A. Five-tenths.

19 Q. Pardon me?

20 A. Five-tenths, half a foot.

21 Q. Okay. Why was the depth of topsoil or
22 was the depth of topsoil important
23 information for you to have in preparing the
24 bid?

25 A. Well, it let me know the amount of

1 topsoil that's on the site, whether I have to
2 import some to finish a site or if I have to
3 waste some off a site. It helps me -- you
4 have to strip the topsoil and then you'll
5 calculate your cut or fill volumes after the
6 topsoil has been stripped.

7 Q. Did the soils report also provide
8 boring logs that indicated what the type of
9 material was in those borings?

10 A. Yes.

11 Q. Except for the garden area that you
12 mentioned and the area in the gymnasium that
13 you mentioned, what did the soils report
14 indicate about the suitability of the rest of
15 the material on site?

16 A. That it was suitable.

17 Q. Okay. And why was that important
18 information for you to have in preparing the
19 bid?

20 A. Well, the soils report and the boring
21 logs, as far as your rock strata, if you have
22 to do any explosives or the materials you
23 have to move on site, whether it is going to
24 be compatible to use a structural fill.

25 Q. Now, we have the excavation grading

1 plan in front of us. Generally tell us what
2 information you took off the plan that went
3 into preparing the bid.

4 A. What I use is an Agtech software. I
5 take the grading plan, digitize in the
6 original ground. Once I get the original
7 ground digitized in, I'll come in and put in
8 the parameter of the work area, strip that
9 according to the boring logs where the
10 topsoil depth is on the boring logs. Then,
11 I'll come in, after I strip it, and digitize
12 in the proposed contour lines and the
13 buildings minus the section -- if it's
14 asphalt, if it is 100 elevation -- if the
15 asphalt is ten inches thick, I'll take that
16 sectional thickness down. It will give me
17 the quantities cut or fill.

18 Q. When you say quantities cut or fill,
19 will it indicate whether you have to bring
20 fill in or haul fill out?

21 A. Yes.

22 Q. Let me pass you a document. This is
23 Exhibit No. 2. Do you recognize that as the
24 take-off that you prepared?

25 A. Yes.

1 Q. Does that show what the difference is
2 between the cut and the fill that you took
3 off the excavation and grading?
4 A. Yes.
5 Q. What's it show?
6 A. I'm showing 3107 yards of topsoil,
7 2898 of cut and 2942 of fill, imported fill.
8 Q. Before submitting American Excavators'
9 bid, did you make any site visits?
10 A. Yes.
11 Q. Did you bring any equipment with you
12 when you made your site visits?
13 A. Yes.
14 Q. Tell me what you did on site in order
15 to further investigate the conditions.
16 A. I brought a backhoe and went to the
17 garden area, in this area here, because I was
18 concerned about the three foot potential
19 undercut that was stated in the soils
20 report. They were talking it may have to be
21 excavated and replaced down to the plow
22 zone.
23 I would say maybe a week prior to the
24 bid, I carried a backhoe to that area and dug
25 two or three pits in that area to see what

1 the soil type was because I believe I took --
2 what I normally do, especially if there is
3 rock encountered on the project, I'll take
4 the boring logs and locate those per his
5 sketch, soils sketch, into my Agtech and I
6 can build a strata layer that will separate
7 my rock quantities out, but he didn't have
8 any in that area.

9 Q. Take a look at -- I think you still
10 have Exhibit No. 1 in front of you, the soils
11 report. Flip to the back of it and see if
12 there is a map in there that indicates where
13 the borings were?

14 A. Yes.

15 Q. Do you find that?

16 A. Yes.

17 Q. Is your writing on there where you
18 would have indicated which bore was in which
19 location?

20 A. Yes.

21 Q. Now, when you took a backhoe out
22 there, did you go to investigate what the
23 condition of the material was in those, what
24 I would call, test pits?

25 A. In the garden area, yes.

1 Q. What did you find concerning
2 suitability of the material in the garden
3 area?
4 A. My determination was that this
5 wouldn't have to be excavated, undercut,
6 three foot.
7 Q. Now, using the take-off that you have
8 in front of you, what does it show the total
9 volume in the cut section to be?
10 A. 2898.
11 Q. Okay. From the soils report, what was
12 the suitability of that material in the cut
13 section indicated?
14 A. It was suitable, to be used as
15 engineered fill.
16 Q. Was that important for you to know in
17 preparing the bid?
18 A. Yes.
19 Q. How so?
20 A. The 2898 was yardage I didn't have to
21 count on importing in.
22 Q. Assuming or based upon the information
23 that you had that the cut section material
24 was suitable, what did you plan to do with it
25 on site?

1 A. Cut it and place it as fill in the
2 fill areas.

3 Q. If the material in the cut section
4 turned out not to be suitable, what would
5 that require you or American Excavators to
6 do?

7 A. To export it, waste it and import
8 replacement fill.

9 Q. Now, when you prepared your bid, did
10 you anticipate -- where did you anticipate
11 getting fill from?

12 A. From the quarry and the county highway
13 department was putting a road project in on
14 the north side of Franklin.

15 Q. You said the quarry. Whose quarry was
16 it?

17 A. I'm assuming it's Williamson County's
18 quarry.

19 Q. At the time you were preparing the
20 bid, did you anticipate getting the fill that
21 you might need for free from those two
22 locations from the county?

23 A. Yes.

24 Q. What was it that led you to believe
25 that you could get any fill material that you

1 needed from the county at no cost?

2 A. Prior to the bid, normally if it is a
3 project just looking at import, I'll find
4 someone who needs a pond dug or something to
5 get material import from. I'm not sure this
6 is his correct name but Jim that works for
7 the county. I think he's a superintendent.

8 Q. All right. Let me pass you a document
9 and ask if you can identify it. Mr. Ezell,
10 I've handed to you what appears to be a May
11 7, 1999 letter from yourself to Joey Craig.
12 Can you identify that as the letter that you
13 wrote on this project?

14 A. Yes.

15 MR. PANTHER: Your Honor, we move
16 that into evidence as Exhibit 18.

17 THE COURT: All right.

18 (Exhibit No. 18 was marked.)

19 BY MR. PANTHER:

20 Q. I realize this is a little bit out of
21 sequence in our discussion, but does this
22 reference the issue of the fill material and
23 where you were getting it from?

24 A. Let me read this. (Pause.) Yes,
25 that's part of it. Correct.

1 Q. Now, although the county -- did the
2 county end up providing American Excavators
3 with fill at no cost?
4 A. Yes.
5 Q. And although the county did that, what
6 other costs for American Excavators were
7 associated with having to bring fill to the
8 site?
9 A. The trucking was the big ticket item.
10 Q. Did American Excavators have an
11 employee at the quarry pit or the chirt pit
12 loading the material?
13 A. Yes.
14 Q. And did American Excavators also have
15 any equipment?
16 A. Yes.
17 Q. What did they have at the chirt pit or
18 quarry pit?
19 A. At the quarry, we had a track loader.
20 I ain't sure if it was 976, and then we had a
21 trackhoe excavator.
22 Q. If the county had not provided fill at
23 no cost, how would that have affected your
24 bid?
25 A. Two or three different ways. It

1 depends upon where I could have found the
2 material to import, the haul distance,
3 whether I had to buy it. I mean, it had the
4 potential to multiply the job by five to ten
5 times.

6 Q. Mr. Ezell, I'm going to hand you what
7 we've marked as Exhibit No. 4 and ask if you
8 can identify that, although it's an unsigned
9 copy, as a copy of the bid that was submitted
10 on this job?

11 A. Yes.

12 Q. Now, in that bid, do you address in
13 there how American Excavators proposes to
14 price additional unsuitable material?

15 A. Yes.

16 Q. Where does that appear in your bid?

17 A. At the very bottom.

18 Q. Go ahead and read for us what you're
19 referring to.

20 A. "Areas in parking lot are three foot
21 below building --"

22 Q. Read slowly because the court reporter
23 is trying to take all this down.

24 A. "Areas in parking lot are three foot
25 below building pad that do not proof roll and

1 require additional undercutting. Will be
2 undercut and replaced at 12.50 per cubic
3 yard."

4 Q. Without using construction
5 terminology, just in layman's terms, what
6 does what you just read mean?

7 A. Anything that's below subgrade that
8 doesn't proof roll or anything that's in a
9 fill section that doesn't proof roll prior to
10 me putting engineered fill on it, that's
11 undercut material.

12 Q. Now, after American Excavators was
13 awarded the subcontract, what was the first
14 field work that you did?

15 A. I went to the site and located the
16 property corners so I could establish the
17 building corners and establish the stripping
18 lengths.

19 Q. When you did that, did you find any
20 problem with how the grading and excavating
21 plan had laid out the boundaries of the site?

22 A. Yes. I'm not sure which portion it
23 was. I know which portion it was on the
24 property, but there was a discrepancy in the
25 boundary locations on the southeast section

1 of the property and the northeast section.

2 Q. What happened as a result of that

3 boundary bust?

4 A. I had to get with Ronnie Brown, a

5 local surveyor here. I believe I worked

6 through RCR first and then got ahold of

7 Ronnie Brown and got him back out to

8 re-establish the correct property corners.

9 Q. What did that do to the schedule of

10 the project?

11 A. It cost us -- we lost probably a week

12 getting all that straightened out.

13 Q. Is that issue addressed in this May 7,

14 1999 letter, Exhibit 18?

15 A. I don't believe so.

16 Q. This letter refers to a delay of four

17 weeks. What does that refer to?

18 A. That was the delay of the whole

19 project before we could get the go-ahead to

20 start work.

21 Q. The four week delay that's referred to

22 in this May 7, 1999 letter, was that before

23 the bust on the boundary line?

24 A. Yes. I can't be for sure but I

25 believe so.

1 Q. Now, at some point -- who was the
2 project superintendent on this job?

3 A. Ricky Tipper.

4 Q. At some point did you release Ricky
5 Tipper to begin stripping topsoil?

6 A. Yes.

7 Q. First off, from your knowledge of
8 construction, why is it necessary to strip
9 the topsoil? Why can't you just start
10 building?

11 A. Because of the organic content of the
12 topsoil.

13 Q. Okay. When you told Mr. Tipper to go
14 ahead and begin stripping the topsoil, did
15 you give him any particular depth or did you
16 just tell him to go strip topsoil?

17 A. I don't believe that I actually came
18 out and said take a half a foot off. I was
19 assuming Ricky had been in construction long
20 enough that he knew what to do.

21 Q. Were you also making any assumptions
22 concerning how the on-site conditions
23 compared with what the soils report said?

24 A. Yes, correct.

25 MS. CARSON: Object to the

1 leading, Your Honor.

2 THE COURT: I will sustain that

3 objection.

4 BY MR. PANTHER:

5 Q. Now, as Ricky started -- as Mr. Tipper

6 started stripping the topsoil, did you run

7 into some unforeseen conditions on the site?

8 A. Yes, when I came back to the site.

9 Q. What did you find?

10 A. I had been away from the project two

11 or three days. I was working on a couple

12 more estimates. When I came back, they had

13 in this section right here --

14 Q. You're pointing to the building corner

15 looking at the north arrow on the east side

16 of the site?

17 A. Yes, uh-huh.

18 Q. Go ahead.

19 A. They had taken out approximately two

20 and a half, three and a half feet of dirt.

21 Q. When you got to the site, could you

22 see in that three and a half feet what the

23 conditions of the soil was?

24 A. Yes.

25 Q. What did you observe?

1 A. It was very dark chocolate material,
2 not cohesive. It was -- it might as well
3 have been a four foot topsoil seam.

4 Q. When you got out to the site -- first
5 of all, from your experience in the business
6 of construction, do you know the difference
7 between topsoil and suitable base material?

8 A. Yes.

9 Q. Describe for us as best you can what
10 the difference is between the two. How do
11 you determine the difference?

12 A. Well, I mean you can take two or three
13 different type of manual tests with your hand
14 to find a piece of the soil, the plasticity.
15 There are a bunch of different factors that
16 you can weigh into it. Visually being around
17 the dirt business for X number of years, it's
18 relatively easy to identify.

19 Q. When you went out to the site and saw
20 how much topsoil had been removed at that
21 point, were any representatives of RCR
22 present?

23 A. Not the day I arrived on the site, no.

24 Q. Was there an issue where you ran into
25 some reinforced concrete pipes, RCP?

1 A. Yes, correct.

2 Q. Was that before or after this topsoil
3 issue?

4 A. It was right there about the same
5 time. Whether it was prior to it, I'm
6 thinking it was at the same time, but like I
7 said, I can't tell you if it was exactly two
8 days before. I know it was in the same time
9 frame.

10 Q. Let's talk about the RCP and then
11 we'll come back to the topsoil since that's
12 more at issue. What occurred where you
13 encountered some RCP, some reinforced
14 concrete pipe?

15 A. Coming out of this drainage swale
16 here -- I can't remember the diameter of
17 it -- an 18, 24-inch RCP pipe ran the entire
18 length of the property and discharged over
19 here.

20 Q. You're indicating with the pointer
21 that it's in the southeast side of the
22 building traversing to the northwest side?

23 A. Correct.

24 Q. Did it go all the way across the site?

25 A. Yes.

1 Q. Is that pipe shown on the grading and
2 excavation plan?

3 A. No.

4 Q. When you encountered that pipe, did
5 you have a discussion about it with any
6 representatives of RCR?

7 A. Yes.

8 Q. Who did you talk to?

9 A. Anthony Orange.

10 Q. What did you and he discuss?

11 A. What to do about the pipe.

12 Q. Tell us what occurred.

13 A. The pipe had to come out because due
14 to the area it was going in, we had to take
15 the pipe out. We was told to take it out.

16 Q. Did you discuss whether American
17 Excavators would be compensated extra for
18 having to do that?

19 A. Yes.

20 Q. What did you and Anthony Orange
21 discuss -- by the way, what was Anthony
22 Orange's position with RCR, if you know?

23 A. I don't know his actual position. He
24 was the project superintendent or field
25 representative on this project. I don't know

1 what they would classify it as.

2 Q. What did you and Mr. Orange discuss
3 concerning payment to American Excavators,
4 extra payment for removal of this RCP?

5 A. To be honest with you, I can't tell
6 you exactly what we shook out on that. I
7 really don't know.

8 Q. All right. Did you discuss with Mr.
9 Orange whether the trench that had contained
10 the RCP needed to be refilled?

11 A. Yes, correct.

12 Q. What did you and Mr. Orange talk about
13 in that regard?

14 A. It wasn't necessarily two separate
15 issues. You have to take it out and put it
16 back with material. Like I say, I don't know
17 if we did that on a lump sum deal. I don't
18 remember exactly what kind of deal we made on
19 that.

20 Q. I understand that you can't remember
21 any specifics. In general, what do you
22 remember with regard to whether American
23 Excavators would be paid extra for this item?

24 A. Yes, yes.

25 Q. Did American Excavators remove the

1 RCP?

2 A. Yes.

3 Q. Was the trench that had contained the

4 RCP then refilled with suitable material?

5 A. Correct.

6 Q. Let's go back to the topsoil now since

7 that's the more involved issue. When we left

8 off, you were saying that you had been to the

9 site and had seen a deep layer of topsoil, I

10 think you said?

11 A. Correct.

12 Q. Is that where we left off?

13 A. In this area here is when I pulled up

14 to the site and saw they had pushed out a

15 wedge.

16 Q. Did you give any directives to

17 American Excavators' field personnel at that

18 point?

19 A. Yes.

20 Q. What did you tell them to do?

21 A. I stopped them.

22 Q. Why?

23 A. Because this was a fill section.

24 Anything that was unsuitable below the six

25 inches was extra compensation. We couldn't

1 go in and get out because every inch they
2 took out over and above the six inches was
3 material that we had to import back in to
4 replace.

5 Q. I think you said that when you first
6 came out to the site, there wasn't a
7 representative of RCR there?

8 A. No. He would come by sometimes,
9 Anthony would. I think he was on another
10 project in the vicinity somewhere that he was
11 finishing up.

12 Q. What I wanted to ask you is: Although
13 an RCR representative was not present maybe
14 initially when you arrived at the site, did
15 you end up discussing this topsoil issue with
16 a representative of RCR at a later point?

17 A. Yes, I called Anthony that day.

18 Q. Okay. Tell us what happened.

19 A. And had him come out.

20 Q. And did he?

21 A. Yes. And told him the situation,
22 showed him the dirt. He was agreeable, yes,
23 this is unsuitable material.

24 Q. Let me stop you there. When he came
25 out to the site, was the depth of the topsoil

1 that you first saw when you came out there
2 the same? In other words, no more material
3 -- was any more material removed between the
4 time that you saw it and Anthony Orange came
5 out to the site?

6 A. No, I stopped them from stripping.
7 When I came out and saw this, I shut the
8 stripping operation down.

9 Q. In more detail, if you could, please,
10 tell us precisely, as best that you can
11 remember, what occurred between you and
12 Anthony Orange regarding the topsoil in the
13 corner of the building that we're talking
14 about.

15 A. In this area right here?

16 Q. Yes, sir.

17 A. That's the area that I told Anthony --
18 when I shut them down, I started looking
19 around the site. They had stripped -- the
20 majority of this area was already stripped.
21 I started looking around the site at that
22 time.

23 Q. You're circling around the building
24 pad area?

25 A. Yes, and the majority of the parking.

1 Q. Okay. And then you and Mr. Orange
2 come out to the site to discuss it?
3 A. Yes.
4 Q. Tell us what you and Mr. Orange
5 discussed concerning the condition on site
6 and what needed to be done about it.
7 A. We started looking. We looked at this
8 area here that had about, like I say, the
9 three --
10 Q. That's the southeast corner?
11 A. Correct. That's where they had cut a
12 big wedge out. It stepped out pretty quick.
13 He had just had a bad pocket and dug it out.
14 I started looking around these areas here --
15 Q. You're gesturing toward the southwest
16 side of the building?
17 A. And then around the southwest side of
18 the parking area.
19 Q. Okay.
20 A. We started looking at that area. I
21 could tell that there had been more than six
22 inches of topsoil taken off from those areas,
23 and I could still see we had a tremendous
24 amount of organic matter going on, so we dug
25 some test pits.

1 Q. Was Mr. Orange present when you did
2 this?

3 A. Yes, yes.

4 Q. What was Mr. Orange's -- let me ask it
5 a different way. Did Mr. Orange say anything
6 to you concerning his conclusions on the
7 suitability of the material?

8 A. Yes.

9 Q. What did he say?

10 A. Exactly what he said, I don't know.

11 Q. I know that, but tell us the best you
12 can remember.

13 A. The conversation was this is
14 unsuitable material and he would get with RCR
15 or whoever for what we're going to need to do
16 about this.

17 Q. Did you and Mr. Orange together walk
18 the site in some detail?

19 A. Yes, yes. He was present when I took
20 the dozer and pushed up three or four or five
21 test pits in this area here.

22 Q. Okay. Now you're gesturing toward the
23 center of the parking lot?

24 A. Yes, yes.

25 Q. What did you find when you opened up

1 the test pits?

2 A. Different stratas of material.

3 Q. Assume we know nothing about

4 construction. Describe for us as best you

5 can what you observed concerning different

6 strata of soils.

7 A. You would have a topsoil seam on top

8 that maybe run six, eight, ten inches just to

9 give you an example. There would be a little

10 seam of -- what you would call it, I don't

11 know, but it would be a four or five inch

12 seam of some really dark chocolatey type

13 material and then it would go back to some

14 lighter brown material, like it had been a

15 fill area over some time.

16 Q. How deep were these test pits that you

17 had dug?

18 A. We went down in some four to five feet.

19 Q. During this entire meeting with Mr.

20 Orange, did you and he ever have a

21 disagreement where you thought the material

22 was unsuitable and he thought it was

23 suitable?

24 A. No.

25 Q. How did you leave the meeting? When

1 you left that day, what did you conclude
2 you'd go do?

3 A. If I'm not mistaken, that day -- I
4 normally carried a set of specs and a file
5 that pertained to everything with that job.
6 If I ain't mistaken, we had the soils report
7 and we kind of made some jokes pertaining to
8 GT&E, to their boring logs. How can you miss
9 something especially when they go -- in the
10 description of the boring logs, they go with
11 the coloration of the material.

12 Q. Were you joking or was Anthony Orange
13 participating in this joking?

14 A. Yes, not joking. Just looking at that
15 and saying how in the world could this be
16 that different from the boring log.

17 Q. After you and Anthony Orange met, did
18 you continue to put the job on hold?

19 A. For a short period but I believe, if
20 I'm not totally mistaken, I would have to
21 look to see when it was proof rolled. We had
22 this section in the back corner of the
23 building staked, laid out and proof rolled.
24 I'm not sure the date we started bringing in
25 structural fill for this building pad, but

1 that's the area we started in. I know we
2 were still working on the resolution of the
3 parking area and the undercut areas at that
4 time. I believe we may have started bringing
5 in some fill for the building pad.

6 Q. When you were gesturing, what area do
7 you have some memory that you had proof
8 rolled?

9 A. The northwest section of the building.

10 Q. That would be southwest?

11 A. Northwest, this section here.

12 Q. Oh, yes. Okay. When you discovered
13 this topsoil, did you continue excavating any
14 more topsoil until the issue was resolved?

15 A. No.

16 Q. Tell us how the operation continued on
17 the building pad while the area on the
18 topsoil was on hold.

19 A. There was an old entrance road that
20 came into the site from this area here that
21 we brought our trucking in from.

22 Q. That's just almost due north?

23 A. Yes.

24 Q. On West Fowlkes Street?

25 A. Yes.

1 Q. Go ahead.

2 A. The material would come in from this
3 area here and this pad was already proof
4 rolled. I can't remember who came out and
5 proof rolled it. GT&E, PSI. I don't know
6 who was involved at that time when the proof
7 rolling was done. I could be a week or two
8 off either side of when this -- you know,
9 this could be a week after we had the
10 conversations. Like I said, I can't pinpoint
11 it.

12 Q. I want to define some terminology.
13 You've used the term "proof roll." Again,
14 use layman's terms for us and tell us, when
15 you're proof rolling something, what are you
16 doing?

17 A. Most of the time, the spec book will
18 call out to proof roll it with a tandem axle
19 dump truck, roll it in two perpendicular
20 passes. Soil tech will take a walk behind
21 the dump truck to see if there will be any
22 give.

23 Q. Let me stop you. You're assuming we
24 understand you perhaps more than we do. What
25 is the purpose of proof rolling?

1 A. To establish the subgrade is suitable
2 to be built upon.

3 Q. Okay. Now, before you ever called a
4 geotechnical inspector out to the site, do
5 you, yourself, perform any testing to draw
6 your own conclusions on suitability?

7 A. Yes.

8 Q. What do you do?

9 A. I proof roll it. If I've got a dump
10 truck on site, or a pan. You can take a
11 loaded pan. Either way, I'll proof roll it
12 before I call the soils guy out because I
13 don't want to pay him for a trip if he's
14 going to come out, you know.

15 Q. When you proof roll it, which I guess
16 is just a fancy way of saying you run a heavy
17 truck over it?

18 A. Correct.

19 Q. What are you looking for?

20 A. Give of the soil, if it's pumping.

21 Q. Pumping meaning heaving up and down?

22 A. Heave up and down. It will float. If
23 it's real bad soil, it will look like a water
24 bed when you're driving across it.

25 Q. If it looks like that, does the proof

1 rolling test fail?

2 A. Yes.

3 Q. What does it look like if it passes?

4 A. If there is no pumping, it is solid

5 just like you were driving on an asphalt

6 surface.

7 Q. All right. Realizing that you may be

8 off a week or two, did American Excavators

9 perform that test with regard to this

10 northerly section of the community building?

11 A. This here?

12 Q. Yes.

13 A. Yes.

14 Q. What was the result?

15 A. It passed.

16 Q. Now, when you were proof rolling it,

17 did you have a representative of RCR at the

18 site to watch what you were doing?

19 A. I don't know. I don't know if Anthony

20 was on site full-time at that time. I have a

21 feeling that he wasn't, but there was a

22 representative of one of the soils testing

23 companies.

24 THE COURT: Let's stand up and

25 stretch a minute; what do you say? Let's

1 take a five-minute break then.

2 (Brief recess observed.)

3 BY MR. PANTHER:

4 Q. Mr. Ezell, I think when we left off,
5 you were telling us how the operation on the
6 building pad continued while you were on hold
7 in this topsoil area. Go ahead and pick up
8 where we left off.

9 A. I'm not 100 percent sure that it did,
10 but I know we put the fill down. The first
11 fill that came in was in this section of the
12 building.

13 Q. Before you began putting fill on the
14 building pad, did you consult with anyone at
15 RCR about getting the go-ahead to do that?

16 A. To put the fill down?

17 Q. Yes, sir.

18 A. No. We had it proof rolled. Like I
19 say, I'm not sure if it was GT&E that came
20 out. Once we got the okay on the proof
21 rolling aspect of it, we started bringing
22 fill in.

23 Q. Concerning this topsoil issue, tell us
24 what the next event was in the sequence of
25 events concerning this topsoil.

1 A. Concerning --?

2 Q. I think when we left off --

3 A. The topsoil or the undercut?

4 Q. Well, when we left off -- let me just

5 take you where we left off. When we left

6 off, you and Anthony Orange had had a meeting

7 concerning the site conditions?

8 A. Correct.

9 Q. After you left the meeting, what was

10 the next thing that happened after that about

11 this issue?

12 A. I'm not sure if we got GT&E out or had

13 the meeting with the county first. I don't

14 know which one came first, but that day I dug

15 the test pits in the parking area.

16 Q. Okay.

17 A. It was either that day or within a day

18 or two a guy from Geotech came out to look at

19 the test pits.

20 Q. You said Geotech. Do you mean GT&E?

21 A. GT&E. I wasn't on site that day. I

22 got there probably about an hour after he

23 left. I called him and told him to make sure

24 I was there. They didn't tell me they were

25 coming and they were gone before I got back.

1 Ricky and Anthony were there --

2 Q. When you arrived?

3 A. Yes. And the soils tech had just left

4 and Ricky said he had almost got into it with

5 him because he told him that's what us

6 southern boys call topsoil.

7 Q. The Geotech guy never said anything

8 like that to you?

9 A. No, not to me, no.

10 Q. We'll ask Ricky about that question

11 then. Now, was Anthony Orange on site when

12 this discussion occurred?

13 A. Yes. Well, now, he was on site when I

14 got there. Now, whether he was there when

15 the soil tech was there, I don't know.

16 Q. That's what I meant, I'm sorry. When

17 you arrived, did you talk with Mr. Orange --

18 A. Yes.

19 Q. What did you and Mr. Orange discuss

20 concerning how you would proceed?

21 A. Well, I told Anthony if you want to

22 build on this, I'll start filling it right

23 now. Somebody needs to make the call because

24 we've got this equipment sitting here and it

25 doesn't bother me either way. If you will

1 sign off on it, if the soils guy will sign
2 off on this, we'll start building this
3 project again. It is no sweat off my back
4 either way you go.

5 Q. Why did you say that to him?

6 A. Because the soil tech was giving the
7 run-around when something was completely as
8 obvious as that. It hit me wrong. I may be
9 a dumb southern boy, but I know what you can
10 grow beans in and what you can't.

11 THE COURT: I think we can
12 probably go ahead and talk about this
13 conversation even though it's hearsay because
14 he certainly -- you're certainly not using
15 it -- in fact, you disagree thoroughly with
16 it but you can put it into evidence to show
17 the effect it had on the recipient of the
18 hearsay. Let's don't beat around the bush.
19 Let's go ahead. Apparently, I got the gist
20 of it. The GT&E guy said, Hey, this is okay,
21 you can go ahead, and you-all said, No, we
22 think it's topsoil?

23 THE WITNESS: Correct.

24 THE COURT: Where did Orange
25 weigh in on that, or did he?

1 THE WITNESS: Orange said, no,
2 this has to come out.
3 BY MR. PANTHER:
4 Q. Did he say that to you?
5 A. Yes. That was the discussion from the
6 very beginning.
7 Q. Now, at some point in this whole
8 sequence of events, did you bring a
9 geotechnical engineer out to the site to take
10 a look at it yourself?
11 A. Yes. Even Scotty Goodrich who, I
12 believe, is one of the owners of GT&E came to
13 the site. I showed him the boring logs.
14 I've dealt with Scotty for quite a few
15 years. You can look at this and see that
16 these boring logs, this visual classification
17 is completely wrong.
18 Q. What was Mr. Goodrich's response to
19 that?
20 A. It wasn't one way or the other kind of
21 response. It was kind of like an avoidance
22 type of response.
23 Q. Did you bring in your own geotech --
24 A. Correct.
25 Q. -- when you started getting these

1 responses?

2 A. That was a discussion with Anthony
3 Orange and Don Stover that we had pertaining
4 to we had to convince somebody that this was
5 not suitable. In my opinion, Goodrich was
6 covering their rear end by not coming out and
7 saying, yeah, our borings were wrong.

8 Q. Did you bring somebody out there --

9 A. Yes, Southern Consulting out of
10 Dickson.

11 THE COURT: GT&E had done the
12 borings for the county in the initial soils
13 report?

14 THE WITNESS: Correct. I was
15 going to keep them on as a soils testing
16 company because the contractor -- I believe
17 it was in this case I had provided the soils
18 testing. Ninety percent of the time, whoever
19 does the initial geotechnical investigation,
20 I hire to do the site work because they're
21 more familiar with the property. It is a
22 cost issue. I can bring someone new in and
23 pay them to get going. They've already got
24 everything in-office, in-house.

25 BY MR. PANTHER:

1 Q. Why didn't that work in this case?

2 A. On account of the soils material. RCR
3 and American Excavators were of the opinion
4 that, no, this is not suitable material. If
5 you can't drive a dump truck over it and keep
6 it from pumping a foot and a half, you sure
7 don't want to put heavy duty parking or
8 portions of a building foundation on it.

9 Q. Now, when you said RCR was of the
10 opinion, what individuals expressed that
11 opinion?

12 A. Anthony Orange and Don Stover.

13 Q. You had mentioned having conversations
14 with Anthony Orange before. Did you also
15 have these conversations with Mr. Stover?

16 A. Yes.

17 Q. Where in the pecking order did Mr.
18 Stover fall in relationship to Mr. Orange?

19 A. I believe he was over Mr. Orange.

20 Q. Did you bring somebody other than GT&E
21 out to the site to take a look at the
22 conditions?

23 A. Yes, I brought Southern Consulting.

24 Q. All right. Did they look at the site
25 and issue you a letter?

1 A. Yes.

2 THE COURT: They're also a
3 geotechnical engineering firm?

4 THE WITNESS: Yes, sir.

5 MR. CASHION: Your Honor, I'm
6 going to object.

7 THE COURT: What do you have?

8 MR. CASHION: Southern
9 Consulting's letter. If he wants to put it
10 in as some type of impression -- I think if
11 we're going to have any evidence of that soil
12 that's supposed to be unsuitable, we need the
13 people here. We don't need to get this type
14 of letter going back to Harley Ezell as
15 evidence. I mean, we're all kind of --

16 THE COURT: Right. That letter
17 seems to be put in to prove that the soil was
18 unsuitable.

19 MR. CASHION: I'm going to
20 object. Maybe you want to see it for some
21 other reason.

22 THE COURT: Let's ask Mr. Panther
23 what he has in mind.

24 MR. PANTHER: Well, my intention
25 was not what Mr. Cashion says it was. My

1 intention was to introduce it because this
2 was the event that brought PSI onto the
3 site. It is not offered to prove that the
4 soil itself was unsuitable. This merely
5 forms the background for what occurred on
6 site. It is not offered to prove the truth
7 of what's contained in it. It is simply an
8 event that occurred on site, and having said
9 that, I think it is no longer hearsay if it
10 is not offered for the truth.

11 MS. CARSON: If I may be heard on
12 that, I think all the parties can stipulate
13 that there was a dispute between Southern
14 Consulting and GT&E and that was the reason
15 they were brought on site. If that's the
16 only purpose for it being introduced, it is
17 not necessary and, therefore, should be
18 excluded.

19 THE COURT: I believe on this one
20 that the only purpose of actually putting the
21 letter in would be to try to prove what's
22 contained in the letter and I will exclude
23 it.

24 MR. PANTHER: Okay.

25 BY MR. PANTHER:

1 Q. After Southern Consulting came to the
2 site, tell us what occurred -- tell us what
3 happened so that further testing, if
4 necessary -- if any further testing was
5 necessary, who would do it and who would pay
6 for it?

7 A. Okay. I was thinking of another train
8 of thought. If the testing --?

9 Q. Let me back you up for just a minute.
10 At some point Southern Consulting came to the
11 site and performed some testing?

12 A. The only reason Southern Consulting
13 came to the site was because GT&E couldn't
14 turn around a soil sample quick enough.
15 Southern Consulting was not brought in to
16 rebut GT&E.

17 Q. Why was Southern Consulting brought
18 in?

19 A. They were brought in because GT&E said
20 they couldn't turn it around within X amount
21 of time frame.

22 THE COURT: Who brought them in?

23 THE WITNESS: I did.

24 THE COURT: Oh, you brought them
25 in?

1 THE WITNESS: Yes, sir, because
2 GT&E couldn't turn me around a soil sample to
3 give to RCR and, in turn, to give to the
4 county.

5 BY MR. PANTHER:

6 Q. After Southern Consulting was brought
7 in, what was the next event that occurred
8 concerning this issue?

9 A. I'm thinking -- I know we had
10 discussion because I was on the site just at
11 that point and I'm not sure if the meeting
12 with the county -- I believe I had the soils
13 report from Southern Consulting when I had
14 the meeting with the county.

15 THE COURT: Is that what we're
16 going to talk about next then, the meeting
17 with the county?

18 MR. PANTHER: I think so.

19 BY MR. PANTHER:

20 Q. Between the time that Southern
21 Consulting issued their results and the time
22 that you had a meeting with the county --

23 A. Okay.

24 Q. -- was there any other event in
25 between there that you can recall relating to

1 this issue?

2 A. Not to my knowledge. I believe we
3 were just putting fill on the back northwest
4 corner of the building pad.

5 Q. All right. Do you remember about when
6 this meeting with the county was?

7 A. Somewhere in the time frame that
8 Southern Consulting's letter is dated. You
9 know, I don't really.

10 THE COURT: Well, tell him, when
11 is that letter dated?

12 MR. PANTHER: I've got a document
13 that will refresh his memory.

14 MR. CASHION: June 17 is the
15 date.

16 BY MR. PANTHER:

17 Q. All right. Mr. Ezell, I've handed you
18 what's designated as June 30, 1999 meeting
19 notes. Do you see that?

20 A. Is that the date of the meeting or the
21 date of the letter?

22 Q. Well, I'm asking you if this refreshes
23 your recollection about when this meeting was?

24 A. Yes, sometime around June.

25 Q. If you will, look at who's present.

1 Do you recall those people attending the
2 meeting in general?

3 A. Yes.

4 MR. PANTHER: Your Honor, I move
5 this June 30, 1999 meeting minutes into
6 evidence.

7 THE COURT: Okay.

8 (Exhibit No. 19 was marked.)

9 BY MR. PANTHER:

10 Q. Tell us what happened at this meeting,
11 please.

12 A. At the meeting, we discussed the
13 condition of the site and what we were going
14 to do about it and how the county was going
15 to try to work with us, and we were going to
16 try to work with them in getting this issue
17 resolved as cheap as we could for the county.

18 Q. If you look in these meeting minutes,
19 the first paragraph, first numbered
20 paragraph, refers to PSI. Do you see that
21 there?

22 A. Uh-huh.

23 Q. You mean yes?

24 A. Yes, sir.

25 Q. How did PSI come into the picture?

1 A. I'm not sure if RCR brought them in,
2 if that was a consulting firm that they had
3 normally worked with, or if they were brought
4 in by the county. I just knew they were
5 going to get a completely different soils
6 representative.

7 Q. I want to direct your attention to the
8 second numbered paragraph where it refers to
9 bad material. Do you see that?

10 A. Uh-huh.

11 Q. You mean yes?

12 A. Yes, sir.

13 Q. Does it say where the spoils are to be
14 wasted?

15 A. Yes, sir.

16 Q. What's it say?

17 A. At the adjacent rock quarry.

18 Q. At whose recommendation?

19 A. The county.

20 Q. Where does it say fill material is to
21 be obtained from?

22 A. At the quarry.

23 Q. What does it say the county will do
24 regarding making fill material available?

25 A. The material sites at the quarry.

1 They were supposed to make available shot
2 rock but that never came to pass.

3 Q. What did the county eventually make
4 available?

5 A. We went back to the chirt pit.

6 Q. Was that the county's chirt pit?

7 A. It was the county's road widening
8 project.

9 Q. Is that consistent with how you bid
10 the project in the beginning?

11 A. Partially.

12 Q. Tell us how it was left at this
13 meeting about what would happen next. After
14 this meeting, what was resolved?

15 A. That we were to go ahead and undercut
16 as needed and get the site built.

17 Q. Okay. Now, this says at the bottom,
18 if you look under the summary of action to be
19 taken, it says, RCR will work up estimated
20 quantities of the soil material to be removed
21 as well as prices for removal off-site.

22 Is that consistent with your
23 recollection?

24 A. Are you on four, did you say?

25 Q. Summary of Action at the very bottom?

1 A. Oh, okay.

2 Q. Is that consistent with what you

3 remember?

4 A. Yes.

5 Q. Now, after this meeting, what's the

6 next thing that happened?

7 A. I know we all adjourned. I know the

8 day of the meeting we went to the site and

9 actually visually looked at the site.

10 Q. Who is "we"?

11 A. I'm assuming everyone on this list.

12 Q. What occurred?

13 A. We looked at the excavated test pits

14 that we had. We talked about some other

15 issues, that there was a tremendous dump

16 site. This tree line that they've got

17 showing here, it is not representative of the

18 actual conditions out there.

19 Q. You're gesturing along the northern

20 boundary, the southern boundary?

21 A. And the western boundary.

22 Q. And the western leg there, sort of a

23 horseshoe around the building?

24 A. Correct. They're showing individual

25 trees, 18-inch hackberry. Well, this was

1 really a dense area that over time this area
2 through here had been a dump.

3 Q. On the northern boundary?

4 A. They had been dumping mattresses and
5 couches and chairs, but you didn't see it
6 until you got through all the underbrush and
7 got back in there.

8 This slope drops down probably five to
9 six feet, a drop down here where this whole
10 bottom swale was full of garbage. I'll go
11 ahead and clean it up. Where can I waste
12 it? You can waste it over at the rock
13 quarry.

14 Q. At this meeting that everybody
15 congregated at the site, did you discuss the
16 soil conditions?

17 A. Yes. We still had the pits open. We
18 discussed the pits.

19 Q. Tell us what occurred at that
20 meeting.

21 A. The consensus was, yes, this was
22 unsuitable material, you know. This material
23 has to go. Everybody try to keep it to a
24 minimum. I even made a suggestion. What
25 we'll do being that the quarry is real close,

1 if we get in a situation if it's six or seven
2 feet of undercut, instead of taking that much
3 out outside the perimeter of the building and
4 these parking areas, we can take out two to
5 three to four feet and bridge up with shot
6 rock. Then, we don't have to use as much
7 imported chirt.

8 Q. You're going to have to explain what
9 you mean by bridging up with shot rock. In
10 very basic layman's terms, tell us what you
11 mean by that.

12 A. If you have very unsuitable, weak
13 soil, you can go in and undercut. Instead of
14 going down to what I call hard pan, you can
15 go down, depending upon the load that it is
16 supposed to carry, you can go down two or
17 three feet and come in with pretty good
18 particle-sized shot rock and put you about a
19 two or three foot bridge of that.

20 THE COURT: That's what you see
21 next to those bridges, those big limestone
22 blocks sometimes?

23 THE WITNESS: Yeah, the rip rap.
24 You can come in with that type of rock and
25 put down a two to three foot lift of that

1 depending upon the soil. You can't go in the
2 swamp and do it. You can go in some pretty
3 bad areas and bridge up with shot rock and
4 then you can come up and finish the top foot
5 with a workable, gradable material.

6 That was our consensus to where,
7 if the depths got too extravagant in the
8 parking area, they had the county quarry
9 available to get shot rock from to bring that
10 bridge up and not have to import so much from
11 the chirt pit.

12 BY MR. PANTHER:

13 Q. What happened next? I'm testing your
14 memory.

15 A. I'm thinking we commenced to building
16 the site. Once I got this issue pretty well
17 resolved or what I thought was resolved, I
18 started fading away from the project because
19 I was in the process of leaving American
20 Excavators.

21 Q. Let me ask you to look at a letter,
22 Exhibit 14. Do you have Exhibit 14 in front
23 of you?

24 A. Uh-huh.

25 Q. You mean yes?

1 A. Yes, sir.

2 Q. One question I forgot to ask you: At
3 this meeting, was something decided about
4 whether American Excavators would continue
5 with geotechnical testing or whether that
6 would be assumed by somebody else?

7 A. At the county meeting?

8 Q. Yes. At one of these two meetings
9 that you talked about, was it discussed as to
10 who would continue on with the soils testing
11 if needed?

12 A. PSI was to continue on with the soils
13 testing but not under my contract.

14 Q. Pardon me?

15 A. Not under my contract. They were to
16 be paid by either RCR or the county.

17 Q. You have this July 1, 1999 letter in
18 front of you. What was the purpose of
19 sending this letter out?

20 A. This was what's referring to back here
21 on your summary of action, if I ain't
22 mistaken, RCR to work up an estimate of
23 quantities of soil material to be removed as
24 well as prices for removal off site. This
25 was generated in response to either a request

1 from Anthony Orange or Don Stover with RCR.

2 Q. Okay. Now, although the letter is
3 dated July 1, 1999, the events that were the
4 basis of this letter, when did those occur?
5 How close to July 1, 1999?

6 A. Oh, it was sometime in the middle of
7 June, end of June, somewhere around in that
8 time frame there. This was the final -- if
9 I'm not mistaken, this was like the final,
10 Okay, this is what we've decided upon; this
11 is what we've agreed upon.

12 When they requested the prices and how
13 far, I told RCR two to three foot section
14 that was already undercut in this area right
15 here, I wouldn't worry about. I'll eat that.

16 Q. The area that you wouldn't worry about
17 that you just described, is the quantity of
18 that material set out in this letter?

19 A. Yes, approximately 600 yards.

20 THE COURT: Where was that area
21 located?

22 THE WITNESS: In this area here.

23 THE COURT: Oh, where you first
24 kind of came on site and realized what was
25 going on?

1 THE WITNESS: The reason I
2 offered to give him the 600 yards, we should
3 have stopped at six inches but we didn't so
4 it was my fault and Ricky's fault for not
5 saying, okay, we'll stop here. We done moved
6 that material. I couldn't go back and charge
7 them for something they didn't give me
8 authorization to move.
9 BY MR. PANTHER:
10 Q. By the way, did you discuss that with
11 either Anthony Orange or Don Stover?
12 A. Yes.
13 Q. That you would just give them that
14 material?
15 A. They told me to include it in there.
16 I told them --
17 Q. Let me stop you. You told them, I'm
18 not going to charge you for the 600 yards?
19 A. Correct.
20 Q. What was their response?
21 A. They said, no, include that in there.
22 Q. Did they tell you why?
23 A. Because I had moved it. I said I
24 didn't -- at that time me and Ricky Tipper
25 weren't on the same page. It wasn't a very

1 good working relationship. I just said, no,
2 we took it out; we're going to eat it. That
3 was kind of a way to show Ricky, okay, hey,
4 you see the consequences for all this stuff
5 out here; you need to pay attention to what's
6 going on. We're going to eat that because we
7 did it.

8 Q. Now, you had also provided in here a
9 rough estimate?

10 A. Yes.

11 Q. What were you estimating at that point?

12 A. What we had seen, this area here
13 mainly --

14 Q. You're pointing to the southeast
15 corner?

16 A. Correct, and taking off, oh, about a
17 foot in this area here in the cut section.

18 Q. Now, is that the 600 yard estimate?

19 A. That's the 1,000 to 1700, the
20 remainder that we had to take out in this
21 area here and some in this area here we had
22 the test pits.

23 Q. At the time that you were making this
24 estimate, percentage-wise how much of the
25 subsurface conditions had been exposed at

1 that time?

2 A. Of the stripping operations?

3 Q. Yes, sir. When you're making an
4 estimate of 1,000, 1700 cubic yards, what
5 percentage of the site had you been aware of
6 at that point that you base that estimate on?

7 A. The continuation of this three and a
8 half to four foot cut here because I knew
9 once we got outside this curb line here,
10 which is about where that cut was, it didn't
11 matter what the material was. I knew there
12 was going to be a little more in this area
13 here to get it past the curb line to get it
14 built back up and some in this area in here.

15 THE COURT: It didn't matter what
16 it was because you weren't going to be
17 building on it?

18 THE WITNESS: Correct, yes, sir.
19 Outside the curb line just as long as it
20 would grow grass.

21 BY MR. PANTHER:

22 Q. You also talk about your understanding
23 concerning who would be determining final
24 depths. Do you see that in your letter? It
25 is the second paragraph.

1 A. Are we on the July 1 letter?
2 Q. Yes, sir.
3 A. I've read the second paragraph. Would
4 you give me the question one more time?
5 Q. Right. You qualify -- let me ask a
6 preliminary question. You qualify your
7 estimate. What do you say in there
8 concerning how accurate this estimate may be?
9 A. Just rough estimate. If you take a
10 foot over an acre, you get about 1600 yards.
11 Q. And then you also say that your
12 understanding concerning who would determine
13 final depths, do you see that in there?
14 A. Correct.
15 Q. What was your understanding at this
16 point concerning who would be calling PSI out
17 to the site to determine final depths?
18 A. RCR.
19 Q. Now, in the third paragraph of your
20 letter, you make a request to RCR to have
21 someone present?
22 A. Yes.
23 Q. What do you say there?
24 A. "I would like a representative of PSI
25 or RCR to be present at the time this work is

1 performed."

2 Q. Why was it important to you to have
3 either PSI or RCR present?

4 A. You need a representative of an
5 independent -- some company or some
6 representative that keeps you from claiming
7 200,000 yards of undercut. I mean, you have
8 to document that because it is a unit, a pay
9 item.

10 Q. All right. Now, after this July 1,
11 '99 letter, what was the next thing that
12 happened; do you remember?

13 A. As far as I know, we continued to
14 build the site.

15 Q. As you continued to build the site --

16 THE COURT: I have to ask a
17 question now I've been thinking about this
18 one. This was your July 1 proposal, wasn't
19 it? You sent this to Mr. Stover?

20 THE WITNESS: Yes. This was
21 after the meeting with the county and they
22 wanted him to kind of come up with some kind
23 of idea of the material, the change order
24 cost factor.

25 THE COURT: And you sent this to

1 Mr. Stover?

2 THE WITNESS: Yes, sir.

3 THE COURT: What was Mr. Stover's
4 response?

5 THE WITNESS: We were to go ahead
6 and continue with the undercut.

7 THE COURT: He called you back,
8 wrote you back, went out to lunch, what
9 happened?

10 THE WITNESS: It was probably a
11 meeting on-site. Every time I met with Don
12 Stover, it was always on site or the one time
13 at the county building.

14 THE COURT: You have a specific
15 memory of this, or are you just kind of
16 guessing?

17 THE WITNESS: The day that we met
18 at the site?

19 THE COURT: After you sent this
20 letter.

21 THE WITNESS: This is prior to
22 this letter.

23 THE COURT: I want to know what
24 happened after you sent this letter. What
25 did Mr. Stover do? You wrote him a specific

1 letter. You gave him a specific proposal.

2 THE WITNESS: Correct.

3 THE COURT: What did he do, if
4 anything, after this letter was sent?

5 THE WITNESS: We got the
6 go-ahead. In my opinion, we had the go-ahead
7 on the day of the meeting. To me, the issue
8 was resolved on June 30. This was just to
9 get the county some type of documentation as
10 a cost factor. We already had the go-ahead
11 prior to the July 1 meeting. To me, the
12 go-ahead was given because --

13 THE COURT: Maybe I'm not
14 understanding your last couple of sentences
15 there. "Due to the lost time already
16 encountered because of this unforeseen
17 problem, your authorization is needed as soon
18 as possible." What are you saying?

19 THE WITNESS: I guess I'm saying
20 exactly what it says.

21 THE COURT: It looks to me like
22 you're saying, Hey, I need to get going on
23 this; I want to hear back from you.

24 THE WITNESS: Right. That may
25 have been pertaining to this summary of it

1 here and talking to Don and Anthony that this
2 thing needed to be -- we needed to know for
3 sure before we continue on with this. We
4 already have 600 yards involved in this.
5 We've already got some extra topsoil involved
6 on this. I want to make sure we're on the
7 right page and American Excavators is
8 covered.

9 Did they turn around and generate
10 me any paperwork? Evidently not. We were
11 told -- the day of the meeting with the
12 county, we continued on that day. We went
13 back to work delivering material that day.
14 This was just something in response that
15 Anthony Orange and Don Stover asked me to get
16 so they could forward it on to the county.
17 What communication they had with the county
18 after this, I don't know. We were given the
19 go-ahead by RCR to continue the work.

20 THE COURT: Orange and Stover
21 told you they wanted a letter like the one
22 you sent?

23 THE WITNESS: Not like this, no.
24 They wanted a letter about the quantities
25 that I anticipated what was unsuitable left.

1 THE COURT: Why did you generate
2 this letter?

3 THE WITNESS: So Don Stover could
4 send it to the county.

5 THE COURT: Whose idea was it to
6 generate this letter?

7 THE WITNESS: Don Stover or
8 Anthony Orange, one of them, because at this
9 point in time RCR was completely on our
10 side. It was a known -- this was a given.
11 They didn't want to build a bad building and
12 have the floor give way, settling and
13 cracking any more than I did. We were trying
14 to get this issue resolved because the
15 project had been on hold for so long a period
16 of time. This was another issue that came up
17 to slow it down. We are trying to get this
18 thing expedited.

19 THE COURT: So what you're
20 telling me is you have this meeting June 30?

21 THE WITNESS: Correct.

22 THE COURT: There is an agreement
23 that comes out of that meeting?

24 THE WITNESS: Correct, my
25 interpretation of an agreement.

1 THE COURT: That agreement was
2 there was unsuitable soil out there?

3 THE WITNESS: Yes.

4 THE COURT: That you would remove
5 it after PSI went out and checked on it?

6 THE WITNESS: After RCR or PSI,
7 either one.

8 THE COURT: Okay. And then
9 either Stover or Orange said send us a letter
10 that kind of --

11 THE WITNESS: I think that was
12 the day after the meeting. He asked me at
13 the site visit, Can you go over here and get
14 me a letter? We discussed 600 yards and we
15 discussed about what's going to be left. Can
16 you get me a letter or something to that so I
17 can forward it on to the county, a rough
18 estimate of about what you think the yardage
19 is. I thought we were just going through the
20 paperwork trail at that time.

21 THE COURT: You kind of went a
22 little further than just getting a rough
23 estimate of what was still out there. You
24 added some things.

25 THE WITNESS: No. I said I'll

1 give you 600 yards and the quantities could
2 be more or less. I feel there is anywhere
3 from 1,000 to 1700 cubic yards. Again, this
4 is just a rough estimate. Quantities could
5 be more or less.

6 THE COURT: Everybody at the
7 meeting the day before had agreed the
8 contract price was going to be 12.50 per
9 cubic yard?

10 THE WITNESS: 12.50 for the
11 material in the fill section, not the
12 material that was in the cut section that
13 couldn't be used in the fill section. We
14 agreed on a different price for that.

15 THE COURT: 12.50 in the fill
16 section?

17 THE WITNESS: Correct.

18 THE COURT: But not in the cut
19 section?

20 THE WITNESS: Not in the cut
21 section that we were going to use to move.

22 THE COURT: That was going to be
23 what?

24 THE WITNESS: \$10.

25 THE COURT: All that was decided

1 on the 30th of June?

2 THE WITNESS: Yes, sir.

3 THE COURT: All these people were
4 present?

5 THE WITNESS: Yes. To the best
6 of my knowledge, like I say, it may have been
7 a day here -- when I left the meeting at the
8 county, I felt that we had everything
9 resolved. When we left the site that day, I
10 figure now we're back on target.

11 THE COURT: It looks like the
12 county had Mr. Ritter there and Keith
13 Feinstein?

14 THE WITNESS: Yes, sir.

15 THE COURT: And then there was an
16 architect there, Al Thomas. He was working
17 for the county, wasn't he?

18 THE WITNESS: Yes, sir. He's the
19 Thomas & Miller Partners, I believe. Al
20 Thomas was engineer of record, I think.

21 THE COURT: Now, Michael Leonard,
22 TMP, was he also with the architect firm?

23 THE WITNESS: Yes, sir.

24 THE COURT: Okay.

25 BY MR. PANTHER:

1 Q. After writing the letter, did you
2 continue to run into unsuitable material as
3 you continued your excavation operation?
4 A. Yes.
5 Q. Did you bring to anyone at RCR's
6 attention when you were continuing to run
7 into unsuitable material?
8 A. Yes.
9 Q. Who did you discuss that with?
10 A. Anthony Orange. I believe at that
11 point in time he was on site the majority of
12 the time. I think the project he was working
13 on splitting time, I think it had come to a
14 close and I think he was spending the
15 majority of his time on this project.
16 Q. When you brought that to Mr. Orange's
17 attention, what did he tell you?
18 A. To undercut it, and at one point in
19 time I had PSI out to proof roll a section of
20 the pad if I'm not mistaken.
21 Q. Who called PSI out?
22 A. I don't know. I couldn't recall.
23 Q. Was it you?
24 A. No, I don't think I ever called PSI.
25 Q. Go ahead.

1 A. We had this section here that I was
2 trying to get the remainder of the building
3 pad to where I could start bringing -- when
4 you bring fill material in, you want to bring
5 it in a lift at a time, a one foot lift over
6 the entire pad and come back and put another
7 lift up. I didn't want to get caught
8 building this section completely upgrade and
9 have a straight face here or try to bring a
10 slope and try to wedge it all together where
11 it wouldn't give. I wanted to bring
12 everything up at once.

13 PSI was on site, I believe, for some
14 proof rolling, and PSI and I, we measured a
15 small section that I had to have undercut
16 right here in the northeast building corner
17 so we could get that proof rolled to where I
18 would have access to the whole pad.

19 Q. Before doing that, did you discuss
20 that with Anthony Orange?

21 A. The undercut?

22 Q. Yes, sir.

23 A. Yes, sir. Yes.

24 Q. Give us the sequence of events. You
25 go out to the site. You see that there's

1 some unsuitable material. Did you then tell
2 Mr. Orange?

3 A. Yes, Mr. Orange and then -- or Ricky.
4 You know, most of the time it was all three
5 of us pretty well together. I had laid out
6 -- he had knocked some of the building
7 corners out along the southwest lines and I
8 re-established the building line and corner
9 down here. It was right beside this
10 excavated area. We knew we still had about
11 two, two and a half foot of bad material. We
12 were more concerned about that because it was
13 under the building and the building envelope.

14 Q. Were there other occasions where you
15 ran into unsuitable material that you brought
16 to Anthony Orange's attention?

17 A. Yes.

18 Q. How often were you coming to Anthony
19 Orange or Don Stover and alerting them to
20 unsuitable material that you're finding?

21 A. At that point in time, I was phasing
22 off the project. Wasn't out there near as
23 much as every day. Just about every occasion
24 I was out, this whole entire area here --

25 Q. You're circling around the inside of

1 the building near the parking?

2 A. The entire perimeter of the parking
3 lot all the way up to about this set of land
4 right here down into the interior of the
5 building, all this area here was undercut,
6 that whole entire area.

7 Q. And when you say it is undercut, what
8 was the condition of the soil in that area?

9 A. Before we undercut it?

10 Q. Yes, sir.

11 A. It was a dark chocolate organic matter
12 soil.

13 Q. Now, before removing it, did you go to
14 anybody at RCR and get their direction on
15 what to do about it?

16 A. I did personally on one or two
17 instances. The rest of the time it was up to
18 Ricky Tipper. He was the project
19 superintendent and he was in on the majority
20 of these meetings. Not in on them, but I
21 explained to him the situation. Okay, this
22 is what we're doing; you need to get with
23 Anthony on everything. I wanted to work with
24 the county. I didn't want to go and get a
25 big change order.

1 Q. Okay. Let's talk about just the
2 occasions where you participated in a
3 conversation with RCR. In just the occasions
4 where you dealt with RCR, you were part of
5 the dealings with RCR?

6 A. Correct.

7 Q. What did they tell you when you
8 brought it to their attention that you were
9 running into unsuitable material in these
10 locations?

11 A. It was to be taken out.

12 Q. And once it was taken out, did they
13 further tell you what you were supposed to do
14 once you took it out?

15 A. You kind of lost me. When you take it
16 out, you have to fill it back. They didn't
17 tell me that. They didn't say take this out
18 and make sure you fill it back. I mean,
19 that's a given, fill it back.

20 Q. During any of these conversations that
21 you had with RCR where they directed you to
22 remove material, was any representative of
23 the county present?

24 A. No, not to my knowledge.

25 Q. Now, at some point did you concentrate

1 more of your efforts in the cut section as
2 opposed to the fill section?

3 A. As far as building the site?

4 Q. Excavating, yes.

5 A. No. The majority -- the biggest thing
6 is getting the building pad ready for the
7 general contractor so he can get in. You can
8 do a lot of your site work in conjunction
9 with him doing his building. You try to get
10 the pad up as quick as you can.

11 Q. Now, did you have any conversations
12 with any representatives of RCR concerning
13 how American Excavators would be paid for the
14 fill that you were bringing in?

15 A. Yes. We had two different sets how we
16 were going to get paid.

17 Q. Okay. Tell us what you talked about
18 with -- first of all, who you talked about
19 getting paid from RCR with?

20 A. Anthony Orange and Don Stover, and
21 then there was another gentleman. I can't
22 remember his name. At the time I don't know
23 if Don had this project kind of put on him.
24 I'm thinking there was another guy also
25 involved either in the latter stages of it or

1 in the beginning of it and then it fell on
2 Don Stover's desk.

3 Q. Okay. But you spoke with either
4 Anthony Orange or Mr. Stover or Mr. Stover's
5 replacement?

6 A. Correct.

7 Q. What did you discuss with them
8 concerning how American Excavators was going
9 to be paid for this material you were
10 bringing in?

11 A. It was 12.50 a yard for any undercut,
12 waste and replace. It was \$10 a yard for any
13 material that's in -- someone has put a cut
14 fill line here.

15 Q. By the way, is that generally where
16 the cut fill line was?

17 A. Yes, correct. This retention pond. I
18 think it may be a little higher up here. I'm
19 thinking the cut line may have went along
20 this contour line here pretty much and over
21 into the entrance road, but any material in
22 the red area that we couldn't use as
23 engineered fill, we would charge \$10 a yard
24 for it because in our original contract we
25 were already getting paid under our contract

1 2.50 a yard to cut and place it. So I told
2 him I don't feel right. I'm not going to
3 charge you the 12.50 because you're already
4 paying me once. In my contract you're paying
5 me 2.50 a yard to dig it, move it 100 feet
6 and put it back so I'll give you a credit
7 back on that side of it.

8 Q. What was either Mr. Orange --

9 THE COURT: Whose idea was it to
10 credit the reduction?

11 THE WITNESS: Mine.

12 THE COURT: Yours?

13 THE WITNESS: Yes, sir.

14 BY MR. PANTHER:

15 Q. What was Mr. Stover or Mr. Orange's
16 response?

17 A. That was fine.

18 Q. Did they ever disagree with you?

19 A. No.

20 Q. Did they ever say, Hey, wait a minute.
21 What are you doing charging us anything in
22 the cut section?

23 A. No.

24 Q. Now, when you were out at the site and
25 the excavation was occurring in the cut

1 section, do you have knowledge as to what the
2 suitability of the material was in the cut
3 section?

4 A. Yes.

5 Q. What was it?

6 A. Not completely in the retention pond
7 area.

8 Q. In those areas that you do have actual
9 knowledge, what was the condition of the cut
10 material?

11 A. Well, I actually dug it at this time
12 frame when we were starting to look at
13 getting this retention pond dug, I dug a test
14 pit in the retention pond just to find out.

15 Q. What did you find?

16 A. It was the same type of material we
17 encountered in this area here.

18 Q. "This area" meaning?

19 A. Different type of strata material. It
20 would be dark chocolate like an ashy type
21 fill material and then another dark chocolate
22 seam and light brown seam. It was a four or
23 five layer strata material. This section
24 here, I was here when it was proof rolled.
25 This was the deepest cut.

1 Q. You're gesturing up near the entrance
2 and the intersection of the West Fowlkes
3 Street?
4 A. Correct.
5 Q. What was the condition of the material
6 in that area?
7 A. That even had -- I think it had maybe
8 a four or five foot cut just to get to
9 subgrade. That was still undercut more and
10 built back up. So all the cut material in
11 that area couldn't be used. Plus, we took
12 out additional because it wouldn't proof
13 roll.
14 Q. Let me ask you that. Did you discuss
15 with either Mr. Orange or Mr. Stover the
16 condition of the material in the cut section?
17 A. Yes.
18 Q. What did you discuss?
19 A. That it could not be used as
20 structural fill. Our cost on that -- our
21 cost to them and then to the county, whoever,
22 would be \$10 a cubic yard to excavate it,
23 waste it and replace it. We were going to
24 give them a \$2.50 credit because we were
25 already getting paid for a portion of that

1 work in our original contract.

2 Q. What did they direct you to do with
3 regard to the cut material?

4 A. To waste it.

5 Q. Meaning what? To try to use it?

6 A. No, if you use it, use it in a grass
7 area, which we had plenty of stripped topsoil
8 for that anyway. Use it in a grass area or
9 waste it off site.

10 Q. Now, in the cut section, did RCR call
11 PSI or any other geotechnical engineer out to
12 investigate the quality of the material in
13 the cut section?

14 A. I don't have that knowledge. I don't
15 know.

16 Q. Do you know of any?

17 A. Do I know of PSI coming out and
18 actually testing the retention pond?

19 Q. Or any other cut area?

20 A. No, I don't. In this area here, there
21 was some undercut in with the cut and it was
22 bad from top to bottom. At one point early
23 on, PSI was out in the northeast corner
24 parking lot, but it only had about like a
25 foot cut maybe.

1 Q. Did you call PSI to the site?

2 A. No, I never called PSI.

3 THE COURT: Did Stover or Orange
4 ever question you or your opinion that any of
5 the material that you thought was unsuitable,
6 that they said, no, we think it's suitable?

7 THE WITNESS: No, sir, not on one
8 occasion. That's what kind of got me about
9 this whole deal. We were on the same page
10 all the way through this thing and then all
11 of a sudden...

12 BY MR. PANTHER:

13 Q. Did the quality of the material end up
14 becoming somewhat of a joke or a laughing
15 matter between you and the representatives of
16 RCR?

17 A. Yeah, sure did.

18 Q. Tell us about that. Tell us what you
19 all were joking about it.

20 A. It really came about when it involved
21 GT&E, about the southern boy topsoil and the
22 situation. Then, looking at the boring logs,
23 you could go to where the boring logs was
24 mainly taken and go down and the big thing
25 was the coloration of the soil.

1 Q. But after that, I mean, after this
2 whole episode with GT&E and PSI was brought
3 in, did the folks at RCR continue to joke
4 about how bad the site conditions were?

5 A. Well, I don't know if it was -- the
6 joking part. It was a continuing problem.
7 It was discussed, yeah, on numerous
8 occasions.

9 Q. How often were you on site?

10 A. Initially I was the first one on site
11 and I probably spent three or four days out
12 getting the boundary tied down, meeting with
13 Ronnie Brown, getting all that settled. Then
14 I mobilized everyone in and I was off for
15 three or four days doing some other take-offs
16 and then when this process came about, I was
17 there about every day for maybe a week or
18 two.

19 Q. Did you have somebody on site whose
20 job it was to keep track of the truck loads
21 of fill that were brought to the site?

22 A. Yes.

23 Q. Whose job was that?

24 A. That was Ricky Tipper's.

25 Q. Between you and Mr. Tipper, who would

1 have more knowledge concerning the number of
2 truck loads of fill that were brought to the
3 site?

4 A. Ricky Tipper.

5 Q. Although he may have more knowledge
6 from your site visits, did you see -- did you
7 witness and observe truck loads of material
8 being brought to the site?

9 A. Yes.

10 Q. These trucks, were they tandem trucks,
11 two axles or three axles?

12 A. I think they were triaxles. I think
13 they were three axle dump trucks.

14 Q. From the times you were out there, did
15 you see how full the trucks were loaded with
16 fill material when they were brought to the
17 site?

18 A. Just like a normal truck is loaded.

19 Q. Which is what? We don't know.

20 A. Well, you've got your standard. You
21 can't -- you have to be four inches below the
22 sideboards with just a standard load.

23 THE COURT: So it won't blow out
24 on motorists like myself going down the road?

25 THE WITNESS: Correct.

1 BY MR. PANTHER:

2 Q. If you were to fill one of these
3 trucks with water, what would be the capacity
4 of the truck?

5 A. You would have to measure the length
6 and depth and width for you to get your
7 yardage that way. I don't have a calculator
8 but you figure 20, 22 yards, 25 yards. It
9 depends on the height of the sideboards.

10 Q. From your observations on the site,
11 what would be a fair estimate of the cubic
12 yardage of fill that was in these trucks?

13 A. Per load?

14 Q. Yes, sir.

15 A. You could get anywhere from 15, 16, 17
16 yards is about what would actually be hauled
17 in. That may be a little high. It may be a
18 little low. It depends on how fine the chirt
19 is. If you're in a hard chirt bank and it
20 comes out in big chunks, you get more air
21 pockets and void. In real fine, you get less
22 pockets, less void. It fluctuates from truck
23 to truck and material to material.

24 Q. During the entire time that you were
25 having these discussions with Mr. Stover and

1 Mr. Orange, did they ever suggest or indicate
2 to you that you ought to be calling PSI to
3 the site before you removed anything?

4 A. No.

5 Q. Did they ever suggest to you that you
6 needed to submit a change order in advance
7 before trying to get paid for the fill that
8 you brought in?

9 A. No.

10 Q. From your observations, Mr. Ezell, was
11 the material that American Excavators brought
12 to the site necessary in order to complete
13 this project in a good and workmanlike
14 manner?

15 A. Yes, yes.

16 MR. PANTHER: Thank you, Mr.
17 Ezell.

18 THE COURT: Let me ask one
19 question. You indicated that you had an
20 agreement with RCR on the amount you were to
21 be paid for this additional soil that was
22 coming out?

23 THE WITNESS: Correct, yes, sir.

24 THE COURT: Part of it was 12.50
25 and the other part was \$10. It was 10 if it

1 was in the fill; right?

2 THE WITNESS: It was 10 if it was
3 any material in this area here which is
4 actually 2898 yards of cut material that I
5 had bid the project to take this cut from
6 this area and put it as structural fill
7 anywhere in the blue area. That was the \$10.

8 THE COURT: Did you have an
9 agreement with RCR on how you were going to
10 measure the cubic yards you were charging the
11 extra money for?

12 THE WITNESS: The \$10. The \$10
13 was this right here. That was a known
14 number.

15 THE COURT: So you discussed that
16 specifically with --

17 THE WITNESS: With Don Stover and
18 Anthony Orange.

19 THE COURT: We're going to charge
20 you \$10 based on our take-off of 2,000?

21 THE WITNESS: Right, of 2898.

22 THE COURT: All right. What
23 about measuring on the 12.50?

24 THE WITNESS: On the 12.50 in
25 place, I had asked either a representative of

1 RCR or PSI to measure all unsuitable
2 excavated areas.

3 THE COURT: How did you propose
4 that they measure it?

5 THE WITNESS: Just length times
6 width by depth. If he cuts out a ten foot
7 swath 50-foot wide and 40-foot deep, do the
8 math and that's the yardage.

9 THE COURT: You would measure by
10 the hole that's left?

11 THE WITNESS: Yes, sir.

12 THE COURT: Did they respond?
13 Was that your suggestion or was that their
14 suggestion?

15 THE WITNESS: I don't know
16 exactly whose suggestion that was, but that's
17 just normal procedure. Like when PSI came
18 out -- I actually measured a small section
19 with PSI myself. Just length times width
20 times depth divide by 27. That gives you the
21 cubic yards for that area.

22 THE COURT: That's what you told
23 them that's how we ought to measure this
24 extra 12.50?

25 THE WITNESS: I don't know who

1 told who. I know it was decided.

2 THE COURT: Everybody was in
3 agreement?

4 THE WITNESS: Correct.

5 THE COURT: That's how the
6 measurement was going to be done?

7 THE WITNESS: Correct.

8 THE COURT: For the 12.50?

9 THE WITNESS: Correct.

10 THE COURT: That's all I have.

11 MR. PANTHER: If I may ask a
12 question based upon Your Honor's
13 questioning?

14 THE COURT: Sure.

15 BY MR. PANTHER:

16 Q. For all the areas where there was
17 unsuitable material, was the volume of the
18 unsuitable material determined by measuring
19 length, width, depth in the manner you just
20 described to the judge?

21 A. I don't know what Anthony and Ricky --
22 how they handled it because at that point in
23 time, I was leaving and didn't spend that
24 much time on the site. Once I got everything
25 pretty well settled as far as how we were

1 going to handle the undercut and how it was
2 going to be done, then I was in the process
3 of leaving American Excavators and working on
4 a couple other things. I stayed away from
5 the site.

6 Q. Although you may have had a
7 conversation early on about measuring length,
8 width, depth?

9 A. Correct.

10 Q. Do you know of your own knowledge
11 whether RCR adhered to that procedure?

12 A. No, I do not.

13 Q. Who would have knowledge about that
14 with American Excavators?

15 A. At American Excavators, it would be
16 Ricky.

17 MR. PANTHER: Thank you.

18 THE COURT: Ricky Tipper?

19 THE WITNESS: Yes, sir.

20

21 CROSS-EXAMINATION

22 QUESTIONS BY MR. CASHION:

23 Q. My name is Greg Cashion. We met at
24 your deposition. Let me just follow up on
25 what the judge was asking you. Is \$10 a

1 cubic yard conversion?

2 A. Correct.

3 Q. How was the excavation, the cut set up
4 on this job; do you know? You bid the job.
5 What kind of job was it for the excavation
6 portion? I guess my question is: Was it
7 classified or unclassified?

8 A. It may have been unclassified. The
9 majority of them nowadays are unclassified.

10 Q. Isn't it true that, if it's
11 unclassified, it doesn't matter what you cut
12 out; you don't get paid any extra for it
13 because that's the definition of
14 unclassified? You take it out. You can use
15 it or not use it. That's yours. That's your
16 soil?

17 A. My definition that I've always dealt
18 with is unclassified portion is mainly 99.9
19 percent for rock, not for the cut to fill.
20 The cut to fill whether that can be used or
21 not is determined by the soils report,
22 whether you can take the on-site material,
23 because if you bid a project and it's
24 unclassified, it would cost you an
25 astronomical amount of money for anyone --

1 you have to rely on the soils report to
2 determine whether that cut can be used as
3 fill.

4 Q. And the soils report in this case
5 indicated the cut could be used for fill?

6 A. Yes, correct.

7 Q. Were you aware that the specifications
8 said that any unsatisfactory soil will be
9 removed from the site and disposed of by the
10 contractor? If the unsatisfactory soil is
11 from a cut section, it will be removed from
12 the site and disposed of by the contractor at
13 the contractor's expense when you took it off
14 the job?

15 A. To be removed?

16 Q. Yes.

17 A. It was removed and redispensed of at my
18 expense. That's where my 2.50 a yard comes
19 into place.

20 Q. That's because you have to cut it
21 anyway?

22 A. Correct, either cut and move it or cut
23 and dispose of it. That's where the 2.50
24 came in.

25 Q. The \$10 you want because you bring in

1 material and replace it?

2 A. Correct.

3 Q. That doesn't say you're going to get
4 paid for replacement. Did you read the
5 specifications that way?

6 A. Yes. I'd have to read the spec book
7 again. Most of your spec books are generic
8 anyway in content. You go from one project
9 to the next. The majority of them, you just
10 change the title page.

11 Q. Stay on that point just a moment
12 more. If I understood you correctly, you
13 went out to the project site prior to bidding
14 the job?

15 A. Correct.

16 Q. And you dug test pits?

17 A. Just in the garden area.

18 Q. So, you didn't go up to the detention
19 pond and dig a test pit to evaluate the soil?

20 A. No.

21 Q. And it is your testimony in the garden
22 area -- let me point to this -- you knew it
23 was about an acre; right?

24 A. I don't think it was quite an acre.

25 Q. Soils report says it is an acre. You

1 don't doubt that, do you?

2 A. The soils report says their dimensions
3 and locations of those boring holes are an
4 assumption anyway. I used to work for a
5 boring company. I know pretty much how
6 they...

7 Q. You knew it said it was approximately
8 an acre in the soils report?

9 A. Off the top of my head, I can't recall
10 that.

11 Q. You're talking about the northwest
12 corner of this community center right here?

13 A. Correct.

14 Q. That's where the garden area was?

15 A. Correct.

16 Q. And what you're saying is you looked
17 at it, the garden area, dug down and you just
18 found six inches of topsoil and it was good
19 solid material from that point down; right?

20 A. Six inches, six or eight inches. It
21 wasn't exact. I know there wasn't a two foot
22 seam of topsoil.

23 Q. But you're aware -- let me put up a
24 poster of the soils report so I don't have to
25 dig it out. I have just recopied the

1 language of the soils report. What it's
2 saying in the diagram that we prepared, the
3 soils report says about a foot of topsoil, a
4 foot and a half of clay silt material.
5 That's what the soils report says?
6 A. Okay.
7 Q. Are you telling the Court that you
8 went out there and dug because you could see
9 this garden real well, couldn't you?
10 A. Not real well. They hadn't had a
11 garden, I would say, in probably a year or
12 two.
13 Q. So you went in?
14 A. You can kind of delineate about where
15 it was.
16 Q. In this area that we're talking about
17 over here, you're saying you only had about
18 six inches of topsoil and what was underneath
19 was good?
20 A. Six to eight inches. I didn't get
21 down and measure the topsoil with the tape.
22 I was concerned about the three foot plow
23 zone that they called for in the spec. I was
24 concerned about that. I wanted to see what
25 type of material that was.

1 Q. So, in your bid, didn't you put three
2 foot of undercut for that area?

3 A. No. I put that I had taken that into
4 account because I had actually fill
5 verified. I wasn't worried about the three
6 foot undercut because I knew from my test
7 pits that that area wouldn't need to be
8 undercut.

9 Q. What you're telling this court is --

10 A. It said potentially undercut in the
11 soils report. It didn't say for sure.

12 Q. So you found all this other bad
13 material out there that you've talked about?

14 A. Later on.

15 Q. Later on?

16 A. Yes.

17 Q. But the one good area that you found
18 prior to bid was where the garden was?

19 A. No. That and this portion --
20 everything from the garden area to the back
21 side, there was no undercutting done along
22 the whole length of the back side of the
23 building, the southwest section. That was
24 good material. The garden area, I can't see
25 up in here. On the upper leg of the building

1 outside of the garden area, that was all bad
2 material. I don't believe the garden area
3 was an acre because this pipe comes out
4 through here, and the pipe was not in the
5 garden area.

6 Q. You didn't measure the garden area,
7 did you?

8 A. No, I did not.

9 Q. Now, when you bid the job, did you not
10 tell me in your deposition that you figured a
11 worst case scenario that you would have to
12 undercut three feet for the garden area?

13 A. Yes, per the soils report.

14 Q. Right. So you figured you were going
15 to take out three feet of that garden area as
16 an undercut as a worst case scenario?

17 A. I knew I wouldn't have to because I
18 done the presite investigation before I bid
19 the project. I carried a backhoe out. My
20 number does not compensate for a three foot
21 because I knew I wouldn't have to do it.

22 Now, if I hadn't went out and done the
23 investigation and just bid the job, my bid
24 would have been higher because I would have
25 included three foot. I knew I didn't have to

1 do the three foot in the garden area. The
2 soils report says I didn't have to. It says
3 potentially you might have to.

4 Q. What would have happened in your bid
5 or on your contract if you got out there and
6 in the garden area you had to go down three
7 foot?

8 A. I would have lost that material.

9 Q. So you wouldn't have charged for --

10 A. No.

11 Q. Okay.

12 A. I believe it is stipulated in my bid I
13 included that three foot buffer. I believe I
14 did.

15 Q. Your proposal says you included the
16 garden area undercut?

17 A. Correct.

18 Q. Let me read you -- it sounded a little
19 different a couple of months ago.

20 A. I don't doubt it.

21 Q. Let me hand the Court one and you
22 one. Let me ask you to turn to Page 12.

23 MR. PANTHER: Actual Page 12 or
24 condensed Page 12?

25 MR. CASHION: Condensed Page 3,

1 actual Page 12.
2 BY MR. CASHION:
3 Q. Are you with me?
4 A. Yes, I believe so.
5 Q. Let me start on Line 14. I ask you:
6 "In doing your take-off, did you figure
7 anything for potential undercutting of the
8 garden area up to three feet?"
9 A. Evidently I'm not.
10 Q. Let me start over. Line 14, my
11 question: "In doing your take-off, did you
12 figure anything for potential undercutting of
13 the garden area up to three feet?"
14 A. Correct.
15 Q. "Answer: Yes.
16 "Question: How is that reflected?
17 "Answer: It is not reflected. On
18 this right here --
19 "And you're referring to the Agtech
20 program.
21 "I did not do that. With the Agtech
22 system, I just take the square footage of the
23 area, and I think the soils report called for
24 approximately three feet. I came up with the
25 yardage. It always assumes there's

1 unsuitable material worst case scenario."

2 On Page 13: "Question: And you
3 realized if it was unsuitable material for
4 that area, you would not be paid an undercut
5 price?"

6 Your answer then was: "No, because
7 when I did the project, I made a statement
8 that any unsuitable material below subgrade
9 would be excavated in a place to 12.50 of
10 cubic yards. I think that's 12.50 per cubic
11 yard.

12 "Question: How are you going to
13 address the garden area?

14 "Answer: When I got to it.

15 "Question: But you had it covered in
16 your bid?

17 "Answer: No, not in the total lump
18 sum. There was a claimer -- disclaimer. Any
19 unsuitable material below subgrade would be
20 billed at 12.50 cubic yard.

21 "Is that a standard disclaimer?

22 "Yes."

23 So at the time of your deposition, you
24 were under the impression, were you not, that
25 you did not include the garden area and if

1 you had to take it out, you are going to make
2 a claim under the undercut portion?

3 A. That sounds like that, but I don't
4 understand. I'm trying to read back through
5 this again. When I talked to you, that was
6 the first time I talked about this thing in
7 years.

8 I knew I had taken into account the
9 three foot because as a matter of fact I had
10 talked to Fred Lepore, which is the estimator
11 for RCR, that I wasn't concerned. He asked
12 me specifically whether I covered the three
13 foot. I said, yeah, because I dug test pits
14 in it.

15 Q. What's the three foot?

16 A. That's the buffer zone, the plow zone
17 they're calling for in the soils report for
18 potentially being undercut.

19 Q. Okay. So you knew that wasn't covered
20 in your bid?

21 A. Correct, correct.

22 Q. Why, when I took your deposition, were
23 you saying if I hit the garden area and I've
24 got three foot of undercut, I'm going to
25 charge you on a per cubic yard your

1 undercutting unit price?

2 A. Probably because I got to thinking the
3 wrong thing.

4 Q. Okay. Now, in fact, your proposal --
5 MR. CASHION: If you will, show
6 him Exhibit No. 4.

7 THE CLERK: (Document passed.)

8 BY MR. CASHION:

9 Q. Your proposal at the bottom says that
10 any additional undercutting will be undercut
11 and replaced at 12.50 per cubic yard; right?

12 A. Correct.

13 Q. By "additional," you mean in addition
14 to what would be required in the garden area?

15 A. Yes. If the three foot was required
16 in the garden area, that would be taken care
17 of in this lump sum total bid. Anything
18 below that three foot, if I took the three
19 foot out --

20 Q. Right.

21 A. -- and it still was pumping, that
22 would go back to 12.50 a yard.

23 Q. In your contract -- do you see your
24 contract? Do you have Exhibit 5 up there?

25 A. I don't believe so.

1 Q. Turn to the third page, Paragraph 20.
2 Do you see that one?
3 A. Okay.
4 Q. It says, "Any additional undercutting
5 and refilling of areas due to unsuitable
6 soils will be done for a unit price of 12.50
7 per cubic yard."
8 A. Yes.
9 Q. Now is that the same thing you're
10 talking about on your proposal?
11 A. Yes, should be.
12 Q. And that's the same thing you were
13 talking about in your deposition because I
14 think you said any unsuitable material below
15 subgrade would be billed at 12.50 a cubic
16 yard?
17 A. Correct.
18 Q. So this undercutting you're talking
19 about in the contract and in your proposal is
20 undercut below subgrade; right?
21 A. Yes.
22 Q. Now, if I remember correctly in your
23 deposition, you said that when you went out
24 there, before you went, you told Ricky Tipper
25 to strip it. You didn't tell him about six

1 inches, did you?

2 A. Don't believe I did. I just assumed
3 that he...

4 Q. Did you tell him about the garden
5 area, that you've got to strip a foot there?

6 A. No, I don't believe I did.

7 Q. You didn't give him instructions in
8 the garden area?

9 A. I don't think I gave him any
10 instructions as far as any stripping depth.

11 Q. And when you went out there and saw
12 it, your reaction was, Wow?

13 A. Correct.

14 Q. Stop everything?

15 A. Correct.

16 Q. Because what you saw was they had
17 stripped, you said, I think two to two and a
18 half feet too much out there?

19 A. In this area here, there was a
20 straight up and down face of two and a half
21 to three and a half, four feet. It was like
22 a pond. As a matter of fact, we had to pump
23 it after it rained to get the water out.

24 Q. In that area you had a shear face on
25 it?

1 A. Correct.

2 Q. But they also had stripped the whole
3 building pad, hadn't they?

4 A. I don't know how far up into the cut
5 section the stripping had actually went. I
6 don't have any idea. I have an idea but it
7 is right in here.

8 Q. They stripped that the whole building
9 pad and pretty much into the blue area there,
10 the cut?

11 A. Yes.

12 Q. Actually, the blue area is the fill.
13 I said that wrong. Isn't that about the fill
14 line?

15 A. Yes, pretty close to it.

16 Q. When they stripped all of that and you
17 looked at it, you realized that they had
18 stripped too much?

19 A. When I saw this, I knew they had here
20 and then I got to looking around. When I set
21 this back building corner back here with
22 Agtech, you can generate a grid either 5 foot
23 or 2500 foot or whatever. I picked a point
24 out of Agtech to find the cut and the fill
25 area was in this area and it was about four

1 and a half. When I was actually staking the
2 fill, they had taken eight to ten inches of
3 topsoil out there.

4 Q. I thought when we talked in your
5 deposition you talked about that northwest
6 corner?

7 A. Correct.

8 Q. And you said instead of having a cut
9 stake --

10 A. It was a fill stake.

11 Q. Excuse me, I'm saying it wrong. Look
12 on Page 54 of your deposition.

13 A. Okay.

14 Q. The scrunch would be 14. You're on
15 54?

16 A. Yes.

17 Q. You state, "When I got them stopped
18 here and they done stripped this area, when I
19 got out there and staked the stakes, there is
20 an additional foot and a half of fill. My
21 stakes should have been filled 3.5. Instead
22 it is filled five on the back corner back
23 here."

24 I asked you: "You're talking about
25 north" --

1 "Correct, yes."

2 THE COURT: What line are you

3 starting on?

4 MR. CASHION: Almost on line 2.

5 BY MR. CASHION:

6 Q. Line 2. When we took your deposition,

7 you are saying on this northwest corner up

8 here that they had stripped, you were looking

9 for a fill stake of 3.5?

10 A. Somewhere in that neighborhood. I was

11 using that as a --

12 Q. And you got five?

13 A. I may have got 4.5 and I may have got

14 five. I know there was more fill in that

15 area. To tell you exactly a foot, two feet,

16 five foot -- I know I can tell you five. It

17 was in a foot, two foot range in this corner.

18 Yes, sir, that's correct.

19 Q. On the day we took your deposition you

20 were taking about a foot and a half cut in

21 this area?

22 A. Of extra additional topsoil.

23 Q. You said pretty much all of it they

24 had stripped out too much; right?

25 A. Yes, by visually looking at it, not

1 even doing any checking.

2 Q. And --

3 A. I assumed they had because if they had
4 here and they had there, I was assuming that
5 they were continuing going down into this
6 dark dirt.

7 Q. They were getting all the dark dirt
8 out, weren't they?

9 A. Correct.

10 Q. They were looking for red?

11 A. Correct.

12 Q. When they took all this out here and
13 here, this area, it was all well below six
14 inches from what you were looking at when you
15 set your fill stakes?

16 A. The only ones that I really paid
17 attention to was this here.

18 Q. Right, okay. At that time you thought
19 it was about a foot and a half cut out?

20 A. Yeah, over and above below the six
21 inches and that's not a verified -- I mean,
22 the Agtech, when you digitize and you're
23 working on a 30 scale or 50 scale and you're
24 trying to follow an existing contour line, if
25 you're off a sixteenth of an inch, it is

1 going to give you -- you know, you're not
2 going to be exact. That foot and a half, I
3 wasn't expecting. It may have been through
4 the digitized and it may have been through
5 stripping too much. I just took it under the
6 assumption, Hey, you-all have stripped this
7 too much using this area here as my guide.
8 When I saw this, I said, Oh.

9 Q. You saw the shear face; you knew you
10 had a problem?

11 A. Correct.

12 Q. You verified in the other corner?

13 A. I didn't verify it. I saw that. The
14 only way I could have verified it is went out
15 and shot the existing ground exactly prior to
16 anything being disturbed and then came back
17 in. That's how I could verify it, but I
18 didn't do that.

19 Q. And so in the garden area, they
20 probably took out the full two and a half,
21 three feet that they were looking for red
22 dirt, weren't they?

23 A. I wouldn't think, no.

24 Q. You didn't recover?

25 A. I stopped them at that point.

1 Q. They had already cut?

2 A. No, they were still coming down. When

3 he stripped this site, he started on the

4 perimeter here, went around and the last

5 thing he was working on was coming down the

6 middle. He was working down this last run in

7 through here when I shut him down right there

8 with the pan.

9 Q. He had already stripped all of this

10 building pad about like this; right?

11 A. And I'm not sure exactly how because,

12 see, this is not really a true picture of

13 what was out there. This tree line actually

14 encroached into the building overlap. I

15 don't know if we had those down to give him

16 access back there.

17 Q. You had that early change order of

18 clearing and grubbing in early June?

19 A. Right. The change order may have been

20 generated before we ever done it. I don't

21 know.

22 Q. The clearing and grubbing, he says in

23 his daily reports, he's pretty exact that he

24 cleared and grubbed trees, hauled off brush

25 and trees, moved trees. That pretty much

1 happened the first week of June?

2 A. Correct. This three foot hadn't been
3 cut out because in my course of staking this
4 building line, I would have noticed. If I'm
5 noticing a foot and a half back here, I would
6 have noticed three foot here.

7 Q. But you noticed a foot and a half plus
8 six inches of topsoil you said?

9 A. The six inches of topsoil had to come
10 off anyway.

11 Q. So actually he's cut down from the top
12 two feet?

13 A. That's what I'm saying, if this
14 building corner was exact.

15 Q. If the existing elevation was
16 correct --

17 A. Yeah.

18 Q. -- it had gone down on that corner two
19 feet below?

20 A. Correct.

21 Q. And you don't know how far; you knew
22 he was up?

23 A. They could have this right here, could
24 have come in conjunction with taking all that
25 garbage out, too, not necessarily in the

1 topsoil stripping operation.

2 Q. Just let me summarize. On this corner
3 he's down two feet below existing grade?

4 A. I know it was a foot and a half, two
5 feet.

6 Q. Up here, he's two and a half feet
7 below?

8 A. Up in here, he was probably close to
9 three, three and a half, four, but it wasn't
10 a big area. The area that he had gouged out
11 was no bigger than the interior right here of
12 this desk.

13 THE COURT: Let's stand up and
14 stretch just a minute.

15 (Brief respite.)

16 BY MR. CASHION:

17 Q. Mr. Ezell, whenever you went out to
18 the site and stopped everything, your intent
19 was to get a geotechnical engineer so you
20 could start a procedure for getting paid for
21 undercut; right?

22 A. Yeah, first when I called, it was
23 RCR. My intent was to get them on site to
24 make them make the call.

25 Q. That was where you were going; you

1 knew that to get paid for your undercut, you
2 were going to have to get a geotechnical
3 engineer in there?

4 A. No. I knew I had to get RCR in there.

5 Q. By that time, the geotechnical
6 engineer was under your contract?

7 A. Correct.

8 Q. You knew you had to get him out there
9 to make the call?

10 A. Not unless RCR would say, no, we'll
11 measure it. I've been on many projects where
12 I've measured it and turned it in. I've been
13 on projects the contractor I'm working for,
14 his representatives, measure it. It doesn't
15 have to necessarily be a soils company, just
16 someone that the owner is comfortable with
17 saying, yes, this is the dimensions, this is
18 the material.

19 Q. When you got to that garden area, did
20 you tell Ricky Tipper, okay, this stuff below
21 the foot of topsoil and plow zone you have to
22 take it out and Ricky packed it back in
23 because that's what the soils report says?

24 A. It says potentially you have to do
25 that. What you do is you strip it and then

1 you proof roll it, and proof rolling tells
2 you what you have to do to it.

3 Q. So, is it your understanding that
4 everything in the garden area no undercutting
5 occurred?

6 A. To my impression, yes.

7 Q. And you don't think any of the garden
8 area was stripped when he stripped everything
9 in the building pad?

10 A. Yes, yes. This area was stripped
11 right here but the garden went like this. It
12 was a triangle with a wide side back here.
13 This whole area proof rolled.

14 Q. After you stripped it?

15 A. Yes, the very first time.

16 Q. But you never took a survey of the
17 elevations in that area to determine how much
18 material had been stripped off by Ricky
19 Tipper before you got to the job site?

20 A. No, but I can visually tell you there
21 was no three foot. If it was, this would
22 have been a pond holding water.

23 Q. You knew in that back corner, the
24 northwest corner, it was two foot?

25 A. No. Didn't know it was two foot.

1 When I gave you that 3.5 to 5, that was I was
2 trying to recall something from two or three
3 years ago. Hey, I knew there was a
4 difference there, but can I tell you if that
5 was eight inches or three foot -- I know it
6 wasn't three foot.

7 Q. You didn't measure any of it so we
8 could be sure?

9 A. I didn't shoot the original ground,
10 no, sir, did not.

11 Q. You didn't shoot the ground after you
12 stripped it to determine how much you had
13 taken off?

14 A. I did, but not to determine how much I
15 took off. I staked it with cut or fill
16 stakes to tell him where to go with his
17 grading operation but not to look for how
18 much topsoil.

19 Q. In the fill area, you were
20 consistently putting more fill because you
21 stripped it too much?

22 A. I can't say. I don't know that.

23 Q. You don't know that?

24 A. No, sir.

25 THE COURT: What happened to the

1 soil that Tipper stripped before you got
2 there?

3 THE WITNESS: Everything was
4 stockpiled on this open area here.

5 THE COURT: It had not been
6 hauled off?

7 THE WITNESS: No, sir, not to my
8 knowledge. Like I said, I wasn't there the
9 whole time.

10 BY MR. CASHION:

11 Q. You stockpiled up here?

12 A. Correct.

13 Q. I think you said your haul road went
14 through where the detention pond is?

15 A. You can see there is a pipe. There is
16 a culvert coming in. There is an old road
17 that came in, not actually through the
18 retention pond, but we came right through
19 here and I bridged it up. I had to put some
20 shot rock to make the bridge roll because
21 this kept pumping and falling in, so I built
22 a road up. It was just a gravel road into
23 here. I built that road all the way up into
24 here to get to the pad.

25 Q. Did you ever plan, before you started

1 stockpiling on your cut areas, to do your cut
2 first and move all this material down to your
3 fill and then hauling in?

4 A. No, because I'm using that. That
5 right there is not a cut area. There is
6 nothing going on in here.

7 Q. It's not cutting?

8 A. No. That's a grass area. Your cut
9 area is only right here, around that.

10 Q. Around the road and the detention?

11 A. This right here stays the same.

12 Q. Did you want to cut this in and cut
13 out your detention to move it?

14 A. No. You want to get the pad ready.

15 Q. That's what I'm saying, use this on
16 your pad?

17 A. No, because I'm bringing in this rock
18 from the quarry. I'm digging that last
19 because I want to keep the drainage going the
20 way it's going on Fowlkes Avenue. When I dig
21 that pond, I have to lay this pipe and tie
22 this drain together, so I leave that to the
23 very end. As long as the water run-off is
24 running good, I'll leave that drainage
25 structure to the last thing.

1 Q. If you leave it to the last thing, you
2 got all your fill done?

3 A. Not the last thing. I know about how
4 many yards is in here. I planned on using it
5 on the parking area.

6 Q. Okay. You mentioned about the
7 capacity of a truck. You said about 15
8 yards?

9 A. Well, it varies with the material.

10 Q. Okay. But that's 15 yards loose;
11 right?

12 A. Correct.

13 Q. It would be 12 yards compacted?

14 A. That depends upon the material. Yeah,
15 12 yards is a good number in place. I think
16 it is a fair number for both sides.

17 Q. Twelve?

18 A. Yes, in place. That's what you
19 normally get paid on is in place.

20 Q. I think you told me in your deposition
21 that you take 12 yards in place per truck.
22 That's what you usually figure?

23 A. Yeah, around there. Like I say it
24 depends on the material. If I'm doing shot
25 rock, it will be less. If I'm doing sand, it

1 will be more.

2 Q. Doing this dirt, twelve is a good
3 number?

4 A. It's a fair number.

5 Q. When you wrote your July 1 letter to
6 Don Stover, it was your intention not to
7 charge for any undercut that had taken place
8 on the site at that time?

9 A. No. On this wedge here, I wasn't
10 going to charge him for that three foot
11 wedge.

12 Q. Were you going to go back and charge
13 him for undercutting could be two feet, could
14 be a foot?

15 A. I didn't know if he undercut a foot,
16 two feet. I just knew in that one area, it
17 caught my eye.

18 Q. But you knew that Ricky Tipper should
19 have stripped off six inches and started
20 proof rolling; right?

21 A. Correct.

22 Q. Instead, he stripped off as much dark
23 material as he could, and that's what you
24 found?

25 A. I don't know how much he stripped

1 before I got him stopped.

2 Q. You realized before you could make a
3 claim for undercut that you were going to
4 have to have a geotechnical engineer out
5 there, you were going to have to proof roll
6 and somebody is going to have to say take
7 it out besides Ricky Tipper stripping it;
8 right?

9 A. No, I didn't have to have
10 geotechnical. I knew -- my avenue was to go
11 through RCR. That's who I was working for.
12 That's who my contract was with. So if
13 anything arose on the site pertaining to that
14 site, I went first to RCR.

15 Q. But you never made any calculation
16 about how much was stripped the first time?

17 A. No, did not, no.

18 Q. Didn't you know that PSI, when you
19 wrote the July 1 letter, was going to be the
20 one that would come in and determine the
21 depth of the undercut?

22 A. I knew PSI or RCR.

23 Q. What does your letter say about who is
24 going to determine the depth?

25 A. To verify actual quantities removed, I

1 would like a representative of PSI or RCR to
2 be present at the time this work is
3 performed. So my impression was either one
4 of them.

5 Q. But look in the second paragraph. It
6 says, Final depths of undercut to my
7 understanding will be determined by PSI?

8 A. Okay.

9 Q. So PSI is going to determine the final
10 depth and you want somebody, either RCR or
11 PSI, to be there while you're working?

12 A. No, I want someone -- when undercut is
13 encountered, a representative of RCR or PSI,
14 if they want verifiable numbers, one of those
15 representatives needs to be present when this
16 pit is measured. You can either measure it
17 from the stockpile or measure it from the pit
18 or however you want to measure it. You can
19 measure it by the load. I don't care. I
20 just need a representative from one of these
21 companies to verify this so when we get to
22 the end of this thing, it all shakes out.

23 Q. But you knew from your meeting with
24 them on 6-30 that removal of these unsuitable
25 materials would be monitored by PSI?

1 A. That's what it says here. I knew PSI
2 was being brought in.

3 Q. And that PSI would document the
4 quantities removed and the new fill to be put
5 in its place; right?

6 A. Correct.

7 Q. That was the way you left it to be
8 compensated?

9 A. Well, I knew either PSI or RCR would
10 take care of it. That's the way it's always
11 been. PSI -- a lot of times if PSI was on my
12 salary and the county was going to take my
13 numbers, I wouldn't call PSI and get a
14 mileage charge and an hourly rate to come out
15 and measure a ten by ten pit. I would go
16 ahead and do that myself and document it and
17 send it on in.

18 Q. Now, did you ever have any
19 conversation with anybody from PSI where they
20 either approved or disapproved the material
21 in the cut section?

22 A. No, I don't believe so. I'm saying no
23 pretty quick but I don't believe so. I know
24 PSI proof rolled this area here. Whether
25 they had told Ricky prior to that this cut

1 right here could not be used, I don't know.
2 I do know I was out there when it failed
3 proof rolling and PSI was on site, but I
4 don't believe I actually had a conversation
5 with PSI about the cut material in the
6 retention pond.

7 Q. You don't remember when the job was
8 shut down for about four and a half hours up
9 in the detention pond because you thought it
10 was bad material and you called PSI? Do you
11 remember that? And PSI come out there and
12 said it was good material, go ahead and use
13 it?

14 A. I don't remember that. I dug -- this
15 is right here. I probably left within a week
16 of this time frame, I think.

17 Q. This is July 27 if you want to look at
18 the daily report?

19 A. I think the first of August was when I
20 left. So it was right about the time I was
21 leaving. I never saw them complete the
22 retention pond.

23 Q. But you remember PSI coming out there,
24 looking at the detention pond material and
25 saying, use it?

1 A. No, I sure don't.

2 Q. If Ricky put that in his daily report,
3 are you saying you don't remember?

4 A. I'm saying I don't remember. Whether
5 it happened or not, no, I don't know.

6 Q. And you checked some of the
7 measurements that PSI made on the job site,
8 didn't you?

9 A. Checked one.

10 Q. And it was correct?

11 A. I made it myself, so...

12 Q. Did you have anything to do with
13 billing this job?

14 A. No. I turned in -- I believe we broke
15 it down on the schedule of values off of my
16 proposal and I would tell Barbara Powers in
17 the office like we were 100 percent done of
18 the construction finish. We're 50 percent
19 done with the grading. You can bill 50
20 percent of that. Actual billing, no.

21 Q. Did you have anything to do with
22 preparing the change orders for the undercut?

23 A. No.

24 Q. Do you know of your own knowledge
25 whether all of the cut sections, the 2898

1 cubic yards, was unsuitable or not?

2 A. Do I know whether it was placed as
3 fill on the site? It was not placed as fill
4 on the site.

5 Q. How much was it?

6 A. I don't know of any that was placed as
7 fill on the site.

8 Q. You don't remember PSI telling you you
9 could use the detention pond?

10 A. No, I do not.

11 Q. I think Mr. Panther asked you if you
12 observed trucks bringing material in?

13 A. Yes.

14 Q. Did you observe trucks taking material
15 out?

16 A. We had some material that went to The
17 Dirt Man and I'd say four or five loads that
18 I observed going out.

19 Q. Is it your testimony that once the
20 system was put in place, according to your
21 July 1 letter, that followed through from
22 your vantage point as far as how the undercut
23 was made, measured and performed?

24 A. I don't know whether it was followed
25 through on or not.

1 Q. Isn't it true, if they had started
2 deviating from what you understood the system
3 to be as put forth in your letter, wouldn't
4 you have said something at that point if
5 there was a deviation?

6 A. I wouldn't have known. From that
7 juncture on, I really avoided the site as
8 much as I could. Me and Ricky at the time
9 wasn't -- you know, we had a personality
10 conflict as far as the way this thing should
11 have been built and how to go about doing
12 it. So I just let him -- I said, okay, I'm
13 going to give you some experience. I'll stay
14 away and let you get this thing built.

15 Q. What was the problem with Ricky? How
16 did he want to build it?

17 A. Personality conflict as far as moving
18 the dirt and where you wanted to cut and fill
19 and where you wanted to start at and how you
20 want to go about it. Just scheduling mainly
21 is what it was.

22 Q. And did you agree with covering up
23 your cut sections with the stockpile?

24 A. We didn't cover up a cut section with
25 stockpile.

1 Q. Did you agree with cutting the job --
2 doing the cut sections last on the job?

3 A. Yes. I told him to cut the retention
4 pond last and road last. We'll use that
5 road. In turn, we'll get the pad up and then
6 we'll bring this cut material over in this
7 parking lot area where this small fill is.

8 Q. You weren't there when he cut the
9 detention pond?

10 A. I was there -- I dug a test pit in it
11 at one time myself to see what it was. Then
12 I was there when they were excavating it for
13 maybe an hour or something. Just went by the
14 site to do something.

15 Q. I have one more question. So you
16 agreed to put the stockpile on top of this
17 cut area up here?

18 A. It is not a cut area. It is a grass
19 area.

20 Q. I know it is grass but it's got
21 different contours?

22 A. Your proposed contours tie to your
23 existing contours.

24 Q. Does your Agtech program, would that
25 show that as no change in elevation?

1 A. Correct. What I draw is a perimeter
2 and this perimeter line, if you follow --
3 whenever a proposed contour ties to an
4 existing one, does it tie right there -- does
5 it tie to existing contour?

6 Q. Yeah.

7 A. Okay.

8 Q. It says cut one?

9 A. Anything in this area, there is no cut
10 here.

11 Q. You don't think there is a cut there?

12 A. I know there ain't. If you've got an
13 existing contour on both sides of it, if you
14 cut there, you shouldn't be cutting there.

15 MR. CASHION: Those are all the
16 questions I have, Your Honor.

17 THE COURT: Ms. Carson?

18

19 CROSS-EXAMINATION

20 QUESTIONS BY MS. CARSON:

21 Q. Mr. Ezell, I'm Lisa Carson. I
22 represent Williamson County in this case.
23 You said you left this project in September
24 of '99?

25 A. That's close.

1 Q. Around that time?
2 A. August, September.
3 Q. All right. You talked a little bit
4 about when you first began the project you
5 actually participated in the estimated cut
6 and fill?
7 A. Correct.
8 Q. And you did the initial boundary
9 control and stripping limits and those things
10 on the site?
11 A. Correct.
12 Q. When you made your estimate, you
13 indicated that you went out to the site and
14 looked at the garden area that was discussed
15 in the soils report?
16 A. Correct.
17 Q. Was that the only area where you did
18 any testing?
19 A. Correct. That was the only area I was
20 concerned about.
21 Q. You said you had read the
22 specifications in the contract between the
23 general contractor and the county; is that
24 correct?
25 A. I didn't read the whole spec book but

1 I tried to read the utility portion of it and
2 site work portion of it.

3 Q. All portions that would pertain to the
4 work that you were doing; is that correct?

5 A. Correct.

6 Q. And so then from reading that you were
7 aware that the county had put the contractor
8 and subcontractor on notice that the soils
9 report was not a warranty of the condition of
10 the site, weren't you?

11 A. The majority -- did I read that
12 specifically in that spec book? No, I
13 didn't. Do I remember? No, I don't but it
14 is in 99.9 percent of them because everybody
15 wants to hire a soils tech but everybody
16 wants to say, no, it's not my
17 responsibility. Here's information but don't
18 use it.

19 Q. So you were not surprised by the fact
20 then that you were not -- that that soils
21 report was not a warranty?

22 A. No, because if it was on the other
23 side of the fence, they'll say, Did you read
24 the soils report?

25 Q. That's why you went out and did your

1 own investigation?

2 A. Pertaining to -- the only area that I
3 had any question is what I went to check.

4 Q. And so you were aware that you
5 couldn't rely on the soils report completely
6 as a warranty to prepare your estimate?

7 A. No, I didn't realize that. No, I
8 didn't. On a soils report when they call out
9 questionable areas, that's what I go check.
10 I worked for Ogden Environmental for almost
11 nine years and that's all they did. They
12 done boring and the soils report. The boring
13 logs are supposed to be the most accurate
14 part of it. When he puts something in there
15 that says pay attention to this, that's what
16 I go look at.

17 Q. Even though in 99 percent of the
18 contracts that you deal with -- I believe
19 that was your testimony -- there is a
20 provision that says don't rely on this, you
21 just went right ahead and relied on it
22 anyway?

23 A. On the boring logs, yes, I did because
24 I always have 99.9 percent of the time and
25 never had a problem with it.

1 Q. Now, going into the job, you expected
2 to have about 3,000 cubic yards of import
3 material; is that right?
4 A. Correct.
5 Q. And all of that fill that you brought
6 in was provided free by Williamson County,
7 wasn't it?
8 A. Correct.
9 Q. And it is your testimony that you knew
10 that was going to happen before you bid the
11 contract?
12 A. Correct, that's the only way I bid it.
13 Q. Who told you that you are going to
14 have that material?
15 A. I talked to Jim. I'm not even sure
16 his name was Jim. He was superintendent or
17 whoever was over the county highway
18 department who's in charge of making the road
19 Moores Lane to Hillsboro, whatever that
20 extension is.
21 Q. When did you have that conversation?
22 A. Oh, I would say at least a month prior
23 to the job.
24 Q. Now, the letter that you wrote in May
25 of 1999 where you mention that you bid the

1 proposal using imported fill material, do you
2 have that in front of you? That's Exhibit
3 18. May 7, 1999. That letter was actually
4 written a couple of months after you did the
5 project, wasn't it?

6 A. Correct, correct.

7 Q. Now, after the excavation actually
8 began, you were out on the site once or twice
9 a week maybe for a period of time?

10 A. Could you run that first part by me?

11 Q. After the excavation actually began,
12 you were only out on the site once or twice a
13 week; isn't that right?

14 A. Yes.

15 Q. And then in June, you came out and
16 visited the site and suddenly realized that
17 your men out there had stripped this two and
18 a half feet of extra material?

19 A. We didn't start until June and I ain't
20 sure about two and a half feet extra
21 material. I know in one section -- I didn't
22 want to get confused with saying the whole
23 site. This one pocket here was where there
24 was probably a three foot, four foot straight
25 up and down wall. This area back here, I

1 knew the fill stake was different than what I
2 had on my Agtech.

3 Q. Do you recall that you testified in
4 your deposition that the area that they had
5 stripped was down about two and a half feet?

6 A. No, I don't.

7 Q. Do you still have your deposition in
8 front of you there, Mr. Ezell?

9 A. Yes, I do.

10 Q. Turn to Page 20, Line 21. Do you have
11 that there?

12 A. Yes.

13 Q. The question was asked: "Now, when
14 did you first become aware that there was
15 some unsuitable soils on the project that
16 needed to be undercut?"

17 A. What line are you on?

18 Q. Line 21, sir, on Page 20.

19 A. Line 21, Page 20, okay.

20 Q. Do you have Page 20?

21 A. I thought you said 21.

22 Q. Page 20.

23 A. Page 20, Line 21.

24 Q. "Now, when did you first become aware
25 that there was some unsuitable soils on the

1 project that needed to be undercut?"

2 You answered: "When I had gotten
3 back -- I came to the site after they had
4 been stripping it and I came to this area
5 right in here and they had stripped down
6 approximately two, two and a half feet of
7 material. They had all this area back here
8 stripped except for this entrance road and
9 there was a step-down of about two and a half
10 feet.

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

20 Do you remember that?

21 A. What I'm talking about in this area is
22 this area right here.

23 Q. You were pretty certain in your
24 deposition it was two and a half feet?

25 A. Two and a half, three feet but not

1 over the entire site. In an area no bigger
2 than this circle right here.

3 Q. And that was the first you knew about
4 any of this stripping going on, isn't it?

5 A. Correct.

6 Q. Ricky Tipper and his men out there had
7 done that without consulting anyone, hadn't
8 they?

9 A. Yes.

10 Q. You didn't know about it; RCR didn't
11 know about it; the county didn't know about
12 it?

13 A. They didn't have to know about it.
14 The only area I was concerned about was about
15 the 600 yards, give or take, in this area
16 here. The rest of it, you know, I had no
17 idea and couldn't tell you today whether it
18 was stripped more or too little.

19 Q. Isn't it true that the reason you
20 called Anthony Orange was because you knew
21 that the soils engineer was the proper person
22 to determine whether that soil should be
23 removed?

24 A. No.

25 Q. Well, let me refer you to your

1 deposition again, Mr. Ezell, on Page 14. If
2 you will, look at Line 10.

3 A. Okay.

4 Q. "You anticipated for a job like this
5 the soils engineer would make the call as far
6 as whether it was unsuitable or not?

7 "Yes, correct. He has total call on
8 the material."

9 A. As far as the proof rolling of it. I
10 go through Anthony -- I go through the owner
11 or general contractor, whoever I'm working
12 for. That's who I go through first. If they
13 say disregard the soils report, disregard the
14 plans, throw the drawings out, they're paying
15 me. I'll build it any way they want me to
16 build it. It doesn't matter.

17 Q. What you said in your deposition was
18 that you anticipated that the soils engineer
19 would have total call on that decision?

20 A. Yes, because if you have a soils
21 engineer who is proof rolling, he can sign a
22 piece of paper and say it failed proof
23 rolling but if the county wants to build on
24 it anyway he can't stop the county so he
25 doesn't have total call. I mean, if they

1 want to go out there and build in a swamp,
2 the soils guy can't stop them.

3 Q. You knew the soils engineer was the
4 proper person to make that determination
5 regardless of whether you followed the
6 contractor's instructions, if they deviated
7 from that?

8 A. Yeah. He was my confirmation if it
9 pumped and didn't proof roll. I'm not out
10 here trying to tell you a soil. The soils
11 guy has watched it pump and watched it roll.
12 If you want me to build it, I'll build it
13 like this. If you don't, I'll take it out.

14 Q. In fact, you knew under your contract
15 that the way you determined whether this
16 12.50 per cubic yard kicks in is that it is
17 proof rolled and the soils engineers come out
18 and determine if it needs to be removed?

19 A. Normally, the soils engineer or the
20 on-site rep of the owner or the general is
21 responsible for that.

22 Q. Isn't it true in your deposition that
23 you testified that the way you would get paid
24 was that the soils engineer would make that
25 decision?

1 A. Are we still on 14/10?

2 Q. Yes, sir. I believe actually the
3 question is at Line 3 on Page 14: "How do
4 you address when that 12.50 cubic yards kicks
5 in?

6 "Answer: At the point in time when I
7 get to subgrade and it is proof rolled and it
8 is deemed by the soils engineer, whoever is
9 inspecting the site, says, no, that needs to
10 come out and bridge it back up."

11 A. Whoever is inspecting the site, be it
12 a soils engineer, be it RCR, be it the
13 county.

14 Q. Whoever is inspecting the site, you
15 were referring to the general contractor?

16 A. I was referring to whoever. RCR would
17 tell me this is the person we're putting in
18 charge of this aspect.

19 Q. In reading the specifications that
20 pertain specifically to excavation and earth
21 work, didn't you see that the county
22 specifications provided that it had to be the
23 soils engineer who made that determination?

24 A. No, I didn't. I didn't.

25 Q. You didn't see those specifications?

1 A. I may have but I don't remember
2 reading that paragraph.

3 Q. It is not your testimony that that's
4 not in the document; it is just your
5 testimony that you don't remember?

6 A. Correct.

7 Q. Now, when the soils engineer came out
8 from GT&E after you had discovered that Ricky
9 had dug farther than you thought he should in
10 some places --

11 A. Correct.

12 Q. -- you disagreed with the soil tech
13 from GT&E, didn't you?

14 A. I didn't see him. I wasn't on site
15 when he was there. I disagree with the
16 response that he gave Ricky Tipper, yes.

17 Q. You're not a soils engineer, are you?

18 A. No. Anthony Orange and Don Stover
19 disagreed with him, too.

20 Q. And they're not soils engineers, are
21 they?

22 A. I don't know about their background.
23 I wouldn't assume they were.

24 Q. You then contacted Southern Consulting
25 which is owned by a friend of yours?

1 A. Not a friend, a business acquaintance.
2 Q. Do you remember calling him a friend
3 in your deposition?
4 A. Yeah, I've got a lot of friends.
5 Marvin is my friend.
6 Q. All right. Now, you said you called
7 Southern Consulting because they couldn't get
8 the soil sample turned -- GT&E couldn't get
9 the soil sample turned around?
10 A. Correct.
11 Q. But Southern Consulting didn't take
12 any soil samples; all they did was take a
13 visual inspection?
14 A. They delivered it to Ogden
15 Environmental to the best of my knowledge
16 now. I saw him put dirt in a bag. I think
17 we had bags.
18 Q. All right. Now after this
19 disagreement arose, you then went to this
20 June 30 meeting, is that right, with the
21 county, the contractor, the architect, soils
22 engineer?
23 A. After the unsuitable material was
24 discovered, yes.
25 Q. Everyone was discussing this issue and

1 what to do about this issue; is that right?

2 A. Yes.

3 Q. Now, isn't it true that you don't
4 recall specifically whether anybody
5 designated that soil as unsuitable at that
6 meeting or not?

7 A. We all did. We all visited the site
8 that day. It was all under the same
9 conclusion that this was bad material, what
10 are we going to do to rectify it.

11 Q. Isn't it true that while you think
12 people may have said, this looks like
13 topsoil, you don't know whether anybody said
14 the soil was unsuitable on that day?

15 A. Yes, I know I did.

16 Q. All right. Again, let me refer you
17 back to Page 30 of your deposition. This is
18 kind of in the middle of a lengthy discussion
19 about this particular meeting, and let's go
20 to Line 9 of Page 30 of your deposition.

21 "You're back on the job site. You had
22 the meeting at the school. You reconvened on
23 the job site. Tell me what you remember
24 occurred.

25 "Answer: The material being

1 unsuitable to use, to build on.

2 "Question: Was that determination
3 made that, yes, we agree this material is
4 unsuitable?

5 "Answer: Yes.

6 "And who made that statement?

7 "Answer: I can't tell you exactly and
8 I ain't sure at that point in time if the
9 final determination had been made. I don't
10 know if this was prior to or after Southern
11 Consulting got me the test results back on
12 the material. I can't say for sure.

13 "Question: Now do you remember if Al
14 Thomas said that?

15 "No, I have no idea.

16 "Question: Somebody said that it's
17 unsuitable?

18 "Yes, this is topsoil. Now whether
19 the word "unsuitable" came out, it was a
20 consensus, yes, this is topsoil."

21 Do you recall that?

22 A. Yeah.

23 Q. Now, you would agree, wouldn't you,
24 that these June 30 meeting notes -- do you
25 have those in front of you, Exhibit 19?

1 A. Okay.

2 Q. Do you have that?

3 A. Yes.

4 Q. Would you agree with me that those

5 notes accurately reflect what occurred at the

6 meeting?

7 A. It has to be because I can't picture

8 the whole thing we discussed, but it is a

9 pretty good representation of what we

10 discussed, yes.

11 Q. You don't remember anything

12 significantly different than what is

13 contained in these meeting notes?

14 A. No.

15 Q. All right. These meetings notes also

16 indicate that they were sent around to

17 everybody after the meeting; do you recall

18 that?

19 A. Yes, uh-huh.

20 Q. Was that a yes?

21 A. Yes.

22 Q. I'm sorry. It is hard for her to take

23 down nods and uh-huhs. And you never made

24 any corrections or clarifications and sent

25 them back to the architect, did you?

1 A. No, just a letter on July 1.
2 Q. The letter that you sent to RCR?
3 A. To Don Stover, correct.
4 Q. These meeting notes specifically say
5 that the removal of the material will be
6 monitored by PSI and that PSI will document
7 quantities removed and that new fill will be
8 put in its place; is that right?
9 A. Yes.
10 Q. As far as you know, was that the
11 county's understanding about what was going
12 to happen based on this meeting?
13 A. Based on this meeting, I would assume
14 that. Yes, I would.
15 Q. Did you have any subsequent meetings
16 with the county where you told them any
17 different?
18 A. No.
19 Q. All your meetings after this where
20 anything was changed were meetings with RCR;
21 correct?
22 A. Correct.
23 Q. The county didn't have anything to do
24 with it and the architect didn't have
25 anything to do with it?

1 A. No.

2 Q. Now, you worked up an estimate as a
3 result of what occurred at this meeting; is
4 that right? You were asked to work up an
5 estimate for RCR?

6 A. Yeah. Don asked me, yeah, correct.

7 Q. And you gave that estimate to RCR so
8 that the county would have a general idea
9 about what they were going to be paying for?

10 A. Correct.

11 Q. Is that right? And that was an
12 estimate of what you thought was going to
13 have to be removed below subgrade because it
14 was unsuitable?

15 A. Correct. That was just taking about a
16 foot over that area right there assuming we'd
17 get out of it after that. Didn't know.

18 Q. Nobody at the county ever told you
19 they were going to pay for removal of
20 materials above subgrade, did they?

21 A. No.

22 Q. No one at the county?

23 A. Don't believe so.

24 Q. And the architect never told you that
25 the county would pay for the materials above

1 subgrade?

2 A. I don't believe so.

3 Q. Now, when you came out of this
4 meeting, you initially expected that PSI
5 would come out and monitor removal of the
6 soils, didn't you?

7 A. Yes, PSI or RCR.

8 Q. When you gave your deposition, you
9 just mentioned PSI, didn't you?

10 A. PSI or RCR. One of the
11 representatives that I was working for. PSI
12 was no longer under my contract. As a matter
13 of fact, when PSI came under someone else's
14 contract, I gave them a credit back for the
15 portion of soils testing that I had in my
16 contract. I tried to make sure everything
17 was above board, and if they was due a
18 credit, they got a credit.

19 Q. Is it fair to say that your general
20 expectation was that PSI was going to do this
21 based on this meeting, but it was up to RCR
22 to make that call?

23 A. Correct, they had the option of not
24 calling them if they didn't want to and
25 measure it themself.

1 Q. Let me refer you to your deposition on
2 Page 33 for a minute, Line 19. Are you
3 there?
4 A. 33/19, yes.
5 Q. "But at the time of this meeting, did
6 you realize that reading on No. 1" -- and I
7 think that refers to No. 1 there in the memo
8 on these notes -- "that the removal of the
9 unsuitable material would be monitored by
10 PSI?"
11 And you answer: "Uh-huh."
12 "Question: So you were expecting
13 that?"
14 You answered: "Yes."
15 "Question: If the situation requires
16 undercutting, PSI will document the
17 quantities removed and new fill will be put
18 in its place?
19 "Yes."
20 Do you recall that testimony?
21 A. Yes.
22 Q. Now, let me ask you about your letter
23 to RCR. Do you know when or if this letter
24 was provided to the county?
25 A. No, I don't know when or if.

1 Q. You sent it to the contractor because
2 that's who your contract is with?

3 A. He asked me to try to get something on
4 paper to try to give to them.

5 Q. In this letter, you mentioned you
6 removed 600 yards of unsuitable material and
7 you told us it was this one little piece?

8 A. This was the hole I was telling you
9 about. 600 yards, like I said, I can't tell
10 you today where I got that 600 yards from. I
11 may have looked and said it's five foot
12 deep. I don't know where I got the 600. I
13 have no documentation of 600 yards being
14 measured out.

15 Q. But your letter doesn't describe that
16 it came from only that limited site, does it?

17 A. No, it does not.

18 Q. In fact, your letter says, I thought
19 this was the extent of the unsuitable
20 material. This is proved wrong, and then you
21 go ahead and give an estimate of future
22 undercutting?

23 A. Correct, correct.

24 Q. Is there anything in this letter that
25 would tell the county, if they read it, that

1 there had been anything removed on the site
2 besides this 600 yards of unsuitable
3 material?

4 A. No, and there shouldn't have been much
5 more.

6 Q. Now, you've also indicated that you
7 estimated this additional 1,000 to 1700 cubic
8 yards at that time?

9 A. Correct.

10 Q. And you are, of course, aware that
11 there is now a claim for much more than that?

12 A. Correct.

13 Q. Did you at any time give an updated
14 estimate to either RCR or to the county?

15 A. No.

16 Q. But you knew that you were giving the
17 county this estimate to give them an idea of
18 their cost factor?

19 A. Yeah, to give them a rough (sic). It
20 could be more or less. I made sure I
21 stipulated this could be more or less. This
22 was just if you take down six inches or taken
23 out a foot over so much square feet, we won't
24 know until we get into it.

25 Q. But that was your best estimate at

1 that time?

2 A. I could have done a whole lot better
3 by taking shots down and figuring exact
4 elevation, digging test pits. I could have
5 acted like a soils tech and done it right and
6 would have had a whole lot better idea.

7 Q. You didn't do that; right?

8 A. No. That was like a guess visual.
9 There is an acre here; take a foot deep.
10 That's 1600 yards.

11 Q. So, in order to give the county a cost
12 estimate that they could rely on, you just
13 guessed?

14 A. No. I worked with RCR. We're looking
15 at about a foot over an acre. That's about
16 1600 yards that you calculate out. This is
17 what it is.

18 Q. You did know, whether it was RCR or
19 PSI, if you were going to seek a change order
20 for unsuitable materials, somebody had to be
21 out there to document it?

22 A. Yes, correct. Correct.

23 Q. And you knew that this verification
24 process was the way you were going to get
25 paid?

1 A. Correct.

2 Q. You never made a calculation of the
3 total amount of undercutting, did you?

4 A. No.

5 Q. You were gone by that time?

6 A. Yes.

7 Q. Other than the one meeting with the
8 county that we've already discussed, did the
9 county have any other meetings or discussions
10 with you? By the county, I mean any
11 representative of the county or the architect
12 in which you discussed what the county would
13 be paying for with regard to unsuitable
14 material?

15 A. Run that by me again.

16 Q. That was a long and laborious
17 question. I'll try to make it a little
18 shorter. We've talked about the June 30
19 meeting where an agreement was reached about
20 what would be done?

21 A. Right.

22 Q. Did you ever have a conversation with
23 the architect or a representative of the
24 county after that time in which there was
25 further discussion about what would be paid

1 for by the county?

2 A. I believe so but maybe once or twice.

3 I either had a conversation with Al Ritter --

4 I know I had talked to him once after the

5 June 30 meeting. Who was the other from

6 Thomas Miller, not Al but --

7 Q. Mr. Leonard?

8 A. Mike Leonard, yes, correct.

9 Q. Did either Mr. Leonard or Mr. Ritter
10 ever promise you that the county would do
11 anything other than pay the 12.50 per cubic
12 yard for unsuitable material below subgrade?

13 A. Did they promise me they would pay me
14 other than the 12.50, no.

15 Q. Your understanding was that the county
16 was going to pay for undercutting below
17 subgrade that was verified and quantified?

18 A. Correct.

19 THE COURT: So, just to sum it
20 up, neither Mr. Ritter nor Mr. Leonard took
21 any position different from the minutes of
22 the June 30 meeting at any subsequent meeting
23 you had with them?

24 THE WITNESS: No, sir, not to my
25 knowledge.

1 BY MS. CARSON:

2 Q. You don't know why PSI didn't verify
3 all the material that was undercut, do you?

4 A. No.

5 Q. You just know they weren't out there
6 for whatever reason and it wasn't you that
7 was supposed to call them?

8 A. Correct.

9 Q. Now, you talked about the RCP pipe
10 that had to be removed and then fill brought
11 back in. Your agreement about payment for
12 that was with Anthony Orange; is that correct?

13 A. Either Anthony or Don Stover. Someone
14 from RCR.

15 Q. That was not a discussion you had with
16 Williamson County, was it?

17 A. I don't believe so. I don't know but
18 I don't believe so.

19 MS. CARSON: That's all I have,
20 Your Honor.

21 THE COURT: All right. Mr.
22 Panther, I guess we'll go back to you.

23 MR. PANTHER: I don't have much
24 redirect.

25 THE COURT: All right.

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REDIRECT EXAMINATION

QUESTIONS BY MR. PANTHER:

Q. Mr. Ezell, do you remember Mr. Cashion questioning you about classified versus unclassified soils?

A. Yes, uh-huh.

Q. And that you were familiar generally that those provisions are often contained in specification books?

A. Correct.

Q. When you put a qualifier or a disclaimer in your bid --

A. Correct.

Q. -- in your contract, what relevance does that unclassified specification have?

A. That overrides.

Q. Which overrides which?

A. To me, my contract with you. If I put a disclaimer in there and you accept my contract, it overrides that portion of it.

Q. Let me hand you a copy of the spec book --

A. Because it makes a fairer job for both people. It doesn't make one person go out on

1 a limb for another one.

2 Q. I think you said that you had reviewed
3 portions of this spec book pertaining to the
4 earth work, is that right, those that
5 affected your contract?

6 A. Yeah, I've read thousands of these
7 spec books. I've probably scanned more than
8 I've read them.

9 Q. Do the specs deal with what the
10 subcontractor is supposed to do with the
11 spoils?

12 A. Probably does. I would assume it
13 would.

14 Q. Take a look at Bates No. -- by the
15 way, Mr. Ezell, on the corner here, there is
16 a stamped number. Those are the numbers that
17 I'm going to refer to. I want you to turn to
18 No. 140. Tell me when you're there.

19 A. Okay.

20 Q. Section 307?

21 A. Okay.

22 Q. What does this say is your
23 responsibility for removal of excess
24 materials?

25 A. Remove excess excavated material from

1 the job site. Upon completion, leave site in
2 clean condition. Take all your waste
3 material and haul it off, all your excess
4 material.

5 Q. Turn to Bates No. 144.

6 A. Okay.

7 Q. Are you there?

8 A. Uh-huh.

9 Q. Specification No. 2230?

10 A. Did you say 144?

11 Q. Well, the specification number is in
12 the lower right-hand corner.

13 A. Yeah.

14 Q. I want to refer you to Subsection 3.7
15 there up at the top entitled Disposal. What
16 does it say the requirements are for disposal
17 of surplus?

18 A. Remove surplus soil material,
19 unsuitable topsoil, obstructions, demolished
20 material, waste materials including trash and
21 debris and legally dispose of them off of
22 owner's property.

23 Q. Take a look at Bates No. 154.

24 A. Okay.

25 Q. This is Section 2300, Subsection 3.19,

1 Disposal of Surplus and Waste Materials.

2 What does this say you're supposed to do?

3 A. Remove all surplus and waste material,
4 remove everything from the site.

5 Q. From the excavation operation, were
6 you creating a stockpile of overburden and
7 surplus?

8 A. Yes.

9 Q. Is that the overburden and surplus
10 that's referred to in these sections that
11 we've just referred to?

12 A. Correct.

13 MR. PANTHER: Thank you, Mr.
14 Ezell.

15

16 RECROSS-EXAMINATION

17 QUESTIONS BY MR. CASHION:

18 Q. I have three areas and I'll be
19 through, Mr. Ezell. First, Mr. Panther just
20 now asked you if you had a disclaimer in the
21 contract about unclassified excavation?

22 A. Correct.

23 Q. Do you? Did you have that in your
24 proposal in the contract?

25 A. Yes, in both of them.

1 Q. What was the disclaimer?

2 A. Any unsuitable material below subgrade
3 would be excavated and replaced at 12.50 a
4 yard.

5 Q. Right. We went over that. But any
6 unsuitable material above subgrade was not
7 disclaimed or qualified in either your
8 proposal or contract, was it?

9 A. It wasn't spelled out, but I thought
10 in my proposal, to me, that's normal. If
11 it's dictated to be used for cut to fill,
12 I've never had a problem in the past ever
13 getting paid for taking cut material that's
14 unsuitable to be used as fill and getting
15 reimbursed for it. Never had a problem in
16 the past at all in having that happen.

17 Q. You're aware with unclassified jobs if
18 they hold it to the letter of the specs --

19 A. Correct.

20 Q. -- that you don't get paid for that;
21 right?

22 A. Correct.

23 Q. And you did not have that type of
24 disclaimer in either your proposal or your
25 contract regarding unsuitable materials above

1 subgrade?

2 A. Well, if it doesn't proof roll, it
3 doesn't matter whether it is below or above.
4 If you take a fill section, my assumption
5 would be, yes, the material was unsuitable
6 for fill material. It was bid to be used for
7 fill material. Did I come out and
8 specifically say that? No.

9 Q. You do not proof roll your cut section?

10 A. Correct.

11 Q. You start cutting?

12 A. Correct.

13 Q. This qualification only applies to
14 below subgrade; right?

15 A. If you interpret it in black and
16 white, yes.

17 Q. Now, the next thing, just so we're
18 clear, after July 1, it is my understanding
19 that you have your subgrade established and
20 you're doing your building in here, right,
21 bringing in your fill?

22 A. When we started importing fill for the
23 building pad, I couldn't tell you.

24 Q. Well, according to the truck tickets,
25 you started importing fill on June 16. By

1 July 1, we've got a couple hundred trucks,
2 probably 300, 400 trucks already in?

3 A. How much of that material went in to
4 replacing the pipe, the drain pipe?

5 Q. That's already over with. That's a
6 small amount. Up here, hauled rock for
7 trench backfill?

8 A. We proof rolled the back section.
9 That's when we proof rolled the back part of
10 the pad.

11 MR. PANTHER: Excuse me, if I
12 could. If you want to hear this, I'm
13 perfectly happy for you to hear this, but
14 this is beyond redirect.

15 MR. CASHION: I don't think Mr.
16 Panther should be talking about redirect when
17 he put his claim against the surety on during
18 his redirect yesterday. I'm getting up to
19 the question.

20 THE COURT: All right. You're
21 both right. Go ahead. You have five minutes
22 -- four now.

23 BY MR. CASHION:

24 Q. How much area were you talking about
25 that you looked at and you made that estimate

1 to come out of?

2 A. The 1,000 to 1700 yards.

3 Q. Right. How much area?

4 A. This area right here is what I was

5 only anticipating on. When we dug those pits

6 is what I was anticipating.

7 Q. Would it be about the size of this,

8 when I fold up this paper? This is your

9 parking lot.

10 A. Maybe, maybe. A little smaller than

11 that probably.

12 Q. Little smaller?

13 A. Yeah, probably.

14 Q. That's what we're talking about?

15 A. Yeah, like I say, plus or minus.

16 Q. The rest of this was resolved?

17 A. It was not in that estimate because I

18 hadn't done any actual proof rolling here.

19 This is my haul. It was all covered up. I

20 had probably a 25 to 30 foot wide shot rock

21 haul road right in there. We couldn't do

22 anything, proof roll that or test that or

23 anything at that time.

24 Q. You left the shot rock in?

25 A. I don't know. I don't know how he

1 finally built it.

2 Q. You're talking about an area kind of
3 like this?

4 A. I know it had to keep being repaired.

5 Q. That's what you were estimating to be
6 left after July 1?

7 A. Yes, just a rough guess on about a
8 foot over an acre.

9 Q. And final question, did you have any
10 documented or any documentation of undercut
11 that was not quantified by PSI in the final
12 analysis?

13 A. Did I personally?

14 Q. Right?

15 A. No.

16 MR. CASHION: Those are all the
17 questions I have, Your Honor

18 MS. CARSON: Nothing further,
19 Your Honor.

20 THE COURT: 1:15.
21 (Luncheon recess observed.)

22 MR. PANTHER: We call Ricky
23 Tipper.

24

25 RICKY TIPPER

1 was called as a witness on behalf of the
2 Plaintiff and, having first duly affirmed,
3 testified as follows:
4

5 DIRECT EXAMINATION

6 QUESTIONS BY MR. PANTHER:

7 Q. Tell us your name and what you do for
8 a living.

9 A. Ricky Saxon Tipper. Right now I'm
10 currently unemployed; hope to start work
11 Monday.

12 Q. Give us a brief sketch of what your
13 education and work history has been.

14 A. High school graduate; four years in
15 the United States Marine Corps. After I got
16 out of the Marine Corps, I was a journeyman
17 machinist; became a journeyman machinist and
18 stayed in that field for about seven and a
19 half years or about nine years actually and
20 then went into construction.

21 Q. Tell us how your career in
22 construction developed.

23 A. I started out with a golf course
24 company, Peerman Golf Course (phonetic),
25 building golf courses. We built the Saddle

1 Creek Golf Course in Lewisburg.

2 Then, I went into -- once it was
3 completed, I went to work in Nashville with
4 Thomas & Associates and worked with them for
5 about a year, I guess.

6 Q. Doing what?

7 A. Sir?

8 Q. Doing what?

9 A. Grading and utilities, and then I went
10 to work with a friend of mine. He started up
11 a little company building small building pads
12 and just clearing and different things. Then
13 he went out of business and we both went back
14 to Thomas & Associates. Then, I left Thomas
15 & Associates and went to MR Dillard
16 Construction Company. I worked with MR
17 Dillard for about a year and a half, I
18 think.

19 Q. Doing what? What did you do for
20 Dillard?

21 A. Mostly utilities, underground
22 utilities. And then I went to work with
23 Civil Constructors; started out in grading
24 and then went into the utility part of their
25 company. Then, I went to work with American

1 Excavators and worked there. When I left
2 American Excavators, I went to work for
3 Bolden Pipe and then I've worked --

4 Q. What did you do at Bolden?

5 A. Utilities. And then I went to work
6 with Ream Construction until Friday a week
7 ago.

8 Q. What happened Friday a week ago?

9 A. He went out of business.

10 Q. What were you doing for Ream before he
11 closed up shop?

12 A. I started out as the utility division
13 superintendent running a utility crew and
14 plus, if I wasn't doing utilities, I'd do
15 grade work also. Then, the superintendent
16 that was there at the time over the grading
17 division, he resigned and I was made
18 superintendent over the grading and utility
19 division.

20 Q. Okay. Who were you hopefully going to
21 work for Monday?

22 A. J&B Road Boring.

23 Q. Give us, if you would, just some
24 approximate dates when you were working for
25 American Excavators.

1 A. I believe it was '98 to 2000. I'm not
2 exactly sure but I believe those are
3 accurate.

4 Q. What was your position with American?

5 A. I was field superintendent.

6 Q. Okay. Just describe for us, if you
7 would, generally what your duties and
8 responsibilities were.

9 A. Started out on a job in Williamson
10 County on the Moores Lane project that was
11 water line and forced main sewer job.
12 Completed that job, and then done the grade
13 work on the clean-up as far as grading the
14 yards back in and finishing all that up.

15 Then, I had another job in Columbia,
16 Casey Valley project, which was a sewer
17 rehabilitation project. It also included
18 grade work as far as cleaning up and dressing
19 up the yards. Then I had worked around the
20 subdivision a little. I believe after that
21 is when I done the Williamson County job.

22 Q. What was were your duties and
23 responsibilities on this project?

24 A. I was the field superintendent over
25 the Williamson County project.

1 Q. What does that mean you did? Just
2 describe in general what your duties were.

3 A. To go in from scratch and clear and
4 grub and bring the site up to subgrade and
5 put in the utilities and finish it and leave.

6 Q. Did your duties on this project
7 include keeping daily logs, daily reports?

8 A. Yes, sir.

9 Q. Explain the procedure that you
10 followed in preparing your daily reports.

11 A. Most of the time I try to do it at the
12 end of the day. Sometimes I was slack and
13 wouldn't do it at the end of the day, but I
14 tried to always keep up with it every day, if
15 possible. I would just try to log down what
16 I had done that day and what I got
17 accomplished. Sometimes I would put down
18 what I may be anticipating doing the next
19 day.

20 Q. At the time that you prepared your
21 logs, did you have actual knowledge of the
22 events contained in those logs?

23 A. Yes.

24 Q. Did your duties for this project also
25 include keeping track of the truck loads of

1 fill that were delivered to the site?

2 A. Yes, sir.

3 Q. What procedure did you go through
4 whereby you kept up with the truck loads of
5 fill that were brought to the site?

6 A. Could you say that again, please?

7 Q. Yes. What procedure did you follow
8 where you kept track of the truck loads of
9 fill that were hauled to the site?

10 A. I would know how many trucks I had
11 that day, and I would keep up with how many
12 rounds they would make during the day. You
13 know, if one of them got out of turn, I would
14 notice it, you know. Once they start out, if
15 they're not stopping at the store or doing
16 something else, they're going to generally
17 stay in line. They're not going to get
18 flip-flopped back and forth.

19 Say, if I had five trucks from five
20 different companies, if I started out with
21 Truck No. 1 through Truck No. 5, if they kept
22 running like they was supposed to, they would
23 always stay Truck No. 1 through Truck No. 5.
24 If one of them was to stop at the store or
25 have a flat tire or something, then Truck 5

1 might move up to Truck No. 2. I could keep
2 up with it that way. Plus, I'd try to keep
3 up with it where they were dumping it and
4 just watch them.

5 Q. Now, before the day began, what
6 arrangements did you make to have trucks come
7 to the site the next morning or that morning?

8 A. If I'm not mistaken, we did have our
9 trucks show up time. If I knew I was going
10 to be able to haul, I would just
11 automatically line them up and tell them to
12 be back that next morning.

13 Q. When they would come in in the
14 morning, what was the first place that they
15 would go?

16 A. They would go to the borrow pit.

17 Q. Then what would happen? Just describe
18 what occurred after that.

19 A. Well, they would start coming in onto
20 the job with their loads of material. They
21 would dump and they would go back and just
22 keeping making their rounds.

23 Q. While they were doing this, were you
24 on site observing what was occurring?

25 A. Yes, sir.

1 Q. In keeping track with the truck loads,
2 would you make written notes or mental notes
3 as to the number of loads that the trucks
4 were bringing in?

5 A. Sometimes both. I mean, most of the
6 time I would just keep up with it and keep an
7 eye on them and just watch them.

8 Q. Okay. Then at some point during the
9 day, would you be presented any documentation
10 concerning the loads that the truck company
11 brought in?

12 A. Yes, sir.

13 Q. Describe what you'd be presented and
14 what you would do after you were presented
15 this material.

16 A. Well, I was supposed to keep up with
17 how many loads of material was coming into
18 the job site so I would have the truckers
19 write me out a truck ticket and put down what
20 time they started and we would sign them out
21 at the end of the day and they would put me
22 down on there how many loads they would have
23 hauled that day.

24 Q. What would you do to compare whether
25 the information contained in the truck ticket

1 was accurate?

2 A. What would I do?

3 Q. Yes. Would you verify in some way
4 that the information on the truck ticket was
5 accurate?

6 A. Yes, sir. I mean, through observation
7 and through the hours. We were averaging a
8 load an hour. If they had nine hours, most
9 of the time they had brought me nine loads.
10 If they had five hours, they brought me five
11 loads.

12 Q. After reviewing the truck ticket, did
13 you or somebody under your direction indicate
14 somehow on the ticket that it was accurate?

15 A. Yes, sir. We would sign the tickets
16 every day.

17 THE COURT: Were they charging
18 you by the load or just by the hour on those
19 trucks?

20 THE WITNESS: By the hour, sir.

21 THE COURT: It worked out that a
22 load was about an hour?

23 THE WITNESS: We originally had
24 hoped we would get two loads an hour but it
25 didn't work out that way.

1 BY MR. PANTHER:

2 Q. As we go through your testimony
3 concerning the events that occurred on site,
4 would it help your memory to testify
5 truthfully and fully to have the daily logs
6 and the truck tickets in front of you?

7 A. It would be nice to have the truck
8 tickets in front of me but I'm going to
9 testify truly and honestly regardless of what
10 I have in front of me.

11 THE COURT: Did you work on that
12 answer with Mr. Panther?

13 THE WITNESS: No, sir, I did not.

14 THE COURT: I'm just kidding.
15 We've got those in evidence. Does he need to
16 look at them? Is there something you want to
17 bring his attention to?

18 MR. PANTHER: I want to go
19 through the site and if it will assist his
20 memory to have his logs and truck tickets in
21 front of him --

22 THE WITNESS: It would help. If
23 you're going to ask specific questions, it
24 would help.

25 BY MR. PANTHER:

1 Q. I'm going to ask what occurred from
2 day to day. As I go through that, would it
3 assist you to have your records in front of
4 you?

5 A. Yes, sir.

6 Q. What was the first field work that you
7 began doing?

8 A. When we first went in, we started --
9 there was trash everywhere. I mean, the
10 whole site had garbage and the people that
11 lived around it, I don't know if they didn't
12 have garbage cans or what. They would throw
13 all their garbage over the fence. It was a
14 mess. There were couches and chairs and all
15 kinds of bottles and cans and a little bit of
16 everything.

17 We concentrated at first on clearing
18 and cleaning up, taking down the trees that
19 was around the perimeter that had to come
20 down and clean up all the trash and debris
21 and putting up the tree protection fence
22 because they actually -- they was wanting to
23 save a lot of the trees, so you have to put
24 up this orange fence around the trees. It is
25 called a tree protection area.

1 Q. What was the next category of
2 activities that you undertook on site?
3 A. We started stripping the topsoil.
4 Q. Okay. Did you receive direction from
5 somebody at American Excavators? In other
6 words, was there somebody ahead of you who
7 would have also given you direction? Were
8 you reporting to anybody at American
9 Excavators?
10 A. Oh, yes.
11 Q. Who?
12 A. I reported to Harley Ezell and Marvin
13 Parker.
14 Q. Did somebody come to you and tell you
15 that you can go ahead and begin stripping
16 topsoil?
17 A. Yes.
18 Q. Who?
19 A. Harley.
20 Q. Did he tell you any particular depth
21 to strip?
22 A. No, sir. I wasn't told to strip any
23 particular depth. I just fell in there and
24 started stripping the topsoil. Once you get
25 everything as far as erosion control and tree

1 protection and get everything cleaned up,
2 that's the first thing you'll generally do,
3 is start stripping the topsoil.

4 Q. There was an issue that's come up
5 concerning some RCP that had been found, some
6 reinforced concrete pipe?

7 A. Yes, sir.

8 Q. If you need to look at your logs, go
9 ahead but at what point did you run into that
10 RCP?

11 A. It was when we were doing the
12 stripping. As far as the actual date, if I
13 wrote it down, on the 9th, 6-9-99, it says
14 hauled off RCP drain tile and hauled in shot
15 rock. You know, I could have encountered it
16 on the 9th but, according to this, I hauled
17 it off on the 9th.

18 Q. Do you remember, when you hit the RCP,
19 did you discuss that with somebody at RCR?

20 A. Yes, sir.

21 Q. Who did you discuss it with?

22 A. Anthony Orange.

23 Q. Tell us what you talked about
24 regarding the RCP and what you were supposed
25 to do about it.

1 A. We got him out there and showed him
2 the reinforced concrete pipe. It wasn't on
3 the plans. The plans didn't show it. Nobody
4 didn't know it was there. Anthony didn't
5 know it was there and we didn't either. It
6 run from one side all the way across to the
7 other side, and it had to come out. He told
8 us to go ahead and take it out and get rid of
9 it and fill it back up with shot rock.

10 Q. Did you have a conversation with Mr.
11 Orange about how you were to keep up with the
12 amount of fill that you brought in to fill in
13 the trench that the pipe was in?

14 A. He told us to keep up with how many
15 loads of material it took to fill it back up
16 and the way we kept up with the loads was
17 through truck tickets.

18 Q. This was just at the -- this
19 conversation with Anthony Orange concerning
20 keeping up with the loads, you know, within a
21 day or two, when would that have occurred?

22 A. I'll say it would have been before 6-9
23 because on 6-9 we were hauling it off and
24 hauling in shot rock. So, it either was 6-9
25 or the day before.

1 Q. Okay. Did you remove the RCP and
2 replace it with fill?

3 A. Yes, sir.

4 Q. Where was the RCP in your stripping
5 process? Was it at the end, beginning?
6 Where did that fall, if you can remember?

7 A. It was right at the beginning. When
8 we started stripping, we hit the pipe, hit
9 the concrete pipe.

10 Q. As you were stripping the topsoil,
11 tell us what sort of depths you were running
12 into when you were stripping topsoil?

13 A. We had an old pan scraper and a D8
14 dozer and sometimes we would be a foot,
15 anywhere from six inches to a foot and a
16 half, two foot deep. In one particular area
17 we were probably about two, two and a half
18 foot deep.

19 Q. Now, from your experience in the
20 construction business, can you tell the
21 difference between topsoil and suitable base
22 material?

23 A. Can I?

24 Q. Yes, you. Can you?

25 A. Yes.

1 Q. Describe for us what the difference
2 is. How do you determine what's topsoil and
3 what's suitable base material?

4 A. There's more than one way. But
5 topsoil, it has a smell about it especially
6 with the organics. If it's been put in, you
7 can take and dig a two foot hole and fill it
8 up with topsoil. You can dig it back out
9 months later and it stinks. It smells almost
10 like cow manure. It has a distinctive odor
11 about it. It has organics, what geotechnical
12 people call organics, which would be roots,
13 grass roots and tree roots and that sort of
14 stuff. Plus, when you pick it up, it has no
15 type of -- unless you've got it wet, like
16 making a mud pie, you can't compact it. It
17 won't compact. It stays crumbly. Plus,
18 color also.

19 Q. How so?

20 A. Not all topsoil, but in this area here
21 in Middle Tennessee, most of the topsoil in
22 this area is black in color or at least real
23 dark brown. Some of it, especially if you go
24 further south, southwest, it becomes more
25 reddish in color.

1 Q. Is there a different feel to it?

2 A. Yes, sir.

3 Q. Describe that.

4 A. It is more granule. Like I said, you

5 can pick it up and it won't stay together.

6 Q. When you're scraping, is there a

7 difference in the feel between how topsoil

8 scrapes versus how suitable base material

9 would scrape?

10 A. Yes, sir.

11 Q. Describe that, please.

12 A. Well, topsoil is going to come out. I

13 mean, it is going to come off easy. When you

14 hit anything that's any good, it's going to

15 be stuck together. It's not going to fluff

16 out like topsoil will. Topsoil will, unless

17 it is wet, it will just kind of fluff out

18 even if you're digging it with a trackhoe.

19 Pick up a bucketful with a trackhoe and when

20 you dump off of it, powder flies off of it

21 everywhere versus compactable soil. It's

22 going to tend to come out of the bucket in a

23 big lump, a big clump.

24 Q. Now, as you were stripping the

25 topsoil, did somebody come up to you and stop

1 you at some point?

2 A. Yes, sir.

3 Q. What happened there?

4 A. Harley Ezell came out and he seen
5 where we had done got so deep on the topsoil
6 that he told me to stop, don't take no more.
7 We was only supposed to take out six inches.

8 Q. What happened after that?

9 A. He got Anthony out there and was
10 showing him that one area where we had went
11 about two, two and a half foot deep. We was
12 looking at all of it, and Anthony agreed that
13 it was topsoil and that we shouldn't build on
14 it.

15 Q. Okay. Did he look at other areas of
16 the site other than this one corner area?

17 A. Yes, sir, basically the whole area.

18 Q. Did Anthony express an opinion or did
19 he say what he thought about the suitability
20 or the unsuitability of the material that was
21 out there?

22 A. Yes, sir. I mean, Anthony's opinion
23 of it at the time matched mine and Harley's
24 opinion that it was topsoil and he didn't
25 want to build on it.

1 Q. While you were stripping the topsoil,
2 was Anthony Orange on site?

3 A. Yes, sir. I can't say he was on site,
4 you know, ten hours a day but he was there.

5 Q. Was he there enough to know what
6 depths of topsoil you were encountering?

7 A. Oh, yes, sir.

8 Q. Before Harley Ezell stopped you, was
9 Mr. Orange aware of how deep the topsoil was
10 in these areas?

11 A. If he paid any attention to it at all,
12 he was.

13 Q. Did you discuss that with Mr. Orange?
14 Before Harley stopped you, did you and Mr.
15 Orange have any conversation where he would
16 have acknowledged knowing how deep the
17 topsoil was in these areas?

18 A. Well, on the RCP drain tile, yes,
19 sir. I had to dig a big -- I had to go a lot
20 -- I wasn't able to just take out the RCP
21 pipe because it was all -- it goes together
22 in eight foot joints. Where the joints had
23 settled and everything it leaked out and all
24 that ground under it and around it, a lot of
25 it was just mud. So I had to take it out

1 there and take it deeper according to Anthony
2 because we didn't want to put the shot rock
3 in on top of the mud.

4 Q. Tell us what occurred in that regard
5 where Anthony would have told you to dig
6 deeper under this RCP. Describe what you're
7 talking about there in a little more detail,
8 please.

9 A. Well, when we took the RCP pipe out,
10 like I said, there was a lot of silt, what we
11 call silt, and mud down in the bottom of the
12 ditch and the ditch was unstable and just
13 kept falling in. I mean, it was nothing but
14 topsoil. Anthony told me to go on and take
15 it down deeper.

16 Q. Take it down deeper meaning from grade
17 or deeper from the bottom of the trench?
18 When you say take it down deeper, what are
19 you talking about?

20 A. When we took the pipe out, to take it
21 deeper.

22 Q. Did you do that?

23 A. Yes, sir.

24 Q. In other areas other than this area
25 where the RCP was, did you have any

1 discussions with Mr. Orange about the depth
2 of topsoil before Mr. Ezell stopped you?

3 A. Just in that trench. Best I can
4 remember, we discussed it when we was looking
5 at that trench at what the RCP pipe looked
6 like.

7 Q. Once Harley Ezell stopped you, did you
8 then have another conversation with Anthony
9 Orange about the topsoil?

10 A. Yes, sir.

11 Q. Okay. What was his conclusion about
12 whether that material was suitable?

13 A. He didn't want to build on it. He
14 said his opinion was it was topsoil, too.

15 Q. Did he direct you to remove it at that
16 point?

17 A. Yes, sir, some of it. Some of it he
18 would have the geotechnical people come out
19 and look at, but most of the time he would
20 just tell me to take it out.

21 Q. At the time that Harley stopped you --

22 THE COURT: Who was he talking
23 about just then, telling him to take it out?

24 THE WITNESS: Anthony Orange with
25 RCR.

1 THE COURT: Okay.

2 BY MR. PANTHER:

3 Q. At the time that Harley stopped you,
4 what section of the site were you in when he
5 told you to stop? I'm going to hand you a
6 laser pointer. Go ahead and show us on the
7 drawing where you were when he stopped you.

8 A. When Harley came out, we were in this
9 area here, which was about anywhere from a
10 foot and a half to two and a half foot deep.
11 That's what Harley saw when he said, whoa
12 whoa, don't take out no more. We can't take
13 out all this topsoil. We're only supposed to
14 take out six inches. But now we had done
15 stripped basically the whole thing.

16 Q. After Harley stopped you, what's the
17 next thing that happened after that on site?
18 What did you do after he stopped you?

19 A. You mean as soon as he stopped me?

20 Q. Well, did you continue working in
21 other areas?

22 A. We didn't shut the job down.

23 Q. What did you do?

24 A. We started building up the pad.

25 Q. Okay. Take a look at your -- from

1 looking at your job records, tell us about
2 when it was that Mr. Ezell stopped you.

3 A. When he stopped me?

4 Q. Yeah, about. If you can get it within
5 a date or two.

6 A. (Pause.) Well, from 6-16 to -- we had
7 a lot of rain in there. I'll say from 6-10
8 to 6-16.

9 Q. Okay. After you met with Mr. Orange,
10 did you proceed to strip any more topsoil
11 after that?

12 A. No, sir.

13 Q. Okay. What other area of the site --

14 A. When Harley stopped me?

15 Q. Yes, sir.

16 A. No, sir. We didn't take out any more
17 until later on.

18 Q. Okay. I understand you to say that
19 you continued your operation on the building
20 pad area?

21 A. Yes, sir.

22 Q. What did that involve?

23 A. We had to haul in material. We
24 started out hauling shot rock from Williamson
25 County's rock quarry which was right down the

VOWELL & JENNINGS, INC.

1 road, but we was having to pick through the
2 area. Where they told us we could get the
3 rock, we were having to pick through and it
4 got so time-consuming trying to pick through
5 all the big boulders that we really couldn't
6 use that we ended up -- they sent us over to
7 the new county road they was building to the
8 chirt pit, but we started out hauling shot
9 rock.

10 Q. Did American Excavators have any
11 equipment at the chirt pit?

12 A. We moved our trackhoe to the chirt
13 pit. Our trackhoe was at the rock quarry
14 also.

15 Q. What company employee -- did a company
16 employee operate the trackhoe at the quarry
17 at the chirt pit?

18 A. Yes, sir.

19 Q. Who's employee was that? Was that
20 American Excavators, RCR, the county? Who
21 was it?

22 A. American Excavators.

23 Q. Were you in a position to see how full
24 that person was loading the trucks that were
25 hauling fill in?

1 A. If I was up there at the quarry, I
2 could see it there but I'd also see them when
3 they come into the job site.

4 Q. How full were they loaded?

5 A. They would be loaded as full as you
6 want to fill them. Their tarps would be
7 humped up.

8 Q. What's the capacity of these trucks?
9 How big a truck is it?

10 A. Most of the -- well, all of the rental
11 trucks were 18 to 20 yard trucks. I consider
12 them 18. Some people consider them -- say
13 they'll hold 20 but most of them is 18 yard
14 trucks.

15 Q. This chirt that they were hauling, on
16 average what would be the volume of chirt
17 that they were putting into these trucks?
18 How much were they getting in the trucks
19 volume-wise?

20 A. It would be heaped up full. I mean,
21 it would be humped up. You couldn't put no
22 more in it. They held 18 yards so I'd have
23 to say 18 yards.

24 Q. Okay. Let's move back to this topsoil
25 issue. Concerning the topsoil, after Harley

1 Ezell had stopped you, what was the next
2 thing that happened concerning that part of
3 the job?

4 A. Concerning that area or the whole --

5 Q. The whole stripping and excavation
6 operation?

7 A. I believe that was when the soils
8 people came out and looked at it.

9 Q. Were you there when the soils person
10 came out?

11 A. Yes, sir, the ones that did the
12 boring. I don't remember exactly which
13 company it was. We had two or three
14 different soils people that came out there.

15 Q. All right. Do you remember the name
16 of the person that came out from the soils
17 company?

18 A. No, sir.

19 Q. Did you have any conversation with
20 them?

21 A. Yes, sir.

22 Q. Was Anthony Orange present while this
23 was happening?

24 A. I believe Anthony was there. I don't
25 remember if he was out there when we were

1 looking at the soil.

2 Q. Okay. Did you show this person around
3 to the various areas of the site that you
4 thought had unsuitable material?

5 A. Yes, sir.

6 Q. Tell us what happened.

7 A. We had took the dozer and scraped up
8 or dug, if you want to call that, five, six,
9 seven places. I don't remember exactly how
10 many, and he looked at it and said that he
11 understands that that's what us southern
12 people call topsoil but it was brown silty
13 clay.

14 Q. Did you agree?

15 A. No, sir.

16 Q. Was Anthony Orange there when he said
17 that this is brown silty clay as opposed to
18 topsoil?

19 A. Once again, I don't remember if
20 Anthony was standing out there with us or not.

21 Q. At some point, was Anthony Orange out
22 to the site to see what material was exposed
23 from those test pits?

24 A. Oh, yes, sir. He had seen the test
25 pit areas.

1 Q. Did he ever say to you what he thought
2 about the suitability of the material that
3 was shown?

4 A. Yes, sir. He didn't like the soils
5 either. He thought it was topsoil. I mean,
6 anybody that looked at it -- that material
7 that was there is growing grass right now in
8 a subdivision. You don't do that with clay.

9 Q. Did Anthony Orange -- at that meeting
10 now, did he tell you why he was going to the
11 effort of getting GT&E out there to test if
12 he thought it was unsuitable?

13 A. He didn't tell me, no. He didn't
14 elaborate to me. I mean, usually you call
15 out a soils company to cover your back.

16 Q. I don't want you to speculate. After
17 this meeting, what's the next thing that
18 occurred concerning this operation?

19 A. We was building the building pad.

20 Q. Okay. Let's look at your reports. On
21 the 16th, what were you doing?

22 A. It says we hauled 33 loads of shot
23 rock off hill. It says the soils man is
24 coming in the morning to evaluate the soils;
25 hit pockets and layers of topsoil under clay;

1 started lifting building pad, 43 loads of
2 shot rock from quarry.

3 Q. Okay. Concerning that note, hit
4 pockets and layers of topsoil under clay, how
5 is all this topsoil and clay and other
6 material layered in these pits as you
7 observed it?

8 A. This site had -- it was a Civil War
9 battlefield in the Civil War and it has also
10 been used as fairgrounds. I think there was
11 a football field there one time. I may be
12 mistaken about that, but the county had also
13 used it as a dump site for years which we
14 didn't find that out until after the fact but
15 the county had been using it as a dump site
16 for years.

17 Any time -- depending on what you're
18 hauling in to an area, you know, you might
19 have a layer of brush or cans or bottles or
20 something and then on top of that you might
21 have a layer of topsoil and then you might
22 have a little layer of clay or you might have
23 some concrete. It was just -- it depends on
24 how it's been put in there. The way it
25 looked as far as everything was, there was no

1 segregation of material. Whatever they just
2 happened to have in their dump truck at that
3 particular time is what they dumped and they
4 pushed it out. You might hit a little thin
5 layer of red clay and think you was doing
6 good and then you get an inch or two deep and
7 you're done back into topsoil, you're back
8 into roots or just trash. There was burn
9 pits out there. I mean, there was a little
10 bit of everything.

11 Q. Now, let's look -- on the 16th, have
12 you noted on your daily reports how many
13 loads of fill were brought to the site?

14 A. It says started lifting pad, 43 loads
15 of shot rock from quarry.

16 Q. Do you have truck tickets for the 16th
17 behind this daily report?

18 A. Yes, sir.

19 Q. What do they show?

20 A. Cook Transport, Truck No. 102 came in
21 at 6:30, signed out at 5:00. He hauled 17
22 loads, worked ten hours.

23 Q. Just tell me the loads.

24 A. Sir?

25 Q. Just tell me the loads.

1 A. Cook Truck No. 103 hauled 16 loads.
2 Q. In addition to a Cook truck, did you
3 have an American Excavators truck on site?
4 A. Yes, sir.
5 Q. How many loads did it haul?
6 A. It says here ten loads but that's not
7 my writing, so I can't say. I can't verify
8 that he hauled ten loads. I didn't write
9 that ten loads on there, but Ole Blue was
10 hauling that day, I do know that.
11 Q. Pardon me?
12 A. American Excavators truck was blue in
13 color and we called it Ole Blue and Ole Blue
14 was hauling rock that day, but as far as to
15 verify how many -- I never kept a ticket on
16 Blue that I remember. I mean, Blue hauled a
17 lot of loads from the chirt pit that was
18 never ticketed. I just never kept a ticket
19 on Blue.
20 Q. On the 17th, on your comments there,
21 tell us what you've written that occurred on
22 the 17th.
23 A. It says, Move 9050 to chirt pit; built
24 pad and compacted; soils man came out, said
25 we have to undercut the unsuitable soil. RCR

1 gave go-ahead on undercut.

2 Q. What area of the site were you in
3 where RCR would have given you the go-ahead
4 on the undercut?

5 A. If it's where we dug the test pits
6 that they looked at, it would have been in
7 this area. I mean, there was five, six,
8 seven -- I don't remember how many. There
9 were several pits where we took the dozer and
10 dug down a foot, two foot, however deep it
11 was. Some of them I think was deeper than
12 that, but it would have been in this area
13 right in here. We had already started
14 lifting this back area of the building pad.

15 Q. Now, by this date, June 17, '99 had
16 you had any conversations with Anthony Orange
17 about how you were to keep up with the amount
18 of unsuitable -- let me start over.

19 By this date, did you have any
20 conversations with Anthony Orange about how
21 you were to keep track of how much fill you
22 were bringing to the site?

23 A. Yes, sir.

24 Q. All right. What did you discuss?

25 A. He told us to keep up with how many

1 loads of material it took to bring the job
2 back up to subgrade.

3 Q. Now, you had mentioned that he had
4 told you that concerning the RCP?

5 A. Right.

6 Q. Did he also tell you that concerning
7 areas that you had to remove different
8 unsuitable material?

9 A. Yes, sir. The whole unsuitable
10 material, RCP, the whole job, I was
11 instructed to keep up with how many trucks it
12 took, how many loads it took to bring the job
13 back up to subgrade.

14 Q. And that was told to you by?

15 A. Anthony Orange, and at one particular
16 time Anthony Orange and Don Stover.

17 Q. By the 17th, do you know if you had
18 started back up with your excavation after
19 Harley Ezell had stopped you?

20 A. As far as the unsuitable material?

21 Q. Yes, sir.

22 A. By the 17th, I think we had just
23 concentrated on the building pad. They
24 wanted the building pad first. I mean,
25 that's always the first thing any contractor

1 wants is their building pad so they can start
2 building. This area here that was deep now,
3 I remember Harley telling them that he was
4 just going to give that to them. Because we
5 had already took it too deep, he was just
6 going to give it to them. Anthony told him,
7 no, count that also. They would keep track
8 of everything that they took, that they would
9 get their money back from the county.

10 Q. Anthony Orange said that to you?

11 A. Yes, sir.

12 Q. Was Mr. Stover there when that
13 occurred; do you remember?

14 A. I don't think he was there at that
15 particular incident.

16 Q. As fill was being brought to the site,
17 were you keeping track of the truck loads in
18 the manner that you've described earlier?
19 Were you keeping track of the truck loads of
20 fill that were being brought to the site as
21 you described earlier?

22 A. Yes, sir, by truck tickets and
23 observation.

24 Q. Were there some occasions that when
25 you were presented with a truck ticket that

1 you would make changes on it or note notes on
2 it if you didn't feel it was accurate?
3 A. Yes, sir.
4 Q. Take a look at July 1, the Denney
5 truck tickets. Do you see that?
6 A. Sir?
7 Q. The Denney truck tickets?
8 A. The Denney?
9 Q. For July 1?
10 A. Yes, sir.
11 Q. Did you make changes on those truck
12 tickets to adjust the amount?
13 A. Yes, sir, to adjust the hours I have
14 changed.
15 Q. And on how many truck tickets did you
16 make adjustments where you didn't feel they
17 were accurate on this day now? Take a look
18 at the Denney ones.
19 A. It looks like I adjusted A1, both of
20 the Denney trucks -- those two on that page
21 on the Denney trucks, the two Denney trucks
22 on the next page. I believe that's all, five
23 tickets.
24 Q. All right. Take a look back at June
25 17, please. How many loads were hauled on

1 that day? Just tell us what the truck
2 tickets show and how many loads per truck
3 tickets.
4 A. I count 40 loads but I don't see the
5 load count on this last ticket.
6 Q. What are you looking at?
7 A. On Bowman Trucking.
8 Q. Does your daily report indicate how
9 many loads Bowman hauled that day on June 17?
10 A. Yes, sir.
11 Q. How many?
12 A. Eight loads.
13 Q. What I want you to tell us is how many
14 loads per truck ticket was hauled on June
15 16. Tell us how many loads were hauled on
16 June 16.
17 A. The two Cook trucks, No. 103 hauled
18 eleven loads; No. 102 hauled ten loads. One
19 DW truck hauled eight loads. One Wisener
20 truck hauled eleven loads. One Bowman truck
21 hauled eight loads and an American Excavators
22 which was Ole Blue hauled ten loads but there
23 is no ticket for Blue. Once again, I may
24 have wrote it down that Blue hauled some but
25 to the best of my knowledge, I never wrote a

1 ticket on Blue.

2 Q. Can you look at your daily reports and
3 tell us when you started finishing up on the
4 building pad?

5 A. (Pause.)

6 Q. I tell you what. Let's get to it a
7 little bit later, Mr. Tipper.

8 A. I know I've got it in here but I can't
9 find it as of yet. It says RCR building pad
10 to start digging footers on Friday, which is
11 7-28.

12 Q. After Harley had stopped you, when did
13 you resume back your excavation of the
14 parking lot area and the area outside the
15 building pad approximately?

16 A. I'd have to look, Mr. Panther.

17 Q. Let me ask it a different way. After
18 you resumed, did you continue to run into
19 unsuitable material?

20 A. Yes, sir.

21 Q. In what areas did you run into
22 unsuitable material?

23 A. The whole job.

24 Q. Did you --

25 A. The whole job was unsuitable. I mean,

1 there were spots that we didn't have to take
2 out but in general the whole site was
3 unsuitable from the entranceway up the road
4 -- the best area that we didn't have to take
5 much out of was this building pad and the
6 back leg of this building pad. There was a
7 place right out in here of the corner of the
8 building pad we had to and back in this back
9 corner of the building pad and basically this
10 whole leg. About the only area in the
11 parking that we didn't have to dig down very
12 much was right in this very corner right
13 here. Most of the entranceway was undercut.
14 It was even undercut right down here at the
15 very entrance. I mean, basically the whole
16 job.

17 Q. As you were running into unsuitable
18 material, were you keeping anyone from RCR
19 informed of this?

20 A. Yes, sir.

21 Q. Who?

22 A. Anthony Orange. He was the
23 superintendent appointed by RCR and he was
24 out there every day unless he went somewhere
25 or something like that. He was well aware of

1 what was going on.

2 Q. On how many occasions did you go to
3 Anthony Orange and tell him that you had
4 encountered yet more unsuitable material?

5 A. Every time we encountered it.

6 Q. Was there ever an occasion -- let me
7 ask you: When you encountered unsuitable
8 material, what would he typically tell you to
9 do?

10 A. Most cases he would tell me to take it
11 out.

12 Q. Would you also discuss with him how
13 you were to keep track of how much fill you
14 were bringing back in?

15 A. We didn't discuss it every time he
16 told me to take something out, but from the
17 very beginning he told me to keep up with how
18 many loads it took to bring the job back up.

19 Q. Did he ever tell you to keep track of
20 how much you took out?

21 A. He told me to keep up with -- most of
22 the site was an import job. Some of it, if
23 it would have been suitable soil, we would
24 have been able to use on the building pad or
25 the parking area, any fill area, but none of

1 it was suitable. He did tell me to keep up
2 with how many loads we took out to get in a
3 cut area to get down to subgrade, yes, sir.
4 He told me to keep up with how many loads it
5 took to get it down to subgrade.
6 Q. And did you do that?
7 A. Yes, sir.
8 Q. Is that reflected in your daily
9 reports or your truck tickets that you know
10 of?
11 A. It may be reflected in my daily
12 reports.
13 Q. When you got into the cut section --
14 when you got into a cut section, did you have
15 a conversation with Anthony Orange and Don
16 Stover about the suitability of the material
17 in the cut section?
18 A. Yes, sir. I mean, that's just what I
19 just explained. The area where we should
20 have been able to get some cut -- where we
21 should have been able to get some fill
22 material from on site was basically in this
23 detention pond, this road entrance and an
24 area right up in here in this corner.
25 Q. Where you thought you would get

1 suitable material, what did you find?
2 A. It was unsuitable.
3 Q. Did you discuss that with Anthony
4 Orange or Don Stover?
5 A. Yes, sir.
6 Q. What did they tell you to do about it?
7 A. They told us to keep up with how many
8 loads of unsuitable material -- they told us
9 to keep up with how many loads it took to get
10 that cut area down to subgrade.
11 Q. Take a look at your July 8 meeting
12 minutes.
13 A. July 8?
14 Q. July 8 job report, yeah.
15 A. Yes, sir.
16 Q. Okay. Tell us what comments you wrote
17 on the July 8 job log.
18 A. It says, RCR came by and said take
19 parking lot to subgrade and then get PSI out
20 to proof roll and go from there. Said to add
21 in the trucks that it takes to get down to
22 subgrade.
23 Q. Is that referring to the conversation
24 that you just described?
25 A. Yes, sir.

1 Q. Now, most of the time, when a truck --
2 THE COURT: That sounds like
3 you're counting the trucks that are going
4 out?
5 THE WITNESS: No, sir.
6 THE COURT: Otherwise wouldn't
7 you say, to get up to subgrade?
8 THE WITNESS: No, sir. We'll
9 call this subgrade. That area that I was
10 talking about right in here where there
11 should have been some material to use in the
12 fill areas was above subgrade. So I was told
13 to keep up with how many loads that it took
14 -- let's say I had to take this off in
15 sections. We'll call it loads. To keep up
16 with how many loads it takes me to get this
17 area down to this area.
18 THE COURT: Am I missing
19 something here?
20 MS. CARSON: If you are, I am as
21 well, Your Honor.
22 THE COURT: You're talking about
23 dirt on top?
24 THE WITNESS: Yes, sir.
25 THE COURT: And you're talking

1 about how many loads it takes to get down?

2 THE WITNESS: Yes, sir.

3 THE COURT: It sounds like you're
4 adding dirt?

5 THE WITNESS: No, sir. Just
6 picture, like I said, this here is subgrade.
7 Your contours will come like this just in
8 exaggeration. If it's below this, you have
9 to come up to subgrade. If it's above this,
10 you have to come down to get to subgrade.

11 THE COURT: What's happening to
12 that dirt that's going down to subgrade?

13 THE WITNESS: It was no good.

14 THE COURT: What did you do with
15 it?

16 THE WITNESS: We put it in the
17 topsoil pile.

18 THE COURT: He said keep up with
19 the number of loads it takes to get down to
20 subgrade. So loads to get down would be
21 loads you're taking off the top to get down?

22 THE WITNESS: To get down but we
23 were supposed to be able to have taken this
24 material -- according to the soils report, we
25 were supposed to be able to take this

1 material and put it in the low areas to bring
2 up to subgrade.

3 THE COURT: Okay.

4 THE WITNESS: And we wasn't able
5 to do that. It was not suitable to use as
6 fill. In order to get down to subgrade, we
7 had to take material off which was too high
8 so he was telling me to keep up with however
9 many loads that was that we was having to
10 take out to get down to subgrade since we
11 could not use it as fill material.

12 THE COURT: It sounds like you're
13 keeping up with how many loads are going off
14 and how many loads are coming on because
15 there are two different things going on
16 here. If you've got something above subgrade
17 and you can't use it, then the only way you
18 can keep track of it is how much dirt you've
19 moved off of it to get down to subgrade.
20 That's one thing, and then you've got where
21 it is below subgrade. You've got to import
22 suitable soil so you have to keep up with how
23 many loads are coming in.

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay. That's two

1 different methods, isn't it? It depends on
2 what you're doing. If you're going down,
3 you're keeping up with how many is going out
4 and if you're adding to it, how many is
5 coming in. Is that not right?

6 THE WITNESS: I think you have me
7 confused.

8 BY MR. PANTHER:

9 Q. Let me ask you a question, Mr.
10 Tipper. When you're in a cut section, what
11 did you anticipate you could do with the
12 material in the cut section?

13 A. Put it in the fill areas.

14 Q. Now, the material in the cut section,
15 is that material above or below subgrade?

16 A. In the cut?

17 Q. Yes, sir. The material in the cut
18 section, is that above or below subgrade?

19 A. It's above.

20 Q. Now, as it turned out, was any of the
21 material in the cut section above subgrade
22 suitable for you to use as fill?

23 A. No, sir.

24 Q. All right. Because the material in
25 the cut section was not suitable, what did

1 you have to do to replace it?

2 A. Haul in more material.

3 Q. All right. How did you keep track of

4 how much material you replaced that you

5 thought was suitable cut?

6 A. Kept up with how many loads that we

7 dug out according to my ticket.

8 Q. Dug out or brought in?

9 A. According to this ticket, it says keep

10 up with how many we took out to get down to

11 subgrade. We kept up with how many it took

12 to bring it back up according to the truck

13 tickets that were hauling in the chirt.

14 Q. To replace the cut that was

15 unsuitable, did you keep track of how much

16 soil was actually on site or how much fill

17 you brought back in to replace the unsuitable?

18 A. How much fill was brought back in to

19 replace it.

20 Q. So when you refer to keeping track of

21 how much it takes to get down to subgrade,

22 what you're really doing was what? How were

23 you keeping track of how many trucks it took

24 to get down to subgrade?

25 A. I'm not sure I understand what you're

1 asking me now.

2 MR. PANTHER: I tried.

3 THE COURT: You know what? I
4 don't think it matters how many trucks it
5 took to get down to subgrade. You didn't
6 care. All your job was to get the cut down
7 to subgrade?

8 THE WITNESS: Yes, sir.

9 THE COURT: It would have been
10 nice if you could have used the cut to bring
11 the low spots up to subgrade.

12 THE WITNESS: Yes, sir.

13 THE COURT: But you didn't have
14 it so it doesn't matter how many it took to
15 get down to subgrade. What you were
16 interested in is how many loads had to come
17 in on this site to bring the low spots up to
18 subgrade?

19 THE WITNESS: Yes, sir.

20 THE COURT: Is that right?

21 THE WITNESS: I agree with
22 that 100 percent.

23 THE COURT: All right.

24 BY MR. PANTHER:

25 Q. Now, one area I forgot to ask you

1 about on most of these truck tickets that
2 there in front of you, have you signed them?
3 A. I signed most of them. Now I didn't
4 sign every one of them and I have not really
5 gone through them and counted how many of
6 them I signed and how many somebody else
7 signed.

8 Q. Let me ask you this. For the truck
9 tickets that were collected on this job when
10 you were keeping track of the fill that was
11 being hauled in, did you sign most of them or
12 did somebody else sign them?

13 A. No, sir, I signed most of them.

14 Q. For those that you did not sign, did
15 you nevertheless have actual knowledge of the
16 truck loads that were delivered to the site
17 on those days?

18 A. I kept up with the trucks every day.
19 I mean, to the best of my ability. I'm only
20 human. There's only been one perfect man
21 that ever walked this earth and he was
22 crucified on the cross. I am not perfect but
23 to the best of my ability, I kept up with
24 every load that came in there. I in no way
25 felt that any of the truckers were cheating

1 me, and if I did, I would correct their
2 tickets to the best of my ability and I'm not
3 perfect. It's possible I could have made a
4 mistake but I don't believe I did. To the
5 best of my ability, I kept up with every
6 truck load that came in there. I was paying
7 them good money and I was not going to let
8 them cheat us.

9 Q. At the time that you or somebody your
10 direction signed the truck ticket, to the
11 best of your knowledge, were the loads shown
12 on those truck tickets actually hauled and
13 delivered to the site?

14 A. If I'm not the one that signed it.

15 Q. If you or you directed someone to sign
16 it, to the best of your knowledge, did you
17 have actual knowledge of the number of truck
18 loads that were delivered to the site?

19 A. Yes, sir, every truck load. I mean,
20 just because I didn't see it don't mean I
21 didn't keep up with the truck.

22 Q. If somebody else signed it, would they
23 turn in their truck tickets to you at the end
24 of the day?

25 A. Yes, sir.

1 Q. And then what comparison would you
2 make with the truck tickets to make sure that
3 they were accurate even if you didn't sign
4 them?

5 A. Visual inspections through the day,
6 keeping up with the trucks, you know, making
7 sure -- like I said, you can tell when a
8 truck is cheating you. If they start
9 getting out of turn, if they don't stay in
10 line, you know, if one of them comes in and
11 you've got them the way they was running, we
12 was getting on average a load an hour. If it
13 would have been an hour and a half or an hour
14 and 45 minutes and I hadn't seen this truck,
15 then, yeah, I was wanting to know what's up.
16 I would correct their tickets if I felt like
17 they had done tried to cheat me. To the best
18 of my ability, I kept up with every truck
19 regardless of whether I signed the ticket or
20 not. I kept up with the trucks to the best
21 of my ability.

22 Q. Were there any occasions where you
23 removed unsuitable material without going to
24 Anthony Orange or Don Stover first?

25 A. I never took out -- I had a good

1 working relationship with Anthony. I trusted
2 Anthony. He was the superintendent appointed
3 to that job by RCR. He was giving me verbal
4 direction as to how he wanted to handle it.
5 Maybe I should have had him sign a piece of
6 paper, but I didn't think there was any
7 need. The superintendent of RCR told me to
8 do it that way, and that's the way I did it.
9 Now if that was a mistake, I apologize to
10 everybody in this room for taking up their
11 time, but I done what I was told to do and
12 the way I was told to do it by the
13 representative from RCR. They were very
14 proud of the job that I did for them. The
15 county was very proud of the job once it was
16 completed. They liked it. If the job had
17 not have been built the way it was built, it
18 would not be standing there today. Yes, you
19 can build on top of grass and topsoil but it
20 will not hold up. It will fall.

21 Q. Were the loads that were delivered to
22 the site necessary to build the building?

23 A. Yes, sir. Every load that come on
24 that site was necessary to be there.

25 Q. In addition to the unsuitable material

1 that you're running into just in the course
2 of your operations, was there anything else
3 going on that added to the amount of fill
4 that you were bringing in? Let me ask it
5 more plainly. Was anybody coming on site
6 after hours from time to time and digging up
7 on the site themselves?

8 A. Yes, sir.

9 Q. Tell us about that.

10 A. Anthony and some of his people from
11 RCR would have organized souvenir hunts from
12 time to time.

13 Q. What type of pits or trenches were
14 they digging?

15 A. It would depend. Sometimes it would
16 just be big pits. A couple of times there
17 were some pretty good trenches. One of them
18 was across the entranceway. They thought
19 they had found the main trench which ran
20 right across like this right here. Actually,
21 a little kid found a nice bayonet back there
22 in the back corner of that detention pond
23 that looked almost brand new. It looked like
24 it had been preserved.

25 Anthony and them thought that the main

1 trench ran right across through here and they
2 had excavated a pretty good trench right
3 across that entranceway, and in other
4 different spots on the job. I ain't even
5 going to try to point them out, but the main
6 one that really stands out is the trench that
7 they dug across through here that they
8 thought was the main trench.

9 Q. After they would dig a trench or a
10 pit, how would they leave the site? Would
11 they backfill it? Would they compact it?
12 Would they refill it with suitable material?
13 What would they do?

14 A. They would just cover it up. We had a
15 lot of rain on this job. I think if you'll
16 look through my tickets, you'll see that. I
17 mean we had a lot of rain on that job but
18 when they would get through, they would just
19 take and fill the ditch back up or the pit
20 back up. And then I would dig it back out
21 and put chirt in it.

22 Q. Did you discuss with Anthony Orange
23 what you were supposed to do about refilling
24 the trenches and pits that they were digging
25 in the search of souvenirs?

1 A. As far as a discussion, we didn't sit
2 down and have a big discussion. He asked me,
3 you know, the next day, Ricky, if you don't
4 mind, dig that back out and fill it back up
5 with chirt. There was no big discussion.

6 Q. Did you keep track of the trucks that
7 it took you to fill in those pits and
8 trenches?

9 A. No, I didn't keep up with -- you know,
10 I can't tell you it took one truck load or 20
11 truck loads to fill the trench or the pit
12 up. I kept up with the loads that come on to
13 the job through the truck tickets, but to
14 actually tell you that it took two truck
15 loads to fill the trench up or if it took 20
16 loads to fill the trench up, I cannot tell
17 you.

18 Q. And that was a problem with my
19 question. Did you differentiate between the
20 trucks that were filling in the pits and the
21 trenches that Anthony Orange was digging in
22 search of souvenirs versus the trucks that
23 were coming in for other reasons?

24 A. I didn't segregate the trucks in no
25 shape or fashion. I was told to keep up with

1 how many loads of material it took. They
2 were going to get their money back from the
3 county.

4 Q. Did Anthony Orange say that to you on
5 more than one occasion?

6 A. Yes, sir. Well, I don't know if he
7 said it on more than one occasion but on one
8 occasion he did tell me that. They are going
9 to get their money back from the county.

10 No, I didn't segregate. Like on the
11 RCP, I may have put down 33 loads or 43
12 loads, whatever it was but I didn't segregate
13 and say, well, I know we have one set of
14 plans that shows some little cut-outs where
15 the soils people -- I didn't say, well, it
16 took me 50 loads in Area No. 1 and it took me
17 five in Area No. 2. I didn't see any need to
18 do that. I was doing what I was told to do
19 by the superintendent and that was keep up
20 with everything it took to bring the job back
21 up and build the job.

22 Q. While Anthony Orange and others were
23 searching for souvenirs, did you participate
24 with them?

25 A. No, sir, I didn't get into any other

1 digs. He did have my hoe man whose name is
2 Virgil -- you'll see his name on probably
3 every daily. He did get Virgil to dig for
4 him a couple of times. Virgil was a good hoe
5 man and he did get Virgil to dig for him a
6 couple of times. I never -- did I stand
7 around for a few minutes when they started
8 digging? Yeah, there is a possibility I may
9 have stood there and looked, but did I get
10 down in a ditch with a shovel and dig, no,
11 sir at any point in time did I put a shovel
12 on the whole job looking for a souvenir. I
13 did not have time. The job was taking longer
14 than it was supposed to because of all the
15 unsuitable material. My main objective was
16 to get the job built and get out of there.
17 No, sir. Did I walk across the ground and if
18 I thought I seen something take my foot and
19 kick the ground? Yes, sir, I'm sure I did
20 that more than once but I never took a shovel
21 and dug for the first souvenir. I never
22 joined in on any of Anthony's and his friends
23 trench digging souvenir hunts.
24 Anthony did -- out of that main trench
25 that I was telling you about now that they

1 dug across there, he did give me about 20, 25
2 Civil War bullets. They found a whole bunch
3 of them that evening. He did bring me in
4 about 20, 25 Civil War bullets the next day
5 and give them to me.

6 Q. As you were removing the unsuitable
7 material, where were you placing it?

8 A. In a stockpile which was in this area
9 right in here. All this undisturbed area was
10 dirt.

11 Q. With all this unsuitable material that
12 you were removing, how big was that dirt pile
13 getting?

14 A. If I had a scale, I could tell you
15 probably exactly on the dimensions, Mr.
16 Panther. It was approximately ten foot
17 behind the curb right here. It was
18 approximately five foot behind the curb and
19 we ended up having to push it back up over --
20 the contour lines for the slope, we ended up
21 having to push some more up on top, but it
22 was -- we couldn't put any more on the front
23 side because it would roll down in this ditch
24 line that was right here. I'll say it was
25 probably -- I don't know -- anywhere from 50,

1 75 maybe even 100 foot tall at one time. I
2 mean, it was dirt everywhere.

3 Q. Whatever became of it?

4 A. A lot of it I used on the site. Some
5 of it we gave away. We gave some away to a
6 minister. Logan hauled some off, the best I
7 remember. Most of it to my knowledge went to
8 Pimpkin Hills Subdivision in Spring Hill (
9 which American Excavators -- which Marvin
10 Parker Building & Development bought to put
11 on the subdivision. I left approximately,
12 I'll say, 75, 100 loads or more on site
13 because Anthony said for me to leave it
14 there, that they wanted it and they would
15 take care of it and they would dress up this
16 area. Where it was left was right in here.
17 Once they got it all out of there, they would
18 be responsible for dressing up that area. A
19 lot of it was used on site. Back here was
20 deep. I mean, there was a big ditch right
21 back in here and a big ditch back here that
22 run down this side. Coming out the back door
23 that was back here, I think there were two
24 back doors -- but there was probably three or
25 four foot step-off and it even got deeper on

1 this side over here. From this corner of the
2 building to the fence row was real deep. I
3 put a whole lot of it in the back, in this
4 back area and down this side and back here
5 they was talking about building a little
6 playground area. It was real -- where this
7 ditch come down through here, it was real wet
8 and muddy so I used a lot of it to build that
9 up and push the ditch on over toward the
10 property line to where they could establish
11 some sort of playground in this area back
12 here. The rest of it we used on the slopes
13 and in the planter areas and around the
14 building.

15 Q. One area I forgot to ask you about, in
16 your daily logs, you make notes of truck
17 loads throughout your daily logs; is that
18 right?

19 A. Truck loads?

20 Q. In your daily logs, did you make notes
21 concerning load counts in your daily reports?

22 A. Yes, sir.

23 Q. What effort did you make to try to
24 match the notes in your daily reports with
25 the truck tickets that you were collecting

1 during the day?

2 A. I'm not sure I understand that
3 question either, Mr. Panther.

4 Q. Did you try to match up the truck
5 ticket loads with what your notes show on
6 your daily reports?

7 A. Yes, sir. I mean if I took the time
8 to write it down on my daily report, just
9 like on 7-8, three Cook trucks, the truck
10 numbers, their starting times, how many hours
11 and how many loads, I'm sure I took that off
12 of my truck tickets.

13 Q. Did you try to match them up every
14 day, day for day?

15 A. I tried to. I mean, I may have fell
16 short in some days. I don't know that. I'd
17 have to look at every one of them to see if I
18 did. I tried to.

19 Q. If we wanted a more accurate count of
20 the loads that were brought to the site,
21 would it be better to look at your daily
22 report count or the truck ticket load count?

23 A. Well, without going through them and
24 I've already seen in there where Ole Blue
25 hauled loads, I'd say it would be more

1 accurate if I kept up with every truck ticket
2 every day on my daily report, it may be more
3 accurate to look at my daily report versus
4 the truck tickets because Blue was never
5 ticketed to my knowledge. There were a lot
6 more loads hauled in there than the truck
7 tickets show were hauled in there.

8 Q. Were there at least as many loads as
9 what is shown in the truck tickets that
10 delivered material to the site? Was there at
11 least as much fill brought to the site as
12 what you have truck tickets?

13 MR. CASHION: Objection, leading,
14 Your Honor.

15 THE WITNESS: Oh, yes,
16 definitely.

17 THE COURT: That's really not
18 leading. The way he testified the first
19 time, that's an obvious answer.

20 MR. CASHION: He's getting into a
21 summary, I think.

22 THE COURT: I got it the first
23 time, Mr. Panther.

24 BY MR. PANTHER:

25 Q. Mr. Tipper, on this job, if the truck

1 ticket is signed by you or one of your field
2 people that was working with you, would that
3 be an inbound truck?
4 A. Inbound? What do you mean?
5 Q. Would that be a truck that brought
6 fill to the site?
7 A. Yes, sir.
8 Q. How many truck loads would you
9 estimate there were in addition to the truck
10 tickets that you have?
11 A. I'll say Ole Blue probably hauled at
12 least, I want to say, 150 or more.
13 Q. What's the capacity of Ole Blue?
14 A. It wasn't as big as the rental
15 trucks. It was only a tandem truck and it
16 held about 15 yards. We also widened the
17 envelope on the building pad, Mr. Panther.
18 We started out with a four foot envelope
19 which would be an eight foot total, and
20 Anthony wanted five foot instead of a four
21 foot so he would have enough room so he could
22 dig his footers.
23 Q. The last question I have for Mr.
24 Tipper is to ask him if he can identify his
25 signature or the signature of one of his

1 on-site people on these truck tickets. What
2 I want you to do, Mr. Tipper, is go through
3 Exhibit No. 6 and just tell me if on all
4 those truck tickets --

5 A. The whole thing?

6 Q. I just want you to identify the
7 signatures, your signature or the signatures
8 of other people on site who signed tickets
9 for you.

10 MR. CASHION: Your Honor if we
11 could, let's let him do this over the break.
12 I don't think this is a necessary exercise.

13 MR. PANTHER: That's fine.
14 That's a good suggestion.

15 THE COURT: Would you like to
16 start or just want to wait until we come back?

17 MR. CASHION: I can say start and
18 you say stop. I don't want to waste any
19 time.

20 THE COURT: All right.

21
22 CROSS-EXAMINATION

23 QUESTIONS BY MR. CASHION:

24 Q. My name is Greg Cashion. We met at
25 your deposition.

1 A. Yes, sir.

2 Q. First, with respect to your
3 experience, this was the largest building or
4 grading job you ever did for American
5 Excavators, isn't it?

6 A. For American Excavators, yes, sir.

7 Q. And all your other prior experience on
8 a building pad, you were the operator,
9 weren't you?

10 A. Yes, sir.

11 Q. So this is the first time you were in
12 charge of a grading job, being the
13 superintendent on the job?

14 A. No, sir.

15 Q. I'm not counting utility jobs where
16 you're dressing up on the grading job of a
17 building pad?

18 A. Of a building pad, yes, sir.

19 Q. This was your first one?

20 A. Of a building pad, yes, sir.

21 Q. That's correct?

22 A. Yes, sir, of a building pad, not of a
23 grading job, though.

24 Q. Pretty much all of your other jobs, in
25 fact, all of your other jobs with American

1 Excavators were utility jobs or I think you
2 did the road boring but the rest were all
3 utility, weren't they?

4 A. Yes.

5 Q. Now, when you went on site, were you
6 aware that Harley Ezell had bid the job with
7 just six inches of topsoil?

8 A. No, sir. I never was told that we
9 only were going to take off six inches. I
10 mean, I went to strip the topsoil and that's
11 what I've done.

12 Q. They told you to just strip the
13 topsoil; correct?

14 A. Yes, sir.

15 Q. And you were looking at the topsoil
16 and if it was dark, you were going to strip
17 it until you found something lighter in color
18 where you knew you had clay; right?

19 A. No, sir, not necessarily color. You
20 can have clay that is dark in color. I
21 wasn't so much looking at the color as I was
22 the texture. I mean, I was looking at both
23 but I can have dark clay. I was mainly
24 looking at the consistency of the material
25 along with the color and the texture and the

1 color and the consistency and the organic
2 compounds and all that.

3 Q. So when you started stripping the job,
4 I think -- do you remember the deposition you
5 gave to me?

6 A. Yes, sir.

7 Q. At that deposition if I remember
8 correctly I said, How much were you
9 stripping, what depth? And you said, In
10 places we took it down as much as a foot,
11 foot and a half, two feet?

12 A. Yes, sir.

13 Q. That's accurate, isn't it?

14 A. Yes, sir.

15 Q. And that's your most --

16 A. Maybe even two and a half in that one
17 corner.

18 Q. Up in that corner, maybe two and a
19 half?

20 A. Yes, sir.

21 Q. And I had asked you if it was in the
22 cut or fill. You said, Both, both cut and
23 fill sections. You were stripping the
24 topsoil one, one and a half, two feet;
25 correct?

1 A. Yes.

2 Q. Over the whole site?

3 A. Yes, sir.

4 Q. When Anthony came out there -- when

5 Harley came out there, he said stop --

6 A. Yes, sir.

7 Q. -- right then? Prior to Harley saying

8 stop, you had never had a conversation with

9 Anthony Orange about how much topsoil to

10 strip or not to strip? You were just

11 stripping on your own; right?

12 A. I was just stripping the topsoil.

13 Q. You and Anthony didn't talk about that

14 prior to Harley saying whoa?

15 A. No, sir.

16 Q. I also think you told me that with

17 your equipment you had an old pan and that

18 you couldn't do six inches with an old pan?

19 A. They're hard to hold it to six

20 inches. I mean, I wasn't looking for six

21 inches. I was stripping the topsoil. If

22 Harley hadn't come out there and stopped me,

23 Mr. Cashion, I probably would have went a

24 whole lot deeper. I mean, I was getting rid

25 of the topsoil. You can't build on topsoil.

1 I was getting rid of the topsoil.

2 Q. You talk about the capacity of the

3 truck. You said that the truck could hold 18

4 cubic yards; do you remember that?

5 A. Yes, sir.

6 Q. Do you bid jobs in your line of work?

7 A. I don't bid them, no, sir.

8 Q. And you don't estimate how much in

9 place or compacted fill you can get from a

10 truck, do you?

11 A. Do I?

12 Q. Yes, sir.

13 A. No, sir.

14 Q. Harley Ezell does that; right?

15 A. I don't know if Harley still does it

16 or not. At that time, yes, sir.

17 Q. So if Harley Ezell testified that for

18 a truck load you get 12 cubic yards in place

19 compacted, you wouldn't disagree with that,

20 would you?

21 A. Which type of material are you talking

22 about? If we're talking about this material,

23 then no, sir, I couldn't argue that, but if

24 you're talking about other types of material,

25 yes, sir, I'd have to argue that fact. It

1 depends on the type of material.

2 Q. On this type of material, you wouldn't
3 argue with the 12 cubic yards compacted in
4 place that Harley testified to?

5 A. Some of it I would. I mean, some of
6 the chirt was a lot finer. In that aspect,
7 I'd say, yeah, you would get more than 12
8 cubic yards. Some of it, I would say he
9 would be very accurate as to you would only
10 get 12 cubic yards, but some of the finer
11 chirt, I'd have to disagree with that. I
12 believe you could get more than -- I believe
13 if you loaded an 18 cubic yard dump truck
14 with the fine chirt -- and a lot of what we
15 did get was 15 -- I believe you could get
16 better than 12 cubic yards compacted. Now,
17 some of the chirt was bigger in size, and I
18 would agree with him that 12 cubic yards
19 would be a good average for that particular
20 material but not all of it. I wouldn't agree
21 with that.

22 Q. But 12 would be a good average?

23 A. Yes, sir.

24 Q. Now, when you were going to do this
25 job, did you ever consider stripping the

1 topsoil and then going to your cut areas and
2 pulling that soil out to start your building
3 pad with?

4 A. Would you say that again?

5 Q. Did you consider, once you had the job
6 stripped of topsoil, taking the material out
7 of your cut area and using it to start the
8 pad so that way you would -- when you started
9 importing soil, you could finish it off with
10 the import?

11 A. That would be the plan. I mean,
12 that's the way you usually do it. I mean,
13 you take -- except in this particular case,
14 they wanted -- since the building pad itself
15 was -- I think the height of the building pad
16 itself was like three, three and a half foot
17 fill. They did want the shot rock on the
18 bottom of the building pad. They wanted the
19 first lift out of shot rock, and then bring it
20 on up.

21 Q. So you would get the first layer of
22 shot rock and then you can put the material
23 on it?

24 A. Yes, sir, in that particular case. If
25 the cut material is suitable, you

1 automatically take it and start putting it in
2 the fill areas.

3 Q. Now, in this particular case, isn't it
4 true that your haul road was over the
5 detention pond area?

6 A. Well, it didn't actually come over the
7 detention pond. It come right here in this
8 corner and come right around the edge of the
9 property line because that had been an
10 entranceway that already had gravel on it up
11 to a point. Yes, sir, but it didn't actually
12 come across the detention pond. No, sir, it
13 actually came up the side here.

14 Q. Was there any reason why you didn't go
15 ahead on the front end of the job and
16 excavate out for the detention pond in order
17 to use that as fill material on your job?

18 A. Sir?

19 Q. Was there any reason why you didn't go
20 ahead and excavate the detention pond in
21 order to use that material as part of your
22 fill on the building pad?

23 A. It was an import job, Mr. Cashion, and
24 we were going to use the shot rock to build
25 the building pad with. Once the shot rock

1 got too big, that's when we went to the chirt
2 pit. We would have -- if the material in the
3 detention pond would have been suitable, we
4 would have used it in the parking areas.

5 THE COURT: Time to go. Be back
6 at 5:30.

7 (Dinner recess observed.)

8 THE COURT: Ready to go?

9 BY MR. CASHION:

10 Q. Mr. Tipper, when we took a break, we
11 were talking about your fill-in operation.
12 You described to us where the haul road was.
13 Now I want to ask you: Did you select the
14 part of the site to put the topsoil
15 stockpile?

16 A. Did I select it?

17 Q. Yes, sir. Did you, when you were
18 managing this site, determine where you would
19 stockpile your topsoil?

20 A. Basically that was the only place we
21 could put it.

22 Q. You put it right here?

23 A. Yes, sir.

24 Q. This says topsoil stockpile. Would it
25 be right about here? Is that pretty

1 accurate?

2 A. That's pretty accurate except it was
3 longer this way.

4 Q. Like that?

5 A. Yes, sir.

6 Q. Is that better? This is where you put
7 your topsoil stockpile up there?

8 A. Yes, sir.

9 Q. You never tried to cut this area down
10 to grade before you put your topsoil
11 stockpile, did you?

12 A. Never tried to cut what area down to
13 grade?

14 Q. This area?

15 A. That area was not supposed to be
16 disturbed.

17 Q. So you just left it up there and put
18 your topsoil?

19 A. Yes.

20 Q. You made a comment -- did you say that
21 pile got up to 100 feet high?

22 A. It was 50, 75, 100 foot tall. It was
23 tall.

24 Q. How tall is this building?

25 A. I don't know.

1 Q. About 40 feet? Are you saying this
2 was going to be a ten story building looking
3 down on Franklin?
4 A. It was 50 foot tall.
5 Q. As tall as this building? Taller than
6 this building?
7 A. It was at least 50 foot tall.
8 Q. In this area you have to run a scraper
9 up there, don't you?
10 A. You couldn't run a scraper up there
11 for the whole thing, no, sir. We had to push
12 it up with the dozers.
13 Q. So you got that dozer to go up that 50
14 foot pile; is that what you're saying?
15 That's pretty big.
16 A. It was a tall pile. I mean, the best
17 of my knowledge it was every bit of that
18 tall. There was a lot of material up there.
19 Q. When you left the job site, there was
20 still a stockpile there?
21 A. Yes, sir.
22 Q. You don't know how that topsoil got
23 off the property, do you?
24 A. What was left?
25 Q. Right.

1 A. No, sir.

2 Q. But you were selling topsoil while you
3 were there?

4 A. I wasn't selling anything.

5 Q. Topsoil was being purchased while you
6 were there?

7 A. Topsoil was being purchased.

8 Q. And paid to American Excavators?

9 A. As far as I know.

10 Q. Were you handling that transaction?

11 A. No, sir.

12 Q. Who was handling that transaction?

13 A. Some of the spoils, the deal to the
14 best of my knowledge was worked out between
15 Harley and Marvin. The pastor, that dirt was
16 given to him. The rest of it that was taken
17 off, other than what was left, was taken to
18 Pimpkin Hills and it was my understanding
19 that Marvin was purchasing that dirt.

20 Q. Purchasing it from American Excavators?

21 A. Yes, sir.

22 Q. Now, with respect to the garden area,
23 do you know where the garden area was?

24 A. Yes, sir.

25 Q. You could see the garden area when you

1 came out on the site?

2 A. Sir?

3 Q. When you first got on the job site,
4 before you stripped the topsoil the one to
5 two foot, you could see the garden where it
6 was, couldn't you?

7 A. Well, if I can, you said one to two
8 foot. I believe you're taking that out of
9 context. The way I'm getting that from you
10 is you're making it sound, to me, like I took
11 it at least one to two foot deep over the
12 whole area. That's not what I meant if that
13 is the way you interpreted what I told you.
14 Some places it was six inches. Some places
15 might have been eight inches. Some places it
16 might have dipped down a foot. In that one
17 particular corner it was a foot and a half to
18 two and a half foot deep, but we did not take
19 a foot to foot and a half to two foot off the
20 whole entire site. With that old pan, you
21 couldn't just go along there and clip six or
22 eight inches. Every once in a while it would
23 gouge down. There would be gouges in the
24 dirt that might be a foot deep, but we didn't
25 take it completely down over the whole site a

1 foot to two foot deep.

2 Q. When I asked you in your deposition --
3 and this is where we started on this
4 subject. Look on Page 17, Line 20 -- let's
5 start on Line 18. "Did you go out there and
6 strip it and that was it?"

7 "Answer: We had a dozer and we had a
8 pan stripper we started stripping the
9 topsoil.

10 "Question: How much were you
11 stripping? What depth?

12 "In places, we took it as much as a
13 foot, foot and a half, two foot.

14 "Were those places in the cut or fill
15 or both?"

16 You answered: "Both."

17 Is that correct?

18 A. Yes, sir.

19 Q. That's where I was getting you were
20 stripping at a foot, foot and a half, two
21 foot in different places. That's what you
22 told me at your deposition; right?

23 A. Yes, sir, and I agree with what I said
24 there but I mean it wasn't like we went in
25 there and took a foot, foot and a half, two

1 foot over the whole thing. I agree that
2 that's what I said. There were places it
3 might have only took four or five inches.
4 There are places that it did take it down a
5 foot or more.

6 Q. But you can't tell the Court how much
7 topsoil you stripped and where you stripped
8 the various depths, can you?

9 A. No, sir. I can't say it gouged down a
10 foot here, and it gouged down a foot there
11 and it was only four inches here or six
12 inches there.

13 Q. Did you talk about that at the break,
14 about your comment about the foot, foot and a
15 half?

16 A. No, sir.

17 Q. You corrected me pretty quickly
18 there.

19 A. Well, it was just the way you said
20 that to me.

21 Q. Where was the garden area? Did you
22 see that on the site?

23 A. I don't have the laser pointer anymore
24 but yes, sir.

25 Q. We can supply that to you.

1 A. It was in this area here.

2 Q. Okay. You're motioning to the

3 northwest wing of the building and extending

4 into the cut section of the parking lot;

5 right?

6 A. To the best I remember, yes, sir.

7 Q. And in that area, did you find the

8 garden -- first, did you know what the soil

9 investigation said about the garden area?

10 A. Did I read it?

11 Q. Yes, sir.

12 A. No, sir.

13 Q. Did anybody tell you, either Mr.

14 Parker or Mr. Ezell, what to expect when you

15 stripped the garden?

16 A. That we may have to undercut it.

17 Q. Did they tell you that you had a foot

18 of topsoil according to the soil report that

19 you're going to have to strip out?

20 A. Did they tell me that?

21 Q. Yes, sir.

22 A. No, sir, not that I remember.

23 Q. Do you have a memory one way or the

24 other whether there was a foot of topsoil on

25 there or not?

1 A. In places, there was more than that.

2 Q. Okay. Did they tell you that, after

3 you got the foot of topsoil, that you had

4 another foot and a half of what was called

5 the plow zone and you were supposed to take

6 that material out and then put it back in

7 recompacted? Did they tell you that?

8 A. I don't remember them telling me

9 that. That's possible.

10 Q. Did you ever try, after you stripped

11 the topsoil off in the garden area, to go in

12 there and pick another one and a half foot

13 out and recondition it and put it back in

14 like the soils report called for?

15 A. No, sir.

16 Q. You just stripped it until you found

17 good bearing soil; right?

18 A. I just stripped it, like I said

19 before. We just stripped the topsoil off of

20 it, and we stopped when Harley come out there

21 and said stop. Some places was deeper than

22 others, but it wasn't like we stripped the

23 whole thing off one depth.

24 Q. When you got through stripping all

25 that out, you just proof rolled it, and if it

1 passed, then you went to work?

2 A. Yes, sir.

3 Q. Did you go back and undercut any of

4 that garden area later on?

5 A. We had to undercut right in here.

6 There was an area right in here that we had

7 to undercut. I had to undercut some of this

8 back corner and I don't remember -- it seems

9 like the garden area went way over, but I'm

10 not sure. We had to undercut some of this

11 corner here and we had to undercut most of

12 this area deeper down here on this end. It

13 was about seven foot deep down here. But,

14 yes, we did have to come back and undercut

15 part of this in here.

16 Q. And that was in the garden area?

17 A. Some of it would have been.

18 Q. Now, do you remember when Harley went

19 out and said, whoa, stop?

20 A. Yes, sir.

21 Q. Didn't you tell me in your deposition

22 that at that time you weren't going to charge

23 RCR for all the stuff you had stripped out at

24 that point?

25 A. No, sir. I don't believe I said it

1 that way. I was talking about this corner
2 here. Harley told them we wouldn't charge
3 them for all of that right there where it was
4 about two, two and a half foot deep. He said
5 we're just going to give you that. Anthony
6 said, no, keep up with that, too. Go ahead
7 and count that also.

8 Q. What about all the other places you
9 stripped out more than six inches? Were you
10 going to charge us for that to get it back up
11 to subgrade? Is that what you told Anthony?

12 A. Say that again.

13 Q. Okay. With respect to the other areas
14 that you took more than six inches of topsoil
15 off, did you tell Anthony, I'm not going to
16 charge you for this corner up here but I'm
17 going to charge you for all this other stuff?

18 A. Harley estimated it. To the best of
19 my knowledge he estimated it was like 600
20 yards counting this area that he thought we
21 had undercut. He told them he wasn't going
22 to charge them for, I believe it was, 600
23 yards.

24 Q. Did he tell them he was going to
25 charge them for anything that you ever heard?

1 A. Did he tell them he was going to
2 charge them for anything?

3 Q. After he said stop and he said I'm not
4 going to charge you, did he go the other side
5 of the question and say but I am going to
6 charge you for bringing the rest of this
7 stuff up to subgrade where we took out a lot
8 of that topsoil? Did he ever say that?

9 A. My understanding from what Harley was
10 saying was that he is estimating there was
11 600 yards, 598 or whatever, 600 yards of
12 topsoil including this that we had done took
13 off the site. He was estimating it to be a
14 total of 600 yards that we had already took
15 off that he was not going to charge them
16 for. But from that point on, we were going
17 to have to start charging them for the rest
18 of the unsuitable material.

19 Q. You were going to start charging them
20 for the unsuitable material that you took out
21 from that point forward; right?

22 A. Yes.

23 Q. You weren't going to go back and start
24 trying to calculate stuff you had taken out
25 before; right?

1 A. Harley had already calculated or
2 estimated it at 600 yards or whatever it
3 was. They told us to go ahead and count that
4 because they would get their money back from
5 the county.

6 Q. But you never told Anthony Orange or
7 Don Stover that you were going to go back
8 after Harley said stop and try to calculate
9 any more undercut, did you?

10 A. I don't understand what you're saying.

11 Q. Did you ever tell Anthony Orange or
12 Don Stover that you were going to go back and
13 try to calculate the undercut and that other
14 area where you've stripped the topsoil and
15 charge them for it?

16 A. I still don't understand what you're
17 asking me.

18 Q. Did you ever tell Anthony Orange and
19 Don Stover about charging them for anything?

20 A. I didn't tell Anthony Orange and Don
21 Stover about charging for nothing, period.
22 Harley took care of all of that.

23 Q. Okay.

24 A. I didn't get involved with what was
25 being charged per yard or per truck or

1 anything else.

2 THE COURT: Let me see if I can
3 ask this. What I think Mr. Cashion wants to
4 know is: Up at the point in time where Mr.
5 Ezell came out and said stop stripping --
6 okay?

7 THE WITNESS: Yes, sir.

8 THE COURT: -- did you ever hear
9 of any effort on your company's part to go
10 back and charge RCR or any of that stripping
11 that took place prior to that date where you
12 were told to stop?

13 THE WITNESS: Only the 600 yards
14 which was estimated as what we had took out
15 too much. As far as I know, that is --

16 THE COURT: And you weren't going
17 to charge for that either?

18 THE WITNESS: He told him he
19 wasn't going to charge for that. They told
20 us to go ahead and charge them for that.
21 They were going to get the money back from
22 the county.

23 BY MR. CASHION:

24 Q. Mr. Tipper, did Anthony Orange ever
25 refuse to bring a PSI guy out there that you

1 thought was necessary?

2 A. I left that up to Anthony. It was his
3 responsibility to get the soils people out
4 there. Lots of times he would tell me just
5 go on and take it out and fill it back up.
6 Sometimes he would have them come out there
7 and look at it theirselves. I mean, I think it
8 was three or four different occasions that he
9 had soils people come out there.

10 Q. Did he ever refuse to measure any of
11 the quantities of undercut that you took out
12 or have them measured?

13 A. Did he ever refuse to measure it?

14 Q. Right.

15 A. Once again, I don't understand. The
16 only thing that I remember there being a
17 measurement on was wherever that little
18 diagram is that shows those four, five spots.
19 That's the best of my knowledge the only
20 thing the soils people ever measured out as
21 far as a dimension. But there was a whole
22 lot more material taken out of there than
23 those shaded areas.

24 Q. Isn't it true where the materials
25 getting taken out after Harley said whoa was

1 in the parking lot; right?

2 A. Not all of it, no, sir.

3 Q. Parking lot and the road?

4 A. Parking lot, the road and still down
5 here under this part of the pad. We only
6 started lifting this back leg. We didn't
7 start lifting this one. There was still a
8 lot of unsuitable material here especially in
9 this lower end.

10 Q. Did you realize that your proposal
11 said that you had a three foot buffer and
12 that you had to go below three foot to get
13 unsuitable soils? Did you know that?

14 A. Say that again, please.

15 Q. Did you realize that your proposal
16 said you had a three foot buffer under the
17 building pad and it wouldn't be undercut
18 until it went down three feet? Did you know
19 that?

20 A. No, sir, I didn't realize that.

21 Q. Now, we've read your daily reports and
22 you have a copy of them up there. You don't
23 have to take my word for it but we've written
24 down the reports that talk about undercut.

25 A. Okay.

1 Q. When we reviewed your daily reports,
2 we didn't find any reference that Anthony
3 Orange or Don Stover were directing any
4 undercut anywhere in here. Do you recall a
5 time when you wrote down Anthony Orange
6 directed me to undercut this area, PSI
7 doesn't know about it or not approved by PSI
8 or any comment like that at the time you were
9 keeping these daily reports?

10 A. I don't recall -- I mean, I wouldn't
11 have wrote it down. Anthony was the
12 superintendent. I didn't think there was any
13 problems with anything; okay? I was doing
14 what I was instructed to do.

15 Q. You wrote down PSI came about 9:00;
16 proof rolled parking lot?

17 A. Right.

18 Q. Why did you write that down if you're
19 not going to write down what Anthony tells
20 you to undercut?

21 A. Anthony is the boss. I'm working for
22 Anthony. If Anthony tells me to do it, I try
23 to do it.

24 Q. Turn to your daily report on July 27,
25 1999.

1 A. Yes, sir.

2 Q. This is where you started digging the
3 retention pond; correct?

4 A. That's what it says but I think I had
5 already dug some on it. I don't see it, but
6 that's what it says.

7 Q. You're taking the detention pond cut
8 material and you were putting it on the
9 building pad; right? That's what you started
10 doing?

11 A. Yes, sir.

12 Q. Then Anthony started a bunch of stuff
13 with you about the material not being
14 suitable for the pad; right?

15 A. Harley.

16 Q. Excuse me, Harley started that with
17 you?

18 A. Yes, sir.

19 Q. Now, you called RCR and told them you
20 were down four and a half hours while waiting
21 for PSI to come and look at the material; do
22 you remember that?

23 A. Yes, sir.

24 Q. Was there a reason why you didn't just
25 ask Anthony, if he was giving you these

1 directions, was this good material or bad
2 material?

3 A. I did ask Anthony. Anthony wanted to
4 use it. When Harley pitched a fit about it,
5 Anthony wanted to cover his butt. The pad
6 was already to subgrade but it had little
7 dips and low spots in it. What I put on
8 there didn't even cover the whole top of the
9 pad. You could still see the chirt. It just
10 filled in the little low spots, inch, inch
11 and a half, two inches at the most. Anthony
12 told me to go ahead and use it. Harley
13 pitched a fit about it and said it wasn't no
14 account and all this. Harley said hang on,
15 let's get them out there to look at it.
16 Since I was doing only what I was doing with
17 it, filling in the low spots being it was
18 going to have the gravel and all that on top
19 of it, it would be suitable to put right
20 there.

21 Q. PSI said the material was suitable and
22 you could use it?

23 A. For what I was doing with it at the
24 time.

25 Q. Okay. And then PSI said take out 55

1 more feet of road entrance?

2 A. Yes, sir.

3 Q. That's who gave you the directions

4 that you wrote on your report; right?

5 A. As far as the road, yes, sir, and the

6 other shaded areas.

7 Q. Now, when you took out -- when you

8 started excavating for the retention pond,

9 that's when you started on 7-27. 7-28 you

10 finished the pad. You're lifting the back

11 parking area. You dug the retention pond on

12 7-29. 7-30 you dug it. When you're digging

13 that retention pond, where are you putting

14 the dirt?

15 A. In the stockpile, in the topsoil

16 stockpile.

17 Q. You're stockpiling all that dirt there?

18 A. Yes, sir.

19 Q. So you're digging it out and

20 stockpiling it?

21 A. Yes, sir.

22 Q. You didn't use any of that dirt?

23 A. Yes, sir, I did. I just told you I

24 took the top of the pad off.

25 Q. Couldn't you take this dirt and finish

1 lifting the parking lot and mix in with your
2 chirt if PSI said it was good material?

3 A. No. See, I think once again you're
4 turning around what I just told you. PSI
5 said since I was using it to fill in the low
6 spots and just to top the pad off and make it
7 even, it would be okay to put on there. It
8 was not suitable to put in a lift anywhere.
9 At the most it was an inch, inch and a half
10 thick and that was just in little dip places.
11 They said it would be okay to use there, but
12 it wasn't suitable to build the building pad
13 out of and it wasn't suitable to build the
14 parking lot out of.

15 Q. Did they tell you you can't put this
16 stuff in the parking lot, you've got to waste
17 it?

18 A. They told me it was not no good to put
19 anywhere. I could use it on top of the pad
20 to do what I was wanting to do with it
21 because Anthony was wanting the building pad.

22 Q. So it is your testimony that PSI said
23 all the material in the detention basin was
24 unsuitable except you could use it for a
25 little bit of topping off the pad?

1 A. They told me I could use it to top the
2 pad off and to fill in the low spots on top
3 of the pad but the rest of it was no good.
4 Q. That's what they told you?
5 A. Yes, sir.
6 Q. And you just put it in your stockpile?
7 A. I dug it out with the trackhoe and put
8 it right over on the stockpile and pushed it
9 up with a dozer.
10 Q. On these truck tickets, you kept up
11 with some of the tickets where you took out
12 the undercut that PSI was directing and you
13 would tell when that material left the job,
14 wouldn't you? Let me just give you a head
15 start. Look at 7-16. What's it say about
16 the undercut?
17 A. It says hauled off undercut three
18 logging trucks, one American Excavators, 17
19 loads undercut, 7 loads of topsoil. But that
20 doesn't tell me where I hauled it from.
21 Q. You're taking that material off the
22 job site; right?
23 A. Yes, sir.
24 Q. And for that undercut, you documented
25 all of it; right? You documented when you

1 took the undercut off; right?

2 A. To the best of my knowledge, I did,
3 sir. The undercut was topsoil. It was all
4 topsoil.

5 Q. With respect to your Civil War relic
6 hunting --

7 A. Yes, sir.

8 Q. -- it is your testimony you didn't
9 participate in that; none of your men did?

10 A. No, sir, I did not.

11 Q. None of your men participated?

12 A. No, sir. Now, that's not what I said.
13 I said Anthony did ask my hoe man if he would
14 run the hoe for him on a couple of different
15 occasions. So if you call that
16 participating -- and I would -- he
17 participated in the hunt also.

18 Q. Did you ever tell him that if he
19 disturbed the ground he was going to have to
20 pay for it and American Excavators was going
21 to charge him?

22 A. I never told him that. I didn't see
23 no need in it. We had a good working
24 relationship. I was doing the job as I was
25 directed by him. When he would dig it out,

1 he would ask me to fill it up and I would. I
2 never told him we're going to have to charge
3 you for that, Anthony. He told me already to
4 keep up with everything we brought into that
5 job to get it up to subgrade.

6 Q. And you're talking about up here in
7 this area. I'm pointing to right next to
8 your stockpile.

9 A. Right here was where we had the
10 backfill. That was one area. There were
11 areas out in here. There was like four,
12 five, six different times that they dug. No,
13 I did not have to backfill this area with
14 chirt. It was dirt. It was not going to be
15 disturbed. It was for future development. I
16 did have to backfill from the face of the
17 curb back three foot each side with chirt.

18 Q. And you can't tell me when that
19 occurred, can you?

20 A. No, sir, I can't. I cannot.

21 Q. You can't tell me how much dirt you
22 refilled with?

23 A. No, sir. I didn't think there was no
24 need for me to keep up with what days they
25 dug pits and how much material it took to put

1 back in it because I was working under
2 direction from the superintendent, and I was
3 doing what he asked me to do. That is one
4 place where my inexperience as a grading
5 foreman, I think, does come into play. If I
6 would have had more experience, I would have
7 probably got everything in writing like it
8 should have been, and I didn't and maybe RCR
9 seen that inexperience in me and maybe they
10 took advantage of me in that aspect. I don't
11 know, but if I had it to do over, you can bet
12 that I would have tried to strip six inches
13 of topsoil and I would have had everything
14 else in writing from that point on, but I
15 didn't have that in my head and that ain't
16 what I done. I done what I was told to do,
17 and I done the job to the best of my ability
18 and everybody was happy and proud of it when
19 I finished.

20 Q. Back when you were talking about
21 correcting the truck tickets, you were just
22 correcting the hours, not the loads, weren't
23 you?

24 A. Do you remember which tickets?

25 Q. You scratched out the hours and you

1 left the loads the same?

2 A. I don't. I'd have to look. All I was

3 looking at was the hours. I'd have to look.

4 If you direct me back to it, I'll see.

5 Q. You said you had a good working

6 relationship with Anthony Orange?

7 A. Yes, sir, I thought I did.

8 Q. Did you have a good working

9 relationship with Harley Ezell?

10 A. To start with we did.

11 Q. Later on?

12 A. Later on we didn't, no, sir.

13 Q. Did you ever tell Anthony that Harley

14 left American Excavators because he underbid

15 this job?

16 A. No, sir, not that I recall, I didn't.

17 Q. Did you ever have that opinion, that

18 Harley left because he underbid this job?

19 A. No, sir.

20 Q. You don't remember telling Anthony

21 that?

22 A. No, sir, I don't. I thought Harley

23 left this job because he wanted to go start

24 up with partners another company. That's

25 what he told me. He was going to be partners

1 in -- I can't remember the name of the
2 company, and he was partners in that company
3 when he left American Excavators. That was
4 my understanding as to where he was going.

5 Q. I noticed on one of your daily reports
6 that you do document an area that was
7 undercut on 7-6; right?

8 A. Yes, sir.

9 Q. Was there any reason why you didn't
10 document any other areas that were measured
11 out there?

12 A. There is no reason one way or another,
13 sir.

14 Q. Now, you've testified a lot that
15 Anthony Orange said keep up with the truck
16 tickets; right?

17 A. Yes, sir.

18 Q. Did you give the truck tickets to
19 Anthony Orange?

20 A. No, sir.

21 Q. If he told you to keep up with them,
22 would you not give him a copy of the truck
23 tickets at the end of each day so he could
24 keep up with them?

25 A. He didn't ask for them. He didn't

1 tell me to keep up with truck tickets and
2 give him a truck -- he told me to keep up
3 with how many loads it took to bring this job
4 back up to subgrade.

5 Q. That's what he told you?

6 A. Yes, sir.

7 Q. Keep up with it. When did you give it
8 to him?

9 A. Sir?

10 Q. When did you give it to him?

11 A. I would turn them in -- I don't know
12 when Marvin would give them to him. I would
13 turn the tickets in with my daily reports.
14 What happened to them from that point on, I
15 don't have a clue.

16 Q. You turned them in to Mr. Parker?

17 A. I wouldn't actually turn them in to
18 Marvin. I would turn them in to the office,
19 the secretary, who we turned our time into.
20 I would turn those in with my daily reports.

21 Q. Did you ever have a conversation with
22 Anthony Orange where you said, Gee, Anthony,
23 I've got, you know, 10,000 cubic yards coming
24 in; do you know that? Did you ever keep him
25 updated? If he told you to keep up with

1 them, did you ever talk about it?

2 A. Mr. Cashion, Anthony was there every
3 day. Anthony seen what was going on. The
4 work I done was done under his direction. He
5 seen the trucks coming in every day. He seen
6 all the undercut we was having to do. No,
7 sir, I did not say, Anthony, we have 10,000
8 yards or we have 2,000. I didn't keep up
9 with how many yards was coming in there
10 myself. No, sir, I did not go to him every
11 day and say, Anthony, this is what's going
12 on. I was doing what he told me to do.
13 Bottom line, I was doing what he told me to
14 do.

15 Q. And you never gave him the truck
16 tickets?

17 A. I never gave him truck tickets.

18 Q. He never asked for the truck tickets?

19 A. He never asked for the truck tickets.

20 MR. CASHION: I don't have any
21 questions, Your Honor.

22 THE COURT: All right. Ms.
23 Goodson?

24

25 CROSS-EXAMINATION

1 QUESTIONS BY MS. GOODSON:
2 Q. Hi, Mr. Tipper. My name is Christina
3 Goodson. I met you at the deposition as
4 well.
5 A. Yes, ma'am.
6 Q. You aren't a geotechnical engineer,
7 are you?
8 A. No, ma'am, I'm not.
9 Q. You don't have any documentation for
10 your opinion that all of the material in the
11 cut areas on this site were unsuitable, do
12 you?
13 A. Ma'am?
14 Q. Do you have any documentation for your
15 opinion that the material on this site in the
16 cut areas was unsuitable?
17 A. Do I have any documentation?
18 Q. Something to back up what you say?
19 A. Only way I could back that up is I
20 have been OSHA certified as a competent
21 person in soils.
22 Q. But you don't have any degree?
23 A. No, ma'am, I have no degree.
24 Q. When you first arrived on the site,
25 wasn't it obvious that the soils weren't in

1 pristine condition?

2 A. Wasn't it obvious?

3 Q. Wasn't it obvious?

4 A. Not until I started stripping it, I
5 mean, it wasn't. You've got grass growing
6 everywhere. The only place that was in
7 question was the garden area.

8 Q. So the trash and the debris and
9 everything that was all over the site that
10 you talked about, that didn't give you a
11 clue?

12 A. It was around the perimeter, in the
13 trees. There was a tree line that ran all
14 the way around it, fence and tree line where
15 the people in the houses they had just thrown
16 their garbage and stuff over there. There
17 wasn't a whole lot of it out into the site
18 but we had to clean it up. We were
19 responsible for cleaning up the trash.

20 Q. And if the site should be used as a
21 dump as you stated, then wouldn't it be
22 obvious that the -- wouldn't you expect to
23 find the soils to start on the site?

24 A. I didn't know it had been a dump,
25 ma'am, when we came onto the job. That

1 wasn't revealed until later.

2 Q. You said that you also knew that the

3 job was going to be an import job from the

4 start, didn't you?

5 A. Yes, ma'am.

6 Q. And the county provided the borrow

7 materials free of charge to you, didn't they?

8 A. Yes, ma'am, they gave us the material.

9 Q. Isn't it true that you decided not to

10 keep up with the material that was taken out

11 of the site because you didn't know how to

12 keep up with that?

13 A. Is that true?

14 Q. Is that true?

15 A. No, ma'am. Wait a minute. Could you

16 say that again? That was taken off the site?

17 Q. That was taken off the site.

18 A. As far as taking the material off the

19 site, as far as I knew, all we had to account

20 for was enough topsoil to backfill around the

21 building and the perimeters and the curbs and

22 the island for the landscaping and dressing

23 the slopes. All the rest of the topsoil

24 actually belonged to us.

25 Q. Okay.

1 A. That was my understanding.

2 Q. That was your understanding, but

3 nobody from the county ever told you that the

4 soils belonged to you?

5 A. No, ma'am.

6 Q. Could I refer you to your deposition

7 one more time? Do you still have that in

8 front of you?

9 A. Yes, ma'am.

10 Q. Turn to Page 68 there.

11 A. 68.

12 Q. 68, yes, sir. Start at Line 20, kind

13 of in the middle of an answer, when you're

14 taking off material in a cut section, you

15 said Anthony said keep up with what it takes

16 on these fill areas on the cut areas that you

17 have to take off.

18 "Question: How are you going to keep

19 up with that?

20 "Answer: I don't know."

21 And then continue to the next page.

22 "Question: Were you trying to keep up with

23 it or was that something Harley Ezell was

24 keeping up with?

25 "Answer: I don't know. I didn't

1 never keep up. All we done was push it up."
2 A. That's all we did, ma'am, was push it
3 up. I didn't try to keep up with how many
4 loads we took out.
5 Q. Okay. You said you kept up with how
6 many loads it took to keep this back up to
7 subgrade; that's your testimony?
8 A. Yes, ma'am.
9 Q. Did anyone from the county or the
10 architect's office tell you to keep up with
11 the truck loads coming onto the site?
12 A. Did anybody from the county?
13 Q. The county or the architect's office?
14 A. No, ma'am.
15 Q. And you stated that you did that
16 through your truck tickets; you kept up with
17 that material through your truck tickets?
18 A. Coming onto the site?
19 Q. Coming onto the site.
20 A. Yes, ma'am.
21 Q. In your direct, didn't you state that
22 you would take the information from the truck
23 tickets and put it on your daily reports
24 sometimes?
25 A. Most cases.

1 Q. In most cases. Then you would not
2 verify the information in your truck tickets
3 by what was contained in your daily reports.
4 It was actually the opposite; right?
5 A. You just lost me, ma'am.
6 Q. You wouldn't verify the information in
7 the truck tickets by your daily reports then;
8 isn't that right?
9 A. I tried to. I mean, once I got the
10 truck tickets, I'd try writing on there how
11 many -- the name of the trucks, how many of
12 each company I had, how many hours they
13 worked, how many loads they hauled. I'm sure
14 I fell short.
15 Q. But you weren't verifying that
16 information. You were merely copying it from
17 the truck ticket to the daily report?
18 A. I don't understand what you're
19 saying. I wasn't verifying.
20 Q. You weren't verifying information.
21 You were merely copying it from the ticket
22 that you had in front of you. You just put
23 it on your daily report; right?
24 A. Ma'am, I don't understand. I really
25 don't understand the question.

1 Q. You took the truck ticket?
2 A. Yes, ma'am.
3 Q. And you copied the information on your
4 daily report?
5 A. Yes, ma'am, but now I verified to the
6 best of my ability that the truck tickets
7 were accurate.
8 Q. Just through your memory?
9 A. No, not just through my memory.
10 Through observation, memory and everything
11 involved in keeping up with trucks.
12 Q. But nothing in writing?
13 A. Did I sit down and every time a load
14 come in write down DW Truck No. 102, one
15 load --
16 Q. Right.
17 A. -- at 6:30 and then when he come back
18 at 7:30 write DW Truck No. 2, come in at
19 7:30, one more load? No, ma'am, I did not.
20 Q. Can you answer how can the county
21 verify the truck loads that were driven by
22 Virgil, Ole Blue, if you didn't turn in a
23 truck ticket for that?
24 A. I didn't keep up with Ole Blue on
25 particulars.

1 Q. Only on your daily reports?

2 A. I don't even think that we tried to
3 keep up with Blue on tickets at all. I mean,
4 there might have been a ticket.

5 Q. So just sometimes on your daily
6 reports?

7 A. Sometimes on the daily reports.

8 Q. And sometimes you wouldn't even fill
9 out those reports until the next day; isn't
10 that what you said?

11 A. Yes, ma'am. Sometimes. I tried to
12 fill them out every day but some days I
13 wouldn't fill them out. Some days I would
14 fill them out the next morning.

15 Q. Could I refer you to some of those
16 truck tickets? Do you have that still in
17 front of you, Exhibit 6?

18 A. Yes, ma'am.

19 Q. Look at June 18 for me. I don't know
20 if we tried this before, but let me see. Can
21 you read what's written there at the bottom
22 of that page?

23 A. On the daily?

24 Q. Yes, sir. Very bottom.

25 A. The very bottom?

1 Q. Yes, sir.

2 A. Tommy P. fixed brake lights on Ole
3 Blue. Said he fixed oil leak on D8K, which
4 was a dozer.

5 Q. I think two lines down you have some
6 more writing there. Can you read that?

7 A. Two lines down?

8 Q. Yes, sir.

9 A. There's not on here.

10 Q. It's not on the copy you have? You
11 don't see writing down on the very last line?

12 A. I see some little marks but I mean I
13 couldn't tell you if that's writing or what
14 that is.

15 MS. GOODSON: Can I approach the
16 witness?

17 THE COURT: Yes, ma'am.

18 BY MS. GOODSON:

19 Q. You're right. It's cut off. Here's
20 mine. Can you read that there at the bottom?

21 A. It says GT&E -- that's all I can make
22 out. No, ma'am, I can't make it out.

23 Q. GT&E must have come out then that day;
24 is that right?

25 A. I don't know, ma'am. I can't make out

1 what it says.

2 Q. Can you turn to the truck tickets

3 behind that day on June 18? Can you tell me

4 where on those truck tickets it states that

5 that material was just being brought on the

6 site and not off? Does it say anywhere on

7 there?

8 A. No, ma'am, it doesn't.

9 Q. Is the volume of material documented

10 anywhere on these tickets?

11 A. Ma'am?

12 Q. The volume of the material, is it

13 documented anywhere on these tickets?

14 A. Cubic yards?

15 Q. Yes, sir.

16 A. No, ma'am.

17 Q. Turn to June 17 for me. If you look

18 behind June 17 at the Bowman ticket --

19 A. Yes, ma'am.

20 Q. Are you there? On that day, it

21 doesn't even say how many loads were hauled,

22 does it?

23 A. No, ma'am, it don't.

24 Q. If you look at the daily report from

25 that day --

1 A. Yes, ma'am.

2 Q. -- it says the soils man came out and
3 said we have to undercut the unsuitable soil?

4 A. Yes, ma'am.

5 Q. Wasn't that Southern Consulting?

6 A. Ma'am, I cannot answer that. It also
7 says one Bowman Truck, 7 to 4:30, nine hours,
8 eight loads.

9 Q. Right. That's reflected on your daily
10 report but it is not on the ticket that the
11 truck turned in?

12 A. No, ma'am. It is not on the ticket
13 but it is on the daily report.

14 Q. If you will, turn to June 21 for me,
15 6-21.

16 A. Yes, ma'am.

17 Q. On that date, didn't a GT&E
18 representative come to the site to evaluate
19 the soil?

20 A. Yes, ma'am.

21 Q. And then didn't that representative
22 identify the questionable soil as brown silty
23 clay and not topsoil? That's going to come
24 from your memory and not written there, just
25 so you know.

1 A. It's on one of my dailies, what he may
2 have said. Now if I could look at another
3 one, I believe if you will look at 6-23, it
4 will state that he said that.

5 Q. On 6-23?

6 A. That was PSI.

7 Q. Yes, sir.

8 A. Okay. Excuse me.

9 Q. Do you remember on 6-21 what the
10 representative from GT&E did say?

11 A. If it's the time that I'm thinking
12 about -- and it may not be -- it could have
13 been the one that told us that's what all
14 southern people call topsoil.

15 Q. Yes, sir. I believe that's --

16 A. In kind words is what he said.

17 Q. That day he did say the material was
18 brown silty clay and not topsoil; is that
19 correct?

20 A. Is GT&E the ones that done the
21 borings?

22 Q. Yes, sir.

23 A. I'm sure that's what he would have
24 said, ma'am. I don't remember that's what he
25 said, but I'm sure that's what he would have

1 said.

2 Q. On 6-23, you pointed out that PSI did
3 come out?

4 A. Yes, ma'am.

5 Q. On 6-23 didn't PSI also identify the
6 soil as brown silty clay and not topsoil?

7 A. It says that it looks like silty clay,
8 not topsoil. Recommended taking it down to
9 subgrade and then proof rolling and go from
10 there.

11 Q. So it says it looks like silty clay
12 and not topsoil, doesn't it?

13 A. That's what it says, it looks like.

14 Q. All right. Let's go to July 8, '99.
15 Tell me when you're there.

16 A. I'm there.

17 Q. Turn to the A1 tickets behind that
18 day.

19 A. Yes, ma'am.

20 Q. One of those tickets doesn't even
21 document how many loads it hauled on that
22 day, does it?

23 A. Not that I can see, ma'am. Part of
24 the bottom of it didn't print. It could have
25 been down there. I said it looks like part

1 of the bottom of the remarks didn't print.
2 It's possible it could have been there.
3 Q. But the Loads line is blank?
4 A. Where it says Loads it doesn't show
5 it, no, ma'am.
6 Q. Turn to July 29 for me, 7-29.
7 A. Yes, ma'am.
8 Q. You only worked until 6 p.m. that day;
9 isn't that true?
10 A. Me?
11 Q. You.
12 A. That's what it says.
13 Q. And then the trucking company it looks
14 like they hauled for thirteen hours, eleven,
15 twelve, thirteen hours, doesn't it?
16 A. Yes, ma'am, they did.
17 Q. They were hauling even after you left
18 the job?
19 A. It appears that way, ma'am.
20 Q. So you couldn't monitor the loads that
21 came in or out after you left, could you?
22 A. I don't believe I could, ma'am.
23 Q. Mr. Tipper, didn't you witness PSI
24 measure and document the material removed
25 that they recommended --

1 A. Ma'am, can we go back? I think what
2 you're getting at is how could I sign the
3 ticket. I believe if you look you'll see H
4 Reed, Hollis Reed. He's the one who signed
5 the tickets that evening.

6 Q. Who is Mr. Reed?

7 A. I probably would have signed them the
8 next morning saying they're okay.

9 Q. You signed them saying they're okay on
10 the word of Mr. Reed; you didn't verify those
11 trucks coming in?

12 A. Yes, ma'am, that's true.

13 Q. Who is Mr. Reed?

14 A. He was Hollis Reed, one of our
15 operators.

16 Q. But he wasn't a supervisor?

17 A. Actually, I think he was. I mean he
18 wasn't the foreman over that job but I
19 actually think he was considered a field
20 superintendent.

21 Q. Why did you feel it necessary then to
22 sign your name below his?

23 A. I think you'll find that I did that on
24 more than one occasion. If we look through
25 them, I believe you'll find that I double

1 signed more than just that one. I mean, that
2 wasn't uncommon.

3 Q. Okay. So, did you witness PSI measure
4 and document the material they recommended
5 removing from this site?

6 A. Once again, I don't see that little
7 piece of paper that shows all the little
8 areas. Is PSI the one that measured those?

9 Q. PSI measured several areas on the
10 site. I want to know if you witnessed them
11 measuring those areas?

12 A. Ma'am, once again, if PSI is the one
13 that measured those areas that are on that
14 little diagram, then yes, ma'am. But if PSI
15 ain't the ones that did those, you know -- I
16 don't remember if PSI is the one, on that
17 little diagram that we have somewhere, that
18 shows the little triangle-shaped areas, four
19 or five areas. If PSI is the one that
20 actually come out there and measured those,
21 then, yes, ma'am, I remember that but if that
22 wasn't PSI, then no, ma'am, I don't remember.

23 Q. They are.

24 A. Okay.

25 THE COURT: Is this what you're

1 talking about?

2 THE WITNESS: Yes, sir.

3 BY MS. GOODSON:

4 Q. Isn't it true that you removed
5 material from the site that PSI didn't direct
6 you to remove? I just want to make sure the
7 record is clear.

8 A. I removed no material from the site.
9 I undercut no material other than what they
10 may have undercut while I was stripping the
11 topsoil, but I removed no undercut material
12 that I was not directed either by the soils
13 people or by the superintendent of the job to
14 remove. I did not ever take it on my own to
15 say, well, I'm going to go dig out a 50 by 50
16 square area ten foot deep just so I can fill
17 it back up, ma'am. I was ready to get out of
18 there myself. I was ready to finish the
19 job. I didn't take out any material that I
20 wasn't directed to take out by the soils
21 people or by Orange.

22 Q. Nobody from the county's office or the
23 architect's office ever directed you to
24 remove any material from the site, did they?

25 A. Ma'am, I don't even remember them ever

1 being out there.

2 Q. Whatever is coming on site, you can't
3 tell me whether it's being placed in a cut or
4 a fill section, can you? You can't tell me
5 where it is placed?

6 A. I can tell you that the only place
7 that it wasn't placed is -- if those papers
8 were moved, I could show you -- the only
9 areas that did not have to have some fill in,
10 but no, ma'am, I cannot show you exactly
11 where every load was actually put.

12 Q. I was questioning whether on your
13 daily reports you marked that material coming
14 in where it was being placed on the site?

15 A. Well, on 6-9, yes, ma'am, I can tell
16 you that the shot rock that was being hauled
17 in, part of it at least that day was being
18 put in the trench where we dug out the RCP
19 drain pipe.

20 Q. You don't have to go through all your
21 reports, Mr. Tipper. In your deposition on
22 that day when we asked you -- if I could
23 refer you to Page 97 of your deposition.

24 A. Yes, ma'am.

25 Q. I'm sorry, on Page 99 on Line 14.

1 "When you brought it back in, where did it
2 particularly go, you don't know that?

3 "Answer: No, ma'am, I can't tell you
4 where I put 15 loads here and we put 20 loads
5 there."

6 Do you see that? You can't tell me
7 exactly where the material went when you
8 brought it back on site? That was my
9 question.

10 A. (Pause.)

11 Q. Is that what you stated there?

12 A. Yes, ma'am, I believe that to be
13 accurate, but if I had my tickets in front of
14 me, I could have probably said. But I can
15 show you that on this day I put some of it in
16 the trench area and I was building up the
17 building pad here. No, ma'am, I couldn't
18 tell you on that particular day where I put
19 it.

20 Q. You may have kept up with some of the
21 material you did take off the site; isn't
22 that true?

23 A. Some of the material that was taken
24 off the site was kept up with because some of
25 it was purchased. How many loads went

1 everywhere it went, I don't have a clue but
2 some of it was kept up with. Some of it was
3 sold to people. Just like there's one daily
4 in there that says five loads was given to a
5 gentleman who was a pastor to take to his
6 church. There's five loads that you can keep
7 up with that actually went somewhere. Logan,
8 I believe -- I believe it was Logan -- hauled
9 off some loads. That was kept up with, but
10 when they started hauling all the topsoil,
11 the lump sum topsoil off the job, I did not
12 keep up with it.

13 THE COURT: Mr. Tipper, just a
14 second.

15 (Off-the-record discussion.)

16 BY MS. GOODSON:

17 Q. I only have a few more questions, Mr.
18 Tipper. During the time when you said Harley
19 came on the site and said, whoa, stop
20 stripping -- do you remember talking about
21 that time?

22 A. Yes, ma'am.

23 Q. And you said that Anthony Orange or
24 someone from RCR said, no, keep up with that
25 material because we're going to get our money

1 back from the county?

2 A. Yes, ma'am.

3 Q. Did anyone from the county or the
4 architect's office ever say that to you?

5 A. No, ma'am. I don't remember ever
6 talking to the architect. The only people I
7 remember talking to from the county -- and I
8 cannot remember his name -- was the gentleman
9 that was in charge of that new county road
10 project. I believe he was in charge of it
11 because he's the one that directed me and
12 showed me where to get the chirt material
13 from, but I do not remember his name. To the
14 best of my knowledge, he's the only one from
15 the county that I ever talked to.

16 Q. So then the county -- I just want to
17 end with this. The county and the
18 architect's office wouldn't have ever known
19 they were paying for fill for the Civil War
20 treasure hunting trenches, would they?

21 A. I don't believe so. I mean, I never
22 talked to them.

23 MS. GOODSON: If you could, give
24 me one second, Your Honor.

25 THE COURT: Yes, ma'am.

1 MS. GOODSON: No more questions.

2

3 REDIRECT EXAMINATION

4 QUESTIONS BY MR. PANTHER:

5 Q. On the break, Mr. Tipper, did you have
6 a chance to review each and every truck
7 ticket that was included in Exhibit No. 6?

8 A. Yes, sir.

9 Q. Can you state that for each and every
10 truck ticket it either contained your
11 signature or the signature of another on-site
12 American Excavators employee?

13 A. Yes, sir, or both mine and theirs.

14 Q. Ms. Goodson asked you a question about
15 whether or not the truck tickets indicate
16 whether they're inbound or outbound. Do you
17 remember her asking that question?

18 A. Yes, sir.

19 Q. Since all the truck tickets were
20 signed either by you or other people on site,
21 what does that tell you about whether they're
22 inbound or outbound?

23 A. Mr. Panther, I know that all the truck
24 tickets that are here that I can visibly see
25 is material coming onto the site, but can I

1 tell her that, yes, I can show you that every
2 one of these is coming on the site? I can't
3 do that, but I know that all these tickets
4 was coming onto the site. I could not answer
5 her question yes. The way she asked me I
6 could not answer it with a yes but they were
7 all coming on site.

8 Q. To the best of your knowledge, was
9 every load that's shown on those tickets
10 there in that Exhibit 6 delivered to the site
11 and used on the site?

12 A. Yes, sir.

13 Q. Mr. Cashion was asking you about the
14 compacted capacity of a truck versus a loose
15 capacity and whether you agreed or disagreed
16 with Mr. Ezell. Do you remember that
17 exchange?

18 A. I believe I told him I didn't agree
19 with that.

20 Q. Mr. Cashion asked you a question
21 similar to this. On average, is 12 a good
22 number? Do you remember him asking that
23 question?

24 A. I remember him asking if Harley said
25 that 12 was a good average, then wouldn't I

1 agree with that, and I told him, no, I
2 wouldn't necessarily agree with that.

3 Q. Twelve is good for some but not good
4 for others?

5 A. Right. The finer stuff would average
6 more than twelve. I believe if you was to
7 average the whole thing out, I would say a
8 better average would be closer to 14 or 15.

9 Q. Compacted?

10 A. Yes, sir. I think 12 -- I think some
11 of the trucks would have had 12 in it and I
12 think some of them would have had closer to
13 17, even 18 yards in them because of the type
14 of material. Some of it was a whole lot
15 finer and some of it was chunkier. So the
16 chunkier, you're not going to get as much but
17 the finer stuff, you're going to get more.

18 MR. PANTHER: Thank you, Mr.
19 Tipper.

20 THE COURT: All right. Thank
21 you, sir.

22 (Witness excused.)

23 MR. PANTHER: Your Honor,
24 American Excavators rests.

25 MR. CASHION: Your Honor, as my

1 first witness, we call Ryan Reeves.

2

3 RYAN C. REEVES

4 was called as a witness on behalf of the
5 Defendant and, having been first duly sworn,
6 testified as follows:

7

8 DIRECT EXAMINATION

9 QUESTIONS BY MR. CASHION:

10 Q. Would you state your full name?

11 A. Ryan Cameron Reeves.

12 Q. What is your address, Mr. Reeves?

13 A. 378-A Green Harbor Drive, Old Hickory,
14 Tennessee 37138.

15 Q. Where are you currently employed?

16 A. AEP.

17 Q. How long have you been employed at
18 AEP?

19 A. I've been employed there for ten years
20 with the exception of about 18 months when I
21 went to school between '94 and '96.

22 Q. What is AEP?

23 A. American Excavating & Pipe. We've
24 done asbestos in the past -- asbestos,
25 demolition, site work, site utilities.

1 Q. What are your job duties at AEP?

2 A. I'm a project manager which means I

3 estimate jobs. I look at the job costs, and

4 I propose what to do and then I manage the

5 jobs as far as making sure the material gets

6 on the site or the superintendent is managing

7 the job properly and that everything is

8 happening efficiently.

9 Q. In your business, do you typically bid

10 work to general contractors?

11 A. Yes, we do.

12 Q. How many general contractors have you

13 worked for?

14 A. Me personally?

15 Q. Right.

16 A. With me being the project manager,

17 approximately 45.

18 Q. What about AEP? How many jobs have

19 they done for general contractors?

20 A. General contractors, probably between

21 150 and 200. There has been -- you know, we

22 repeat with contractors.

23 Q. You've had more jobs but that's with

24 different general contractors?

25 A. Correct.

1 Q. Have you personally ever done any work
2 for RCR?

3 A. I personally have never been a project
4 manager on any RCR job.

5 Q. Has AEP performed any work for RCR?

6 A. Yes, we have.

7 Q. How many jobs have you bid total?

8 A. Approximately, I'd say, about 450.

9 Q. Explain to the Court how you would bid
10 an earth work job.

11 A. As far as an earth work job, when you
12 start it, you need to get three things. You
13 need to get the specifications. You need to
14 get the civil drawings and you need to look
15 at the architectural and the plumbing to see
16 if they affect your work any. You need to
17 get a geotechnical report. You study those
18 three things and then you go and you do a job
19 site visit. You look at the site. You look
20 at all the job conditions.

21 After that, I come and look at the
22 material, the equipment and labor it would
23 take to do the preliminary things as far as
24 mobilization, how many times am I going to
25 have to move a piece of equipment in and out

1 of here, silt fence, tree protection.

2 Then, I take my grading drawings and
3 generally I'll put them in an Agtech system
4 and I'll enter in my topsoil region because
5 you've got to strip the topsoil. I'll enter
6 in my existing grades and my finish grades
7 and my sectional thickness, which is the area
8 between the finish grade and your subgrade.

9 The Agtech helps me come up with a
10 quantity where I can kind of bid the job
11 based on is it an import, is it an export,
12 and it helps me to understand how to do it.

13 I'll look at anything that I see on
14 the site or anything that I study in the
15 geotechnical report that wouldn't be
16 reflected on that Agtech program.

17 Q. Did you have an occasion to bid the
18 Williamson County service building project in
19 March of 1999?

20 A. Yes, I did.

21 Q. On that job, did you visit the job
22 site?

23 A. Yes, I did.

24 Q. What did you observe when you visited
25 the job site?

1 A. I looked at the site. My main concern
2 when I looked at it, I read in the
3 geotechnical report that there was a garden
4 there that it said it was approximately an
5 acre. I pulled off of a few marks to come up
6 with my area for it. I come up with 55,000
7 square foot garden. I basically looked at
8 the topsoil region, how I felt like I needed
9 to proceed with the job.

10 Q. And then you put all the contours and
11 everything into your Agtech program?

12 A. Correct.

13 Q. Then you got a printout from your
14 Agtech; correct?

15 A. Correct.

16 Q. Let me hand to you what we'll mark as
17 Exhibit 20. Can you identify this document?

18 A. Yes, sir.

19 Q. Please tell the Court what it is.

20 A. It is a balance report from my Agtech
21 program. It tells the quantities of topsoil
22 and cut and fill based on cross sections that
23 I entered into my computer.

24 Q. Now, when you look at that program,
25 you've got a special area for garden area.

1 Can you explain that to the Court?

2 A. In the geotech --

3 Q. First, point out where it is on the
4 drawing.

5 THE COURT: I see it.

6 BY MR. CASHION:

7 Q. Go ahead.

8 A. The geotechnical report reported that
9 there was six inches of topsoil in all their
10 borings. So, in that area where it says
11 strip .5, that's where you have to strip the
12 topsoil. Topsoil contains organic material
13 and you can't -- you have to strip that off
14 and get down to the clay before you build
15 because if you build on organic material --
16 if you build on topsoil, the organic material
17 decays and it will settle. So, you can't
18 have it under parking lots or building pads
19 because when it settles, your building will
20 settle.

21 The first thing we have to do is we
22 have to strip that. The strip region where
23 it says six inches is all the area outside of
24 the garden. In the geotechnical report it
25 reported that they used a hand auger and went

1 through the garden and that they believe that
2 there was one foot of topsoil that could not
3 be used as fill. I took that area, that
4 55,000 square feet, and stripped it at one
5 foot because the material under that was
6 unusable.

7 Q. Did you also pick up in the soils
8 report what the next foot and a half was?

9 A. It said that the next foot and a half
10 was clay that was usable for fill material,
11 but it was in the plow zone which means that
12 they plowed it.

13 The purpose of what a grading
14 contractor does especially in this area where
15 they were putting the building, you have to
16 compact it with like a vibratory roller.
17 When you run a compaction dozer over it, it
18 vibrates and pushes it down and you can only
19 -- it will only vibrate -- they'll probably
20 tell you to put it in eight inch lifts, is
21 what the geotechnical engineer will tell you
22 to do. Because if you take it on a foot and
23 a half and you roll a compaction dozer over
24 it, it will only compact the top maybe eight
25 inches. The rest of it will be soft. So,

1 what you had to do is you had to dig it out.
2 You had to proof roll the bottom. Make sure
3 the bottom of that after a foot and a half
4 was soft and then you've got to put it down
5 in eight inch lifts. That's what the next
6 foot and a half was.

7 Q. Is that reflected on your Agtech
8 program?

9 A. No, sir, it is not because of the
10 nature of what you're doing cross-sectioning
11 it, it was just easier to do the math on my
12 worksheets.

13 Q. In addition to the one foot, you also
14 anticipated cutting the next one and a half
15 feet out and putting it back in?

16 A. Correct.

17 Q. When you put it back in, does it fill
18 up the one and a half feet you just took out?

19 A. No. A general rule, very conservative
20 rule is if you have -- it will compact down
21 to about 15 percent and I believe over a foot
22 and a half -- you might have to correct me --
23 I believe that's about three inches. I
24 figured it out about three inches over 55,000
25 square feet, that's about 460 more yards you

1 have to haul in.

2 Q. So you have to put back more?

3 A. I would have to put back more.

4 Q. Now, did this job balance on your

5 Agtech program?

6 A. No, sir.

7 Q. And how much material did you

8 anticipate taking out as topsoil, total cubic

9 yards?

10 A. Reflected on my Agtech, 3,969 cubic

11 yards.

12 Q. How much material did you plan to take

13 out as cut?

14 A. Well, on the Agtech it says 4,318.

15 There is a way to borrow on the site to get

16 more material than that in the non-structural

17 fill areas such as the pond or in the areas

18 where you don't have paving or building.

19 Q. But the 4,000 is what you anticipated

20 cutting?

21 A. 4318 is what I anticipated cutting,

22 and that came out of the Agtech. Like I was

23 saying, there are other ways to get more

24 material on the job.

25 Q. We'll talk about that in a minute.

1 What about the fill? How much did you plan
2 on filling this job?

3 A. 7,390 yards plus the 450, 460.

4 Q. And did you know of any reason why you
5 couldn't use the cut material as your fill?

6 A. According to geotechnical report, it
7 was material that could be used below the
8 topsoil.

9 Q. Does your Agtech program print out a
10 colorized --

11 A. Cut sheet.

12 Q. -- cut sheet? You gave that to us;
13 correct?

14 A. Correct.

15 Q. We've blown it up. Is this what you
16 printed out from your take-off?

17 A. Yes, sir, it is.

18 MR. CASHION: I move that as
19 Exhibit 20.

20 (Exhibit No. 20 was marked.)

21 MR. CASHION: I'd also move his
22 sheet as Exhibit 21.

23 THE COURT: Let's identify 21
24 again. Tell me what this is.

25 Q. What's the name of this printout?

1 A. I call it a cut sheet.

2 THE COURT: Cut sheet, colorized
3 cut sheet.

4 (Exhibit No. 21 was marked.)

5 BY MR. CASHION:

6 Q. If you want to come around and point
7 to it, explain to the Court what this color
8 means and what it is telling you.

9 A. The reason that we do this, the colors
10 mean -- it helps you to be able to look at
11 the job and be able to tell where the cut and
12 the fill is, the blue and the green. The
13 blue marks the deeper fill areas where you
14 need to build up to come to your final grade,
15 and then the red and the orange shows your
16 cut.

17 Each one of these little marks where
18 it says F1.923, that means you have to fill
19 1.92 feet to get to your grade.

20 When I look at this, it helps me to
21 figure out how to come up with a plan of
22 action of what needs to happen where I need
23 to cut to bring in. It just helps.

24 Q. On this job, what was your plan of
25 action for performing the work?

1 A. A general contractor always, more than
2 likely, will prefer that you get your pad
3 ready first so the other trades can come in
4 and be doing their work while you're
5 finishing up, but what you need in order to
6 build your pad up, you're going to need this
7 cut. You're going to need this fill material
8 right here.

9 My plan of action would be to put a
10 dozer up here to push the topsoil, strip the
11 topsoil right here. I'd push it to this area
12 right here and you're going to have to strip
13 this area of your building pad. Then you're
14 going to have to take that foot and a half
15 out of the garden and stockpile it right
16 beside it and then you're going to have to
17 proof roll it with a third party, whether it
18 be GT&E, PSI or just another engineer to look
19 at it and make sure there are no more soft
20 soils.

21 After they approve your bottom layer,
22 what I would do is I would start -- I would
23 take that material, that foot and a half that
24 GT&E said would be suitable fill material,
25 and I'd roll in in eight inch lifts and have

1 them inspect it at each lift.

2 After that, I would start digging my
3 detention pond down to the subgrade and
4 building my pad up. Then, what I would do
5 beyond that is I would start to look at how
6 deep I can go in this area and put back my
7 topsoil because you can build your pond out
8 of topsoil to get as much material as I
9 needed to get that started.

10 After they got their pad ready, you
11 could proceed to finish out the job.

12 Q. For you, why was it important that you
13 do your cut area first?

14 A. Because you need your material to
15 start building up your pad. Otherwise,
16 you're going to import material and export
17 material that you could have utilized on the
18 job.

19 Q. Now, let me hand to you --

20 MR. CASHION: Did I move that
21 into evidence, Your Honor?

22 THE COURT: It's 21.

23 BY MR. CASHION:

24 Q. Did you submit a proposal to RCR for
25 performing this work on the Williamson County

1 service building?

2 A. Yes, I did.

3 Q. I've handed to you a document dated
4 March 30, 1999. Is this a copy of your
5 proposal?

6 A. Yes, sir, it is.

7 MR. CASHION: Your Honor, I move
8 this in as Exhibit 22.

9 (Exhibit No. 22 was marked.)

10 BY MR. CASHION:

11 Q. Now, on this summary of work, if you
12 would, turn to Page 2 and explain how you're
13 telling RCR you're going to address the
14 undercut at the garden area.

15 A. It says that I'm going to undercut the
16 garden area approximately -- which I figure
17 was approximately 55,000 square feet, to 2.5
18 foot below the original existing grade and
19 I'm going to stockpile the material.

20 If you'll look, I've actually on Sheet
21 1 stripped the topsoil, already stripped and
22 stockpiled the topsoil and then I'm going to
23 put back in place and compact -- the price is
24 based on material -- under the topsoil in the
25 plow zone being suitable fill material like

1 it reports it in that geotechnical report.

2 Q. I believe your 55,000 square feet is
3 what you actually measured when you went to
4 the job site?

5 A. Correct.

6 Q. On this job, if you encountered
7 unsuitable soil below the subgrade, how would
8 you address it?

9 A. Below design and depth is what I would
10 say.

11 MR. PANTHER: Let me object at
12 this point. I think it is perfectly
13 acceptable for him to testify as to what he
14 did in preparing his bid, but if he plans to
15 offer expert testimony, I object. I
16 propounded interrogatories asking for any
17 proposed expert and none were identified.
18 For him to testify and give opinion testimony
19 on what's the proper procedure, I object to
20 that.

21 THE COURT: Mr. Cashion?

22 MR. CASHION: Your Honor, I'm
23 just asking him -- he did bid the job. He's
24 a fact witness. He's not proffered as an
25 expert.

1 THE COURT: I hadn't heard any
2 opinion yet.

3 MR. CASHION: What I've asked
4 him, the question on the floor is: In
5 preparing this proposal, how would he address
6 the undercut area.

7 THE COURT: How did he address it?

8 MR. CASHION: Yes.

9 THE COURT: In his bid?

10 MR. CASHION: Right.

11 THE COURT: Okay.

12 THE WITNESS: If I remember
13 correctly, in bidding this project, they
14 asked for a unit price to undercut and also
15 to backfill. On this site, like I said, what
16 you do -- just about on any job and I'm
17 pretty sure the specs will back this up --
18 after you strip the topsoil, you'll proof
19 roll the site. You'll call out a third party
20 engineer to look and see if there are any
21 soft spots to undercut, that need to be
22 undercut, and then they verify it. They
23 verify the dimensions and the quantity that
24 needs to be dug. I would call the general
25 contractor. I would let him know. He lets

1 the owner know and then I also have a form
2 that we give to our superintendents that they
3 work up and agree with the general
4 contractor's on-site superintendent and the
5 third party engineer and we have the general
6 contractor superintendent sign it. When we
7 turn in our billings, we turn that in with
8 it.

9 Q. On Page 2, Work Not Included -- that's
10 Item No. 2 -- you list undercut?

11 A. Undercutting of unsuitable material,
12 backfill and structural observation. I write
13 that on all of my bids. If I remember
14 correctly, if you look on the civil drawing
15 on that, the job was unclassified down to
16 design depths. What we're talking about is
17 below your subgrade, you know, before you
18 start building up.

19 Q. What did it mean to you on this job
20 that it was unclassified down to design
21 depths?

22 A. That means if you hit soft soils, if
23 you hit rock, because rock is harder to
24 excavate because you have to drill or shoot
25 it or hammer, then that means that you are

1 responsible for it. Classified means that
2 you can say, I'm saying that it's dirt and
3 it's good dirt.

4 Q. So an unclassified you're responsible?
5 A. You're responsible.

6 Q. Down to design depths?
7 A. Down to design depths.

8 Q. And you excluded design depths below
9 design depths?
10 A. Correct.

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

13 THE COURT: All right. I guess
14 I'll pass it to Ms. Carson.

15 MS. CARSON: Your Honor, I have
16 no questions.

17 THE COURT: Back to you.

18

19 CROSS-EXAMINATION

20 QUESTIONS BY MR. PANTHER:

21 Q. Mr. Reeves, we haven't met before. My
22 name is Todd Panther. I represent American
23 Excavators. I think you said you made a site
24 visit?
25 A. Yes, sir.

1 Q. Did you dig any test pits?
2 A. No, sir, I didn't.
3 Q. So, you don't know what the actual
4 soil conditions are, do you?
5 A. I made an assumption based on the
6 geotechnical report.
7 Q. Let me ask the question again. You
8 don't know the actual soil conditions, do you?
9 A. I bid based on what I saw with my eye
10 on top of the ground and what I read in the
11 geotechnical report.
12 Q. Let me ask you to look at Exhibit No.
13 22, your proposal.
14 A. Okay.
15 Q. Now, Exhibit No. 22 under the items,
16 the second page, you have -- follow down with
17 me -- excavate, put in place and compaction
18 of on-site materials; price is based on
19 material being suitable fill material. Did I
20 read that correctly?
21 A. Correct.
22 Q. Now, take a look at your Agtech
23 report. This is Exhibit No. 21.
24 A. Okay.
25 Q. What you're saying in your proposal

1 is that the material in the cut, the 4,318
2 cubic yards shown in your Agtech report, was
3 suitable; right?

4 A. Correct.

5 Q. And when you said in your proposal
6 that the price is based on material being
7 suitable, if the material in the cut section
8 ended up not being suitable, you would expect
9 extra money for that, wouldn't you?

10 A. If the material --

11 Q. Can you answer that question yes or
12 no?

13 A. Say it again.

14 Q. If the material in the cut section was
15 not suitable as fill, you would expect an
16 extra for that, wouldn't you?

17 A. It would depend how my contract was
18 written, not my proposal.

19 Q. If your contract provided that you
20 would be paid a unit price for unsuitable
21 material anywhere on this job and you ran
22 into unsuitable material in the cut section,
23 would you expect an extra?

24 A. If my contract --

25 MR. CASHION: Your Honor, I

1 object to the question. He doesn't want him
2 to be an expert. Now he wants to go to a
3 hypothetical opinion. Plus, his opinion on a
4 provision is not anything like our contract.
5 We're getting pretty far --

6 THE COURT: That may be true but
7 that's for you to argue.

8 MR. CASHION: I may come back
9 with some opinions when he gets through.

10 MR. PANTHER: I just want to know
11 what his bid means.

12 THE COURT: I'm going to allow
13 him to ask that, cross-examine the witness.
14 Did you hear the question?

15 THE WITNESS: You can ask it
16 again.

17 BY MR. PANTHER:

18 Q. If your contract that you ultimately
19 signed provided that you would be entitled to
20 a unit price for unsuitable material whether
21 above or below subgrade and you ran into
22 unsuitable material in the cut section, you
23 would expect more money, wouldn't you?

24 A. If my contract said that it was
25 suitable -- if I would be paid my unit price

1 above and below, then, yes, I would but --

2 Q. Now, according to your Agtech report,

3 you plan for 3,000 cubic yards of import;

4 isn't that right?

5 A. According to the Agtech, there was

6 still some material based on my worksheets

7 also that needed to be dealt with.

8 Q. Now, you had talked about your plan

9 for how you proposed to attack this job if

10 you were awarded the job, and you talked

11 about removing the material in the cut

12 section first. Did I understand that right?

13 A. I would strip the topsoil at the cut

14 section and then I would prepare my building

15 pad to be built up and then I would start the

16 cut. I'd run my trucks both ways.

17 Q. Let me ask you: Would you use the

18 material in the cut section on your building

19 pad first?

20 A. Yes, I would.

21 Q. If you were already planning to bring

22 in 3,000 cubic yards of fill anyway, wouldn't

23 it be better to use rock and chert under a

24 structure such as the building rather than in

25 the parking lot?

1 A. No, it wouldn't because you have to
2 dig your footers and you have to put your
3 plumbing in. If you meet the compaction --
4 the specs will call for probably about a 98
5 compaction rate. I'm sure they probably
6 prefer for that to be rock. That would be
7 the general contractor's question for him.

8 Q. But of your own knowledge, you don't
9 know what occurred below the surface of the
10 ground that you observed? You have no idea
11 what's below the surface, do you?

12 A. I do based on the drawing -- a
13 conclusion based on the geotechnical report.
14 I didn't look underground and see anything.

15 Q. But other than that, you have no way
16 of knowing whether the geotech report is
17 accurate or inaccurate?

18 THE COURT: You didn't go out
19 there and test it by digging your own pits?

20 THE WITNESS: I didn't dig my
21 own pits. I did a site visit but I didn't
22 dig my own pits.

23 MR. CASHION: No redirect, Your
24 Honor.

25 THE COURT: Thank you, Mr.

1 Reeves.

2 (Witness excused.)

3 (Brief recess observed.)

4 THE COURT: Who do we have?

5 MR. CARNEY: Marshall Bassett.

6 I'm Trajan Carney. We're going to call

7 Marshall Bassett.

8 THE COURT: Mr. Bassett, come on

9 around.

10

11 MARSHALL BASSETT

12 was called as a witness on behalf of the

13 Defendant and, having been first duly sworn,

14 testified as follows:

15

16 DIRECT EXAMINATION

17 QUESTIONS BY MR. CARNEY:

18 Q. Mr. Bassett, would you just introduce

19 yourself to the Court, tell them your full

20 name.

21 A. My name is Marshall Bassett.

22 Q. Where do you live?

23 A. Greenbrier, Tennessee.

24 Q. Where do you currently work?

25 A. Gate Bluegrass Precast.

1 Q. What do you do for them?
2 A. Design engineer.
3 Q. How long have you been doing that kind
4 of work?
5 A. I've been involved in concrete design
6 two and a half years.
7 Q. Do you have a degree?
8 A. I have a bachelor's degree in civil
9 engineering.
10 Q. Where did you work before Gate
11 Bluegrass?
12 A. Metromont. They were a structural
13 precast concrete manufacturer.
14 Q. What did you do for them?
15 A. Design engineer as well.
16 Q. And then before that, where were you
17 working?
18 A. I worked for PSI as a soils engineer.
19 Q. How long were you with them?
20 A. Approximately two years, two and a
21 half years.
22 Q. In your capacity with PSI, you were
23 familiar with the Williamson County community
24 service building?
25 A. That's correct.

1 Q. Can you tell us what your job or
2 responsibilities were on that project?

3 A. With PSI, I was the testing inspection
4 division manager. I had oversight for the
5 technicians involved in the project.

6 Q. Did you ever visit the site yourself?

7 A. Yes.

8 Q. Do you remember when that was?

9 A. 23rd of June, one of the first two
10 site visits PSI was on site.

11 Q. Do you remember why you were called
12 out there or do you know why you were called
13 out there?

14 A. We were basically asked to come out
15 and make an evaluation of the on-site soils.

16 Q. When you got out there, could you just
17 tell us what you found or what you did?

18 A. We basically dug a couple of test pits
19 just to make an evaluation of what type of
20 soils were there and their suitability for
21 use in fill areas.

22 Q. Did you review anything before you
23 went out there?

24 A. We had a copy of the original soils
25 investigation that was reviewed prior to

1 arriving on site.

2 Q. And do you remember who did that

3 report?

4 A. GT&E.

5 Q. So you got out there and you dug some

6 test pits. Can you tell us generally what

7 you found?

8 A. Generally, it was a situation where

9 there was a yellowish clay on top, probably

10 six to eight inches of the clay, and brown

11 silty clay below that.

12 Q. Mr. Bassett, this is a drawing of the

13 site. Can you tell us where you were when

14 you visited the site, what areas you were

15 looking or inspecting? If you can, just

16 point to where you were looking.

17 A. In the parking area here.

18 Q. In any particular part?

19 A. If I remember correctly, our

20 evaluations were made in this area here.

21 Q. Do you remember what kind of -- what

22 condition the site was in as far as the

23 construction, what phase they were in at that

24 time?

25 A. If I recall correctly, they had

1 already stripped vegetation from the site
2 prior to our arrival.

3 Q. Had they began to build anything?

4 A. The building pad was in place. It was
5 already built. I can't say that it was at a
6 certain grade but I know that our work was
7 confined to the parking areas.

8 Q. Did you prepare a report based on your
9 visit that day?

10 A. Yes.

11 Q. Is it normal for you to prepare a
12 report when you go and visit a site?

13 A. Yes, that's correct.

14 Q. Mr. Bassett, they're passing a
15 document to you. I'm just going to ask you
16 if you recognize that document?

17 A. Yes. It is the report that was
18 generated first day on site.

19 Q. Who generated this?

20 A. I did.

21 MR. CARNEY: Your Honor, at this
22 time before I forget, I'd like to move this
23 into evidence as the next exhibit.

24 (Exhibit No. 23 was marked.)

25 BY MR. CARNEY:

1 Q. Looking at this report, can you tell
2 us what kind of material you were looking
3 at? I know you already mentioned that. Just
4 tell us again what you found.

5 A. Consistent with the brown silty clay
6 below the yellow brown clay.

7 Q. I'm looking at a sentence that -- it
8 is the fourth sentence. It says, "With the
9 in place moisture content." Could you just
10 read that for us?

11 A. "The in place moisture content of the
12 brown material was on the order of 19 to 20
13 percent with an organic content of less than
14 4 percent."

15 Q. Now, when you're looking at this soil
16 to be able to use it as fill, what are you
17 looking for?

18 A. Again, moisture content and organic
19 content are a key role in the compactability
20 of material.

21 Q. What are the levels you look for as
22 far as being suitable or unsuitable for
23 compaction?

24 A. Generally, on the organic content,
25 again, anything less than 4 or 5 percent and

1 moisture is on the -- it is hard to say the
2 moisture of the material. It is an in-place
3 visual observation. Generally, 16 to 18
4 percent.

5 Q. What did you recommend that they do at
6 this time?

7 A. I believe the day that I was there, we
8 asked the site be brought to a subgrade
9 elevation and evaluation of the materials be
10 made.

11 Q. I'm looking at the second-to-last
12 sentence. Well, before that, it says it is
13 suggested. What are you talking about in
14 that sentence?

15 A. Again, it is a recommendation that the
16 areas are to be brought to an elevation or
17 subgrade elevation and then evaluate the
18 material at that time.

19 Q. Let's move forward a little bit. When
20 was the next time you did anything on this
21 site?

22 A. I believe a meeting was called to
23 discuss this letter on the 30th of June.

24 MR. BASSETT: I believe Exhibit
25 19 has already been admitted into evidence.

1 I have another copy. Just let him see a copy
2 of that.

3 THE CLERK: (Document passed.)

4 BY MR. CARNEY:

5 Q. Mr. Bassett, you've just been handed
6 Exhibit 19 and it is the meeting notes from
7 the June 30 meeting. If I'm looking right,
8 it shows that you were there as a
9 representative of PSI; is that correct?

10 A. That's correct.

11 Q. Have you seen these meeting notes?

12 A. Yes.

13 Q. If you could, just take a second and
14 look over those.

15 A. (Pause.) Okay.

16 Q. Is that your recollection of what was
17 discussed at the meeting?

18 A. That's correct.

19 Q. What was your understanding after this
20 meeting would be PSI's role?

21 A. We were to be used for the evaluation
22 of suitable or unsuitable materials.

23 Q. Where are we talking about when we
24 talk about suitable or unsuitable materials?

25 A. Parking and drive areas.

1 Q. There's been some testimony of grades,
2 above or below subgrade. Which areas were
3 you going to be looking at?
4 A. It would be the subgrade elevation.
5 Q. Were you going to look at any
6 materials above subgrade?
7 A. Generally, no.
8 Q. When you say generally, why?
9 A. Usually when we go to the site, it is
10 an evaluation of subgrade to prepare the area
11 for structural fill.
12 Q. Next, Mr. Bassett, I want to direct
13 you to -- these are already in evidence --
14 your reports under Exhibit 8. They're
15 attached. Flip to the back, you'll see some
16 reports by PSI. Are they there?
17 A. Yes.
18 Q. When was the first time PSI tested
19 material at the site after that June 30
20 meeting?
21 A. That would be July 6.
22 Q. First, what were the observations that
23 PSI found?
24 A. It appears that there was an unstable
25 area as diagrammed on the second page.

1 Q. Does it say where that area is?
2 A. That would be the northwest building
3 corner.
4 Q. Okay. What did PSI recommend?
5 A. That the area be removed to firm
6 material.
7 Q. And then what was supposed to be done
8 after that?
9 A. Then the area be proof rolled and
10 approved for fill placement.
11 Q. And then, what was the next time PSI
12 was on the site inspecting?
13 A. Again, that would be July 20.
14 Q. Where were you inspecting the site at
15 this time? What location?
16 A. Again in the parking area, in the
17 entryway.
18 Q. What were your observations or remarks?
19 A. Another area of unstable soil was
20 detailed with remedial action.
21 Q. Where was that section?
22 A. It looks to be near the south side of
23 the building pad.
24 Q. Can you point us to that?
25 A. It is probably in this area maybe.

1 Q. Okay. What remedial action did PSI
2 recommend at this point?
3 A. Again, removing the material to
4 stable.
5 Q. When was the next time PSI was on
6 site?
7 A. That would be the 27th of July.
8 Q. What area were they testing at this
9 time?
10 A. That would be the front entryway, in
11 this area here.
12 Q. Okay. What were the observations or
13 remarks at this time?
14 A. Again, they found instability in the
15 roadway itself.
16 Q. What did PSI recommend to do?
17 A. Again, excavation to stable material.
18 Q. I believe attached, if you have
19 Exhibit 8 there, is Change Order No. 3. Do
20 you see that? There is a little diagram.
21 That's what I'm trying to get to.
22 A. Yes, okay.
23 Q. Do you have the diagram that has the
24 four areas?
25 A. Yes, sir.

1 Q. Does that look like an accurate
2 representation of the areas we just discussed
3 that PSI documented?
4 A. It appears so.
5 Q. Could you compare those with the areas
6 that are listed on Change Order 3 and see if
7 that is accurate with your observations and
8 recommendations?
9 A. Without doing a calculation, it
10 appears that it is.
11 Q. Doing this work, I assume PSI was
12 getting paid for it?
13 A. That's correct.
14 Q. And who actually hired PSI?
15 A. We were hired by RCR.
16 Q. What was the process for getting
17 paid? Did you review materials? Did you
18 keep up with your time? How did you go about
19 generating a bill for that?
20 A. We, of course, got the time from the
21 technician that was present at the site and
22 then reviewed that with relation to his
23 report that he generated.
24 Q. And you did review those?
25 A. That's correct.

1 Q. They're going to hand you another
2 document. Mr. Bassett, they've handed you a
3 document. If you could, just tell us what
4 that is?

5 A. These are invoices for work performed
6 on this project.

7 Q. Is there any way to cross-reference
8 those with your inspection reports?

9 A. We can cross-reference each invoice by
10 report number.

11 Q. I guess on July 6 -- I'm sorry, June
12 23 would have been the first one?

13 A. That's correct. The report from June
14 23 is Report No. 1.

15 Q. Do you have an invoice that references
16 that report?

17 A. Yes. It is the third page in the
18 package.

19 Q. How much was that bill?

20 A. \$171.32.

21 Q. Do you have one for the June 30
22 meeting?

23 A. I do not.

24 Q. Do you know why?

25 A. I can't say. It was done as a

1 courtesy.

2 Q. What's the next invoice you have there?

3 A. It would be Invoice 73668 for Report

4 Nos. 2 and 3.

5 Q. How much were those for?

6 A. \$260.54.

7 Q. What was the next invoice you have?

8 A. That would be for Report No. 4.

9 Q. How much was that amount?

10 A. \$125.32.

11 MR. CARNEY: Your Honor, at this

12 time, I'd like to admit those three invoices

13 as the next exhibit.

14 (Exhibit No. 24 was marked.)

15 BY MR. CARNEY:

16 Q. I only have a few more questions and

17 we'll let you get out of here -- well, at

18 least from me anyway. You have testified

19 earlier that you did review the GT&E soils

20 report that was prepared?

21 A. That's correct.

22 Q. How did PSI's findings compare with

23 those in the GT&E report?

24 A. It was very favorable. Basically, the

25 same findings that we had in our test pits

1 were a direct correlation to what they had in
2 their soils investigation.

3 Q. I guess my final question is: Did PSI
4 document any other undercutting other than
5 the information we've just gone over?

6 A. No.

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

9 THE COURT: All right. Ms.
10 Goodson?

11 MS. GOODSON: I have very few,
12 just a couple.

13
14 CROSS-EXAMINATION

15 QUESTIONS BY MS. GOODSON:

16 Q. Mr. Bassett, I'm Christina Goodson. I
17 met you the other day.

18 A. That's correct.

19 Q. Does PSI measure and document the
20 excavation of material within their reports?
21 Within your four reports, did PSI measure and
22 document the excavation of that material?

23 A. Yes.

24 Q. And can you tell me the method they
25 would go about doing that?

1 A. Basically, it would be a visual
2 evaluation by using a loaded tandem axle
3 truck to determine areas of instability,
4 spray paint -- generally speaking, spray
5 paint the corners of the area and then
6 measure prior to excavation.

7 Q. Okay. Isn't it true that none of the
8 reports that you've been handed today refer
9 to the soils removed from the site as
10 unsuitable?

11 A. That's correct.

12 Q. And isn't there a difference between
13 non-compactable soil and unsuitable soil?

14 A. Yes.

15 Q. American Excavators could have used
16 the brown silty clay as fill material with a
17 little extra preparation, couldn't they?

18 A. Yeah. It appears so, yes.

19 MS. GOODSON: Thank you. That's
20 all.

21 THE COURT: Mr. Panther, any
22 follow-up questions?

23 MR. PANTHER: Just a couple.

24

25 CROSS-EXAMINATION

1 QUESTIONS BY MR. PANTHER:

2 Q. On the four areas that you looked at,
3 on all four of them you recommended the
4 removal of the unstable material, didn't you?

5 A. That's correct.

6 Q. On your reports, does it indicate who
7 you're working for, tested for?

8 A. That's correct.

9 Q. Who were you doing these tests for?

10 A. For RCR Building.

11 Q. If somebody was going to call you out
12 to the site, you expected RCR to do that?

13 A. Yes.

14 MR. PANTHER: Thank you.

15 THE COURT: When you asked your
16 question, I think you said unstable. You
17 meant unsuitable soil, didn't you?

18 MR. PANTHER: Yes.

19 THE COURT: You took it that way,
20 didn't you?

21 THE WITNESS: Yes.

22 MR. PANTHER: Thank you, Your
23 Honor. I'm sorry.

24 (Witness excused.)

25 MR. CARNEY: Your Honor, our next

1 witness is going to be Eric Snyder.

2

3

ERIC SYNDER

4

was called as a witness on behalf of the

5

Defendant and, having been first duly sworn,

6

testified as follows:

7

8

DIRECT EXAMINATION

9

QUESTIONS BY MR. CARNEY:

10

Q. Mr. Snyder, please state your name for

11

the Court?

12

A. Eric Ronald Snyder.

13

Q. Where did you live?

14

A. 605 Harpeth Noel Drive, Nashville,

15

Tennessee.

16

Q. Where are you currently working?

17

A. KS Ware & Associates.

18

Q. What do you do at KS Ware?

19

A. I'm the senior geotechnical engineer.

20

Q. How long have you been in that field?

21

A. Since 1989. So, twelve or thirteen

22

years.

23

Q. Do you have a degree in engineering?

24

A. I have a degree from Vanderbilt

25

University in civil and environmental

VOWELL & JENNINGS, INC.

1 engineering.

2 Q. Where did you work before you were

3 with KS Ware?

4 A. Goodrich Testing & Engineering.

5 Q. Is that GT&E?

6 A. Yes.

7 Q. Slang for that?

8 A. Yes.

9 Q. Were you working for GT&E in the

10 spring of 1999?

11 A. Yes, I was.

12 Q. And you're familiar with the

13 Williamson County community services building?

14 A. Yes, I am.

15 Q. What did you do on that project?

16 A. I performed a geotechnical

17 exploration.

18 Q. Who did you perform that for?

19 A. I believe I performed it for

20 Williamson County.

21 Q. I'd like to hand the witness Exhibit

22 No. 1, I believe it is. Mr. Snyder, I'm

23 going to ask you if you recognize this

24 document?

25 A. I do.

1 Q. Could you tell us what it is?
2 A. It is my geotechnical exploration
3 report which I performed for Thomas Miller &
4 Partners. I did misstate earlier.
5 Q. Okay. On the second page it looks
6 like you signed it?
7 A. Yes, I did.
8 Q. Could you tell us what you were doing
9 when you prepared this report and performed
10 the tests? What was the purpose of it?
11 A. To characterize the subsurface
12 conditions at the site and give the civil and
13 structural engineers parameters to design the
14 structure.
15 Q. Are you familiar with what has
16 previously been testified to as the garden
17 area?
18 A. Yes, I am.
19 Q. Did you refer to that anywhere in your
20 A. I believe I did, yes.
21 Q. Do you know what page it was on? Flip
22 over to Page 2.
23 A. Yes.
24 Q. The second paragraph there, could you
25 tell us what that says about that garden area?

1 A. There is a triangular-shaped garden
2 area near the center of the site which is
3 approximately one acre in size.
4 Q. What we've got up here on the board is
5 a drawing of the site. Does that look
6 familiar to you?
7 A. Yes, basically.
8 Q. There weren't any buildings or
9 anything there when you did your testing?
10 A. No, there was not.
11 Q. I've got a triangle here. You're
12 saying the garden area was a triangular
13 shape. Was it approximately -- I know we're
14 not going to be too accurate.
15 A. It was something similar to that, yes.
16 Q. I'm going to hand this to you. If you
17 would, kind of stick it up on the drawing
18 where the garden area was and how it was
19 turned.
20 A. It was somewhere in here. Obviously,
21 it is not exact.
22 Q. I do realize a corner is off the site
23 boundary so it must not have been exactly
24 shaped like that triangle but it was pretty
25 close to where it was?

1 A. Yeah.

2 Q. On Page 4 of your report, in the
3 second paragraph there, you talk about the
4 garden area. What were your recommendations
5 for this area?

6 A. I recommended that the upper layer of
7 topsoil, which is approximately one foot
8 deep, be removed from the area and then I
9 indicated that there was an additional area
10 that was, I called it, the plow zone that was
11 loose and relatively soft. I indicated that
12 it needed to be undercut and recompacted or
13 filled with another fill material.

14 Q. You say here brown to dark brown clay
15 silt materials to the depth of 2.5 feet. Is
16 that what you're referring to?

17 A. Yes.

18 Q. Would you classify that as a suitable
19 material to build on or is it unsuitable
20 material to build on?

21 A. Based on my recommendations in this
22 report and my fill criteria in this report,
23 it is suitable material.

24 THE COURT: Once you rework it;
25 right? You want them to compact it?

1 THE WITNESS: Yes. In this
2 instance what I found was a soft and
3 relatively yielding soil but if you undercut
4 it and recompact it, it is acceptable
5 material.
6 BY MR. CARNEY:
7 Q. Now, after you prepared this report,
8 did you have any further dealings with this
9 project?
10 A. I did go to the site twice after that.
11 Q. What was the reason for you going to
12 the site those two times?
13 A. I believe a representative of
14 Williamson County called me out to the site
15 and they informed me that there was some
16 discussion about whether there was unsuitable
17 soil or suitable soil out at the site and
18 they wanted me to go take a look at it.
19 Q. Was anybody out there? Did you talk
20 to anybody out there on the site?
21 A. Yes. I believe representatives of
22 American Excavators were there.
23 Q. What did you discuss with them?
24 A. We looked at the test pits that were
25 opened up. We looked at the soil that was in

1 the test pits, and I discussed with them
2 about what I thought was suitable and
3 unsuitable and I informed them that the dark
4 brown silty clays in my opinion were suitable
5 for use on the site.

6 Q. Did you find anything different than
7 what was in your soils report?

8 A. Nothing dramatically different, no.

9 Q. Did you find any material that was
10 unsuitable to build on?

11 A. Based by just looking at the soil, I
12 did not find anything that was unsuitable.

13 Q. As far as the topsoil conditions out
14 there, what did you observe as far as the way
15 the topsoil looked, the color of it, how deep
16 it was?

17 A. At what time?

18 Q. Well, let's back up. When you first
19 did your testing.

20 A. I believe I found somewhere around six
21 to eight inches of topsoil on the site.

22 Q. Is that on the whole site?

23 A. Where I took the borings, that's where
24 I found that.

25 Q. Is that going to be anywhere in your

1 report where you did your borings?

2 A. Yeah, I believe there is a borings
3 location plan at the back of the report
4 before the boring logs. That would be it.

5 Q. If you could, just turn over to that
6 page, diagram at the back. In the appendix
7 to your report, it is the second drawing.

8 How do you do these borings? What equipment
9 do you use?

10 A. We use a truck-mounted drill rig and
11 use a powered auger to drill into the soil
12 and then we sample with a -- there is a
13 description of it in here, but it is called a
14 split barrel sample. It is a split spoon and
15 we drive it into the ground with a 140 pound
16 hammer and then remove it.

17 Q. I'm looking at one here. It looks a
18 little different to me. It says HAP. It is
19 in the corner of the building in the parking
20 lot.

21 A. Yeah.

22 Q. Tell us what that is.

23 A. That is a hand auger probe. As
24 described in the report, we performed that
25 using just hand auger techniques. You turn

1 it by hand. It may be similar to digging a
2 post hole, but we used that in that
3 particular area because the garden area was
4 soft and yielding and we were concerned about
5 getting our drill rig stuck and having to
6 have a bulldozer come in and pull it out so
7 we performed a hand auger there.

8 Q. You could visually see the garden area?

9 A. Yes, I could. I think it was in
10 turnips at the time.

11 Q. Do you still feel your soils report
12 accurately depicts the soils condition on
13 that site?

14 A. Yes, I do.

15 Q. And that's even after your visit, two
16 visits in the summer of '99?

17 A. Yes.

18 MR. CARNEY: I don't have any
19 further questions, Your Honor.

20 THE COURT: All right.

21 MS. GOODSON: I just have a few.

22

23 CROSS-EXAMINATION

24 QUESTIONS BY MS. GOODSON:

25 Q. Mr. Snyder, I'm Christina Goodson. I

1 met you on a prior occasion?

2 A. Yes.

3 Q. In your report, is there a particular
4 section on earth work recommendations on Page
5 9?

6 A. Let me check. Yes, there is.

7 Q. On Page 10, don't you specifically
8 talk about scarifying within that section? I
9 think it is the first bullet point there.

10 A. Yes, there is.

11 Q. Can you explain what scarifying is to
12 the Court? I think that's a new term for us.

13 A. In layman's terms, it would be the
14 equivalent of aerating or discing that upper
15 twelve inches, to go ahead and loosen it up
16 so that you could effectively compact it
17 after that.

18 Q. Do you remember attending a meeting at
19 the county complex on April 7 of 2000?

20 A. Yes, I do.

21 Q. Do you have the meeting notes there in
22 front of you from that meeting?

23 A. Yes, I do.

24 Q. Reading the first page of the meeting
25 notes there, does that accurately reflect

1 your understanding of what was discussed at
2 that meeting?

3 A. Yes, it does.

4 MS. GOODSON: Your Honor, at this
5 time I'd like to move that as the
6 next-numbered exhibit.

7 (Exhibit No. 25 was marked.)

8 BY MS. GOODSON:

9 Q. From those meeting notes, can you tell
10 me what was your understanding of the outcome
11 of that meeting?

12 A. Based on the notes, there wasn't a
13 whole lot of outcome from it but I know it
14 was discussed about the claim for extra
15 payment for the extra removal and replacement
16 of "unsuitable" soils.

17 Q. Do you remember the county's position
18 being expressed at that meeting?

19 A. I believe it was expressed as, based
20 on contractual documents, they didn't feel
21 that they should have to compensate the
22 contractor for that.

23 Q. You as a participant at that meeting
24 understood clearly that the county was not
25 going to compensate them for that extra

1 material?

2 A. That's what I felt their opinion was,
3 yes.

4 Q. American Excavators claims to have
5 excavated 13,500 cubic yards of unsuitable
6 material from this site. Does that seem
7 logical to you?

8 A. It doesn't seem logical, no.

9 Q. Could you explain?

10 A. That's a tremendous amount of
11 material, and based on what I know about the
12 site, the majority of the material out there
13 was suitable so there wouldn't have been a
14 cause for removing it.

15 MS. GOODSON: Thank you.

16 THE COURT: All right. Mr.
17 Panther?

18

19 CROSS-EXAMINATION

20 QUESTIONS BY MR. PANTHER:

21 Q. We haven't met before. My name is
22 Todd Panther. I represent American
23 Excavators. We've heard that when somebody
24 from GT&E went out to the site to look at the
25 soil conditions, that person told the people

1 from American Excavators that what they were
2 looking at is what dumb southern boys call
3 topsoil. Was that you that said that?
4 A. I believe I was at the site.
5 Q. And was it you that said that to the
6 American Excavators representatives?
7 A. No, I did not say that.
8 Q. Take a look at your report, Exhibit
9 No. 1.
10 A. Yes.
11 Q. Now, I think that your testimony is
12 that, based upon the report, you think it is
13 unlikely that there was 13,500 cubic yards of
14 unsuitable material removed; right?
15 A. Yes, sir.
16 Q. Do you typically include a
17 qualification section of your report?
18 A. I believe all the geotechnical
19 engineers working in Middle Tennessee include
20 one.
21 Q. Including this one?
22 A. Including this one.
23 Q. Can you find the qualification section
24 for me, Page 11?
25 A. Yeah.

1 Q. In fact, in your report, what you were
2 saying is except what's specifically shown in
3 the borings that you took, you're not making
4 any recommendations as to any other area of
5 the site; isn't that right?

6 A. Yes, that's the industry standard.

7 Q. You took twelve borings; right?

8 A. Yes.

9 Q. The diameter of each boring was what?

10 A. Approximately six and three-quarter
11 inches.

12 Q. Six and three-quarter inches. What's
13 the area of this site?

14 A. I don't know. It is obviously a few
15 acres.

16 Q. Okay. So of the few acres that this
17 site represents, you've looked at only a
18 fraction of a percent, haven't you?

19 A. True.

20 Q. And you stand behind your report only
21 to the extent of the very fraction of a
22 percent that's represented in those boring
23 holes; isn't that right?

24 A. Basically.

25 Q. Now, when you observed the test pits,

1 you didn't take any test samples from the
2 pits, did you?

3 A. I believe I took one soil sample and I
4 can't remember if it was the first day I was
5 out there or the second day.

6 Q. But your comments concerning whether
7 the soil in the pits was suitable or
8 unsuitable, I think you said, was based upon
9 your visual observations; is that right?

10 A. I did say that.

11 Q. Now, with regard to what occurred on
12 site between American Excavators and RCR, you
13 have no actual knowledge of what directives
14 RCR gave American Excavators, do you?

15 A. I only have knowledge of the two times
16 I was out there.

17 Q. So if RCR was directing American
18 Excavators to remove material that you
19 believe is suitable, you have no way --

20 A. I have no knowledge of that either
21 way.

22 MR. PANTHER: Thank you, Mr.
23 Snyder.

24 MS. GOODSON: One more, Your
25 Honor.

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FURTHER CROSS-EXAMINATION

QUESTIONS BY MS. GOODSON:

Q. Isn't it true that you did go out there and do your twelve borings and after you did go out there, the entire site was stripped and you could see the material that had been exposed on the site, couldn't you?

A. Yes, I could, and I could see the material in the test pits. I believe that's why they dug them.

Q. So then you could make a recommendation based on your --

A. Yes. And my recommendation based on my report and my visual observations and actually afterwards the tests that I took, the sample that I took and the test results, my recommendation was that it was suitable material.

MS. GOODSON: That's all, Your Honor.

MR. PANTHER: Nothing further.

THE COURT: Mr. Snyder, thank you.

(Witness excused.)

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MR. CASHION: We have no more
witnesses for today.

(The proceedings were adjourned
at approximately 8:00 p.m.)

Vol. IX

FILED
ELAINE B. BEELER
CLERK & MASTER

2002 AUG 21 PM 3:52

IN THE CHANCERY COURT
FOR WILLIAMSON COUNTY, TENNESSEE

ENTERED _____

AMERICAN EXCAVATORS, LLC,

BOOK _____ PAGE _____

Plaintiff,

vs.

NO. 27213

RCR BUILDING CORPORATION and
FIREMAN'S FUND INSURANCE
COMPANY,

M2002-01757

FILED

OCT 11 2002

Clerk of the Courts

Defendant/
Third-Party Plaintiff,

vs.

WILLIAMSON COUNTY, TENNESSEE,

Third-Party Defendant.

VOLUME III

Transcript of Proceedings

Taken before the
Honorable Robert E. Lee Davies

February 1, 2002

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1 P R O C E E D I N G S

2 THE COURT: All right. RCR has
3 got a few more witnesses?

4 MR. CASHION: Yes, sir, two more.

5 THE COURT: Who's your next
6 witness?

7 MR. CARNEY: Your Honor, we'd like
8 to call Don Stover.

9 THE COURT: Don Stover.

10

11 DONALD STOVER

12 having first been duly sworn, was examined and
13 testified as follows:

14

15 DIRECT EXAMINATION BY MR. CARNEY:

16 Q. Mr. Stover, if you would introduce
17 yourself to the Court. Tell him your full
18 name.

19 A. My name's Donald Stover.

20 Q. Where do you live, Mr. Stover?

21 A. I live in Nashville.

22 Q. Where are you currently working?

23 A. At Carden Company.

24 Q. What do you do for Carden Company?

25 A. I'm a project manager.

1 Q. How long have you been in the
2 construction business?

3 A. 42 years.

4 Q. Just give us a little bit of history
5 of where you've worked in the past.

6 A. Well, when I got out of the Marine
7 Corps, I started out in the millwork business
8 and was in that for a number of years. Then I
9 got out of that and went to work for Hardaway
10 Construction Company, was there for a number
11 of years.

12 Q. What did you do for Hardaway?

13 A. I was a special projects coordinator,
14 which entailed -- we were developing
15 multifamily projects throughout the state.
16 We'd buy property, put a package together and
17 present it to the State, and then they would
18 select one of the contractors to do the
19 project.

20 Q. After you left Hardaway, where did you
21 go then?

22 A. Then I went to Mulligan down in
23 McMinnville.

24 Q. What did you do for them?

25 A. There I was a project manager and

1 later became president of Mulligan.

2 Q. How long were you president?

3 A. Until the FDIC thought that the

4 company need not be in business. That was

5 when the butcher -- they closed up the butcher

6 banks, and they were involved in that.

7 Q. Where did you go after that?

8 A. RP Industries.

9 Q. How long were you with RP Industries?

10 A. Approximately four years.

11 THE COURT: That's the Parks,

12 right?

13 THE WITNESS: Right.

14 BY MR. CARNEY:

15 Q. How long were you with them?

16 A. Approximately four years.

17 Q. What were your responsibilities there?

18 A. I was project manager.

19 Q. And then after you left RP?

20 A. I was with Heery International.

21 Q. What did you do for them?

22 A. Monitored state projects.

23 Q. Construction projects?

24 A. Right.

25 Q. And then what was next?

1 A. Then I was with RCR.

2 Q. How long were you with RCR?

3 A. Approximately four years.

4 Q. What was your title and job
5 responsibilities with RCR?

6 A. I was a project manager there, and
7 then later a senior project manager.

8 Q. Just let us know a few of your
9 responsibilities as a project manager on a
10 typical project.

11 A. Well, generally, at RCR, it was
12 managing the projects. We would write the
13 subcontracts and deal with the subcontractors
14 and the owners.

15 Q. Did you handle any kind of payment
16 issues?

17 A. We would approve the payment requests,
18 yes.

19 Q. And I guess submit that back to the
20 owner of the project?

21 A. Correct.

22 Q. Are you familiar with the Williamson
23 County community service building project?

24 A. I am.

25 Q. What was your role on that project?

1 A. I was project manager.

2 Q. When did you first take over as

3 project manager on that project?

4 A. I don't remember the time frame, but

5 it had already started when I took it over.

6 Q. What stage do you recall it being in?

7 A. They were in the grading and --

8 putting in utilities and grading at the time.

9 Q. Had all the contracts with the

10 subcontractors been entered into at that

11 point?

12 A. Most of the major contracts had

13 already been written.

14 Q. Now, on that Williamson County

15 project, as a project manager, did you review

16 the contract between RCR and the county?

17 A. I don't know that I actually saw the

18 contract, that is, the county's contract.

19 Q. With RCR?

20 A. Right.

21 Q. Were you familiar with the subcontract

22 between RCR and American Excavators?

23 A. Yes.

24 Q. I think you said -- is that one of

25 them that was already written when you took

1 over as project manager?

2 A. That's correct.

3 Q. Do you recall what that contract, the
4 subcontract, now, said about undercutting on
5 it?

6 A. Not specifically, no.

7 MR. CARNEY: If I could, Your
8 Honor, I'd like to hand Mr. Stover what's
9 previously been marked as Exhibit 5.

10 (Exhibit passed.)

11 BY MR. CARNEY:

12 Q. Mr. Stover, they've handed you a
13 subcontract that's already been admitted into
14 evidence. And if you could, Mr. Stover, just
15 turn over to Page 3, to what is the last
16 paragraph there. It's No. 20. If you could
17 just look at that and see if that refreshes
18 your memory.

19 A. Okay.

20 Q. What is that paragraph referring to?

21 A. It's referring to any undercutting,
22 refilling of areas due to unsuitable soils.

23 Q. Now, when we talk about undercutting,
24 could you tell the Court what that term means?

25 A. Well, undercutting is generally taking

1 the grade down to subgrade, so that under the
2 pad, for example, you would be eight inches
3 below the finished grade and that would allow
4 you to put your gravel and your concrete to
5 get back up to your floor elevation.

6 Q. So is undercutting above or below
7 subgrade?

8 MR. PANTHER: Objection to
9 leading.

10 THE WITNESS: Below.

11 THE COURT: Actually I think
12 if you pose an alternative, it wouldn't be
13 leading. I'll watch him, how he emphasizes
14 the alternative, though.

15 MR. PANTHER: Thank you.

16 BY MR. CARNEY:

17 Q. I'm sorry. What was your answer?

18 THE COURT: He said it was below
19 subgrade.

20 BY MR. CARNEY:

21 Q. Could you explain to us -- it says
22 here, "If there's any additional undercutting
23 and refilling of areas." Could you explain
24 how the process happens when they do that, the
25 excavator?

1 A. Well, normally if we would encounter
2 unsuitable soil areas, we'd notify the testing
3 lab and they would usually monitor and tell us
4 what to remove and to what depth. They
5 generally dictate what we do to replace that.

6 Q. When you say "unsuitable soil," could
7 you tell us what that is?

8 A. Well, that would be a soil that's not
9 compactable.

10 Q. And who makes that determination?

11 A. Usually the soils engineers.

12 Q. On the big picture, how would you say
13 that this project ran?

14 A. Well, it was an extremely good
15 project, in that I don't know that we had any
16 problems throughout the whole project,
17 anything that was an issue. Al Thomas, the
18 architect, would generally come by at 6:30 or
19 so in the morning, and if he had any questions
20 about anything, we'd discuss it on the phone.
21 But outside of that, I can't think of anything
22 that was an unusual problem. I think when the
23 project was finished, we had a few glitches in
24 our mechanical system, but that's normal.

25 Q. Now, how often, as a project manager,

1 were you on the site?

2 A. Oh, I was probably there once a month,
3 depending -- you know, if there was some
4 reason for me to be there other than that, I
5 would be there.

6 Q. When was the first time you became
7 aware that American Excavators was questioning
8 the soil conditions on the site?

9 A. Well, I guess the first time was when
10 we had some areas that would not compact. And
11 at that time is when we had the soils people
12 come in and check them and give us the
13 designated areas to replace.

14 Q. Do you remember what time frame that
15 was?

16 A. No.

17 Q. Have you done a couple of projects
18 since then?

19 A. Several.

20 Q. Do you remember having any
21 conversations with anybody from American
22 Excavators?

23 A. Yes. I believe we had -- excuse me,
24 but I forgot --

25 Q. Mr. Parker?

1 A. Parker. Excuse me. In fact, I didn't
2 recognize him. He had called me one day and
3 we met out at the project with Anthony and
4 Mr. Parker.

5 Q. Now, was this during construction or
6 was this after construction?

7 A. This was at the end of the project, if
8 I remember correctly.

9 Q. How about during, while the grading
10 was being performed?

11 A. I'm not aware of any times.

12 THE COURT: With Mr. Parker or any
13 other representative of American Excavators?

14 THE WITNESS: I'm not comfortable
15 saying with anybody. I may well have. It's
16 been several years ago.

17 THE COURT: All right.

18 THE WITNESS: I'm not disputing
19 whether I did or didn't. I just don't
20 remember.

21 BY MR. CARNEY:

22 Q. Now, do you remember a meeting on June
23 30th?

24 A. No, I don't.

25 Q. How about if we hand you what is

1 Exhibit 19, which are some meeting notes from
2 a meeting on June 30th, and see if that helps
3 us.

4 A. I'm sure it would do better than my
5 memory would.

6 (Exhibit passed.)

7 BY MR. CARNEY:

8 Q. At the top of that, I believe you're
9 one of the people listed as being at the
10 meeting.

11 A. Correct.

12 Q. So if you could just take a second and
13 look at that and see if that helps us.

14 A. (Pause.) Okay. I believe this
15 was the meeting where we met with the soils
16 engineer to discuss some areas in the project
17 that were not compacting properly and what we
18 would do for the fix.

19 Q. Do you remember where those areas
20 were?

21 A. I believe there were four areas, and
22 if I remember correctly, most were in the
23 parking areas. At some time I think they gave
24 us an area showing -- or a drawing showing
25 those areas that were required.

1 Q. When you say "they" gave you
2 drawings --
3 A. The testing lab.
4 Q. Now, what was the result of that
5 meeting as far as what action was going to be
6 taken?
7 A. We would notify the testing lab of
8 unsuitable areas and then quantitize and price
9 those areas.
10 Q. Do you remember after that meeting
11 getting a letter from Harley Ezell?
12 A. No. Not that I didn't, but...
13 MR. CARNEY: Your Honor, I'd like
14 to pass the witness what's been previously
15 marked as Exhibit 14.
16 (Exhibit passed.)
17 BY MR. CARNEY:
18 Q. I'll just let you look at that,
19 Mr. Stover. I know it's been a long time.
20 A. I didn't realize Mr. Ezell was at the
21 meeting. Okay.
22 Q. Did you receive that letter?
23 A. Yes, obviously I did.
24 Q. What does that say about the plan from
25 July 1st on?

1 A. Apparently American Excavators had
2 removed some soils that they were not going to
3 charge the county for, and he was giving us a
4 rough estimate of what he thought the
5 quantities were.

6 Q. Okay. And how were you going to
7 handle the undercutting from this point on?

8 A. There again, we'd have the -- I
9 believe it was PSI that was going to be the
10 soils people that would determine those areas
11 and give us the size of the areas to remove.

12 Q. Now, was there any other procedure
13 that was followed after that meeting, or do
14 you know if that's the one that was followed?

15 A. I don't remember if there was any
16 deviations or changes.

17 Q. Were you on the site after that, I
18 guess in July, or do you remember? I know
19 that's a long time ago.

20 A. I could very well have been. More
21 than likely I was.

22 Q. As a project manager, Mr. Stover, do
23 you communicate with the architect on the
24 projects?

25 A. I do.

1 Q. Did you on this particular project?

2 A. I did.

3 Q. And do you recall who the architect
4 was?

5 A. Al Thomas.

6 Q. Mr. Stover, we're going to hand you a
7 copy --

8 MR. CARNEY: And, Your Honor, I
9 apologize. It seems like I'm missing one copy
10 of this document.

11 THE COURT: That's fine.

12 (Exhibit passed.)

13 BY MR. CARNEY:

14 Q. Mr. Stover, do you recognize the
15 document that's just been handed to you?

16 A. I do.

17 Q. Do you see that there's a stamp or
18 something at the top? Could you tell us what
19 that says or what that means?

20 A. That's when it was received at RCR's
21 office.

22 Q. Did you get a copy of this letter?

23 A. I'm sure I did.

24 Q. What are we talking about in this
25 letter? What was the purpose of it?

1 A. I guess Al's just explaining the
2 specifications and, it looks like, saying that
3 the subcontractors had a chance to investigate
4 the site.

5 Q. Now, I'm looking at that first
6 sentence, Mr. Stover, and it says, "As a
7 follow-up" -- well, it's not into evidence
8 yet. If you could just read that first
9 sentence again.

10 A. "As a follow-up to our telephone" --

11 Q. Just to yourself. I'm sorry.

12 A. (Pause.)

13 Q. My question is: Is that sentence
14 referring to above subgrade or below subgrade,
15 or do you know?

16 A. Well, they're referring to unsuitable
17 soils, so it could be below subgrade.

18 Q. Do you recall how RCR or American
19 Excavators, as a subcontractor, was going to
20 be compensated for unsuitable materials or if
21 they were?

22 A. Well, it was my understanding that the
23 areas that the geotech lab designated --

24 MR. PANTHER: Your Honor, if I
25 could, he said his understanding. I'm not

1 sure where he's getting his understanding, so
2 if we could find out so he's not testifying to
3 hearsay, I would appreciate it.

4 THE COURT: Could you be a little
5 more specific on where you're getting this
6 understanding? Is this coming from something
7 you've read, something someone's told you? If
8 so, who? When you say it's your under-
9 standing, that doesn't -- tell me where that
10 comes from.

11 THE WITNESS: I guess I was just
12 generalizing. It wasn't something I heard.

13 THE COURT: Okay.

14 MR. PANTHER: Let me object. If
15 he doesn't have actual knowledge, then he's
16 not permitted to testify as to what the
17 procedure was.

18 THE COURT: All right. That was a
19 specific question, as I took it, with regard
20 to this project, not as to the usual operation
21 or the normal course of dealings. Can you
22 answer the specific question?

23 THE WITNESS: Would you ask the
24 question again?

25 MR. CARNEY: We can move on, Your

1 Honor.
2 BY MR. CARNEY:
3 Q. You did receive this letter; is that
4 correct?
5 A. I did.
6 MR. CARNEY: Your Honor, I'd like
7 to move this letter into evidence at this time
8 as the next marked exhibit.
9 THE COURT: All right.
10 (Exhibit No. 26 was marked.)
11 BY MR. CARNEY:
12 Q. Let's move along a little bit. I'm
13 going to hand you another document -- and I do
14 have enough copies of this one -- and ask you
15 if you recognize this, Mr. Stover.
16 A. It's a pay request.
17 Q. It's a pay request from whom?
18 A. From American Excavators.
19 Q. And what number was this one?
20 A. This was No. 1.
21 Q. Okay. What was the date that RCR
22 received this letter?
23 A. Looks like August 2nd.
24 Q. I'm looking at a box in the center of
25 it. Could you tell us what that is?

1 A. Well, when they receive it, this
2 is stamped, and then it goes into a super-
3 intendent's file for them to review and
4 initial or approve.
5 Q. Where does it go then?
6 A. Then it comes to me.
7 Q. Whose initials are these in this --
8 I'm talking about, now, this second box, the
9 one right in the middle of the page?
10 A. The second one is my initials.
11 Q. Okay. So did you review this pay
12 application?
13 A. Yes.
14 Q. Do you know if you approved this pay
15 application?
16 A. I did.
17 Q. When you approved this pay application
18 -- could you kind of explain to us what your
19 process is for reviewing them and going about
20 approving them?
21 A. Generally the pay requests are
22 reviewed by the superintendent telling us that
23 the work in place is adequate to the amount of
24 money that's requested for their draw. If we
25 had had a \$100,000 pay request and the person

1 had done 25 percent of that, then we obviously
2 would not approve anything above \$25,000. But
3 it's generally just based on value of work in
4 place so that we're sure we have enough money
5 to complete the project with the money
6 allotted for that specific item.

7 Q. Okay. And this one also, I see, says
8 Pay Request No. 1 is referenced.

9 A. Correct.

10 Q. Now, what is the status of that pay
11 request at this time?

12 A. In reference to --

13 Q. Has it been approved or not approved?

14 A. Oh, it's been approved.

15 Q. By whom?

16 A. By myself and the superintendent.

17 Q. What about the county at this point,
18 what's the procedure for giving these pay
19 applications to the county?

20 A. Well, there again, accounting will
21 take and verify that the monies to pay the
22 subcontractor are there.

23 Q. Now, who has the approval authority on
24 pay applications in regards to RCR and the
25 county?

1 A. Besides myself?

2 Q. Yes, sir.

3 A. You mean is there someone else?

4 Q. Correct.

5 A. I guess accounting, if they had -- if

6 I'd approved something and there wasn't enough

7 money there, they would probably bring it back

8 to me and have me look at it again to see...

9 MR. CARNEY: Your Honor, at this

10 time I'd like to move that document into

11 evidence as the next exhibit.

12 THE COURT: I believe it already

13 is an exhibit.

14 MR. CARNEY: Your Honor, the pay

15 application is. It is not with the stamp

16 where it was received from RCR.

17 THE COURT: Okay. That's fine.

18 (Exhibit No. 27 was marked.)

19 BY MR. CARNEY:

20 Q. Mr. Stover, we're going to hand you

21 another document and ask you if you recognize

22 that one.

23 A. I do.

24 Q. What is it?

25 A. It's also a pay request.

1 Q. And it's got another one of those
2 boxes like the last pay request did.
3 A. Correct.
4 Q. Are those your initials or not there?
5 A. They are.
6 Q. So when you got this and it had your
7 initials on it -- could you tell us what
8 you've approved again?
9 A. Apparently I'd approved the pay
10 request.
11 Q. And then for how much money?
12 A. 146,468.
13 Q. And you just previously testified that
14 you based that last pay application on work in
15 place. Is that the same procedure you used on
16 this one?
17 A. Correct. Yes.
18 Q. Now, if you look under Statement of
19 Contract Account, under No. 2 it has Change
20 Orders 1, 2 and 3. Do you see that?
21 A. Correct.
22 Q. The last pay application, 1, from
23 American Excavators that we just looked at
24 referenced Change Order No. 1.
25 A. Correct.

1 Q. Can you tell us why 1 is on here
2 again?

3 A. That, I don't know. I don't know
4 whether they just listed all their change
5 orders or --

6 Q. Are you paying that one again?

7 A. Well, again, the amount of payment is
8 based on the work in place and not so much --
9 accounting will keep up the with the change
10 orders, generally, to make sure that they're
11 not billing twice for anything.

12 Q. Okay.

13 MR. CARNEY: Your Honor, I'd like
14 to move that pay application into evidence as
15 the next marked exhibit.

16 (Exhibit No. 28 was marked.)

17 BY MR. CARNEY:

18 Q. Mr. Stover, I'm going to hand you
19 another document.

20 A. This is worse than working.

21 Q. There is an end to it. I'd ask you if
22 you recognize that.

23 A. This is Pay Request No. 3.

24 Q. From American Excavators?

25 A. Correct.

1 Q. Now, this one has that same box.
2 Could you tell us when you received it?
3 A. I can't read the received date on
4 there. It looks like it's -- well, I can't.
5 Q. Can you see the one in the box below
6 where you initialed? Those are your initials,
7 correct?
8 A. Right. Looks like 9/4.
9 Q. And those are your --
10 A. I'm guessing.
11 Q. And are those your initials?
12 A. They are.
13 Q. Now, this one also references Change
14 Orders 1, 2 and 3. Can you tell us why
15 they're on there again?
16 A. I'm not sure why they're on there.
17 Q. Now, this one has some handwritten
18 notes on there. Do you recognize those or
19 know where those came from?
20 A. Are you still talking about this one
21 that has --
22 Q. Pay Application 3.
23 A. It appears that I had made a mistake.
24 Q. How so?
25 A. Apparently I had approved too much

1 money, it looks like.

2 Q. Okay. So what did you do?

3 A. I changed it.

4 Q. So how much did you approve for

5 payment at this point?

6 A. Well, here again, you may have -- it

7 looks like about \$1,857. I can't read the --

8 Q. I think it says 1,857.60 underneath

9 here. Does that sound about right?

10 A. Well, someone had written it more

11 clearly below.

12 MR. CARNEY: At this time, Your

13 Honor, I'd like to move Pay Request No. 3 into

14 evidence.

15 THE COURT: All right. 29.

16 (Exhibit No. 29 was marked.)

17 THE COURT: So where they were

18 asking for \$46,114, when you back and reviewed

19 the overpayment, they were really only due

20 \$1,857?

21 THE WITNESS: Correct.

22 THE COURT: All right.

23 BY MR. CARNEY:

24 Q. Let's just back up one second, because

25 I'm a little confused on Pay Application No.

1 3. You testified that you looked at the
2 amount of work in place; is that correct?

3 A. Correct.

4 Q. And what do you compare that number
5 with?

6 A. The amount of work on the project
7 that's been done to date.

8 Q. And you compare that with your
9 contract prices?

10 A. Right.

11 Q. So when you got to Pay Request No. 3,
12 could you explain to us what happened?

13 A. The only thing I can say is apparently
14 -- and I don't know exactly what prompted
15 that change, but obviously there was something
16 that wasn't right, so I went back and
17 corrected it. I don't remember the details of
18 why or what caused me to do that.

19 Q. Okay.

20 THE COURT: That process doesn't
21 work with a change order because that's not a
22 set price; that's additional price?

23 THE WITNESS: Well, it's added to
24 their contract amount, correct.

25 THE COURT: But what you're saying

1 is if their lump sum price is \$100,000 and the
2 pay application comes in, you go and see the
3 percentage of work that's been done and then
4 you'll pay that according to the lump sum
5 price?

6 THE WITNESS: Well, that's true,
7 but the change orders also become a part of --

8 THE COURT: Then if there's a
9 change order, you look to see if the work's
10 been done pursuant to the change order,
11 right?

12 THE WITNESS: Most likely, that's
13 correct.

14 THE COURT: And if it has been
15 done, then you approve the change order for
16 payment.

17 THE WITNESS: That would be the
18 normal procedure.

19 BY MR. CARNEY:

20 Q. Mr. Stover, when you're reviewing
21 these pay applications, do they have change
22 orders attached to them or do they just come
23 in as a pay application?

24 A. Normally, if there's a change order,
25 we will submit it to the owner for his

1 approval.

2 Q. So when you receive a change order
3 from the subcontractor, what do you look for
4 on that change order?

5 A. Well, normally we always try to make
6 sure that it's been approved by the owner.

7 Q. Do you look for any kind of signatures
8 on the change order?

9 A. The sub's change order or the owner?

10 Q. The sub's.

11 A. Well, I don't know that that would be
12 an issue as long as we had an owner's change
13 order approved.

14 Q. Okay. Does a subcontractor sign his
15 change orders?

16 A. He would submit the change order. I
17 don't know what you mean by "sign." The
18 approval process would be that once the
19 architect and the owner had approved it, then
20 we would file it and pay him when he submitted
21 it.

22 Q. Okay. And we'll talk about this a
23 little bit later. I think I'm getting ahead
24 of myself. I think they've handed you another
25 document, if we're on the right one. Could

1 you tell us what that document is?

2 A. That was a change order that I had

3 submitted to be approved.

4 Q. So that's an RCR change order?

5 A. Correct.

6 Q. And who are you submitting that to?

7 A. To the architect and to the owner.

8 Q. Okay. Now, under No. 1, could you

9 tell us what that change order is that you're

10 submitting?

11 A. That was for removal of unsuitable

12 material.

13 Q. And it says PSI. What does that

14 indicate?

15 A. That's Pittsburgh Testing. That's the

16 geotech.

17 Q. And how much was that request for?

18 A. \$28,980.

19 Q. Now, do you remember American

20 Excavators' change orders on this project?

21 A. No.

22 Q. Okay. If you want to -- you should

23 have it in front of you. If you'll look back

24 on, I believe it was Pay Application No. 2, it

25 should have some change orders that were

1 submitted from American Excavators attached to
2 it.
3 A. Okay.
4 Q. So could you tell us what that 28,980
5 is referring to as far as American Excavators'
6 change orders, which number?
7 A. That's their Change Order No. 2.
8 Q. And on No. 2, RCR's request for a
9 change order to the county, could you tell us
10 what that item is?
11 A. The other two?
12 Q. Yes, sir.
13 A. Those are apparently American's Change
14 Order No. 1.
15 Q. Okay. And how much were those for?
16 A. One was for 6,200 and the other was
17 for 1,800, for a total of, I guess, \$8,000.
18 Q. And that's Change Order No. 1 from
19 American Excavators?
20 A. Correct.
21 Q. Okay. Now, it has a little
22 handwritten note on that request from RCR.
23 It says "Did not pay." Do you recognize that
24 or know anything about who wrote that?
25 A. Where it says "Did not pay"?

1 Q. Yes, sir. I wouldn't swear to it, but
2 that's probably my writing.

3 MR. PANTHER: Let me object to the
4 speculation.

5 THE COURT: I think that goes to
6 the weight. I'll admit it.

7 THE WITNESS: I would think I did,
8 but I'm --

9 BY MR. CARNEY:

10 Q. Do you know if that would have been --
11 well, this is probably a bad question. If you
12 can't answer it, that's fine. But when you
13 submitted this to Williamson County, would
14 that have been on there; do you know?

15 A. You mean "Did not pay"?

16 Q. Yes, sir.

17 A. I would doubt that, because if I
18 remember it correctly, they didn't pay that
19 removal or replace of structural fill of 400
20 linear feet.

21 Q. I guess my question is, though, when
22 you submitted this -- did you submit this
23 request for a change order to Williamson
24 County?

25 A. I did.

1 Q. You submitted it in what amount? How
2 much did you submit it for?
3 A. For the total amount.
4 Q. And what was that?
5 A. Well, the total amount was \$40,678.
6 Q. At the bottom, is that your signature?
7 A. It is.
8 Q. Okay. So when did you submit this, I
9 mean, roughly? I see your signature's dated.
10 A. Looks like January 14th.
11 MR. CARNEY: Your Honor, I'd like
12 to move this document into evidence as the
13 next marked exhibit.
14 THE COURT: Okay. That would be
15 January 14th, 2000, right, Mr. Stover?
16 THE WITNESS: Correct.
17 (Exhibit No. 30 was marked.)
18 BY MR. CARNEY:
19 Q. Mr. Stover, I'm going to hand you
20 another document. I'm trying to keep these
21 straight because I know it gets a little
22 confusing. And when you get it, if you could
23 just look at it and tell me what that document
24 is.
25 A. This is also a change order.

1 Q. Now, whose change order is this?
2 A. This is Williamson County's change
3 order to us.
4 Q. To RCR?
5 A. Correct.
6 Q. And what's the date on this?
7 A. January 21st.
8 Q. Okay. Under No. 1, what are they
9 doing at that point?
10 A. They're incorporating the 2,898 cubic
11 yards of unsuitable soil.
12 Q. Does that mean they're approving that?
13 A. Correct. Although it looks like they
14 changed the amount.
15 Q. And what did they change it to?
16 A. Looks like 28,000.
17 Q. Do you know why?
18 A. No.
19 Q. Okay. Now, what's under that, No. 2?
20 A. That's the import of grubbing
21 additional trees, so forth and so on. That
22 was the 6,820 which they approved.
23 Q. Now, if you look back, Mr. Stover, to
24 the previous one, it looked like you requested
25 6,200.

1 A. I did.

2 Q. So they're approving 6,820. Could you

3 tell us what the difference is there?

4 A. You mean the \$600?

5 Q. Yes, sir.

6 A. I mean, I don't know why.

7 Q. Let me ask you this. When RCR submits

8 a change order to the county based on work --

9 or a change order that's been submitted by a

10 subcontractor, does RCR just get back that

11 amount of money, typically, or is there --

12 A. We have a markup that we add to, you

13 know, whatever that amount is. If the sub has

14 a price of \$1,000, we add our markup to that

15 and that becomes the amount that goes to the

16 county.

17 Q. So could that be that difference

18 there?

19 A. That could be.

20 Q. But you're not sure?

21 A. I don't remember the percentage of

22 markups.

23 Q. Okay. Now, was there anything else

24 approved?

25 A. That was the only two items on that

1 one that was approved.

2 Q. Now, we looked at your request for a
3 change order previously, and it had \$1,800.
4 And then that handwritten note that you think
5 you might have written, but you're not sure,
6 that said "Did not pay," was that not on here?

7 A. That was probably done when -- to make
8 note that the county didn't pay us for that
9 \$1,800.

10 Q. Is this your signature at the bottom
11 of this?

12 A. It is.

13 Q. And I guess these other signatures,
14 you can't testify to them, but it looks
15 like --

16 A. Al Thomas, who is the architect. And
17 that's Clint Callicott, I believe.

18 Q. Okay. I'm going to hand you another
19 document. I promise you we're almost through
20 with these.

21 (Exhibit passed.)

22 BY MR. CARNEY:

23 Q. Could you tell us what this one is,
24 Mr. Stover, please?

25 THE COURT: Wait a minute.

1 Something didn't get marked here.

2 MR. CARNEY: I'm sorry. I'd like
3 to move that into evidence, Your Honor. I
4 forgot. It's Exhibit 31.

5 (Exhibit No. 31 was marked.)

6 MR. CARNEY: It's hard to keep
7 these straight, and I'm not making it any
8 easier, I don't think.

9 BY MR. CARNEY:

10 Q. Mr. Stover, could you tell us what
11 they just handed you?

12 A. This is a change order.

13 Q. And whose change order is this?

14 A. This is going to American.

15 Q. RCR's change order?

16 A. Our change order to American
17 Excavators.

18 Q. What's the amount of this?

19 A. We're paying the 28,000 and the 6,820,
20 and I assume those two total up to 34,820.

21 Q. Now, it looks to me like you've passed
22 on that 6,820 that RCR got approved?

23 A. I did.

24 Q. So would that normally be the
25 procedure or should it have been less?

1 A. That's not a normal procedure. I
2 think in that instance we felt American
3 Excavators should have been paid for the pipe
4 that was not shown on the drawings, and that
5 was -- we had given them back our markup to
6 help.

7 Q. Okay. Now, was this change order
8 signed by anyone?

9 A. This one's not, no.

10 Q. Now, to your knowledge, while you were
11 the project manager, was this one paid?

12 A. Best of my recollection it was not
13 paid.

14 Q. Did you have any conversations with
15 anyone from American Excavators about this
16 change order?

17 A. If I remember right, I would have
18 called their office.

19 Q. And what would you have called them
20 for?

21 A. Probably -- if they were asking for
22 money, I was probably telling them I couldn't
23 pay them until I had the signed change order
24 back in my possession.

25 Q. And what did they say in response?

1 A. I don't remember what their response
2 was. I just -- I don't believe they ever
3 signed it, as far as I know.
4 Q. Did you get a reason?
5 A. I can't remember.
6 Q. Okay. And if this had been signed,
7 what would you have done with it?
8 A. We would have paid them.
9 Q. Okay. What was the date on that,
10 Mr. Stover?
11 THE COURT: 1/31/2000.
12 THE WITNESS: Thank you.
13 MR. CARNEY: I'm just trying to
14 get us a time line of where we are in this
15 project.
16 Your Honor, I'd like to move that,
17 before I forget, into evidence.
18 THE COURT: 32.
19 (Exhibit No. 32 was marked.)
20 BY MR. CARNEY:
21 Q. So it looks like, Mr. Stover, we're
22 at least up to January 31st. Did you have
23 any conversations with anyone at American
24 Excavators after that? Not including the
25 discussions we were just talking about in

1 regards to the change order, but did you have
2 any conversations with Mr. Parker or anyone at
3 American Excavators?

4 A. We had a discussion, but I can't tell
5 you when that was exactly.

6 Q. What was that about?

7 A. If I remember correctly, that was --
8 Mr. Parker had some additional charges that he
9 said he hadn't been paid for, I think.

10 Q. Did he tell you what those were?

11 A. It was material he had, I believe,
12 hauled in or off the site.

13 Q. Did he give you any information more
14 specific than that?

15 A. If I remember right, the discussion
16 was that he felt he had some additional monies
17 coming from the county. We obviously couldn't
18 authorize any additional monies. And I think
19 at that time he was asking to meet with the
20 architect and the engineers to tell them his
21 reasoning. You want me to --

22 Q. That's fine. We'll get to that in a
23 second. In looking at the pay requests and
24 the approvals that we just went over, I didn't
25 see Change Order No. 3 in there from American

1 Excavators. Do you know anything about that
2 one?

3 A. If that's the one I'm talking about,
4 that didn't come about until after we were
5 pretty well through with the project.

6 Q. Okay. Let's back up, then. If you
7 would, go ahead and look back over to that Pay
8 Application 2. It's got the change orders in
9 there. I hate to keep referring you back to
10 these.

11 A. Pay Request 2?

12 Q. Yes, sir. I believe that has several
13 change orders attached to it.

14 A. Okay. That has Change Order No. 3 on
15 it.

16 Q. What was that change order?

17 A. I don't remember.

18 Q. Now, was that one ever submitted?

19 MR. PANTHER: I'm sorry, Your
20 Honor. I'm having trouble hearing.

21 THE COURT: Turn that air off.

22 BY MR. PANTHER:

23 Q. Was Change Order No. 3 from American
24 Excavators --

25 MR. PANTHER: I'm sorry, but he

1 gave an answer that I didn't hear.

2 THE COURT: His answer was "I
3 don't remember."

4 THE WITNESS: It's attached to
5 this.

6 BY MR. CARNEY:

7 Q. Do you remember Change Order No. 3 --
8 well, you just testified that you didn't. Do
9 you know if that got submitted to the county?

10 A. I'm not sure whether it was or wasn't.

11 Q. Okay. Let's jump back to -- you just
12 testified that Mr. Parker had contacted you or
13 you had contacted him. I can't remember what
14 you said.

15 A. I believe he had contacted Anthony,
16 and I went out and I think we met at the job
17 site.

18 Q. And he was making a request for --

19 A. For some additional monies, yes, sir.

20 Q. And what did you tell him?

21 A. Well, I told him it would have to be
22 approved through the county or the architect.

23 Q. And what did he say to that?

24 A. He asked for a meeting with Al Thomas,
25 I believe. And if I'm not mistaken, Al Thomas

1 -- they had a meeting.

2 Q. Were you there?

3 A. No, not at that meeting.

4 Q. Did you set that up or do you just

5 know?

6 A. I did.

7 Q. I'm going to hand you another

8 document. I promise I'm near the end of

9 handing you documents. I'm going to ask you

10 if you recognize that document. Just take a

11 second and look at just the front of it. It

12 has some attachments, but the front page is

13 all we're going to worry about right now.

14 A. I guess he's referring to that Change

15 Order 3 for the 16.

16 Q. Now, did you receive this letter?

17 A. I did.

18 Q. Is that about the time frame that

19 we're talking about right now?

20 A. I'm not sure.

21 Q. Okay. And what is your understanding

22 of this request? Is it going to be approved

23 or not approved?

24 THE COURT: You don't have to ask

25 him his understanding. It's pretty clear it's

1 denied.

2 MR. CARNEY: Okay.

3 BY MR. CARNEY:

4 Q. You do remember seeing this letter?

5 A. Yes, I'm sure I did.

6 MR. CARNEY: Your Honor, I'd like
7 to move that into evidence, if I could, at
8 this time.

9 THE COURT: All right.

10 (Exhibit No. 33 was marked.)

11 BY MR. CARNEY:

12 Q. After you received this letter, did
13 you have any further contact with Mr. Parker?

14 A. I don't remember whether this letter
15 came before our conversation about the
16 additional money or not.

17 Q. Do you know if this was the end of it
18 or was there some further --

19 A. No, I don't believe that was the end
20 of it. I think this progressed into some
21 additional meetings.

22 Q. How did those come about? What
23 prompted the meetings?

24 A. I think after Mr. Thomas and Mr.
25 Parker met, I think at that time whatever

1 answer Al Thomas gave wasn't satisfactory to
2 Mr. Parker and he asked to set up a meeting
3 with the county, the architect, the geotech
4 people.
5 Q. He asked you?
6 A. Yes.
7 Q. Did you do that?
8 A. I did.
9 Q. Did you go to that meeting?
10 A. I did.
11 Q. Can you tell us about what was said?
12 A. Just discussing the issues he had on
13 the additional yardage that he felt he was
14 entitled to.
15 Q. Okay.
16 A. The result of the meeting was they
17 felt he wasn't entitled to it.
18 Q. When you say "they," who are you
19 referring to?
20 A. The people in the meeting: the
21 county, the architect, the geotech.
22 Q. So they were approving or
23 disapproving --
24 A. They disapproved.
25 Q. Do you remember when that meeting was?

1 A. No. It was sometime after -- we were
2 either at the finishing stages or through with
3 the project.

4 Q. I'm going to hand you one more
5 document. I promise this is the last one.
6 Actually this document's already -- it was
7 admitted under Exhibit 11. This is Exhibit
8 11, Mr. Stover. If could you tell us what
9 this is.

10 A. It says 12 on the bottom.

11 Q. Just disregard that. This is just a
12 copy.

13 A. That's a pay request.

14 Q. Which number is that one?

15 A. No. 4.

16 Q. And it's from American Excavators?

17 A. It is.

18 Q. And it's to RCR, I'm assuming?

19 A. Correct.

20 Q. What's the date on that one?

21 A. The ending date is -- this billing's
22 through 4/10. I don't see a stamp on here.

23 Q. 4/10 of what year?

24 A. 2000.

25 Q. Do you remember when American

1 Excavators completed the project or if it was
2 completed at this time?

3 A. No, I don't remember the completion
4 date.

5 Q. If you look under Item No. 2, it says
6 "approved change order" and it has "all," and
7 has four listed there. I'm going to ask you
8 the same question. We've looked at the prior
9 two, do you know why they would be on there as
10 an amount again?

11 A. No. The No. 4, I believe, was also --
12 I think, if I remember correctly, that was
13 the --

14 Q. If you want to flip over a couple of
15 pages in that exhibit, you'll see Change Order
16 No. 4. Does that have a date on it?

17 A. 4/12.

18 Q. Okay. When was the first time you saw
19 this change order?

20 A. I'm sorry. I don't remember.

21 Q. Would it have been sometime around
22 that date, 4/12 of 2000?

23 A. I would think so, if it came to our
24 office, but I notice it wasn't stamped either.

25 Q. Do you remember if that change order

1 came into your office with any documentations
2 or other items?

3 A. No, I don't.

4 MR. CARNEY: Okay. Just one
5 second, Your Honor. I think I'm about
6 finished.

7 (Pause.)

8 Your Honor, I think that's all the
9 questions I have for Mr. Stover.

10 THE COURT: All right.

11 Ms. Carson?

12

13 CROSS-EXAMINATION BY MS. CARSON:

14 Q. Good morning, Mr. Stover.

15 A. How are you?

16 Q. Fine. How are you?

17 A. Just fine.

18 Q. Probably be better when you're done
19 here, won't you?

20 A. Right.

21 Q. Mr. Stover, you were not the
22 individual who actually negotiated the
23 contract with the county, were you?

24 A. No. That's correct.

25 Q. I'd like to pass you a copy of what I

1 believe to be the contract between the county
2 and RCR and just ask you if you could identify
3 some signatures, if you would. I believe the
4 signature page falls somewhere before the end
5 of the document. We've got some bonds and
6 things back there. If you'll just flip
7 through until you can find the signature page
8 for the actual contract.

9 A. Is this the one you're referring to
10 (indicating)?

11 Q. Is that the bond signatures,
12 Mr. Stover, or is that the actual contract;
13 can you tell?

14 A. That might be right.

15 Q. Mr. Stover, actually I think I
16 referred you way too far back. If you'll look
17 at about Page 5, I think you'll be able to
18 find those.

19 A. (Pause.)

20 Q. Have you found the signature page yet?

21 A. No. Okay. I found it.

22 Q. Can you tell me who Patrick Riley is?

23 A. He's the owner of RCR Building
24 Corporation.

25 Q. And do you recognize that to be his

1 signature on that document?

2 A. Not that many people would write that

3 poorly.

4 Q. So that's him?

5 A. I would have to say it was.

6 Q. All right. And then do you know who

7 Clint Callicott is?

8 A. Yes, I do.

9 Q. Who is Clint Callicott?

10 A. He's the county executive.

11 Q. If you'll look at the face sheet

12 there, this is the standard form agreement for

13 the Williamson County community services

14 building, is it not?

15 A. It is.

16 MS. CARSON: Your Honor, I would

17 move that into evidence as No. 34.

18 (Exhibit No. 34 was marked.)

19 BY MS. CARSON:

20 Q. Mr. Stover, do you have that document

21 back in front of you?

22 A. I do.

23 Q. If you could look at Page 4 of that

24 document. Do you see where there's a

25 discussion there, in Article 8, of enumeration

1 of the contract documents?

2 A. Enumeration of the contract?

3 Q. Yes, sir.

4 A. Uh-huh.

5 Q. Did this particular contract

6 incorporate, by reference, the general

7 conditions, supplementary conditions and

8 project manual for this project?

9 A. That's what it says.

10 Q. And as project manager for this

11 project, was it your understanding that the

12 specifications and the general conditions were

13 a part of the contract?

14 A. That's normal procedure, yes.

15 Q. As project manager, did you have an

16 opportunity to work with the agents of

17 Williamson County, and in particular with the

18 architects, with regard to this project?

19 A. I did.

20 Q. Did you feel that they were fair and

21 reasonable in their relationship with RCR?

22 A. They were very good.

23 Q. Did you feel that they did what they

24 said they were going to do with regard to this

25 project?

1 A. Always.

2 Q. Did you feel that they kept their
3 commitments with regard to this particular
4 subcontractor, American Excavators?

5 A. I feel that Williamson County did
6 everything they said they would do.

7 Q. Now, do you recall -- and I know you
8 may not recall the specifics of this, but do
9 you recall that there was a dispute among some
10 soils people and some of the individuals out
11 there on the site about whether certain soils
12 were suitable or were unsuitable?

13 A. As I remember, there was a discussion,
14 one was saying one thing and the other
15 something else.

16 Q. And do you recall that there was a
17 process that was put in place for resolution
18 of that dispute?

19 A. I don't remember specifics, but I
20 remember they were discussing it and somehow
21 or other came up with a resolve to it.

22 Q. All right. Mr. Stover, I'm going to
23 pass you a letter dated June 22nd, 1999, and
24 ask you if you recognize that. I guess it's
25 actually a memo and not a letter.

1 A. Right.

2 Q. Is that a memorandum to you from Mike

3 Leonard at Thomas Miller & Partners?

4 A. That's correct.

5 Q. Do you recall receiving that

6 memorandum?

7 A. I don't remember, but I obviously did.

8 Q. You don't dispute that you received

9 that?

10 A. No, no.

11 Q. And was Mike Leonard one of the

12 architects who worked on this particular

13 project?

14 A. He was actually the project

15 architect. He was the one that was there on a

16 more regular basis.

17 Q. Okay. And Al Thomas was the

18 supervising partner of the project; is that

19 right?

20 A. Correct.

21 MS. CARSON: Your Honor, I'd ask

22 to move that document into evidence as Exhibit

23 35.

24 THE COURT: All right.

25 (Exhibit No. 35 was marked.)

1 BY MS. CARSON:
2 Q. Mr. Stover, I want to refer you
3 to that memorandum for just a moment. Mr.
4 Leonard refers to a memorandum from Southern
5 Consulting and subsequent conversations with
6 Eric Snyder from Goodrich Testing, and he
7 states, "It is my understanding that soils
8 uncovered in the area of the parking lot may
9 or may not be suitable as fill material." Does
10 that refresh your memory at all that the
11 dispute was between Southern Consulting and
12 Geotech as to suitability of the soil?
13 A. Well, if I remember correctly, that
14 was when the issue came up.
15 Q. All right. And Mr. Leonard has
16 indicated to you that in order to make a
17 decision resulting in the greatest value to
18 the owner, appropriate tests would need to be
19 performed; is that correct?
20 A. Correct.
21 Q. And he then requested that you, RCR,
22 retain an independent testing agency to run
23 some tests and make that determination; is
24 that right?
25 A. That's correct.

1 Q. And to your understanding was that the
2 reason that PSI was retained?
3 A. That's correct.
4 Q. And PSI did do that testing, did they
5 not?
6 A. Correct.
7 Q. Now, you've already talked a little
8 bit about this June 30th, 1999, meeting among
9 the architect and the --
10 THE COURT: Just a second. Were
11 you moving on from this letter?
12 MS. CARSON: Yes, Your Honor.
13 THE COURT: Who ended up paying
14 for the test done out there by PSI? This
15 letter says the owner will pay the cost of the
16 testing if the material does prove to be
17 unsuitable and you'll pay it if the cost --
18 I'm sorry, you'll pay it if the soil is proven
19 to be suitable.
20 THE WITNESS: I don't remember who
21 paid that.
22 THE COURT: Go ahead.
23 BY MS. CARSON:
24 Q. Mr. Stover, you recall the meeting
25 with the architect, the soils consultant,

1 American Excavators and RCR in June of '99?
2 You've talked a little bit about that
3 already.
4 A. This is the one where we were at the
5 county's office? Is that the same one?
6 Q. Yes, sir. I believe you have the
7 meeting notes there in front of you. If
8 you'll refer to those, I believe --
9 A. Is this in the past stack?
10 Q. Do you have those notes in front of
11 you?
12 A. (Pause.)
13 THE COURT: I believe you do.
14 What exhibit number is that?
15 MS. CARSON: Exhibit 19, Your
16 Honor.
17 THE COURT: Look on the back.
18 THE WITNESS: Okay. I have them.
19 BY MS. CARSON:
20 Q. Do you have those in front of you now?
21 A. I do.
22 Q. Is it correct that one of the outcomes
23 of that June 30th, 1999, meeting was that the
24 parties set up a system for how these
25 unsuitable soils would be verified and

1 measured and removed?

2 A. Correct.

3 Q. And that's described there in that

4 memo?

5 A. It is.

6 Q. Is it described accurately, to the

7 best of your recollection?

8 A. Yes, I think that's...

9 Q. Is that accurate?

10 A. Yes.

11 Q. During that meeting, the process that

12 was worked out was that PSI would be called to

13 the site when there was an issue about

14 noncompactable or unsuitable soil, the soil

15 would be stripped to subgrade or brought to

16 subgrade, proof rolled, and then PSI would

17 make a determination about whether that soil

18 was unsuitable and needed to be removed,

19 correct?

20 A. Correct.

21 Q. And then PSI would also verify and

22 quantify what was being removed; is that

23 correct?

24 A. Well, let me back up. When we found

25 an area that was unsuitable, they would

1 designate the area to be taken out and then we
2 would do that, and then they would come back
3 and verify that that was in fact done.
4 Q. So PSI made the decision about what
5 needed to be removed and then they verified
6 how much was going to be removed?
7 A. Right, for the size of the areas.
8 Q. All right. And coming out of this
9 meeting, was it your understanding that that
10 would be the process for any unsuitable soils
11 identified below subgrade on this project?
12 A. Correct.
13 Q. Now, after that particular meeting,
14 Mr. Ezell, who was in attendance, wrote you a
15 letter. I believe you have that in front of
16 you as well. It's dated July 1st, if you can
17 pull that out. It's Exhibit 14, Mr. Stover.
18 Do you have that in front of you?
19 A. I do.
20 Q. And there Mr. Ezell provides you with
21 an estimate of the additional soil he believes
22 may have to be taken out, doesn't he?
23 A. He does.
24 Q. And what was his estimate?
25 A. If I'm reading it right, looks like

1 \$21,250.

2 Q. Okay. And how many cubic yards?

3 A. 1,700.

4 Q. All right. To the best of your

5 recollection, did Mr. Ezell ever send you a

6 subsequent document changing that estimate?

7 A. For some reason I was thinking that it

8 had gotten changed to \$10.

9 Q. You thought the price got changed?

10 A. Right.

11 Q. I'm asking you did Mr. Ezell ever come

12 back to you and say it's going to be way more

13 than 1,700 cubic yards?

14 A. No.

15 Q. When the parties agreed that the

16 geotechnical engineer was going to be the one

17 to go out and make these determinations that

18 we've talked about, that was consistent with

19 the specifications in the contract, wasn't it?

20 A. Correct.

21 Q. And that is consistent with the

22 standard in the industry, isn't it?

23 A. That is.

24 Q. The specifications in RCR's contract

25 with the county actually provided that

1 undercutting without prior approval by the
2 owner would be at the contractor's risk, did
3 they not?

4 A. I don't remember specifically, but
5 that's a normal verbiage for that type of
6 thing.

7 Q. That would be the custom in the
8 industry, and you don't have any reason to
9 believe that's not the case?

10 A. Generally it would be, yes.

11 Q. And would you agree that the only
12 undercutting that was approved by the owner,
13 Williamson County, in this case was the
14 undercutting that was verified and quantified
15 by PSI?

16 A. Correct.

17 Q. You understood that the county
18 intended only to pay for those soils below
19 subgrade that were identified and verified by
20 the geotechnical engineer?

21 A. That was my understanding.

22 Q. Did the county or the architect ever
23 tell you or, to your knowledge, tell American
24 Excavators that removal of soils in a cut
25 section or above subgrade would be compensated

1 as extras under the contract?

2 A. I don't remember that discussion.

3 Q. In fact, if you'll refer back to

4 Exhibit No. 26 --

5 A. (Pause.)

6 Q. Do you have that in front of you,

7 Mr. Stover?

8 A. I do.

9 Q. In this particular letter, the

10 architect makes it crystal clear that the

11 county will not pay for anything above

12 subgrade, doesn't he?

13 A. He does.

14 Q. And that letter is signed by Ralph

15 Moore who is a project engineer at Thomas

16 Miller; is that correct?

17 A. Yes.

18 Q. And when Thomas Miller sent

19 that letter, they actually attached the

20 specifications and other material from the

21 contract supporting the county's position in

22 that, didn't they?

23 A. It is attached, yes.

24 Q. You understood that the architect was

25 acting as the county's agent for this project,

1 didn't you?

2 A. He is.

3 Q. Now, you mentioned that you thought

4 that American Excavators was entitled to this

5 \$1,800 for fill to replace the RCP pipe?

6 A. Correct. And my reason for that, it

7 wasn't shown on the drawings.

8 Q. Because it wasn't shown on the

9 drawings?

10 A. Correct.

11 Q. Was there anything in the contract

12 that indicated that the contractor would be

13 entitled to additional compensation for

14 something of that nature?

15 A. That, I wouldn't swear to. I don't

16 remember.

17 Q. In fact, are you aware that the

18 contract specifically said that the contractor

19 was responsible for locating all types of

20 drainage material on the property before the

21 commencement of construction?

22 A. The general contractor or the

23 subcontractor?

24 Q. The general contractor.

25 A. I don't remember that.

1 Q. You were not aware of that?
2 A. Well, I don't remember that.
3 Q. Just don't know one way or the other?
4 A. Yeah.
5 Q. Now, we've talked a little bit about
6 the change orders that were submitted to you
7 and then that you submitted to the county.
8 I'd like you to look back at Exhibit 19, which
9 is your request for a change order to
10 Williamson County.
11 THE COURT: Are you sure it's 19?
12 MS. CARSON: 30. I'm sorry. It
13 was our Exhibit 19, Your Honor, when it got
14 introduced. It's Exhibit 30.
15 BY MS. CARSON:
16 Q. Do you have that in front of you?
17 A. I do.
18 Q. Now, you signed this proposed change
19 order on January 17th of 2000, correct?
20 A. Correct.
21 Q. And you would have signed this before
22 you submitted it to the county, wouldn't you?
23 A. Correct.
24 Q. All right. So it was at least January
25 17th of 2000 when you submitted this proposal

1 to Williamson County?

2 A. Correct.

3 Q. Now, the first numbered item in that

4 proposed change order is removal of unsuitable

5 materials as required by the testing company,

6 and then you have in parentheses, PSI, 2,898

7 cubic yards at \$100 a cubic yard, which I

8 assume is a typo and should be \$10 a cubic

9 yard; is that right?

10 A. Correct.

11 Q. When you submitted this to the county,

12 it indicated that these were the unsuitable

13 materials that had been verified by the

14 testing company; is that right?

15 A. It did. It looks like the county owes

16 us a lot more money, don't they?

17 Q. At \$100 a cubic yard, I guess they

18 do.

19 The second item is clear and grub

20 additional trees not shown on construction

21 drawings, including removal from site. Do you

22 see that?

23 A. Correct.

24 Q. And that was for \$6,200?

25 A. Correct.

1 Q. And then the last was for this RCP
2 pipe that we've talked about.
3 A. That's right.
4 Q. Isn't it true that the county paid
5 all of that with the exception of \$980 on the
6 unsuitable materials and the \$1,800 for the
7 RCP?
8 A. That's true.
9 Q. And that is reflected, is it not, in
10 the county's change order that was sent back
11 to RCR signed by Mr. Callicot and Mr. Stover
12 and Mr. Thomas?
13 A. I believe that's right.
14 Q. All right. Now, you indicated that
15 you weren't certain whether American
16 Excavators' Change Order No. 3 had been
17 submitted to the county or not; is that
18 accurate?
19 A. Is that the large --
20 THE COURT: That's the 16,000.
21 BY MS. CARSON:
22 Q. That's the 16,000.
23 A. I don't remember.
24 Q. Okay. I've not seen a document such
25 as this from RCR to the county reflecting that

1 change order. If you had submitted it to the
2 county, would there be such a document?

3 A. There should have been.

4 Q. Now, there is a letter dated April 2nd
5 -- and this is Exhibit 33 if you'd like to
6 refer to that. I think I've got the number
7 right this time.

8 THE COURT: It's a letter from
9 Thomas Miller & Partners, April 2nd.

10 THE WITNESS: Is that it
11 (indicating)?

12 THE COURT: Yes.

13 BY MS. CARSON:

14 Q. Do you have that in front of you?

15 A. I do.

16 Q. This letter addresses the architect's
17 refusal to recommend approval of a request for
18 \$16,500 for consideration of fill brought in
19 from off site to complete the building pad.
20 Do you see that?

21 A. Correct.

22 Q. Is it your understanding that this
23 \$16,500 was the same money that was the
24 subject matter of the Change Order No. 3 from
25 American Excavators that was approximately

1 that amount?

2 A. I believe that would have been that
3 amount, yes.

4 Q. All right. And from this letter it's
5 apparent that Mr. Thomas's understanding was
6 that this was for fill brought in off site to
7 complete the building pad?

8 A. That's correct.

9 Q. And if you'll refer back to Exhibit
10 No. 28 and look at Change Order No. 3 from
11 American Excavators --

12 A. I'm going to have to get a better
13 filing system up here. Okay.

14 Q. If you'll flip to Change Order No. 3
15 that was submitted to RCR by American
16 Excavators.

17 A. Okay.

18 Q. Now, in fact, Change Order No. 3
19 actually describes the areas that were
20 identified by PSI, doesn't it?

21 A. It does.

22 Q. And if you flip back a page earlier,
23 to Change Order 2, it actually discusses
24 removal of materials in the cut section above
25 subgrade, doesn't it?

1 A. It does.

2 Q. That doesn't match up with what you
3 submitted to the county which indicated that
4 was for PSI-approved materials?

5 A. That's correct.

6 Q. Is it your understanding that the
7 county simply paid Change Order No. 2 instead
8 of Change Order No. 3 in error?

9 A. That would be my understanding.

10 Q. They were under the impression that 2
11 was for what 3 was for, and 3 was for what 2
12 was for?

13 A. And that may have been my mistake,
14 because I probably submitted it that way in
15 error.

16 Q. Because they saw the PSI written on
17 the change order?

18 A. That's correct.

19 Q. Now, this request for change order
20 from RCR, you've already testified, was
21 submitted in January of 2000. The excavating
22 work on this project was actually done in June
23 and July of 1999; is that right?

24 A. That's correct.

25 Q. So when this change order was

1 submitted and the county paid it, that was
2 long after that part of the job was finished?

3 A. That's correct.

4 Q. So, in fact, as a result of the
5 confusion with regard to those change orders,
6 the county overpaid by about \$12,000?

7 A. That's what it looks like. See, I
8 told you they paid well.

9 Q. Now, you were aware, were you not,
10 that any change to the contract was supposed
11 to be approved in writing by the owner before
12 the additional work was done?

13 A. That's correct.

14 Q. But there were no written claims for a
15 change before this work was done, were there?

16 A. Not that I can remember.

17 Q. But nonetheless, the county honored
18 its verbal request to pay for those materials
19 that were removed below subgrade and verified
20 by PSI?

21 A. They did.

22 Q. Is it your understanding that the
23 county paid the amount reflected in RCR's
24 change order to the county with the exception
25 of that \$1,800 for the RCP pipe and I think

1 about \$800 on the 28,000?

2 A. Your question is?

3 Q. Is it your understanding that the

4 county paid everything on RCR's change order

5 submitted to the county with the exception of

6 the RCP pipe and the \$800 of the other?

7 A. Correct. Yes.

8 Q. And that change order that the county

9 issued based on American Excavators' Change

10 Orders 1 and 2 was the only change order

11 Williamson County signed in relation to

12 American Excavators' work on this project,

13 wasn't it?

14 A. Correct.

15 Q. You talked a little bit about the

16 meeting that you attended in April of 2000

17 regarding this issue after Mr. Parker came

18 back and was asking for additional money.

19 I'd like to refer you back to those meeting

20 notes. I believe they're Exhibit No. 25. Do

21 you have that in front of you there?

22 A. I do.

23 Q. Those meeting notes indicate, do

24 they not, that the county essentially told

25 Mr. Parker that what's between you and RCR is

1 between you and RCR, but we don't owe anything
2 further on this contract?

3 A. That's what the letter says.

4 Q. And did you also prepare some
5 handwritten notes at this meeting?

6 A. Do I have to own up to that being my
7 writing?

8 Q. Is that your writing?

9 A. Unfortunately it is.

10 Q. Would you just read to the Court what
11 you documented about that April 7th meeting in
12 your own writing?

13 A. It just says, "Meeting was held to
14 accommodate Marvin Parker's request to be
15 heard by the architect and the county
16 commissioner. The purpose was so he could
17 tell his reasons for needing additional money
18 for the off-site borrow. It appears everyone
19 in the meeting agreed that this contract and
20 the contract documents were clear as to what
21 should be paid and what should not. The
22 county did agree to pay for some unsuitable
23 soil in the parking areas that were called for
24 by PSI Testing Lab and nothing else. I
25 believe the county was more than fair with

1 American Excavators."

2 Q. And then are those names listed there
3 at the bottom your listing of the individuals
4 who were present at the meeting?

5 A. Yes.

6 MS. CARSON: Your Honor, I would
7 move this into evidence as Exhibit No. 36.

8 THE COURT: Okay.

9 (Exhibit No. 36 was marked.)

10 BY MS. CARSON:

11 Q. Now, that meeting took place on April
12 7th, correct?

13 A. Yes.

14 Q. And then approximately a week after
15 that you received American Excavators' Change
16 Order No. 4. That's Exhibit 11 if you'd like
17 to pull it out to look at the date. That
18 Change Order No. 4 seeks an additional
19 123,000.

20 A. It's blacked out at the bottom there.
21 Is that where it goes (indicating)?

22 MS. CARSON: I don't believe he
23 has the right document.

24 THE COURT: Yeah, he does.

25 MS. CARSON: He does?

1 THE COURT: Oh, no. This is the
2 proposal. He doesn't have the right one. You
3 wanted him to have Change Order No. 4?

4 MS. CARSON: Pay Application No.
5 4.

6 THE COURT: You can have mine.
7 I've got it right here.

8 (Exhibit passed.)

9 BY MS. CARSON:

10 Q. Now, do you have Change Order No. 4 in
11 front of you?

12 A. Yes.

13 Q. What is the amount of additional
14 monies sought by American Excavators in that
15 change order?

16 A. \$123,395.

17 Q. Now, you did not have any under-
18 standing of how they came up with that
19 calculation when you received this change
20 order, did you?

21 A. No.

22 Q. And you did not feel this was a
23 justifiable change order, did you?

24 A. No.

25 Q. And you didn't submit the change order

1 to the county because you did not feel it was
2 justifiable?

3 A. Correct.

4 Q. In fact, you didn't even know where on
5 the project these soils were supposed to have
6 been removed from, did you?

7 A. That's correct.

8 Q. Were you aware that the contract
9 between the county and RCR required a written
10 waiver of any contract terms?

11 A. No.

12 Q. Are you aware of whether there was
13 ever any written waiver executed by the county
14 waiving any of the contract terms?

15 A. No, I'm not.

16 MS. CARSON: Your Honor, if
17 Exhibit 13 could be passed to the witness,
18 please.

19 (Exhibit passed.)

20 BY MS. CARSON:

21 Q. If you'll look, there's some Bates
22 stamp numbers down at the bottom of those
23 pages. If you would, turn to Page 54.

24 A. The black stamps, is that what I'm
25 looking for?

1 Q. Yes, sir.

2 A. Okay.

3 Q. Can you look at Section 13.4.2?

4 A. Okay.

5 Q. That does require that any waiver of

6 the contract terms be in writing, doesn't it?

7 A. It says, "No action or failure to act"

8 -- yes.

9 Q. All right. Would you go ahead and

10 read that, Mr. Stover?

11 A. "No action or failure to act by

12 the owner, architect or contractor shall

13 constitute a waiver of the right or duty

14 afforded them under the contract, nor shall

15 such action, failure to act constitute

16 approval of the acquiescence and a breach

17 thereunder except as may be specifically

18 agreed in writing."

19 Q. In writing. All right. Mr. Stover,

20 did you ever authorize American Excavators to

21 remove and replace unsuitable soils below

22 subgrade other than those that were verified

23 by PSI?

24 A. No.

25 Q. So you didn't expect that RCR would be

1 paying for anything beyond what PSI approved,
2 did you?

3 A. That's correct.

4 Q. So certainly you didn't expect the
5 county to be paying for any more than that?

6 A. That's correct.

7 Q. Now, this job was bid on a lump sum
8 basis, wasn't it?

9 A. Correct.

10 Q. And the county was to pay RCR extras
11 only if certain procedures in the contract
12 were followed?

13 A. That's correct.

14 Q. And that's the reason that PSI
15 procedure was set up, isn't it?

16 A. That's correct.

17 Q. And you did not feel that either the
18 county or RCR owed these additional funds to
19 American Excavators, did you?

20 A. Correct.

21 Q. Is that still your conclusion today?

22 A. Yes.

23 MS. CARSON: Let me have just a
24 moment, Your Honor.

25 (Pause.)

1 Your Honor, could Exhibit 24 be
2 passed to the witness?

3 THE COURT: Certainly.

4 (Exhibit passed.)

5 BY MS. CARSON:

6 Q. Mr. Stover, these documents which have
7 already been introduced into evidence are
8 invoices from PSI for the work done on this
9 particular site. Can you tell the Court who
10 was invoiced for those services?

11 A. RCR.

12 Q. Would it be reasonable to conclude
13 that RCR paid for those services?

14 A. They did.

15 MS. CARSON: Thank you, sir.

16 THE COURT: All right. Mr.
17 Panther, why don't we take a short break
18 before you begin your cross-examination.

19 MR. PANTHER: That's fine.

20 (A short break was observed.)

21 THE COURT: Mr. Panther?

22

23 CROSS-EXAMINATION BY MR. PANTHER:

24 Q. Mr. Stover, I'm Todd Panther. We met
25 at your deposition. You've been project

1 manager over a lot of projects where you were
2 the general contractor, correct?

3 A. Correct.

4 Q. And as the general contractor, one of
5 your duties and responsibilities on a project
6 such as this is to communicate with the
7 various subcontractors that you hire; isn't
8 that right?

9 A. Generally that's correct.

10 Q. And when there are issues in the
11 field, the general contractor's responsibility
12 is to give direction to its subcontractors;
13 isn't that true?

14 A. Yes.

15 Q. And in a sense, the general contractor
16 serves as somewhat of a conduit from the owner
17 through the general contractor and then down
18 to subcontractors. That's true too, isn't it?

19 A. Correct.

20 Q. And so if a subcontractor has an issue
21 on site, the proper chain of command would be
22 for the subcontractor to first bring it to the
23 general contractor's attention; isn't that
24 right?

25 A. Generally it will be brought to the

1 superintendent, who in turn will inform me.

2 Q. And you gave even a more precise
3 answer, but the subcontractor would bring it
4 to the attention of, in this case, RCR's field
5 superintendent, who would then bring it to the
6 office, I would suppose?

7 A. Correct.

8 Q. And then if the general contractor
9 felt that the issue that had been raised by
10 the subcontractor deserved attention to the
11 owner, you would decide whether to discuss it
12 with the owner or not, right?

13 A. Normally.

14 Q. Okay. And it is generally true,
15 isn't it, Mr. Stover, that you, as the general
16 contractor, do not want all of your various
17 subcontractors communicating directly with the
18 owner and the owner's representatives, do you?

19 A. That's correct.

20 Q. And likewise, it's your experience,
21 isn't it, that owners don't want to be
22 communicating and dealing face-to-face with
23 all of your various subcontractors and
24 suppliers, do they?

25 A. Normally that's true.

1 Q. Now, I think you testified earlier
2 that when you got to this project, it was
3 already underway.
4 A. Correct.
5 Q. In terms of the site conditions, do
6 you remember at what stage the site prep was
7 in at the time that you took over
8 responsibilities for this job?
9 A. Not exactly. I just know the
10 excavating and the pad work was started.
11 Q. It was started, but you can't tell us
12 at what point it was?
13 A. No.
14 Q. And I think you said that at the time
15 that you took over responsibility for this
16 project, you had not read the prime contract
17 between RCR and the county; is that true?
18 A. That's correct.
19 Q. And I assume, then, that if you did
20 not read the contract which we've marked as
21 Exhibit No. 34, you did not read the
22 specification book that came with it either,
23 did you?
24 A. Well, now, the specification book is
25 an entirely different issue.

1 Q. Okay. You have the specification book
2 in front of you there on the corner of the
3 witness stand, Exhibit No. 13. Are you saying
4 that when you took over responsibility for
5 this job, you read the specs but you didn't
6 read the contract?

7 A. More than likely, because I don't know
8 why I would have read the owner's contract.

9 Q. Do you remember?

10 A. No.

11 Q. And because you didn't take over this
12 project until after American Excavators' work
13 was already underway, you didn't participate
14 at all in the negotiation of the subcontract
15 between American Excavators and RCR, did you?

16 A. No, I didn't.

17 Q. Whatever conversations Mr. Parker had
18 with the RCR representative concerning the
19 meaning of the subcontract, you have no
20 knowledge of that directly, do you?

21 A. That's true.

22 Q. At the time that you took over
23 this job, did you know whether or not the
24 subcontract with American Excavators
25 paralleled identically your prime contract

1 with the county?

2 A. No, I didn't.

3 Q. You didn't know one way or the other?

4 A. No.

5 Q. Now, counsel had asked you about

6 various meetings that occurred on site. I

7 thought you said that you remembered the June

8 30 meeting and you remembered the April

9 meeting, but that you didn't remember any

10 other meetings that you had concerning the

11 excavation and grading. Is that right?

12 A. Nothing other than the conversation I

13 had with Mr. Parker at the job site. That

14 wasn't -- I don't know if you're classifying

15 that as a meeting.

16 Q. But that would have occurred either at

17 the end or after American Excavators had

18 completed the excavating and grading portion

19 of the contract?

20 A. That's correct.

21 Q. All right. As far as what meetings

22 you might have attended while American

23 Excavators' work was underway, you don't

24 remember any meetings during that time?

25 A. No, I don't.

1 Q. And I think you said that you don't
2 dispute that they occurred, you just don't
3 remember any meetings while their work was
4 underway?

5 A. That's correct.

6 Q. You had discussed earlier, in your
7 responses to counsel, that you remember PSI
8 doing some testing. Do you remember that
9 general discussion?

10 A. Yes.

11 Q. Do you remember how many times PSI
12 came to the site?

13 A. No, I don't.

14 Q. Can you tell us within ten how many
15 times PSI came to the site?

16 A. Well, we know they had been there at
17 least four times. Now, how many other times,
18 I'm not sure. If each of those times resulted
19 in three or four trips for that area, or more,
20 I'm not sure.

21 Q. Okay. Do you have Exhibit No. 35 in
22 front of you? It's the June 22, 1999, memo
23 from Mr. Leonard to you. It looks like this
24 (indicating).

25 A. (Pause.)

1 THE COURT: Here's one. Use this
2 one.

3 (Exhibit passed.)

4 BY MR. PANTHER:

5 Q. Do you have a copy of Exhibit No. 35
6 in front of you?

7 A. Yes, I do.

8 Q. All right. Have you read Exhibit 35?
9 I don't remember if counsel had asked you to
10 read it. Have you read it in its entirety to
11 yourself?

12 A. You mean just now?

13 Q. Yes, sir.

14 A. No.

15 Q. Do you remember receiving this June 22
16 memo from Mr. Leonard?

17 A. No, but obviously I did.

18 Q. Would you read it for me to yourself?
19 I want to ask you a question after you do.

20 A. You want me to read it to you or --

21 Q. To yourself.

22 A. (Pause.) Okay.

23 Q. Are you finished?

24 A. Uh-huh.

25 Q. After having read it, does what

1 Mr. Leonard wrote to you conform to your
2 understanding as to what occurred regarding
3 this issue?

4 A. It does.

5 Q. Okay. Now, this memo is right about
6 the time that the dispute occurred between
7 GT&E, the owner's testing agency, and Southern
8 Consulting. You remember that, don't you?

9 A. This is the dispute over one saying it
10 was and one saying it was not.

11 Q. Right. It was GT&E who was contending
12 that the soil was suitable and Southern
13 Consulting was saying that it was not
14 suitable?

15 A. Correct.

16 Q. All right. And it is true, isn't it,
17 that RCR was weighing in on this issue and
18 saying the soil was not suitable; isn't that
19 true?

20 A. I believe that's correct.

21 Q. In fact, RCR was saying, Don't make us
22 bring a testing agency out there, because this
23 soil is so obviously unsuitable we don't need
24 to pay for testing. That's true, isn't it?

25 A. Well, I don't know that we would have

1 said that.

2 Q. Well, what Mr. Leonard says -- it
3 says, "Since your firm has stated that the
4 soil material is not suitable and the tests
5 are not necessary" -- let me stop right
6 there. That's true, isn't it?

7 A. Yes.

8 Q. RCR was saying soil tests are not
9 necessary because the soil is not suitable,
10 true?

11 A. True.

12 Q. Okay. And so what the owner was
13 saying in the rest of the sentence was the
14 owner will pay the cost of the testing if the
15 material does not prove to be unsuitable,
16 right?

17 A. Correct.

18 Q. So I take it that the way that this
19 was sorted out between the county and RCR was
20 we'll put our money where our mouth is, so
21 says RCR, and if it turns out that it's
22 suitable, we'll pay for it?

23 A. Right.

24 Q. If it's not suitable, then you pay for
25 it?

1 A. Right.

2 Q. And so PSI was brought out there,

3 weren't they?

4 A. Correct.

5 Q. And they told you to remove the soil

6 that they tested?

7 A. Correct.

8 Q. I don't remember when we went over

9 your qualifications. Are you a professional

10 engineer or have any education in engineering?

11 A. No, I don't.

12 Q. Or soils sciences?

13 A. No, I don't.

14 Q. Although you may not be a geotechnical

15 engineer, do you have enough experience in

16 construction that when you see soils, you have

17 a pretty good idea of whether they're

18 structurally suitable or unsuitable?

19 A. Well, I would say I have an idea.

20 Now, whether that's worth anything or not, I

21 don't know.

22 Q. But you recognize, don't you, that

23 there is sort of a continuum where there are

24 some soils that are obviously unsuitable and

25 then there are some soils that may be a closer

1 call?

2 A. I would know if we dug a hole and we
3 had tree roots and beer cans and so forth in
4 there that that's not suitable soil.

5 Q. Right. Same thing with topsoil; you
6 would know that topsoil is not a suitable soil
7 for building pad and parking lot structures?

8 A. Correct.

9 Q. It's true, isn't it, that if you ran
10 into soils that were obviously unsuitable, you
11 would not want to incur the cost of bringing a
12 geotechnical engineer out there to test soils
13 that are obviously unsuitable?

14 A. Well, if they were like I gave
15 you the example, if they were that obvious,
16 correct. If it was something that was my
17 judgment, just looking at it and they looked
18 borderline, I obviously would, because it's to
19 the owner's benefit to have that compaction
20 done on those soils or tested to be sure that
21 they are.

22 Q. I understand. And I think that goes
23 back to what we were talking about earlier, is
24 that in soils there is a continuum where some
25 are obviously unsuitable. But then the closer

1 calls, you would want to get a professional
2 engineer to make the judgment on that,
3 wouldn't you?

4 A. That's correct.

5 Q. It's true, isn't it, Mr. Stover, that
6 once PSI came on the scene, it was RCR's call
7 as to when and whether to bring PSI in to do
8 the testing, right?

9 A. I guess that would be a true
10 statement.

11 Q. You mentioned that you came to the
12 project -- and correct me if I misstate it --
13 once a month; is that right?

14 A. That's about the time frame.

15 Q. On average?

16 A. Right.

17 Q. You had somebody who reported to you,
18 though, on the project, didn't you?

19 A. Correct.

20 Q. What was his name?

21 A. Anthony Orange.

22 Q. What was Anthony Orange's frequency on
23 the project?

24 A. He was there all day long.

25 Q. Weren't there other projects, though,

1 that Mr. Orange was responsible for at this
2 time?

3 A. Not that I'm aware of.

4 Q. All right. Was Mr. Orange preparing
5 daily reports?

6 A. That's correct.

7 Q. Is that part of his responsibility, to
8 prepare daily reports?

9 A. That's correct.

10 Q. What would be the procedure or
11 protocol that would be followed? When he
12 would prepare a daily report, would it be
13 submitted to you on a regular basis?

14 A. I guess daily reports is sort of a
15 misnomer, because generally we got them once a
16 week. But they were done daily on the job
17 site, and then when he would come into the
18 office, he would bring his daily reports in.

19 Q. If you don't know the answer to this
20 question, you just tell me and I'll ask
21 Mr. Orange. Did Mr. Orange prepare his daily
22 reports daily or did he prepare his daily
23 reports weekly?

24 A. That's something I don't know.

25 Q. But whenever he prepared them, you

1 only saw them once every week or so?

2 A. That's correct.

3 Q. When he would hand them to you, would
4 you just file them away or would you make a
5 review of them? What would you do?

6 A. Well, the procedure was when he would
7 come in and go through his invoices for
8 approval, he would then put his -- he'd have
9 his daily reports in there. And then I would
10 get that folder and then I would read through
11 the daily reports and then I would file those
12 or put them to be filed.

13 Q. Let me state it back to you to make
14 sure that I understand. As Mr. Orange was
15 preparing daily reports, they would be
16 submitted to you on a weekly basis?

17 A. Correct.

18 Q. Then when a subcontractor or supplier
19 of yours would make a pay application, was it
20 Mr. Orange's responsibility to review his
21 daily reports to make sure that the work that
22 was being applied for was performed?

23 A. Well, I would think that when he saw
24 the pay application, he would be aware that
25 that work had been in place. Now, whether he

1 had to look back, I don't know, but I would
2 think not.

3 Q. He may have enough knowledge about the
4 job at the time that he wouldn't even have to
5 look at his daily reports?

6 A. I would say that would be a...

7 Q. How about you, though? Since you
8 weren't going to the job as often, when
9 Mr. Orange would approve a pay application and
10 then submit it on to you, would you then ask
11 to see Mr. Orange's daily reports before you,
12 yourself, approved it?

13 A. If I had any questions on the pay
14 application, I would probably call him and
15 review it with him that way. And if there was
16 something he thought I ought to go back and
17 read, he would inform me that he had put it on
18 the daily report, and then I would go back and
19 look it up if it was necessary.

20 Q. Same thing with change orders. When a
21 subcontractor such as American Excavators
22 would submit an application for a change
23 order, a proposed change order, was the
24 procedure at RCR that first Anthony Orange
25 would review the proposed change order?

1 A. Are you saying if he's requesting some
2 additional money for something that's outside
3 of the scope of his work?

4 Q. Yes, sir. Let me restate it so that
5 you don't have any confusion on my question.
6 If a subcontractor submitted a proposed change
7 order for additional work which the
8 subcontractor felt entitled him to extra
9 money, would Anthony Orange review that
10 proposed change order?

11 A. Yes.

12 Q. And thereto, would Mr. Orange compare
13 the daily reports with that proposed change
14 order, or if he knew enough about it, would he
15 just approve it?

16 A. I would think he would know enough
17 about if that change order had been completed
18 or was in the process of being completed.

19 Q. And how about you? After Mr. Orange,
20 say, approves a proposed change order by a
21 subcontractor, is that proposed change order
22 then submitted up the chain to you for
23 approval?

24 A. Yes.

25 Q. Okay. And when you're reviewing the

1 proposed change order, do you from time to
2 time ask to see Mr. Orange's daily reports?

3 A. There might be some occasions for
4 that, but generally I would pick up the
5 telephone and call.

6 THE COURT: Just a second. Under
7 this scenario that you've been describing, has
8 the subcontractor already done this work or is
9 he usually trying to find the answer out
10 before the work is done?

11 THE WITNESS: The subcontractor --
12 it would be after the change order had been
13 approved.

14 THE COURT: Okay. The way Mr.
15 Panther has described it to you, the change
16 order comes in to Orange, Orange approves it,
17 sends it up to you. I'm asking you, in the
18 normal course of things, has the sub already
19 done the work or is he trying to find the
20 answer -- is he trying to get an approval
21 before he does the work?

22 THE WITNESS: If he was asking for
23 approval, that would come to the office
24 first. Anthony would approve the work that's
25 been done on the site.

1 THE COURT: Out in the field.

2 THE WITNESS: Correct. So the
3 actual approval of a change order request
4 would come to the office, we would then
5 process it, that would go to the architect, to
6 the owner, then back to us, and then we would
7 issue a change order to the subcontractor and
8 he would act on that change order. Then, at
9 that point, the work that he has completed on
10 that change order, Anthony or the
11 superintendent would then authorize payment
12 for that work.

13 THE COURT: So normally it's out
14 in the field, they hit something and they go,
15 What do you think? Orange goes, You probably
16 can go ahead and do it. It gets done. The
17 change order goes to Orange -- a written
18 change order then goes to Orange --

19 THE WITNESS: Well, hopefully the
20 change order gets done before he says go ahead
21 and do it.

22 THE COURT: Right. But from what
23 I've been told, that is the exception rather
24 than the rule. What do you say about that?

25 THE WITNESS: Well, now you're

1 going to put me on the spot. I guess that can
2 happen. It's not the ideal situation.

3 THE COURT: I agree with that. As
4 a general rule, how does it work?

5 THE WITNESS: I would say minor
6 things get done like that. If it was moving a
7 light switch from one spot to another and it
8 was going to be a minor change, that probably
9 would get done. But, now, if it was adding a
10 wing onto the building, obviously that's not
11 going to get started until we have an approved
12 change order. Or moving the brick off the
13 building, that wouldn't get approved -- or be
14 done until it was approved. But simplicity of
15 relocating a door or something like that, that
16 could happen.

17 BY MR. PANTHER:

18 Q. While we're on that topic, do you have
19 American Excavators' Pay Application No. 1 in
20 front of you? It's Exhibit 27.

21 A. All right.

22 MR. PANTHER: While the courtroom
23 deputy's got the exhibits, if he could also be
24 handed No. 2, which would be Exhibit 28,
25 probably. Yes, 28.

1 (Exhibits passed.)

2 BY MR. PANTHER:

3 Q. Do you have Exhibits 27 and 28 in

4 front of you?

5 A. Yes, I do.

6 Q. Okay. From the looks of these

7 exhibits, on Exhibit No. 27 -- first of all,

8 this is on an RCR form, isn't it?

9 A. Correct.

10 Q. Mr. Carney was asking you about where

11 the change orders are listed here on this

12 Exhibit No. 27. It shows Approved Change

13 Orders: 1. Do you see that there?

14 A. Yes, uh-huh.

15 Q. And then on Exhibit 28 it has Approved

16 Change Orders: 1, 2 and 3?

17 A. Correct.

18 Q. What your procedure was, if I'm

19 understanding this right on this balance

20 sheet, is to put the total contract sum, then

21 add the approved change orders to come up with

22 an adjusted contract sum?

23 A. This is what the subcontractor submits

24 to us on our form.

25 Q. Yes, sir.

1 A. We don't fill in the...

2 Q. I understand. But on Line Item No.

3 2 --

4 A. Yes.

5 Q. -- Approved Change Orders --

6 A. Right.

7 Q. -- what they're supposed to do is

8 submit the total value of approved change

9 orders up to that date to come up with an

10 adjusted contract sum, aren't they?

11 A. That's correct.

12 Q. So it's not a matter of trying to get

13 paid twice, it's just to accurately reflect

14 what the adjusting contract sum, in their

15 mind, should be?

16 A. Or it's some means to track.

17 Q. Okay. Now, Pay Application No. 1

18 included a Change Order No. 1 -- this is

19 Exhibit 27 -- for clearing and grubbing of

20 \$6,200 and removing of 400 linear feet of

21 reinforced concrete pipe of \$1,800, right?

22 A. That's correct.

23 Q. Now, if I look at the proposed change

24 order, this was received and approved by Mr.

25 Orange July 19 on the approved stamp, right?

1 A. Okay.

2 Q. That's true, isn't it?

3 A. Right.

4 Q. And you admit that American Excavators
5 was entitled to the \$1,800 for removing and
6 replacing the RCP, don't you?

7 A. Correct.

8 Q. But you didn't submit Change Order No.
9 1 up to the owner at that point, did you?

10 A. I don't remember what the sequencing
11 was.

12 Q. Let me ask you to look at Exhibit No.
13 30.

14 A. (Pause.)

15 Q. Are you with me? This is RCR's
16 proposed change order to the county, isn't it?

17 A. That's correct.

18 Q. And if I look at the date, you signed
19 this January of 2000, didn't you?

20 A. Yes, uh-huh.

21 Q. Okay. So although American Excavators
22 did the work before July 19, 1999, you didn't
23 ask the owner to pay for it until January of
24 2000, did you?

25 A. According to that, it looks that way.

1 Q. And the job wasn't on hold waiting for
2 the owner to approve this change order, was
3 it?

4 A. No.

5 Q. American Excavators was moving dirt
6 and trying to get the building pad up so that
7 you could do work on it, weren't they?

8 A. That's correct.

9 Q. And then American Excavators submitted
10 Exhibit No. 28, Pay Application No. 2. August
11 20 is when Mr. Orange approved it, right?

12 A. Correct.

13 Q. And there again, you didn't submit
14 that on to the county until January 17, 2000,
15 did you?

16 A. Is that the date that I sent it?

17 Q. Yes, sir. On Exhibit 30. Right?

18 A. Correct.

19 Q. Let me ask you this fundamental
20 question. You wouldn't have submitted a
21 pay application to the county to pay if you
22 didn't think that the work was done and done
23 correctly, would you?

24 A. Not normally.

25 Q. And you wouldn't have done it in this

1 case, would you?

2 A. No.

3 Q. Now, looking at Exhibit No. 28 --

4 THE COURT: Mr. Panther, I've kind
5 of reached that point where we need to stop.

6 MR. PANTHER: I can stop anytime
7 you want to.

8 THE COURT: Tell me what your
9 situation is, Mr. Stover.

10 THE WITNESS: I have an out-of-
11 town client that's going to be here and I have
12 a meeting with him at one o'clock that I've
13 been waiting six months to have.

14 THE COURT: Okay. How long do you
15 think this meeting will go?

16 THE WITNESS: I have no idea.

17 THE COURT: Mr. Panther, what's
18 your situation on where you are in your
19 examination?

20 MR. PANTHER: (Pause.)

21 THE COURT: I'm not telling you to
22 stop. Just tell me where you are.

23 MR. PANTHER: Well, I've got
24 probably another -- I'm always reluctant to
25 make deadlines.

1 THE COURT: It's not a deadline;
2 it's an estimate.

3 MR. PANTHER: I'm estimating 20
4 minutes.

5 THE COURT: We've got to figure
6 out a way to get you back over here so we can
7 finish.

8 THE WITNESS: Do I have an
9 option?

10 THE COURT: I'm not sure. You're
11 able to contact Mr. Cashion, are you not,
12 during the day? You have a cell phone or
13 something like that?

14 THE WITNESS: Yeah, I have a cell
15 phone.

16 THE COURT: Why don't you check
17 back with us around three o'clock and give us
18 a status report on your meeting. Okay? And
19 if we can, we'll get you back out here to
20 finish.

21 THE WITNESS: Do I get a choice?

22 THE COURT: No. We really need to
23 get this done today. I hate to let this case
24 just go on. We'll figure out a way to get you
25 back.

1 THE WITNESS: Well, in fairness,
2 too -- when are you going to come back?

3 THE COURT: I'm going to come back
4 a little after 1:00, so you'll be in your
5 meeting. That's the problem.

6 THE WITNESS: If it hasn't
7 changed. Because I haven't been to my office
8 since 6:30 this morning, so there may be -- my
9 question is if he's moved it back for some
10 reason. The reason I'm asking you the
11 question is if he were, for some reason, to be
12 at 2:30, then I could have time to give you,
13 say, approximately 20 minutes, 30 minutes.

14 THE COURT: You can tell him that
15 you're in court and the judge --

16 THE WITNESS: That's not a real
17 good way to meet a new client, is it? I'm in
18 court testifying.

19 THE COURT: Let's do that. Call
20 Mr. Cashion and let him know what you find
21 out. I don't want you to miss your meeting.
22 I want you to have that.

23 THE WITNESS: So if it does get
24 changed --

25 THE COURT: If it changes, let us

1 know.

2 (A lunch break was observed.)

3 BY MR. PANTHER:

4 Q. When we left off, we were talking
5 about Exhibits 27, 28 and 30, and I've got
6 those in front of you. When this work in
7 Exhibit No. 27 and 28 was performed, you
8 didn't expect American Excavators to stop work
9 until you submitted a change order to the
10 county, the county approved it, sent it back
11 to you and then you sent a change order on to
12 American Excavators, did you?

13 A. I can't say what I would have thought
14 at that time.

15 Q. Well, this job was considered a
16 fast-track project, wasn't it?

17 A. No, I don't know that it was -- I'm
18 sure they would like to be in as quick as
19 possible, but I don't remember it being a --
20 that fast of track.

21 Q. Let me just ask you this. When
22 American Excavators performed the extra work
23 shown in Change Order No. 1, Exhibit 27, did
24 you expect American Excavators to stop work
25 and wait until the county approved a change

1 order?

2 A. Are you referring to the 6,200 and --

3 Q. Yes, sir. Did you expect American
4 Excavators to stop work?

5 A. If I might, that situation occurred
6 when we were putting the pad in, if I remember
7 right, and the trees were in the pad. And I
8 think at that time the architect had said we
9 can't stop. Obviously that was in error and
10 they missed -- the survey didn't show the
11 trees and incorrectly. So we were told at
12 that time, I think, to continue on with that
13 work.

14 Q. Yes or no, did you expect American
15 Excavators to stop work?

16 A. No.

17 Q. Exhibit No. 28, Pay Application No. 2,
18 you didn't submit this pay application or even
19 a portion of it until January of 2000. Did
20 you expect American Excavators to wait to
21 perform the work until after you got a change
22 order approved by the county?

23 A. I don't know how to answer that.

24 Q. Yes or no would be good.

25 A. I was thinking that was part of the

1 PSI portion that they had approved as far as
2 the cut. I guess in an answer yes or no, it
3 would have to be yes.

4 Q. You expected them to stop work until
5 they --

6 A. No, no. I'm sorry.

7 Q. You did expect them to continue on?

8 A. Right.

9 Q. Now, it's true, isn't it, that one of
10 your job responsibilities was to review pay
11 applications that were submitted by
12 subcontractors for payment, right?

13 A. Correct.

14 Q. And it was your practice that if a pay
15 application contained a change order, that you
16 would review the change order at the time you
17 reviewed the pay application, wouldn't you?

18 A. That's not necessarily so. I would
19 take it into consideration the amount of work
20 that was in place at the time.

21 Q. Pardon me?

22 A. The work that was in place for the
23 overall project is what I would base their
24 amount of pay application on.

25 Q. You have Exhibit No. 28 in front of

1 you, right?

2 A. Pay Application No. 2?

3 Q. Yes, sir.

4 A. Yes.

5 Q. According to Line No. 2, it's got

6 approved Change Order Nos. 1, 2, 3 listed on

7 the front page of Exhibit 28, doesn't it?

8 A. It does.

9 Q. And Change Order No. 1 we've already

10 discussed. Exhibit No. 28 had Change Order

11 No. 2 and Change Order No. 3 attached to it,

12 didn't it?

13 A. Correct.

14 Q. And you reviewed Change Order No. 2

15 and Change Order No. 3 when you reviewed the

16 pay application, didn't you?

17 A. I should have.

18 Q. Would you have approved a change order

19 without reviewing it?

20 A. Well, with this drawing on the back, I

21 was taking it to be these areas that we had

22 approved.

23 Q. My question is very simple, Mr.

24 Stover. At the time that you approved Change

25 Order No. 2 and No. 3, did you review them?

1 Yes or no.

2 A. Yes.

3 Q. And when you initialed Pay Application
4 No. 2, to the best of your knowledge, you were
5 certifying to your company that that work was
6 done and American Excavators deserved to be
7 paid for it, right?

8 A. Correct.

9 Q. Earlier on, in response to counsel's
10 questions, you said that at one point the unit
11 price was changed from 12.50 to \$10 a cubic
12 yard. Do you remember that area of your
13 testimony?

14 A. Correct.

15 Q. Pardon me?

16 A. Yes.

17 Q. Okay. Now, it's true, isn't it, that
18 at the time that American Excavators got to
19 the cut section, that you and Harley Ezell had
20 a conversation where RCR and American
21 Excavators agreed that in the cut section
22 American Excavators would charge \$10 a cubic
23 yard, not 12.50, right?

24 A. I believe there was a conversation
25 about that, yes.

1 Q. And that's what's reflected in Change
2 Order No. 2, isn't it?

3 A. That's correct. This one
4 (indicating)?

5 Q. Yes, sir. With regard to the material
6 below subgrade, you don't dispute that
7 American Excavators' subcontract entitles it
8 to extra for unsuitable material below
9 subgrade, do you?

10 A. If PSI has authorized it to be taken
11 out. For them just to go in and take it out
12 without any approval --

13 Q. Well, you're the one that calls PSI,
14 right?

15 A. Right.

16 Q. If RCR directs American Excavators to
17 remove material, they ought to follow that
18 directive, don't you think?

19 A. Well, I think in the areas that they
20 did, in the parking areas, they did follow
21 that.

22 Q. Can you answer my question, Mr.
23 Stover?

24 A. Well, I'm trying to.

25 Q. Yes or no? If RCR directs American

1 Excavators to remove material, yes or no, they
2 should follow that directive?

3 A. Yes, if we tell them to do something.
4 That's correct.

5 Q. And you agree, don't you, that
6 American Excavators' subcontract entitles
7 American Excavators to 12.50 a cubic yard for
8 unsuitable material below subgrade; isn't that
9 true?

10 A. If it's approved.

11 Q. By whom, RCR?

12 A. By RCR.

13 Q. All right. And then in Change Order
14 No. 2 we talked about the price above subgrade
15 was adjusted from 12.50 to \$10 a cubic yard,
16 right?

17 A. Correct.

18 MR. PANTHER: Can the witness be
19 passed -- actually, I'll do it -- Exhibit 14.

20 (Exhibit passed.)

21 BY MR. PANTHER:

22 Q. This is the July 1, 1999, letter from
23 Harley Ezell to you. I believe in response to
24 either Mr. Carney's questions or Ms. Carson's
25 questions that you had talked about that as of

1 July 1, 1999, a procedure had been in place
2 between RCR and the county concerning how
3 unsuitable material was to be accounted for;
4 is that right?

5 A. Correct.

6 Q. And I think what you said in response
7 to Mr. Carney's question was that you don't
8 know one way or the other if the procedure set
9 out in the letter was deviated from
10 afterwards, after July 1, 1999, right?

11 A. Right.

12 Q. Do you have Exhibit 29 in front of
13 you, Mr. Stover? You may not. No, you
14 don't. Here it is.

15 Now, in Exhibit 29, American
16 Excavators applied for \$46,114 and some
17 change, and you approved a payment for 1,857
18 and some change?

19 A. Correct.

20 Q. I'm going to show you the check and
21 see if you can recognize that as the check
22 that was used to pay that amount. I've handed
23 you a check. It's dated October 20, 1999, in
24 the amount of 1,857.60.

25 A. Correct.

1 Q. Can you identify that as the check
2 that was used to pay this amount shown in Pay
3 App No. 3?

4 A. Yes.

5 MR. PANTHER: Okay. Your Honor,
6 I'd move that into evidence as Exhibit No. 37.

7 (Exhibit No. 37 was marked.)

8 BY MR. PANTHER:

9 Q. After paying 1,857 on this \$46,000
10 change order, is it true that Mr. Parker began
11 calling you to find out why you had done that?

12 A. He did. And I believe I talked to
13 his -- I guess it was his bookkeeper, and I --
14 here again, it's been some time. If I'm not
15 mistaken, there was also a change order -- I
16 mean a change order we had sent them that they
17 had signed and sent back to us, I believe, was
18 part of the confusion.

19 Q. Mr. Parker testified that when he
20 received this lesser amount, that he began
21 trying to set up a meeting with you, calling
22 you. Do you have any reason to dispute that?

23 A. No, except for the fact that I
24 generally return all my phone calls every
25 day. Those that I don't, I make a point of

1 the first thing the next morning returning,
2 and I get 60 and 70 phone calls every day. So
3 it would be highly unlikely I wouldn't talk to
4 him.

5 MR. PANTHER: Thank you, Mr.
6 Stover.

7

8 REDIRECT EXAMINATION BY MR. CARNEY:

9 Q. I've just got a few more quick
10 questions, Mr. Stover, and then I'll be
11 through.

12 While you were the project manager,
13 did you review the specifications for this
14 project?

15 A. Yes.

16 Q. Now, after the June 30th, 1999,
17 meeting and then the subsequent letter, the
18 letter you received from Harley Ezell July
19 1st, 1999, after those letters, who was it
20 that RCR would rely on to determine whether
21 soil was suitable or unsuitable?

22 A. Generally the superintendent on-site
23 would make that call to whether we needed to
24 get some testing lab to check it or that it
25 wasn't compacting and have PSI or somebody

1 then come out and verify.

2 Q. Okay. When we looked at Change Order
3 No. 2 from American Excavators, the one for
4 28,900, somewhere around there, when you
5 received that change order, what work did you
6 believe that that change order represented?

7 A. I thought it was the areas in the
8 parking lots that we had cut out per PSI's
9 instructions.

10 Q. Now, you just testified that you --
11 I think I've got this right -- that you had a
12 conversation about a price reduction from
13 12.50 to 10.50.

14 A. Correct.

15 Q. My question is: Did you agree to that
16 price reduction or do you just remember the
17 conversation? I wasn't clear.

18 A. I remember the conversation, but if it
19 was a reduction, I probably would have agreed
20 to it.

21 Q. Now, I'm talking about -- it was my
22 understanding that that was for unsuitable
23 material in a cut section. Was that your
24 understanding?

25 MR. PANTHER: Objection to the

1 leading.

2 THE COURT: Sustained. Try it
3 again.

4 BY MR. CARNEY:

5 Q. What did you believe that that
6 reduction in price was?

7 A. I don't remember, at the time, what we
8 were discussing.

9 Q. As far as your recollection, did you
10 ever deviate -- or did you deviate from the
11 procedure that was established in that June
12 30th, 1999, meeting?

13 A. No.

14 MR. CARNEY: I have no further
15 questions.

16

17 RECROSS-EXAMINATION BY MS. CARSON:

18 Q. I have one question, Mr. Stover. I
19 promise. You were clear that Williamson
20 County only expected to pay extra for below
21 subgrade approved and verified by PSI?

22 A. Correct.

23 THE COURT: You received, I take
24 it, this package, then, the second application
25 for payment?

1 THE WITNESS: Is that the one
2 that -- yeah.

3 THE COURT: It looks like you
4 would have received Change Order 2 and 3 at
5 the same time. That's the way it's been
6 presented to me. Is it in the same form that
7 it was presented to you?

8 THE WITNESS: I would assume that
9 would have been the way that it would have
10 been presented.

11 THE COURT: Did everybody hear
12 that?

13 MR. PANTHER: No, I didn't.

14 THE COURT: He said yes, he
15 thought it was. That's it.

16 MR. PANTHER: Nothing further.

17 THE COURT: Mr. Cashion, who do
18 y'all have up next?

19 MR. CASHION: The next witness
20 will be Anthony Orange.

21
22 ANTHONY ORANGE
23 having first been duly sworn, was examined and
24 testified as follows:
25

1 DIRECT EXAMINATION BY MR. CARNEY:

2 Q. Mr. Orange, if you would, please,
3 state your name for the Court.

4 A. Anthony Wayne Orange.

5 Q. And where do you live?

6 A. 1210 Martha-Leeville Road in Lebanon.

7 Q. What kind of work do you do?

8 A. Project superintendent.

9 Q. Who are you working for right now?

10 A. Robinson Building Group.

11 Q. How long have you been with Robinson?

12 A. Since last June.

13 Q. Who were you with prior to that?

14 A. RCR Building Corporation.

15 Q. How long have you been in this line of
16 work?

17 A. Since '82. Well, actually since '75.

18 Q. Okay. What have you been doing in the
19 construction industry? Have you always been a
20 superintendent?

21 A. No, sir. I worked for several
22 companies as a laborer, operator, carpenter.
23 And then I went in business for myself in '82
24 as a general contractor. I stayed in business
25 for myself until '95, and then I went to work

1 for Soloman as a project manager for about a
2 year, and then I went to work for RCR for
3 about five years.

4 Q. Okay. What kind of projects did you
5 work on for RCR, just generally? You don't
6 have to go into a lot of detail.

7 A. Commercial mainly.

8 Q. Were you working for RCR in the summer
9 of 1999?

10 A. Yes.

11 Q. What project were you working on then?

12 A. Williamson County community center.

13 Q. What was your job?

14 A. As a project superintendent?

15 Q. You were the project superintendent?

16 A. Yes.

17 Q. What did you do as a project
18 superintendent?

19 A. Mainly oversaw the work that was out
20 on the project on-site.

21 Q. Could you tell us what the site looked
22 like when you arrived?

23 A. When I first got there, there was
24 grading taking place, topsoil being stripped.

25 Q. Okay. Anything else, or was that

1 about where it was?

2 A. That's about where it was at.

3 Q. Okay. As a project superintendent, do

4 you keep any kind of daily record or daily

5 report?

6 A. Yes, sir.

7 Q. How do you keep up with those? Do you

8 write them daily?

9 A. Yes, sir.

10 Q. What do you do with them at the end of

11 the day?

12 A. I keep them and turn them in to the

13 office every week.

14 Q. Mr. Orange, I'm going to show you some

15 documents here. Do you recognize the stack of

16 paper we just handed you, Mr. Orange?

17 A. Yes, sir.

18 Q. Does that look familiar?

19 A. Yes, sir.

20 Q. And what are those?

21 A. They're my dailies, daily reports.

22 Q. Okay. Did you keep a report for every

23 day or did you miss some in there every now

24 and then?

25 A. I may have missed a day or two, but

1 for the most part I tried to do them every
2 day.
3 Q. What's the first one that would have a
4 date?
5 A. 6/11.
6 Q. If you would, just kind of go to the
7 last one and tell us what that date is.
8 A. August 17th.
9 Q. When was this project completed, as
10 best you remember?
11 A. I don't remember.
12 Q. Was it after that August date?
13 A. Yes, sir.
14 Q. So that's just a portion of your
15 dailies?
16 A. Yes, sir.
17 MR. CARNEY: Your Honor, if
18 there's no objection, I'd like to move this
19 portion of his daily reports into evidence as
20 the next exhibit.
21 THE COURT: All right.
22 (Exhibit No. 38 was marked.)
23 BY MR. CARNEY:
24 Q. We'll probably get to those in a
25 minute, Mr. Orange, if you want to hold onto

1 them. Who was the excavator on this job?
2 A. American Excavation.
3 Q. Had you ever worked with them in the
4 past prior to this job?
5 A. No, sir.
6 Q. Have you worked with them since?
7 A. No, sir.
8 Q. Do you remember who GT&E was?
9 A. Yes, sir.
10 Q. Who were they?
11 A. That was the company that did the
12 original soils analysis work on the project.
13 Q. Okay. And who was PSI? Do you
14 remember who they were?
15 A. PSI was a testing agency that was
16 hired after a meeting.
17 Q. We'll get to that in just a second.
18 A. Okay.
19 Q. Now, you said you got on the site and
20 they were stripping topsoil?
21 A. Yes, sir.
22 Q. Where were they putting that? When I
23 say "they," who was stripping topsoil?
24 A. American Excavators.
25 Q. Okay. Where were they putting it?

1 A. Basically where your topsoil, the
2 brown patch up there on the map was.

3 Q. And you're referring to the drawing
4 and where we have it marked?

5 A. Yes, sir.

6 Q. If you could, just kind of tell us --
7 you pointed to Exhibit 17, the brown -- I
8 guess it says stockpile on it up at the top,
9 the north end of the drawing. Do you know
10 where American Excavators had a haul road onto
11 the site?

12 A. Yes, sir.

13 Q. If you could, could you come around
14 and kind of point out where that is if you
15 don't mind?

16 A. The haul road was right here on this
17 side of the detention pond, going out on the
18 street (indicating).

19 Q. That's the west side of the site?

20 A. Yes, sir.

21 Q. And where did it come down to?

22 A. They were -- actually the detention
23 pond wasn't here at that time, so they were
24 coming down the property line just like this,
25 you know, coming into the job site right there

1 (indicating).
2 Q. Okay. So that's from the north, kind
3 of northwest down on that side of the project?
4 A. Yes, sir.
5 Q. Okay. Before you sit down, if
6 you would just point out where American
7 Excavators' job trailer was, best you can
8 remember.
9 A. This fence line came across by the --
10 behind the Carter House here (indicating).
11 Their parking lot came around to this back
12 side here, right here in the corner right off
13 the parking lot on the grassy area right here
14 (indicating).
15 Q. So that would be on the east side of
16 the project?
17 A. It would be on the, yes, east.
18 Q. Adjacent to the entrance road that's
19 on that drawing?
20 A. Yes, to the east of the entrance road.
21 Q. You can sit down now. Thank you.
22 A. (Complying.)
23 Q. Do you know, as far as the excavating
24 scope of the work, whether this was an import
25 job?

1 A. Yes.

2 Q. Could you tell us what that means?

3 A. An import job basically refers to your
4 having to import the material back into the
5 job to build the job.

6 Q. When you say "you," who are you
7 referring to?

8 A. Whoever the subcontractor is that's
9 handling the excavation and building the pads
10 and parking lot areas, such as that.

11 Q. And how would that be included in the
12 price that the excavator gave to RCR, the
13 import?

14 A. Well, you figure the import that you
15 have to do to build the job into the original
16 bid and you take the job basically down to
17 subgrade, and then, you know, if you encounter
18 bad soils at that point, then you have to get
19 into the undercutting.

20 Q. So undercutting, where would that be,
21 above or below?

22 A. Below subgrade.

23 Q. Below subgrade. Now, what kind of
24 material would you have to undercut?

25 A. Material that wasn't suitable to build

1 on, you know, not -- you couldn't get the
2 compaction in the material that you would need
3 to build on.

4 Q. Whose job was it to determine whether
5 soil was suitable or not?

6 A. That would be the testing agency.

7 Q. Okay. Right after you got to the job
8 -- moving forward a little bit -- when was
9 the first time American Excavators came to you
10 regarding the soils?

11 A. When we were in the parking lot. The
12 first time that someone came to me on the
13 soils was -- Harley came to me and said that
14 the soils reports were bad or were wrong,
15 incorrect, and that where it showed it had a
16 layer of topsoil and then it went into clay
17 was incorrect, and that was in the parking lot
18 area. That's the first that I heard of it.

19 Q. What happened when he came to you?
20 What was --

21 A. Well, we looked at it, and I believe
22 Southern had already come out at that point or
23 was coming out at that point, and they agreed
24 that the soils that were there was not
25 compactable.

1 Q. Who was Southern?

2 A. They were the testing agency that
3 American had hired. They were responsible for
4 testing.

5 Q. GT&E, did they ever come out to the
6 site at that time?

7 A. Yes. They also came out when -- there
8 was a disagreement with the original soils
9 analysis from GT&E and Southern. Then we got
10 GT&E to come out and take a look at it, you
11 know, to have two opinions. And that
12 basically led to the meeting that we had where
13 the discussion was to hire an independent or
14 to get an independent.

15 Q. What was GT&E's position on the soils?

16 A. The gentleman said that the soils
17 would -- was a silty clay that would work
18 under optimum conditions, moisture conditions.

19 Q. When do you first recall PSI coming to
20 the site?

21 A. When there was a disagreement between
22 Southern and GT&E, PSI came out -- it was
23 before the meeting -- to take a look at it.
24 And I guess they was taking a look at it to
25 where he would know what to bring to the table

1 at the meeting. But he did come out before
2 the meeting.

3 Q. All right. And this meeting you're
4 talking about, who was at that meeting?

5 A. PSI representatives, the architect,
6 the county reps, RCR, and Harley Ezell, as I
7 remember.

8 Q. Do you remember what you all decided
9 to do at that meeting?

10 A. It was suggested in that meeting that
11 the site be taken down to subgrade, and PSI
12 would come out at that point and would
13 document what areas to take out as unsuitable
14 material.

15 Q. Was there any discussion about any
16 materials that were discovered prior to that
17 meeting?

18 A. The only thing I remember was when
19 Harley said that, you know, he had already
20 taken out some of the -- what he called bad
21 material around the -- it would be the east
22 side of the -- northeast side of the building,
23 corner, and that he wasn't going to ask for
24 any extra at that point. That's about all I
25 remember.

1 Q. Okay. Do you remember anything about
2 an area called the garden area?

3 A. No, sir.

4 Q. Now, this plan that you just discussed
5 that came out of that meeting on June 30th, do
6 you remember where the areas were that PSI
7 marked?

8 A. There were four areas. One was at the
9 entrance, one would be -- or two were actually
10 right in that garden area that you have on the
11 map, and then, if I recall, there was another
12 one over on the east side of the building.

13 Q. Okay.

14 A. There was a sketch, if I remember.

15 THE COURT: Here it is.

16 BY MR. CARNEY:

17 Q. That's what I was fixing to get to
18 you. On Exhibit 8, attached to the pay
19 application for American Excavators, there's a
20 drawing. Could you tell us what that
21 indicates?

22 A. Yes, sir. That's the areas that I'm
23 speaking of.

24 Q. When was that work performed?

25 A. After the meeting of PSI, after

1 everything was brought to subgrade or gotten
2 to subgrade, PSI sent one of their testing
3 reps out and proof rolled, and he decided what
4 to take out and what not to.

5 Q. Okay. Did PSI document any other
6 undercutting that's not reflected in those
7 four areas?

8 A. Not that I know of.

9 Q. Did you direct American Excavators to
10 remove any other material besides the four
11 areas?

12 A. There was two other instances that I
13 told them to take something out.

14 Q. And where were those?

15 A. Well, there was an old RCP line that
16 ran across the parking lot that was not
17 reflected in the original plan. It didn't
18 come up in any of the plans that we had. It
19 was an old abandoned storm sewer line, and it
20 had to be taken out in order for us to build a
21 parking lot on. So I did instruct them to
22 take that out.

23 Q. When was that?

24 A. I couldn't tell you when.

25 Q. Do you think it was before that

1 meeting or after that meeting on June 30th?

2 A. (Pause.)

3 Q. You want to look through your daily
4 reports? Would that help you?

5 A. It may.

6 THE COURT: Do you know which one
7 he should look at?

8 BY MR. CARNEY:

9 Q. It's not going to be in there. I'm
10 sorry.

11 A. It's not?

12 Q. No. Let's just move on. What was the
13 second place that you said?

14 A. It was in the drive area that was due
15 to the excessive amount of truck traffic. It
16 was bumping so bad that it was getting to the
17 point that we couldn't get any trucks in there
18 unless we did take it out and replace it.

19 MR. CARNEY: Okay. Your Honor, if
20 I could pass the witness, looks like, Exhibit
21 No. 23.

22 THE COURT: 23?

23 MR. CARNEY: Yes, Your Honor.

24 (Pause.) I'm sorry. It's going
25 to be No. 8. I apologize.

1 (Exhibit passed.)

2 BY MR. CARNEY:

3 Q. There should be some PSI reports

4 attached to that document. If you can find

5 the one dated July 20th.

6 A. July 20th?

7 Q. Yes, sir.

8 A. Okay.

9 Q. If you'll look under the section

10 entitled Observations and Remarks --

11 A. Okay.

12 Q. -- the third sentence, it starts with

13 "other," could you read that to us?

14 A. "Other areas proof rolled did not

15 deflect but could be subject to deterioration

16 under the dump truck haul path."

17 Q. Is that the area we're talking about?

18 A. Yes, sir.

19 Q. Now, what kind of material was that?

20 A. If I'm not mistaken, it was on good

21 material.

22 Q. Well, what was the problem, then?

23 A. It was just excessive truck traffic.

24 I mean, you can take a pad or a driveway

25 that's been proof rolled, passed, tested and

1 everything works out fine, but you can put an
2 excessive amount of truck traffic on it and it
3 will deteriorate that soil to where it's no
4 longer suitable for compaction.

5 Q. Were there any other areas besides
6 those that PSI marked and the two we just
7 discussed?

8 A. Not that I remember.

9 Q. Let's change the subject a little bit
10 and let's talk about some civil war relics.
11 Do you remember what this is all about with
12 the civil war relics?

13 A. Yes, sir.

14 Q. What was going on?

15 A. Well, the first day I got there, there
16 were people with metal detectors all over the
17 site, even running behind the excavators every
18 time they'd make a swipe with the pan. There
19 would be four of them following the pan
20 around, which I thought was very dangerous and
21 I would run them off. And, you know, it was
22 just almost impossible to keep them off the
23 site. At that point I knew there was, you
24 know, something on the site, but I didn't even
25 realize that it was a civil war battlefield

1 until someone told me.

2 In our excavations, different areas
3 there, especially around where -- the first
4 time that we found anything at all -- and we
5 weren't digging the trench at this time. We
6 were doing some excavation over there behind
7 where American had their trailer. There was a
8 ditch dug over there, and some boys found a
9 bunch of items in the ditch.

10 Q. Could you show us on the map what area
11 that is?

12 A. Yes. We had a temporary pole set up
13 right here in this corner (indicating).

14 Q. So that's on the east side, about
15 where the --

16 A. It's the east side of the entry
17 driveway.

18 Q. Okay.

19 A. We had a temporary pole set up here.
20 We had a ditch dug here. I don't remember
21 exactly what for, if it was a plumber or
22 electrician that dug this ditch here, and he
23 left about a three-foot ditch open there.

24 Well, when we came back to the job
25 site -- I think this was on a Friday -- on

1 Monday, the people that were hunting for all
2 the souvenirs or bullets or whatever, they had
3 dug way back into this ditch. It was
4 dangerous. I mean, they were back in there
5 three or four feet with dirt just like a
6 cave. So we collapsed this and filled it up
7 to keep them from -- somebody from getting
8 hurt on the site.

9 We figured that the entrenchment --
10 trench was here (indicating). And in talking
11 to the people at the Carter House and
12 different ones, they said that the trench
13 probably ran in this direction right across
14 the (indicating) --

15 Q. Southeast?

16 A. From the very north part of the
17 detention pond right here (indicating), in
18 that direction. So after hours and on
19 Saturdays we would dig and, you know, look for
20 bullets or whatever else.

21 Q. Well, was anybody from American
22 Excavators participating in that?

23 A. Yes, sir.

24 Q. Who was that?

25 A. Virgil was on the track hoe most of

1 the time digging the ditch.

2 Q. What about that stockpile right

3 there (indicating) --

4 A. Not all the time. We dug some.

5 Q. What about that stockpile right there,

6 was that in the way?

7 A. Yes, sir. What we did was, when we

8 dug this, we dug across the road to the

9 stockpile and then we stopped until they

10 hauled a bunch of the stockpile out. And then

11 when it opened back up, we dug on across to

12 where the stockpile was.

13 Q. At the end of your digging, what did

14 you do with the ditch?

15 A. Filled it back in.

16 Q. Every time?

17 A. Yes, sir.

18 Q. Now, is that in an area where there's

19 going to be any buildings?

20 A. No, sir.

21 Q. Is there going to be any special

22 compaction requirements up there in that area?

23 A. Not this side of the road there

24 wasn't.

25 Q. Just beside the road?

1 A. Yeah, right there at the road there
2 was.
3 Q. And how wide was that road right
4 there?
5 A. Should be approximately 20, 24 feet.
6 I don't see it on here.
7 Q. You can have a seat now.
8 A. (Complying.)
9 Q. Mr. Orange, did you ever have any
10 conversations with Ricky Tipper as to why
11 Harley Ezell left American Excavators?
12 A. Yes, sir.
13 Q. What was that?
14 A. Harley just alluded to the fact that
15 -- I mean Tipper alluded to the fact that
16 Harley left when he found out that the job was
17 not bid correctly. I don't know the exact
18 words, but that's...
19 Q. After your June 30th, 1999, meeting --
20 and you've testified that it was agreed that
21 PSI would document any undercutting -- are you
22 aware of any other undercutting that American
23 Excavators did that wasn't marked or wasn't
24 one of the two areas we talked about?
25 A. No, sir.

1 Q. And after that meeting, did you ever
2 direct American Excavators to remove any
3 material?

4 A. As I said before, the only two
5 instances that I remember directing him to
6 take those two locations that I mentioned
7 before -- now, as I said a while ago, I don't
8 know if that was before the meeting or after
9 the meeting, but that's the only two cases.

10 Q. Now, you had your deposition taken for
11 this case; is that correct?

12 A. Yes, sir.

13 Q. And that would have been sometime last
14 spring. Does that sound about right?

15 A. Yes, sir.

16 Q. Now, during your deposition, Mr.
17 Panther, the attorney for American Excavators,
18 asked you a bunch of questions, didn't he?

19 A. Yes, sir.

20 Q. Did he ever ask you if you told
21 American Excavators to keep up with the truck
22 count for the undercutting?

23 A. No, sir, I don't remember if...

24 Q. Why wouldn't you tell him something
25 like that?

1 A. Why wouldn't I?

2 Q. Yes, sir.

3 A. I would be kind of giving him a blank

4 check if I told him just to keep up with the

5 loads. You pretty well have to document what

6 you take out or put back or any kind of

7 undercut or anything like that. If I told him

8 that, that would pretty much give him a blank

9 check.

10 Q. Let me ask you one more question, then

11 I'll sit down for a second. Did you ever tell

12 anyone at American Excavators to keep up with

13 truck counts as a means of documenting

14 undercutting?

15 A. No, sir.

16 MR. CARNEY: Okay. Thank you.

17

18 CROSS-EXAMINATION BY MS. GOODSON:

19 Q. Hi, Mr. Orange. I'm Christina

20 Goodson. Mr. Orange, didn't you review the

21 contract between RCR and the county concerning

22 this project?

23 A. Yes, ma'am.

24 Q. You understood that under that

25 contract, the architect was to act as a

1 representative for the county, didn't you?

2 A. Yes, ma'am.

3 Q. And didn't you review the subcontract

4 agreement between RCR and American Excavators?

5 A. Yes, ma'am.

6 Q. Isn't it true that there is a specific

7 provision in the subcontract agreement related

8 to the removal of unsuitable soils?

9 A. Yes, ma'am.

10 Q. That provision is different than the

11 section that's in the contract between RCR and

12 the county relating to unsuitable soils, isn't

13 it?

14 A. Yes, ma'am.

15 MS. GOODSON: If I could have

16 Exhibit 13 handed to the witness.

17 THE COURT: All right.

18 (Exhibit passed.)

19 BY MS. GOODSON:

20 Q. Mr. Orange, if you would look inside

21 Exhibit 13, you'll see at the bottom of each

22 page there's a Bates stamp number. The page

23 numbers are stamped in black. If you would

24 turn to Page No. 150.

25 Now, I want to ask you about the

1 specifications in this contract related to
2 unsuitable soils and the removal of
3 undercutting. Okay?

4 A. Okay.

5 Q. Would you read for the Court -- start
6 at Section B and continue to Subsection 1. Do
7 you see that there at the top of the page?

8 A. D?

9 Q. B.

10 A. Okay. "Geotechnical engineer
11 determines that unsatisfactory soil is present
12 below subgrade, continue excavation upon
13 approval of the owner and replace with
14 compacted backfill and fill material as
15 directed. Undercutting without owner's
16 approval is at contractor's risk."

17 Q. Okay. Will you continue through
18 Subsection 1 for me?

19 A. "For undercutting below subgrade
20 within a cut section, additional excavation or
21 replacement material will be paid for
22 according to contract provisions for changes
23 in the work. Measurements for payment of
24 unsuitable material will be by the average-in-
25 area method for volume of the unsuitable

1 material excavated below designed depths.
2 Any proposed trench excavation within the
3 impacted area will be deducted from the volume
4 computed."

5 Q. Thank you, Mr. Orange. Is that
6 consistent with your understanding of what the
7 contract terms between RCR and the county
8 state for the removal of unsuitable soils?

9 A. Yes, ma'am.

10 Q. So on this project, wasn't the goal
11 always to get down to subgrade and then
12 document the materials that were removed?

13 A. Yes, ma'am.

14 Q. The participants at the June 30th
15 meeting that you attended specifically agreed
16 that PSI would document the removal of
17 materials below subgrade, didn't they?

18 A. Yes, ma'am.

19 Q. And didn't you understand that RCR was
20 only going to get paid extra for undercutting
21 below subgrade that was documented by PSI?

22 A. Yes, ma'am.

23 Q. There was no commitment by the county
24 or the architect to ever pay for material
25 above subgrade at any time, was there?

1 A. Not to my understanding.

2 MS. GOODSON: Could you please

3 hand the witness Exhibit 26?

4 (Exhibit passed.)

5 BY MS. GOODSON:

6 Q. Mr. Orange, that's a letter from the

7 architect dated July 8th, 1999, that's already

8 been entered into evidence. Could you look

9 through the context of that letter really

10 quick to yourself? I want to ask you some

11 questions about it.

12 A. (Pause.) Okay.

13 Q. That letter clearly states that the

14 county's not going to pay for material above

15 subgrade, doesn't it?

16 A. Yes.

17 Q. Crystal clear, right?

18 A. Yes.

19 Q. And that was consistent with the

20 contract, wasn't it?

21 A. Yes.

22 Q. After that June 30th meeting, do you

23 remember Harley Ezell working up an estimation

24 of the quantity of unsuitable soils that were

25 to be removed?

1 A. Yes.

2 Q. Is it your understanding that

3 Mr. Ezell recommended approximately 1,000 to

4 1,700 cubic yards of material?

5 A. Yes, ma'am.

6 MS. GOODSON: Could you hand

7 Exhibit No. 8 to the witness?

8 (Exhibit passed.)

9 BY MS. GOODSON:

10 Q. Mr. Orange, could you turn to Change

11 Order No. 3?

12 A. Okay.

13 Q. That 1,000 to 1,700 cubic yards, is

14 that kind of close to that PSI estimate listed

15 there?

16 A. Yes.

17 Q. Okay. You don't know whether that

18 estimate was ever conveyed to Williamson

19 County, do you?

20 A. No.

21 Q. You testified that you told American

22 Excavators to remove two other areas of

23 unsuitable soil from the site that weren't

24 documented by PSI, didn't you?

25 A. Yes, ma'am.

1 Q. And you testified that taking out a
2 reinforced concrete pipe was one area that you
3 were discussing earlier; is that right?

4 A. Yes, ma'am.

5 Q. Do you know, according to the contract
6 provisions, that the taking out of pipe such
7 as that is the responsibility of the
8 contractor and the contractor must bear the
9 expense of that?

10 A. No, ma'am.

11 Q. Do you have a copy of Exhibit 17 or
12 have you ever seen one?

13 A. 17?

14 Q. I'm sorry. I should have identified
15 it more clearly. The diagram of the site,
16 have you ever seen this before (indicating)?

17 A. Yes, ma'am.

18 Q. Did you have a copy of it at the time
19 you were working on the project?

20 A. Yes.

21 Q. You can't read this, so I'm going to
22 read it for you. You're just going to have to
23 trust me here, but you can get up if you want
24 to. Under No. 4 it says, "The contractor
25 shall verify locations of all existing

1 utilities, including storm drainage pipes or
2 structures, before commencement of
3 construction." Do you understand what that
4 means?

5 A. Yes. Before you commence
6 construction, yes, before you start.

7 Q. Wouldn't that include finding that RCP
8 pipe prior?

9 A. No, ma'am. You had no idea whenever
10 it's completely buried.

11 Q. Well, didn't you submit the RCP pipe
12 to the owner on a change order as part of the
13 change order?

14 A. Yes, ma'am.

15 Q. And didn't the owner deny payment for
16 that?

17 A. Yes, ma'am.

18 Q. And the county never told you or the
19 architect never told you that we were going to
20 pay for the removal of those unsuitable
21 materials you told American Excavators to
22 remove that were not documented by PSI, did
23 they?

24 A. No, huh-uh.

25 MS. GOODSON: Can I have just a

1 second, Your Honor?

2 THE COURT: Sure.

3 Mr. Panther, are you going to
4 cover those two areas in your cross that he
5 alluded to?

6 MR. PANTHER: In part, yeah.

7 THE COURT: I'll just be quiet
8 then.

9 MR. PANTHER: Feel free.

10 BY MS. GOODSON:

11 Q. Did you attend a meeting at the county
12 complex on April 7th of 2000?

13 A. Would you refresh my memory about what
14 the meeting was about?

15 Q. Yes, sir.

16 MS. GOODSON: Could we hand him
17 Exhibit 25?

18 (Exhibit passed.)

19 BY MS. GOODSON:

20 Q. Does that refresh your memory?

21 A. Yes, uh-huh.

22 Q. And, again, didn't the county make
23 their position very clear that they weren't
24 going to pay for any material above subgrade
25 or that was below subgrade that wasn't

1 documented?

2 A. Yes.

3 Q. I just have a general question for you
4 to wrap it up. To your knowledge, based on
5 your experience in the construction industry,
6 a truckload of good topsoil is a valuable
7 commodity, isn't it?

8 A. Yes, ma'am.

9 MS. GOODSON: Thank you. That's
10 all.

11 THE COURT: All right.

12

13 CROSS-EXAMINATION BY MR. PANTHER:

14 Q. I'm Todd Panther, Mr. Orange. We met
15 at your deposition. Do you have Exhibit No.
16 38, your daily reports, in front of you?

17 A. Yes, sir.

18 Q. Okay. What happened on June 16?

19 A. Don't know.

20 Q. Pardon me?

21 A. It wasn't documented.

22 Q. What happened on June 17th?

23 A. It's not here.

24 Q. 18?

25 A. Not here.

1 Q. 20.
2 A. Not here.
3 Q. 21?
4 A. Not here.
5 Q. 22?
6 A. Not here.
7 Q. 23?
8 A. Yes.
9 Q. Is that there?
10 A. Yes.
11 MR. PANTHER: Can the witness be
12 passed Exhibit No. 8? It's Change Order No. 2
13 -- Pay Application No. 2.
14 (Exhibit passed.)
15 BY MR. PANTHER:
16 Q. Do you have Exhibit No. 8, Mr. Orange?
17 A. Yes, sir.
18 Q. Look at the back page.
19 A. Okay.
20 Q. This is a PSI report dated June 23,
21 1999.
22 A. Uh-huh.
23 Q. PSI was out to the site to test the
24 soils; is that right?
25 A. Yes.

1 Q. Is that reflected in your report?
2 A. No.
3 Q. July 6 -- actually look at Exhibit 8.
4 I'm sorry. Pick Exhibit 8 back up.
5 A. I've got 8 right here.
6 Q. Turn to the July 6, 1999, report from
7 PSI in Exhibit No. 8, please.
8 A. Okay.
9 Q. According to PSI's report, they were
10 out at the site testing the suitability of the
11 soil; is that right?
12 A. Yes.
13 Q. Now look at your July 6 report.
14 A. Okay.
15 Q. Anything in there about that?
16 A. No.
17 Q. Look back at Exhibit No. 8, at the
18 July 20 PSI report.
19 A. Okay.
20 Q. PSI was testing again that day?
21 A. Yes.
22 Q. July 20, your report, you show that
23 one there, don't you?
24 A. Yes, uh-huh.
25 Q. Okay. The next PSI report, July 27,

1 1999 -- do you have the July 27, 1999, report?
2 A. Yes.
3 Q. According to PSI, they were testing on
4 that day to determine suitability of soils.
5 A. Right.
6 Q. Any notes about that in your report?
7 A. No.
8 Q. Take a look at July 2nd of your
9 reports.
10 A. Okay.
11 Q. On that day you met with Ricky of
12 American Excavators on bad soils, right?
13 A. Yes.
14 THE COURT: Now, where is that?
15 MR. PANTHER: On his report, July
16 2nd.
17 THE COURT: Okay. Got it.
18 BY MR. PANTHER:
19 Q. It doesn't say what you and Ricky
20 talked about, though, does it?
21 A. No.
22 Q. Turn to July 9 of your reports. There
23 you noted "Dredging out entrance and hauling
24 off unsuitable soil," right?
25 A. Right.

1 Q. July 28?
2 A. Okay.
3 Q. Are you there?
4 A. Yes.
5 Q. "Excavating retention pond." Is that
6 because the soil was unsuitable?
7 A. No. You have to dig the detention
8 pond.
9 Q. Okay. July 30, "Excavated driveway
10 out, bad soils."
11 A. Okay.
12 Q. Except for the one PSI on July 20, you
13 were noting bad soils on a variety of other
14 days that PSI was out there, weren't you?
15 A. Do what now?
16 Q. You were noting bad soils in your
17 daily reports on days that PSI was not out to
18 the site, weren't you?
19 A. Give me a for instance. Where else
20 did I refer to it?
21 Q. July 2. Take a look at July 7.
22 A. July 2 and 7?
23 Q. Yes, sir. PSI wasn't there July 2,
24 were they?
25 A. I just said that I met with Ricky

1 about the bad soils. I didn't say anything
2 about us excavating anything.

3 Q. I understand, but you're noting in
4 your daily reports that you're having some
5 discussions on site about bad soils on days
6 that PSI isn't anywhere around. That's true,
7 isn't it?

8 A. We may have talked about it.

9 Q. You and Mr. Tipper?

10 A. I guess.

11 Q. Well, who else would you have talked
12 to?

13 A. He's the only one, really, that I ever
14 talked to out there other than Harley.

15 Q. So Mr. Tipper was, in fact, coming to
16 you and notifying you of bad soils on these
17 occasions?

18 A. Rephrase your question, please. What
19 are you asking?

20 Q. I'm asking you, on the days that you
21 note bad soils that PSI is not on site, isn't
22 it true that Mr. Tipper was informing you of
23 bad soils on site?

24 A. Well, we had discussions a lot about
25 what the soils looked like.

1 Q. All right. And it's true, then, that
2 Mr. Tipper was informing you, on various
3 occasions throughout his work on this job,
4 that he was running into unsuitable material?
5 Yes or no.
6 A. Yes.
7 Q. And he was doing that on days not just
8 when PSI was out to the site; isn't that true?
9 A. Yes.
10 Q. Do you remember the occasion when
11 American Excavators was stripping topsoil and
12 they stopped because they had run into two,
13 two and a half feet in one area? Do you
14 remember that?
15 A. I think that was the same time that we
16 had the disagreement.
17 Q. And by "disagreement," you mean the
18 disagreement between GTE on the one hand and
19 Southern Consulting on the other, right?
20 A. Yes.
21 Q. Now, it's true, isn't it, that you
22 agreed with Southern Consulting that that soil
23 was bad and it needed to come out?
24 A. Yes.
25 Q. Now, one of the areas that I think you

1 said that you did in fact direct Mr. Tipper to
2 excavate was for the RCP, right?

3 A. Yes.

4 Q. Okay. You're aware, aren't you, that
5 American Excavators submitted a change order
6 to remove that RCP and replace it with fill,
7 right?

8 A. Yes.

9 Q. That change order is in front of you
10 within Exhibit No. 8, isn't it?

11 A. Yes.

12 Q. And in the first instance, that change
13 order was passed to you as the project
14 superintendent to review and approve if you
15 felt it was appropriate?

16 A. Yes.

17 Q. I may have misspoken, Mr. Orange. I
18 think I told you that it was in Exhibit No. 8,
19 and I don't think that it is. It's actually
20 in Exhibit No. 7. I'm sorry. Exhibit No. 7
21 included the Change Order No. 1 that regards
22 the RCP, doesn't it?

23 A. Yes.

24 Q. Was it your job responsibility at RCR
25 to take a look at subcontract change orders

1 that are submitted to determine if they should
2 be paid or not?

3 A. Most cases, yes.

4 Q. And you, in fact, reviewed this pay
5 application along with the change order,
6 didn't you?

7 A. Yes, sir.

8 Q. And you approved it for payment?

9 A. Yes, sir.

10 Q. Now, with regard to Exhibit No. 8,
11 likewise with Pay Application No. 2, which is
12 Exhibit No. 8 -- do you have it there?

13 A. Yes.

14 Q. If I go too fast, you just stop me and
15 tell me and I'll be glad to slow down. These
16 documents are a lot more familiar to us than
17 they are to you right now.

18 Are you with me on Exhibit 8?

19 A. Yes.

20 Q. You reviewed Exhibit No. 8, Pay
21 Application No. 2, that had Change Order Nos.
22 2 and 3 included within it, didn't you?

23 A. Yes.

24 Q. And your duty at RCR was to determine
25 whether the subcontractor was entitled to be

1 paid what it was asking to be paid, right?

2 A. Excuse me? Okay.

3 Q. Would you like me to rephrase the
4 question? I'll be glad to.

5 Your job responsibility on this
6 project included the review of Pay Application
7 No. 2, right?

8 A. Yes. I would look at it, yes.

9 Q. And when you reviewed Pay Application
10 No. 2, it had Change Order 2 and 3 along with
11 it, didn't it?

12 A. Yes.

13 Q. And you approved Pay Application No. 2
14 for payment, didn't you?

15 A. Yes.

16 Q. And by approving Pay Application No.
17 2, you therefore were approving Change Order
18 Nos. 2 and 3?

19 MR. CARNEY: Your Honor, I'm going
20 to object. I think he's making a legal
21 conclusion.

22 THE COURT: Overruled.

23 What he's saying is when you
24 approved Pay Application No. 2, that also
25 included Change Orders 2 and 3.

1 THE WITNESS: Yes, sir, that's
2 what is written on it.

3 BY MR. PANTHER:

4 Q. Okay. You don't dispute, do you, that
5 American Excavators was owed the \$1,800 that
6 it billed for removing and replacing the RCP,
7 do you?

8 A. No, sir.

9 Q. Now, the other area that you said that
10 you had directed American Excavators to --

11 THE COURT: Let me stop you here.
12 RCP (sic) paid that, didn't they?

13 MR. PANTHER: No.

14 THE COURT: Didn't they like cut a
15 check?

16 MR. PANTHER: They did and then
17 they backed it out.

18 MR. CASHION: They paid \$620 of
19 it. So you have 1,180 remaining, \$1,180.
20 That's the issue.

21 THE COURT: All right.

22 BY MR. PANTHER:

23 Q. The other area that you talked about,
24 where you told Ricky Tipper to remove material
25 without PSI's permission, I think you said was

1 in the haul road?

2 A. Yes.

3 Q. How often were you on site?

4 A. After I got to the site after
5 finishing up the other job, I was pretty well
6 there every day.

7 Q. Every day consistently from the dates
8 on your report, June 11 until at least the
9 ending date on this report, August 17, you
10 were there every day that the job was
11 underway?

12 A. Not every day, but I had to be there
13 the majority of the days.

14 Q. And for the days that you were there,
15 did you spend most of the day there?

16 A. Yes.

17 Q. Okay. From June 16, 1999, until July
18 30, 1999, there were an enormous number of
19 trucks that were bringing fill to that site,
20 weren't there?

21 A. There were several trucks hauling. I
22 wouldn't say enormous.

23 Q. Pardon me?

24 A. I wouldn't say enormous, but there
25 were several trucks hauling.

1 Q. You don't document anything like that
2 in your reports, though, do you?
3 A. Huh-uh. No.
4 Q. You couldn't tell me from memory how
5 many trucks a day you saw delivering fill to
6 the site?
7 A. No.
8 Q. Couldn't tell me how many loads per
9 day were delivering fill to the site?
10 A. No.
11 Q. Couldn't tell me if it was 10 a day,
12 20 a day, 50 a day?
13 A. No.
14 Q. 80 a day?
15 A. I didn't keep up with it.
16 Q. Could have been that many, you just
17 don't know?
18 A. I doubt if there was ever 80 trucks
19 that come in there in the daytime.
20 Q. You said you doubt. Can you swear
21 under oath that there weren't 80 trucks one
22 day or another?
23 A. Yes, I can swear that there never was
24 80 trucks hauled on that site in one day when
25 I was there.

1 Q. How many were there?
2 A. Most of the time they had five to six
3 trucks running.
4 Q. At a time?
5 A. Yes.
6 Q. Did they ever stop?
7 A. Yes.
8 Q. You agree, don't you, that at one
9 point American Excavators and RCR agreed that
10 in the cut section, American Excavators' price
11 for unsuitable material would be reduced from
12 12.50 to \$10 a cubic yard, right?
13 A. I remember that issue coming up, yes.
14 Q. And you remember that that was agreed
15 upon, right?
16 A. Vaguely, yes.
17 THE COURT: And is that covered in
18 Change Order No. 2?
19 THE WITNESS: Yes, sir, it looks
20 like, because it's \$10 instead of 12.
21 THE COURT: Okay. I didn't see
22 any other change order where there was a
23 \$10 --
24 THE WITNESS: I think that's the
25 only one.

1 BY MR. PANTHER:

2 Q. What's the explanation for why we

3 don't have any daily reports from June 16

4 until June 23?

5 A. I couldn't answer that.

6 Q. Well, when you prepare them, how would

7 you keep them?

8 A. I would turn them in to the office,

9 and then the office would -- they would be

10 reviewed by Dee to keep up with the man-hours

11 that was on the job, and then they would be

12 turned over to our vice-president. He would

13 review them and then he would turn them back

14 over to the project manager.

15 Q. Who was the vice-president that would

16 have reviewed these?

17 A. Steve Yokley.

18 Q. The reason why the haul road needed to

19 be -- material needed to be removed out of the

20 haul road is because there were so many trucks

21 bringing fill to that site; isn't that true?

22 A. Yeah. Yes, sir.

23 THE COURT: That's the one I'm a

24 little confused about. That's the second area

25 that you indicated you instructed American

1 Excavators to go ahead and take out some of
2 the unsuitable soil?

3 THE WITNESS: Yes, sir.

4 THE COURT: And what I guess I'm
5 confused on is, is that covered in a separate
6 change order, that particular work that they
7 did?

8 THE WITNESS: No, sir, not that
9 I'm aware of.

10 THE COURT: That's not included in
11 Change Order No. 3 where the four PSI areas
12 are indicated?

13 THE WITNESS: No, sir.

14 THE COURT: That's something
15 separate from the haul area?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay.

18 BY MR. PANTHER:

19 Q. Did American Excavators do the work
20 that you directed them to do?

21 A. Yes, sir.

22 Q. Who did you discuss that with? Who
23 did you ask?

24 A. Ricky Tipper.

25 Q. How did you tell him to document what

1 he was going to be asking to be paid?

2 A. In those two instances, to keep up

3 with his time.

4 Q. His time?

5 A. Yeah, what time that he had on his

6 track hoe and what he hauled out.

7 Q. Pardon me?

8 A. What he hauled out of those two areas.

9 Q. Is that documented in your reports

10 anywhere?

11 A. No.

12 THE COURT: When was this work

13 performed as we're looking at the month of

14 June or July?

15 THE WITNESS: Your Honor, I was

16 trying to think of that a while ago, and I

17 don't remember when -- if it took place before

18 our meeting --

19 THE COURT: June 30th is the

20 meeting.

21 THE WITNESS: -- or after.

22 THE COURT: You don't remember

23 which one?

24 THE WITNESS: No, sir.

25 THE COURT: And Tipper was

1 supposed -- in order to get paid for this, he
2 needed to keep up with his time on running the
3 backhoe, you said, and the number of loads
4 that were removed?

5 THE WITNESS: Well, on the RCP
6 pipe, when I instructed him to take that out,
7 it was a time and material deal. In other
8 words, keep up with how long it took him to
9 take it out and how much fill you had to bring
10 back to compact it back.

11 THE COURT: Now, that's in Change
12 Order 1, isn't it, that one?

13 THE WITNESS: Yes, sir. It's the
14 one we just looked at a while ago. It was --

15 MR. PANTHER: It's Exhibit No. 7.
16 I think you should have it.

17 THE COURT: Okay. Right here
18 (indicating)?

19 THE WITNESS: Yes, sir.

20 THE COURT: "Remove and replace
21 with structural fill approximately 400" --
22 what's LL?

23 THE WITNESS: Linear feet, length.

24 THE COURT: Of pipe. And that was
25 the \$1,800 charge?

1 THE WITNESS: Yes, sir.

2 THE COURT: Now, whose change

3 order is this, y'all's or American

4 Excavators?

5 THE WITNESS: It's from American

6 Excavators. This is American's.

7 THE COURT: Right. Because Harley

8 Ezell has signed off on it.

9 THE WITNESS: Yes, sir.

10 THE COURT: So you told him in

11 that instance, on the pipe, to keep up with

12 the number of loads he had to fill; is that

13 right?

14 THE WITNESS: Yes, sir, time and

15 material. How much time he had digging it out

16 and then replacing it with fill.

17 THE COURT: And is that the same

18 thing you told him on the haul road?

19 THE WITNESS: Yes, sir. It was

20 about a 60 by 20 area about a foot and a half

21 deep, is what it was. We both agreed to how

22 much we'd take out of that.

23 THE COURT: Okay. But apparently

24 you didn't document it on your daily report?

25 THE WITNESS: No, sir.

1 THE COURT: Did you ever account
2 for that with Mr. Stover or anybody at your
3 place of business?

4 THE WITNESS: I expected a change
5 order to come across from American. Normally
6 Ricky --

7 THE COURT: If it had, then you
8 would have gone: I told him to do this?

9 THE WITNESS: Yes, sir, just like
10 I did this one (indicating). See, I disagreed
11 with this one.

12 THE COURT: You disagreed with
13 what?

14 THE WITNESS: I thought that this
15 should have been paid because this was not
16 shown on the --

17 THE COURT: You agreed that
18 American Excavators should have been paid?

19 THE WITNESS: Yes, sir.

20 THE COURT: You disagreed with
21 your superior officers on that?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. I'm with you.

24 BY MR. PANTHER:

25 Q. So with regard to the RCP, Mr. Tipper

1 was supposed to keep track of the number of
2 loads it took to fill it back in?

3 A. Yes, sir.

4 Q. Okay. And I think you answered the
5 judge that on the haul road, he was supposed
6 to keep track of the number of loads it took
7 to fill it back in?

8 A. Yes, sir.

9 Q. We had an area. We agreed on an
10 area.

11 THE COURT: If you can do this,
12 can you just give me an estimate, a ballpark
13 figure on how many loads you would have
14 expected American Excavators to use to fill up
15 the pit or whatever it was in the haul road
16 that had to be excavated? Because in my mind
17 I don't know if you're talking about one dump
18 load or a hundred or 500.

19 THE WITNESS: Would you give me
20 just a minute?

21 THE COURT: Are you writing on one
22 of my exhibits?

23 THE WITNESS: Sorry, Your Honor.

24 THE COURT: I'll give you a piece
25 of paper. Do you want a calculator?

1 THE WITNESS: It would help.
2 THE COURT: Here you go.
3 THE WITNESS: (Pause.) It should
4 have been about 300 yards.
5 THE COURT: Then that would be,
6 depending on whose -- what did you say, you
7 get 12 cubic yards in a truck? Is it 12?
8 MR. CASHION: 12 was the first
9 one. 15 was the trial testimony.
10 THE COURT: If you use 12, that
11 would be 25 trucks.
12 THE WITNESS: Yes, sir.
13 THE COURT: All right. That
14 helps.
15 BY MR. PANTHER:
16 Q. And it's your testimony, Mr. Orange,
17 that except for PSI, what it took to fill in
18 the areas that PSI documented, the only
19 truckloads that American Excavators brought in
20 at your direction was 25 trucks; is that
21 right?
22 A. If that's what it figured out.
23 Q. That's what your sworn testimony is?
24 THE COURT: Wait just a second
25 now, Mr. Panther. That's how much it was on

1 the haul road. He also said for the pipe.
2 Did you cover the pipe?
3 MR. PANTHER: I didn't, Your
4 Honor. You're right. Thank you.
5 BY MR. PANTHER:
6 Q. So 25 trucks for the haul road, \$1,800
7 for the RCP pipe and then whatever it was for
8 PSI?
9 A. Right.
10 Q. It's your testimony that that's all
11 the unsuitable material that American
12 Excavators removed at either your direction or
13 PSI's direction? Is that your testimony?
14 A. Ask that one more time. You put PSI
15 in --
16 Q. The areas that PSI documented.
17 A. Okay. What they documented.
18 Q. 1,800 for the RCP.
19 A. Right.
20 Q. And 25 loads in the haul road.
21 A. Yes.
22 Q. That's all the loads that you think
23 were brought to the site?
24 THE COURT: No.
25 THE WITNESS: That's kind of

1 deceiving.

2 BY MR. PANTHER:

3 Q. Let me rephrase the question, Mr.

4 Orange. That's all that was brought to the

5 site at your direction. Is that your

6 testimony?

7 A. Yes, sir.

8 Q. You're not with RCR any longer?

9 A. No.

10 Q. When did you leave RCR?

11 A. Last June.

12 Q. Whose decision was it to leave, yours

13 or RCR's?

14 A. Mine.

15 Q. Let me ask you to look at Exhibit No.

16 11. Before I ask you about Exhibit No. 11, I

17 want to clear up one area. Do you agree that

18 other than the area for the RCP, the areas

19 that PSI identified and at the haul road,

20 there were a lot of other areas where

21 unsuitable material had been found?

22 A. Are you talking about above subgrade

23 or below subgrade or what?

24 Q. Let's take above subgrade first.

25 There were a lot of other areas above subgrade

1 other than those four: RCP, PSI -- I guess
2 those three -- and the haul road? There were
3 a lot of other areas above subgrade than those
4 three?
5 A. Yes.
6 Q. Now below subgrade. In the area where
7 the RCP was, areas that PSI documented and the
8 haul road, there were a lot of other areas on
9 this site below subgrade where unsuitable
10 material had been encountered; isn't that
11 true?
12 A. The only other area that I remember
13 was the east side where Harley had already
14 excavated before we had that meeting.
15 Q. And other than that, it's your
16 testimony that there was no other unsuitable
17 material below subgrade?
18 A. We were pretty well directed from that
19 point forward.
20 Q. Who? I'm sorry. Can you answer my
21 question?
22 A. PSI --
23 Q. Can you answer my question?
24 A. After that point, we were directed by
25 PSI if there was -- they inspected it.

1 Evidently there wasn't any.

2 Q. You agree, though, don't you, that
3 there were far more truckloads of fill being
4 brought to the site than just what was
5 necessary to fill the areas that PSI
6 identified, that the RCP required, that the
7 haul road required?

8 A. To build the pad, yes.

9 Q. But beyond that, there were far more
10 than the 3,000 or so that American Excavators
11 had in its bid, weren't there?

12 A. I don't know if there was or not. I
13 just remember them building the pad.

14 Q. Exhibit No. 11, I was going to ask you
15 about that when I got diverted. Sorry.

16 THE COURT: Do you want to take a
17 short break?

18 THE WITNESS: Yes, sir.

19 MR. PANTHER: I'm nearly through,
20 Your Honor.

21 THE COURT: Okay.

22 BY MR. PANTHER:

23 Q. Now, when you were the superintendent,
24 did you review a copy of American Excavators'
25 subcontract while you were acting as super-

1 intendent on this job?

2 A. Yes, sir.

3 Q. Now, Exhibit No. 11, Pay Application

4 No. 4 which contained Change Order No. 4, was

5 this submitted to you?

6 A. (Pause.)

7 Q. Was it submitted to you, Mr. Orange?

8 A. Seems to me like I remember seeing it,

9 yes.

10 Q. Did you review this pay application?

11 A. I don't remember. This is the next

12 year in April.

13 Q. Pardon me?

14 A. This is April of the next year. I

15 don't remember.

16 Q. You know that pay application wasn't

17 paid, right?

18 A. Yes.

19 Q. But you can't tell me why, can you?

20 A. No.

21 Q. Now, you attended a meeting, I

22 think, in the spring of 2000 where American

23 Excavators, Marvin Parker, Mr. Stover, the

24 county, the architect, a great big meeting

25 where the issue of paying American Excavators

1 came up, didn't you?

2 A. Yes.

3 Q. And at that meeting, the position that

4 RCR took through you and Mr. Stover is that

5 American Excavators is entitled to be paid

6 what it's asking for because the county is not

7 paying RCR that amount. That's right, isn't

8 it?

9 A. (Pause.)

10 Q. RCR was refusing to pay American

11 Excavators because the county was refusing to

12 pay RCR. That's right, isn't it?

13 A. Yes.

14 Q. But at that meeting you took that

15 position not knowing that American Excavators

16 had a unit price for unsuitable material;

17 isn't that true?

18 A. I don't know what you're talking

19 about. I mean, I'm not following what you're

20 getting at.

21 Q. I guess what I'm asking you is, at the

22 time that this meeting occurred where RCR took

23 the position that it wasn't going to pay

24 American Excavators unless the county paid

25 RCR, the basis for RCR's position was the

1 belief that American Excavators didn't have a
2 clause in its contract entitling it to
3 payment. That's true, isn't it?
4 A. I don't remember that.
5 Q. You had a conversation with
6 Mr. Parker, didn't you?
7 A. Yes.
8 Q. Where you, in so many words, told him,
9 We're not going to pay you under your Pay
10 Application No. 4; is that right?
11 A. Yes, I did call, I think, Marvin. If
12 I'm not mistaken, Marvin came to the trailer
13 with his secretary or bookkeeper, and Don
14 Stover and I were there, yes.
15 Q. And your position at that meeting
16 was: I'm sorry, Mr. Parker, we're not going
17 to pay you the amount that you're asking for?
18 A. I don't have a position. I'm not in
19 the authority position to do anything about
20 it.
21 Q. What you told him was, RCR is not
22 going to pay you, right?
23 A. I think that the conversation --
24 we were discussing about getting paid for
25 material above subgrade as unsuitable soils.

1 I don't remember all the conversation, but
2 basically for anything that was above subgrade
3 that he wanted payment for as unsuitable
4 soils, that wasn't covered.

5 Q. I thought you just got finished
6 testifying that at some point in the job
7 American Excavators and RCR reached an
8 agreement that American Excavators would get
9 10 rather than 12.50 a yard for unsuitable
10 material above subgrade.

11 A. No, not above subgrade.

12 Q. Didn't you just testify to that?

13 A. If I did, I was mistaken.

14 Q. Didn't you just testify that in Change
15 Order No. 2 for \$28,980, that that's what that
16 covered?

17 A. Which document is it?

18 Q. Exhibit No. 8, Change Order No. 2.

19 A. That was not my intention.

20 Q. Well, you approved a change order for
21 \$10 a cubic yard; isn't that right?

22 A. Yeah, but this doesn't say anything
23 about above subgrade.

24 MR. CARNEY: Your Honor, I'm going
25 to object to the question that he approved

1 Change Order No. 2. I don't think that's into
2 evidence.

3 THE COURT: Well, I think actually
4 he did say that. He said pretty clearly that
5 when Application 2 came in, he approved it,
6 and included in that was Change Orders 2 and
7 3. That's what I remember him testifying to.
8 And then I asked him was Change Order 2 this
9 part about the \$10, and he told me that it
10 was.

11 THE WITNESS: Yes, sir.

12 THE COURT: I didn't take it any
13 further than that, though. I didn't
14 extrapolate that it was \$10 for everything
15 above grade. I just took it as -- that's why
16 I asked him were there any other change orders
17 submitted. And my understanding of his
18 testimony was that the \$10 deal was covered in
19 Change Order No. 2. I didn't take it that it
20 went any further. Maybe it did.

21 THE WITNESS: This doesn't mention
22 anything about above subgrade.

23 BY MR. PANTHER:

24 Q. Do you remember me taking your
25 deposition?

1 A. Uh-huh.

2 Q. Let me pass you a copy of it.

3 A. Okay.

4 THE COURT: You say it doesn't
5 cover anything above subgrade. What I've been
6 taught the last few days, where it says to
7 cover the cost of cut -- do you see that on
8 number --

9 THE WITNESS: Yes, sir.

10 THE COURT: I was told that that
11 means, if I remember from the diagram, that
12 cut is above subgrade; is that right? Dirt to
13 be removed off the top to reach to subgrade,
14 is that what "cut" is?

15 THE WITNESS: Well, yes. That's
16 kind of a loose term. We use it for cutting
17 down to subgrade as well as undercut, you
18 know.

19 THE COURT: You said undercut,
20 though. To me there's a difference there, to
21 cut and undercut.

22 THE WITNESS: Okay.

23 THE COURT: I'm just saying, this
24 change order says to cover the cost of cut.
25 Do you see that, No. 2?

1 THE WITNESS: Right.

2 THE COURT: And that made sense to

3 me. Because the way I understood this change

4 order came about was they were talking about

5 the cut of the pile of dirt on top that was

6 going over as fill. That's what I remember.

7 And that's why they gave the break of \$2.50.

8 So I guess what I'm asking you

9 is: Do you think that Change Order No. 2

10 could have actually covered the cut being

11 material above subgrade?

12 THE WITNESS: Your Honor, I can't

13 say. I can't say.

14 BY MR. PANTHER:

15 Q. Mr. Orange, I've got a copy of your

16 deposition there in front of you.

17 A. Okay.

18 Q. Would you turn to Page 19? If you

19 look, the deposition is in four pages. You

20 see how it's broken up into four?

21 A. Okay.

22 Q. Page 19 is going to be on the very

23 bottom, in the center bottom of one of those

24 four pages. Are you with me?

25 A. Yes, sir.

1 Q. The line I want you to begin at is
2 Line 12.
3 A. Okay.
4 Q. It begins, "Let me rephrase it." You
5 with me?
6 A. Yes.
7 Q. I asked you this question: "At one
8 point in the job, you complained or Don Stover
9 complained to American Excavators that it
10 wasn't fair for them to charge 12.50 a cubic
11 yard for them to remove and replace fill
12 because they were having to cut it anyway;
13 isn't that so?"
14 Mr. Cashion objected to form.
15 "Question: Go ahead.
16 "Yes, I remember that.
17 "Question: And what American
18 Excavators agreed to do was that since they
19 were having to cut certain areas anyway, for
20 those areas that they would cut, if they had
21 to remove and replace unsuitable fill that was
22 in those areas, they would only charge \$10 a
23 cubic yard as opposed to 12.50, right?
24 "Answer: Yes."
25 Is that your testimony? Did I read

1 that correctly?

2 A. Yes, you read it correctly.

3 Q. Is that your testimony?

4 A. Yes.

5 Q. The spoils that American Excavators
6 pushed aside, you were aware that American
7 Excavators was hauling off those spoils,
8 weren't you?

9 A. Yes.

10 Q. It's true, isn't it, that before
11 American Excavators finished the site, that
12 they top dressed the site and spread as much
13 topsoil as was needed on the site?

14 A. Pretty much. There was a few places.

15 Q. Did they come back and address those
16 areas?

17 A. No, I think we pretty well took care
18 of most of those.

19 Q. With the topsoil that was left for you
20 to do that?

21 A. Yes, sir.

22 Q. In fact, isn't it true that American
23 Excavators left a lot of topsoil for you that
24 you wanted? Isn't that true?

25 A. I don't remember that.

1 Q. It could have happened, you just don't
2 remember?

3 A. I don't think so. I don't have any
4 way of hauling it.

5 Q. All right. But American Excavators
6 top dressed, except for isolated areas,
7 generally most of the site, didn't they?

8 A. Yes, sir.

9 Q. And then they hauled off the rest of
10 the spoils, rest of the topsoil that was not
11 needed on site, didn't they?

12 A. Yes, sir.

13 Q. And they were supposed to do that,
14 weren't they?

15 A. Right.

16 MR. PANTHER: If I may have just a
17 moment.

18 THE COURT: Yes, sir.

19 MR. CASHION: Can we take a
20 break? I don't know what he's going to do,
21 but he was going to wrap up 20 minutes ago.

22 THE COURT: Well, that's probably
23 my fault too.

24 MR. PANTHER: Let me just confer
25 with --

1 THE COURT: I think he's done.

2 MR. PANTHER: I'll do whatever
3 Your Honor wants to do.

4 THE COURT: Why don't you talk to
5 your client during the break.

6 MR. PANTHER: All right.

7 (A short break was observed.)

8 MR. PANTHER: Thank you, Mr.
9 Orange. I have nothing further.

10

11 REDIRECT EXAMINATION BY MR. CARNEY:

12 Q. Mr. Orange, I have very few
13 questions. First, at the time this job was
14 bid, was there any way to determine whether
15 that RCP, that reinforced concrete pipe, was
16 present on the site?

17 A. No, sir.

18 Q. Could you tell me why not?

19 A. There was no evidence of it anywhere
20 on the site. There was not a headwall going
21 into it or coming out of it. It was
22 completely closed in. I mean, it was buried
23 under, you know, topsoil. There was no
24 evidence of it.

25 Q. All right. After June 30th, 1999,

1 which is that meeting you were in, whose job
2 was it to determine whether material needed to
3 be undercut?
4 A. PSI's.
5 Q. We've spent some time on Pay
6 Application No. 2 that was submitted by
7 American Excavators. When you approved that,
8 were you approving Change Order No. 2 that was
9 attached to it?
10 A. No. What I do is I just -- I wasn't
11 approving that particular one. I was just
12 approving the pay request, the office.
13 Q. My final question is: When we're
14 talking about the road, does American
15 Excavators have a responsibility to maintain
16 that road?
17 A. Yes, if they're responsible for
18 tearing it up, you know, rutting it up.
19 Q. And what would cause that?
20 A. Excessive truck traffic.
21 Q. And was that in the area that you said
22 earlier that you directed them to take up that
23 section?
24 A. Yes, sir.
25 THE COURT: Take up the what?

1 MR. CARNEY: That section.
2 BY MR. CARNEY:
3 Q. What was your answer, Mr. Orange?
4 A. Yes, sir.
5 MR. CARNEY: I don't have any
6 further questions.
7 MS. GOODSON: Nothing further,
8 Your Honor.
9 MR. PANTHER: Your Honor, may I
10 have a moment?
11 THE COURT: Sure.
12 (Pause.)
13
14 RECROSS-EXAMINATION BY MR. PANTHER:
15 Q. Do you have your daily reports in
16 front of you?
17 A. Yes, sir.
18 Q. Turn to July 30, and tell me when
19 you're there.
20 A. Okay. -
21 Q. "Excavated driveway out, bad soils,
22 and compacted clay back in"?
23 A. Yes, sir.
24 Q. Is that the roadway that you were
25 referring to that American Excavators --

1 A. Yes, sir.

2 Q. Yes?

3 A. Yes, sir.

4 Q. So the excavation was not, as you just
5 testified, because of excessive traffic; it
6 was as you wrote in your report, bad soils?

7 A. Well, I wrote bad soils.

8 Q. But that's not true?

9 A. It was due to excessive truck traffic
10 when you're going in and out there.

11 Q. So when you wrote "bad soils," you
12 didn't mean bad soils?

13 A. I can't answer that, but I remember
14 why it rutted up; it was just so many trucks
15 running in and out.

16 Q. So when you wrote "bad soils," that's
17 really not true?

18 A. It was bad soils because it was
19 bumpy. But, you know, as far as bad soils,
20 no, I couldn't answer that.

21 MR. PANTHER: That's all.

22 THE COURT: All right. Mr.
23 Orange, you're excused, sir.

24 Mr. Carney, anything else? Or,
25 Mr. Cashion, anything else?

1 MR. CASHION: I have about five
2 minutes of Mr. Yokely. There's one point I
3 want to make with him.

4

5 STEVEN W. YOKLEY

6 having first been duly sworn, was examined and
7 testified as follows:

8

9 DIRECT EXAMINATION BY MR. CASHION:

10 Q. Would you state your full name?

11 A. Steven Wesley Yokely.

12 Q. Where do you live, Mr. Yokely?

13 A. I live here in Franklin.

14 Q. What is your employment?

15 A. I'm VP of construction with RCR
16 Building Corporation.

17 Q. How long have you been in that
18 position?

19 A. I've been in that position five, maybe
20 six years.

21 Q. How long have you worked for RCR?

22 A. I believe the past 11 years now.

23 Q. Okay. How long have you been in
24 construction?

25 A. Since the late '70s, I guess.

1 Q. Now, with respect to the Williamson
2 County community services building, did you
3 have any role on this project during the
4 construction of it?

5 A. In that I'm in charge of all the
6 operations of the company, yes, I had a role.
7 I would make periodic job site visits. They
8 might be every two to three weeks. I would
9 just come to the site just to observe where we
10 were in the work so that I could have a sense
11 of how we were progressing.

12 Q. Okay. Now, did you monitor the pay
13 application process?

14 A. No, I did not.

15 Q. When did RCR discover the confusion
16 about Change Orders 2 and 3 of American
17 Excavators? And by "confusion," I mean the
18 fact that you submitted 2 and not 3 that was
19 represented as the PSI undercutting?

20 A. I believe I became aware of that
21 sometime maybe in the spring of 2000 after the
22 dispute about the extra undercut that had been
23 done that American Excavators was making a
24 claim for.

25 Q. In the spring of 2000?

1 A. I believe that's correct.

2 Q. Okay. Has Williamson County overpaid
3 RCR?

4 A. That certainly appears to be the
5 case. It appears that from the attachments
6 that we have discovered, I believe Change
7 Order 2 and Change Order 3, that I believe we
8 mistakenly submitted the one for the 2,890 and
9 whatever many yards, thinking that that was
10 the one that went with the map of the four
11 areas, and later discovered that that is not
12 the case.

13 Q. Okay. And how is that issue going to
14 be addressed with Williamson County? Because
15 they haven't brought a cross-claim against us
16 in this action.

17 A. Well, when we made the last payment to
18 American Excavators, we held back the 12,000
19 believing that a mistake had been made, and it
20 is our intention to refund that to Williamson
21 County pending the outcome of the decision
22 here.

23 MR. CASHION: That's all the
24 questions I have, Your Honor.

25 MS. CARSON: No questions, Your

1 Honor.

2 MR. PANTHER: No questions.

3 MR. CASHION: Part of the relief
4 that we have requested is for attorneys'
5 fees. And at this point in the proof, I would
6 like to present my affidavit for the
7 attorneys' fees in this case.

8 THE COURT: All right. That's
9 attorneys' fees against which party?

10 MR. CASHION: American.

11 THE COURT: All right. Pursuant
12 to the contract with American Excavators?

13 MR. CASHION: Yes, sir.

14 THE COURT: Does everybody agree
15 there's a paragraph that provides for the
16 prevailing party?

17 MR. PANTHER: Yes, sir.

18 THE COURT: That's all I need to
19 know.

20 MR. CASHION: Okay.

21 (Exhibit No. 39 was marked.)

22 THE COURT: I have your affidavit
23 for fees, Mr. Cashion, as Exhibit 39.

24 MR. CASHION: And as a final piece
25 of proof, Your Honor, I would like to put into

1 evidence the deposition of Harley Ezell and
2 read one section of that into evidence.

3 THE COURT: All right.

4 MR. PANTHER: Let me object.
5 I don't believe that the rules of civil
6 procedure permit the use of a party's
7 deposition who, at the time of the deposition,
8 was not employed by a party. Let me rephrase
9 that because I said that wrong. I don't think
10 the rules permit the introduction of a
11 deposition of a witness who is not a party to
12 the case. I think it's under Rule --

13 THE COURT: Okay. Probably 30.

14 MR. PANTHER: That's what I was
15 going to look at.

16 THE COURT: It's 32, Use of
17 Depositions in Court Proceedings.

18 MR. PANTHER: I think it's
19 Subparagraph C.

20 THE COURT: C?

21 MR. PANTHER: I'm sorry,
22 Subparagraph 3. "The deposition of a witness,
23 whether or not a party, may be used by any
24 party for any purpose if they're dead, outside
25 a hundred miles, unable to testify or the

1 offering party has been unable to procure
2 attendance or upon exceptional circumstances."
3 None of those apply. Paragraph 2 is a 30.026
4 representative. Paragraph 1 is for impeaching
5 and contradicting testimony.

6 MR. CASHION: I think when we
7 impeach the witness, Your Honor, as we did,
8 we can move the deposition into evidence to
9 consider the whole of that. I guess that's
10 what I'm asking first to do, is move it into
11 evidence. I can either do it in closing or do
12 it now, one portion of it.

13 THE COURT: Well, now, I'm not so
14 sure about that, Mr. Cashion. I think when
15 you're impeaching the witness and you refer to
16 a page and line number and you read that,
17 certainly you're entitled to submit the
18 deposition as an exhibit in case the court of
19 appeals wishes to review that portion of the
20 deposition. But anything else in that
21 deposition, I don't believe the court of
22 appeals would consider it, because I'm not
23 going to consider it.

24 The only time I would consider it
25 is if you brought it to my attention for

1 impeachment purposes, unless it's the
2 deposition of a party, which you may then read
3 in the record as much as you wish, but I don't
4 believe Mr. Ezell would qualify as a party.

5 Now, you know, we do have
6 people that are designated as the party
7 representative. Obviously if you've got RCR,
8 you can't take the deposition of RCR. That
9 would be where I'd be going if I were you.

10 MR. CASHION: Yeah, but I would
11 still think a party -- he was employed by
12 them. I don't think the fact that he leaves
13 employment after his activity in representing
14 them -- because he's a party for the acts --

15 THE COURT: I don't think whether
16 he left the employment has a thing to do with
17 it. It's whether or not he's a party.

18 MR. CASHION: Excuse me?

19 THE COURT: It's whether or not he
20 was a party. That's what I'm wanting to focus
21 on.

22 MR. PANTHER: I think actually
23 it's addressed in Subparagraph 2. It says,
24 "The deposition of a party or of anyone who,
25 at the time of taking the deposition, was an

1 officer, director or managing agent or person
2 designated under these rules to testify on
3 behalf of the corporation." So if they're a
4 party, it can be used -- Your Honor's right --
5 or if at the time of the taking of the
6 deposition, the witness was an officer,
7 director, managing agent or someone designated
8 under the rules, then it can be used. None of
9 those apply to Mr. Ezell.

10 THE COURT: At the time of his
11 deposition, y'all will have to tell me what --

12 MR. PANTHER: He was not employed
13 by American Excavators.

14 MR. CASHION: That's accurate. He
15 was not employed at the time of his
16 deposition. I was considering him a party
17 since he was employed by them at that time,
18 during this case. I think Tipper, Ezell and
19 Parker are all parties that's testified in
20 this case for American Excavators.

21 THE COURT: I believe Mr.
22 Panther's correct. I'll have to sustain his
23 objection.

24 MR. CASHION: Okay.

25 THE COURT: For the reason that

1 Mr. Ezell, at the time of the deposition, was
2 not an officer, director or managing agent or
3 person designated to testify on behalf of RCR.

4 MR. CASHION: Then I won't do it.
5 In that case, Your Honor, we would rest our
6 case.

7 THE COURT: Do you wish to, at
8 some point, move that in as an offer of proof
9 or anything like that?

10 MR. CASHION: No.

11 MS. CARSON: Your Honor, I have a
12 motion for the Court at this time. I always
13 feel funny calling it a directed verdict
14 motion when there's nobody to direct but Your
15 Honor, but I guess Your Honor can direct
16 yourself.

17 THE COURT: Sure.

18 MS. CARSON: After hearing the
19 proof of both the plaintiff and third-party
20 plaintiff, a reasonable mind could draw but
21 one conclusion as to the liability of
22 Williamson County in this case. It is
23 undisputed throughout the course of this trial
24 that the contract provisions between
25 Williamson County and RCR for payment of extra

1 compensation were not followed as to any of
2 this extra work.

3 It is also undisputed that,
4 nonetheless, when Williamson County made a
5 commitment to pay for something, it paid for
6 it. When the plans didn't show the tree line
7 exactly where it was supposed to be,
8 Williamson County paid for the clearing and
9 grubbing of those trees. And when PSI
10 identified soils below subgrade that needed to
11 be removed and verified those soils,
12 Williamson County paid for those, despite the
13 fact that the formality of a written change
14 order was not obtained in advance, because
15 Williamson County had committed itself to do
16 that consistent with the provisions of its
17 written contract.

18 And it's important, Your Honor,
19 that everything that Williamson County
20 committed itself to do and then did with
21 regard to extra work was in accordance with
22 Williamson County's contract. So there was
23 never any waiver of the provision in that
24 contract by virtue of any action of Williamson
25 County. The only thing that they did not

1 require and may have waived was the written
2 change order requirement in advance as to the
3 things they had verbally committed themselves
4 to do.

5 THE COURT: When you say "things
6 they had verbally committed," you're talking
7 about the June 30th meeting?

8 MS. CARSON: The June 30th meeting
9 where this --

10 THE COURT: So, in essence, that
11 was a modification of the written contract,
12 what came out of that meeting?

13 MS. CARSON: Well, Your Honor, in
14 fact, it really wasn't, because if you look
15 back at the contract terms -- and we've cited
16 all of them in kind of a laundry list in our
17 pretrial brief for the Court's convenience.
18 If you look back at the contract terms, they
19 say exactly what the parties agreed on at that
20 meeting: soils would always be identified as
21 unsuitable only by the geotechnical engineer,
22 they would always be removed only after
23 approval by the geotechnical engineer and the
24 owner, and they would always be verified and
25 quantified by the geotechnical engineer.

1 So what Williamson County agreed
2 to was exactly what its contract said. It was
3 simply that not only did the contract say
4 that, but all parties were on notice that
5 that's what Williamson County was going to do
6 because they discussed it at a meeting where
7 all parties were present.

8 So not only was RCR aware of that,
9 but American Excavators, the subcontractor,
10 who had no contractual relationship with
11 Williamson County, was also aware that that
12 was Williamson County's intention, regardless
13 of what RCR and American Excavators might have
14 discussed outside of those conversations.

15 Your Honor, the underlying factual
16 elements of all of the equitable theories fall
17 short on this case, and it hasn't even been
18 seriously disputed. For an implied contract,
19 for an estoppel, for quantum meruit, for any
20 of those theories to apply to a governmental
21 entity, they must show affirmative action by
22 the county that led a party conferring of
23 benefit to believe he would be paid for that
24 benefit. The parties haven't agreed on much
25 in this case, but they all agree the county

1 didn't do that. The county said what it was
2 going to do and it stuck by that. I think
3 Mr. Ezell said they never deviated from that
4 in answer to one of Your Honor's questions.

5 It also must be unfair for the
6 party receiving the benefit to refuse to pay
7 for it. Your Honor, I would submit it hasn't
8 even been shown by a preponderance of the
9 evidence that the county received a benefit by
10 virtue of removal of some of these soils. The
11 county had already bargained in its contract
12 for removal and replacement of any unsuitable
13 soil that was in the cut section above
14 subgrade. Nobody disputes that. And the
15 architect made crystal clear all throughout
16 this process that the county wasn't going to
17 pay for that. That's a risk they had shifted
18 to RCR by virtue of the contract from the very
19 beginning, and they never waived from that
20 position.

21 The county also contractually
22 provided and, later, through verbal agreement
23 with the parties, reinforced that unsuitable
24 soils would be verified by the geotechnical
25 engineer. And that's not just a technicality,

1 Your Honor. That's because not just everybody
2 is qualified to tell what an unsuitable soil
3 is. What might look like topsoil to some, a
4 geotechnical engineer can go out there and
5 tell you -- and two of them did tell you under
6 oath in this court -- that no, you have to
7 have a certain organic content for it to be
8 topsoil. There are materials that may be dark
9 and appear like topsoil simply to the naked
10 eye, but upon testing may be usable and may be
11 suitable.

12 Well, nobody gave the county the
13 opportunity to make that determination with
14 regard to any of these soils except the ones
15 that were approved by PSI, and so we can never
16 know whether the county was conferred a
17 benefit, Your Honor. Nobody has met the
18 burden of proving that. But even if they had
19 conferred some kind of a benefit, it certainly
20 wasn't unfair for the county to receive it,
21 because the county didn't sit by and let work
22 be done and benefit from it.

23 It is undisputed in the proof,
24 Your Honor, that the county knew nothing about
25 any of the extra work except what was approved

1 by PSI and what had been done by Harley
2 Ezell's men before anybody knew about it, and
3 the county certainly couldn't have approved
4 that or encouraged that.

5 Every witness for American
6 Excavators, every witness testified that the
7 county never said it would pay for anything
8 other than below subgrade materials approved
9 by PSI. Mr. Stover said that and Mr. Orange
10 said that on behalf of RCR. The two
11 geotechnical engineers who testified made
12 clear that that was the process that was put
13 in place by the parties. The county's
14 intentions were crystal clear throughout this
15 process.

16 And, Your Honor, the cases that
17 deal with quantum meruit and with implied
18 contract and with estoppel all address
19 situations in which a party has either led
20 someone to act to their detriment or has, at
21 the very least, knowingly sat by and let them
22 do it and benefited from it. Neither of those
23 are the situation here.

24 Your Honor, even as to the basic
25 elements of quantum meruit, as to the basic

1 elements of estoppel, the basic elements of
2 implied contract, those cases haven't been
3 proved by the preponderance of the evidence.
4 But for the county the standard is even higher
5 because there has to be this affirmative act,
6 and there certainly hasn't been an affirmative
7 act.

8 Now, American Excavators may say
9 they relied on representations to their
10 detriment, but all of those representations
11 came solely from RCR, if they came at all, and
12 they didn't come from the county. And
13 American Excavators' witnesses have been very
14 frank in telling you that and very honest in
15 telling you that.

16 We don't know whether it was
17 necessary to remove the extent of soil that
18 was removed. We don't know what all those
19 trucks brought in. We don't know how much
20 went to the building pad, which is clearly
21 part of the county's contract to begin with,
22 and we don't know how much topsoil was hauled
23 off and sold or taken to Mr. Parker's own
24 subdivision. And the county's not making an
25 issue -- it hasn't made a counterclaim back

1 for the topsoil that was sold. We don't care
2 what happened to the topsoil, but it certainly
3 wasn't that American Excavators was a terrible
4 victim in this case. They were benefiting
5 from what they were taking off this site.

6 And quite frankly, Your Honor,
7 what it appears is that it was easier to
8 remove this soil and replace it, thinking
9 they'd just bill the taxpayer for it, than it
10 was to rework it, which is what they would
11 have had to do in some of these areas
12 according to the geotechnical engineer, but
13 it's what they could have done. And as long
14 as it was suitable soil, it was what they were
15 required to do under the contract unless the
16 county told them otherwise.

17 Ricky Tipper is the only person
18 who testified that all of these extra areas
19 were unsuitable soil, the only one who
20 testified of his personal knowledge. Ricky
21 Tipper is simply not qualified to make that
22 determination in the face of two geotechnical
23 engineers who have testified to the contrary.

24 Harley Ezell told you that he
25 didn't quantify what was all over the site.

1 All he was really able to testify about were
2 the same areas that PSI reported on. He gave
3 some generalities about other things, but the
4 only person who told you that 13,000 cubic
5 yards of unsuitable soil existed was Ricky
6 Tipper. And even Ricky Tipper admitted he
7 never told the county that and he didn't know
8 if anybody else told the county that. In
9 fact, I think he told you he didn't see the
10 county or the architect or any of those
11 folks. They weren't out there every day.

12 They didn't have the opportunity to know what
13 American Excavators and RCR knew. They were
14 relying on their general contractor for that.

15 Now, RCR has an interesting
16 argument. They claim that because their
17 subcontract with American Excavators requires
18 that they get paid before American Excavators
19 gets paid, that somehow that requires the
20 county to pay them if they owe money to
21 American Excavators. So what they're saying
22 is they want you to hold American Excavators
23 very, very strictly to the terms of its
24 subcontract, meanwhile totally disregarding
25 RCR's contract with the county which says

1 something entirely different.

2 There's nothing in the county's
3 contract that says it's subject to this
4 subcontract. The county wasn't a party to
5 this subcontract. RCR's relationship with the
6 county is separate and it is governed by those
7 contractual terms in that relationship.
8 Regardless of what the Court decides between
9 RCR and American Excavators, it doesn't
10 automatically flow uphill is what I'm arguing,
11 Your Honor. If RCR didn't manage its job
12 appropriately, didn't get the right approvals,
13 didn't do what it should have done in doing
14 extra work, RCR bears the risk of that, not
15 the county. That's why we have contracts,
16 Your Honor, is to allocate risk. And the
17 county did that and it never deviated from
18 it.

19 Now, there was this error that's
20 confused things a little bit, but, again, the
21 testimony has been undisputed and the
22 contemporaneous documentation makes very clear
23 how that error came about. The county was
24 led, by RCR, to believe that what they were
25 paying for was the PSI-approved soils, and

1 that's all the county ever paid for. The
2 county was led by RCR to believe that the
3 \$16,000 change order was for the above
4 subgrade. The two were simply swapped. And
5 the contemporaneous correspondence from the
6 architect and RCR's own correspondence shows
7 that that is the case, and it hasn't been
8 disputed.

9 THE COURT: You're saying it
10 doesn't qualify as a waiver because there's no
11 knowledge on the part of the county that it
12 was, in fact, making the waiver?

13 MS. CARSON: Not only that, Your
14 Honor, but a waiver, again, must be in the
15 course of performance of the parties that
16 induces some action. Remember, this change
17 order wasn't submitted to the county until
18 January of 2000. This work was done in June
19 and July of 1999. There is no way the
20 county's payment in January of 2000 could have
21 misled anybody. The work was already long
22 done. So the county didn't somehow waive and
23 induce them to do more work above subgrade
24 because they thought it was being paid for.
25 It was a mistake that took place so long after

1 the fact, it could not have impacted that.

2 And frankly, Your Honor, I believe
3 that because of the language in the contract
4 about written waivers, even if it had happened
5 earlier, it would not be an effective waiver
6 based on the mistake and RCR's knowledge of
7 the mistake. And remember, RCR is the only
8 party suing.

9 If the Court decides that American
10 Excavators was completely innocent and really
11 believed that the county knew about all this
12 stuff, you know, they may be entitled to
13 recover against RCR, but they're not seeking
14 recovery against the county; only RCR is. And
15 RCR is the one that caused the mistake. RCR's
16 own documentation, as Mr. Stover told you,
17 misled the county.

18 It couldn't have been a waiver
19 anyway and it couldn't have misled anybody,
20 because it happened too long after the fact.
21 Work was done, soil was long gone to Mr.
22 Parker's subdivision and elsewhere. There was
23 no way the county could have made any
24 determination.

25 The county also provided materials

1 for this project. And although Mr. Ezell has
2 testified that someone named Jim, who I
3 haven't been able to locate, told him that he
4 could use this material before he bid the
5 project, whether or not that's true, he didn't
6 incur any material cost for this. He
7 apparently didn't incur any outgoing trucking
8 costs. So what we're talking about is the
9 cost for the fill coming in.

10 And, Your Honor, that brings me
11 to, I suppose, what's my last point, which is
12 for a finding on quantum meruit or implied
13 contract or estoppel, I believe the Court will
14 find that the case law -- and I think the
15 Warren Brothers case at 550 Southwest 2d 243
16 addresses this -- the measure of damages is
17 the actual value of the services rendered, not
18 the contract unit price. There has been no
19 proof, not one scintilla of proof of the
20 actual cost of the services rendered in this
21 case. So damages awarded on the basis of any
22 of those equitable theories would be
23 impossible to calculate anyway.

24 Your Honor, it's our contention
25 that the county did exactly what it was

1 supposed to do under the contract all along.
2 It did more than it had to under the technical
3 terms of the contract. It paid more than it
4 should have under what its verbal commitment
5 was, and it has acted in good faith
6 throughout. The only issue between RCR and
7 the county about what should have been paid is
8 this \$1,800 for RCP pipe, and no one has been
9 able to cite to the Court any provision of the
10 contract which would have shifted the risk of
11 that loss to the county. In fact, except for
12 specific exceptions, this was a lump sum
13 contract, as Mr. Stover testified.

14 And so without pointing us to that
15 contractual provision, there's nothing that
16 would prompt the county to be required to pay
17 for that. Even if the Court were to find that
18 the county would have the \$1,800 cost, we've
19 overpaid by \$12,000, so they still come out to
20 the good. And they can reduce their credit to
21 us, I suppose, if it comes to that. Our
22 position would be that under the applicable
23 law, the county's entitled to a directed
24 verdict at this time.

25 THE COURT: All right. Thank

1 you.

2 Mr. Cashion?

3 MR. CASHION: Your Honor, first
4 let me get the big red book. Turn with me to
5 Bates stamp 43. It's 5.3.1 of the AIA General
6 Conditions, Subcontractor Relations.

7 THE COURT: All right.

8 MR. CASHION: It says, "By
9 corporate agreement written where legally
10 required for validity, the contractor shall
11 require each subcontractor, to the extent of
12 work to be performed by the subcontractor,
13 to be bound to the contract by the terms of
14 the contract documents and to assume toward
15 the contractor all obligations and
16 responsibilities which the contractor by these
17 documents assumes toward the owner and
18 architect.

19 "Each subcontract agreement shall
20 preserve and protect the rights of the owner
21 and architect under the contract documents
22 with respect to the work to be performed by
23 the subcontractor, so that the subcontracting
24 thereof will not prejudice such rights and
25 shall allow to the subcontractor, unless

1 specifically provided otherwise in the
2 subcontract agreement, the benefit of all
3 rights, remedies and redress against the
4 contractor that the contractor by the contract
5 document has against the owner."

6 This is the pass-through language
7 of the contract between Williamson County and
8 RCR. To the extent that the subcontractor,
9 American Excavators, has a claim against the
10 contractor, these rights flow down to the
11 subcontractor as well as flow up from the
12 subcontractor to the owner. And they set the
13 contract up in that manner to make sure you do
14 have pass-through.

15 So as we started out when we filed
16 the third-party complaint, if there is any
17 remedy to be given to the sub- contractor,
18 then that remedy could also be applied to the
19 county. Without knowing your ruling, we can't
20 quite figure out, at this point, each part and
21 how it will apply, but certainly there is a
22 pass-through formula for the parties in this
23 case.

24 I think from what we've said today
25 and the proof today and this week, it's

1 obvious that we do not believe American
2 Excavators is entitled to any of these funds,
3 but that does not stop the county from sitting
4 with us in the event you rule that they are
5 for any number of reasons that may come
6 forward.

7 Now, unfortunately, the easiest
8 example is the \$1,800 RCP, because there you
9 have -- without getting into quantum meruit,
10 without any of that stuff, you have a claim
11 where there's an undisclosed condition on the
12 plans. The plans are a representation.
13 They're a warranty that they show everything
14 that's there. The RCP's not shown, couldn't
15 be discovered, not on the plans, and they have
16 to dig it out, and that's a change order.
17 That's what we're requesting. We believe
18 we're entitled to it. We've told that to
19 American Excavators. And from everything that
20 was represented, you'll probably go in that
21 direction against us, but what we need to do
22 is hear from the proof on the county as to
23 whether they have any liability for the small
24 claim there.

25 On the other claims, you know, we

1 do not believe they're entitled to the funds,
2 so it's hard to argue in the alternative that
3 they would be entitled to it. But I think as
4 the contract's written, you expect the pass-
5 through provisions both up and down of the
6 obligations in this case.

7 THE COURT: So just for the sake
8 of argument -- let me be sure I'm with you --
9 if the contract between you and American
10 Excavators has a binding provision that they
11 get paid for the removal of unsuitable soil
12 above subgrade, does the county have to pay
13 for that even though --

14 MR. CASHION: I don't think so.

15 THE COURT: You don't? Because
16 why?

17 MR. CASHION: Their contract is
18 very specific on that issue. They've quoted
19 it and we've quoted it to you, that it's
20 unclassified and that unsuitable soil in the
21 cut will be removed at the contractor's
22 expense. It couldn't be much more clear from
23 their standpoint.

24 THE COURT: All right. But in my
25 scenario, you'd have to be responsible for it

1 because that was the contract you entered into
2 with American Excavators. You see what I'm
3 saying?

4 MR. CASHION: Right, if you find
5 there is a contract provision that says that
6 in our contract.

7 THE COURT: Right. That's just an
8 "if." I'm not saying I have. I'm just
9 trying to see how I apply that to this
10 argument you're making.

11 MR. CASHION: Right. And you're
12 right. There is a way, in your example, to
13 hang RCR in the middle. I'm not disputing
14 that theory. It's not going to always be 100
15 percent. Like you say, if you've got two
16 different contract provisions, I can't make
17 them pay me for something I have to pay them,
18 if our contracts are different. So you can
19 get hung in the middle on this.

20 But I guess the bigger question
21 is, on the big claim, is they're looking at
22 every equitable remedy they can get to say
23 it's not fair, you ought to pay us. They're
24 throwing everything out there for that, and we
25 don't know -- we don't think you're going to

1 give anything, but if you do, we're not sure
2 how that will come out. I agree with you on
3 the above grade. I think that's very clear in
4 our contract.

5 THE COURT: Now, of course, when
6 we get to the equitable remedy, the county has
7 the additional protection under the case law
8 that you don't have.

9 MR. CASHION: Correct. We
10 acknowledged that in the summary judgment.

11 THE COURT: So would it be
12 possible for an equitable remedy to hang you
13 but not hang the county?

14 MR. CASHION: I think that's a
15 possibility. We've got to know how you
16 fashion that.

17 THE COURT: How I got there.

18 MR. CASHION: Right.

19 MS. CARSON: Your Honor, if I can
20 briefly respond on this contract provision.

21 THE COURT: Yeah. But that one
22 made a point with me, so I...

23 MS. CARSON: It's crystal clear,
24 if you read the exact language, that it only
25 flows one way. It says specifically,

1 "Subcontract agreements shall preserve and
2 protect the rights of the owner and architect
3 under the contract documents with respect to
4 the work to be performed by the
5 subcontractor." It doesn't say anywhere in
6 here that the contractor shall have the rights
7 against the owner that the subcontractor has
8 against the contractor. Nowhere in this
9 paragraph does it flow back the other way.
10 It's very specific. And the purpose of this
11 paragraph is to require the contractor to
12 write and enforce its subcontracts in such a
13 way that we don't get into this mess.

14 THE COURT: Well, I was wondering
15 why the county would set up, in their own
16 contract, a scenario where they could get
17 popped on a flow-through.

18 MS. CARSON: Well, Your Honor, if
19 you read it carefully, it does not say that.
20 It says very specifically the contractor will
21 do these things. It does not say the opposite
22 of that.

23 THE COURT: Show it to me on the
24 line you're talking about.

25 MS. CARSON: Well, Your Honor,

1 it's really the whole thing. "By appropriate
2 agreement written where legally required, the
3 contractor shall require each subcontractor,
4 to the extent of the work to be performed, to
5 be bound to the contractor by the terms of the
6 contract documents." In other words, exactly
7 the argument that Mr. Cashion has been making
8 throughout the trial. The subcontractor is
9 bound by the contract documents and to assume
10 toward the contractor all the obligations and
11 responsibilities that the contractor assumes
12 toward the owner and architect. In other
13 words, the subcontractor is bound to the
14 contractor to the extent the contractor is
15 bound to the owner.

16 It goes on to say, "Each
17 subcontract agreement shall preserve and
18 protect the rights of the owner and architect
19 under the contract documents with respect to
20 the work to be performed by the subcontractor,
21 so that subcontracting thereof will not
22 prejudice such rights and shall allow to the
23 subcontractor, unless specifically provided
24 otherwise in the subcontract agreement, the
25 benefit of all rights, remedies and redress

1 against the contractor that the contractor has
2 against the owner." In other words, if the
3 contractor has the right under this contract
4 to sue the owner, then the subcontractor has
5 that right to sue the contractor, but not vice
6 versa.

7 "Where appropriate, the contract
8 shall require each subcontractor to enter into
9 similar agreements with sub subcontractors.
10 The contractor shall make available to each
11 proposed subcontractor, prior to execution of
12 the subcontract agreement, copies of the
13 contract documents to which the subcontractor
14 will be bound. And upon written request of
15 the sub, identify to the sub terms and
16 conditions of the proposed subcontract
17 agreement which may be at variance with the
18 contract documents. Subcontractors shall
19 similarly make copies for sub subcontractors."

20 So you see, Your Honor, there's
21 nothing in here that makes it flow back up to
22 where the county is bound by anything to the
23 subcontractor. Clearly the county would be
24 crazy to bind itself to every subcontract that
25 a general contractor entered into, and that's

1 clearly not the case. The entirety of this
2 paragraph protects the right of the owner and
3 the architect.

4 THE COURT: All right. On your
5 motion, I do begin with a written contract
6 between the county and RCR. I do note that
7 all waivers of that contract pursuant to its
8 terms have to be in writing. I do note that
9 the county was not a party to the contract
10 between RCR and American Excavators. And I do
11 note that the meeting that took place on June
12 30th was really nothing more than a
13 confirmation of the terms of the county's
14 contract on how these additional payments
15 would take place, and that was whenever there
16 was additional undercutting, it would have to
17 be documented by a geotechnical engineering
18 firm. In this case it was PSI.

19 After that happened and was
20 approved -- after it was done and approved by
21 PSI, then I think the county was required to
22 pay for that, which they did mistakenly. I do
23 understand that they meant to pay one change
24 order and ended up paying another one. But I
25 have heard all the proof, and that was nothing

1 more than a mistake. And if there's blame to
2 go around, it has to fall on the shoulders of
3 RCR for that mistake.

4 Any other removal of unsuitable
5 soil, I find, was done without the knowledge
6 or the consent of Williamson County. I have
7 turned to the equitable theories that have
8 been advanced in this case, implied contract
9 and estoppel. I do find that these theories
10 do not generally apply to public entities, and
11 I agree with the county on that, unless the
12 public agency has, by some act -- some
13 affirmative act induced the innocent third
14 party to do something for the benefit of the
15 public entity and to the detriment of the
16 third party.

17 In this case, I find there was no
18 action by Williamson County that would cause
19 either RCR or American Excavators to
20 justifiably believe they would be paid for any
21 additional removal of unsuitable soil that was
22 not done without the approval of PSI, nor has
23 there been a preponderance of evidence to
24 prove a benefit to Williamson County for this
25 removal that's still at issue. In this case,

1 Williamson County never ordered additional
2 work, nor did Williamson County have knowledge
3 of the additional work and did not object
4 while it was being done.

5 I think these findings really
6 apply to the quantum meruit argument, too, and
7 for that reason I don't believe can be used
8 against the county. But in the event there is
9 some difference in the quantum meruit theory
10 and the other two, I do find that there was an
11 existing and enforceable contract in place
12 which did cover the subject of the additional
13 removal of unsuitable soil, and for that
14 reason -- for that separate reason, quantum
15 meruit cannot be advanced in this case.

16 So with all that being said, I
17 grant the motion for directed verdict and
18 dismiss the county as a defendant in this
19 lawsuit.

20 MS. CARSON: Thank you, Your
21 Honor.

22 THE COURT: Now, I guess that ends
23 the proof except for rebuttal.

24 Mr. Panther, do you have
25 rebuttal?

1 MR. PANTHER: No, Your Honor, we
2 have no rebuttal.

3 THE COURT: Gentlemen, considering
4 the lateness of the hour, would you prefer to
5 submit the points you want to make in writing
6 or would you want to come back and make those
7 orally at another time?

8 MR. PANTHER: Your Honor, I view
9 oral argument as something that's for your
10 benefit. Having observed you through the
11 trial and seeing you ask witnesses questions,
12 I've got a pretty good idea that you know what
13 this whole case is about. I'm more than happy
14 to present you with oral argument to help
15 summarize the points I think are important if
16 it will take less time in you making a ruling,
17 but if it will take less time in you making a
18 ruling, I'm happy to present those points to
19 you in writing so that you don't have to
20 listen to me stand up and repeat them for
21 you.

22 THE COURT: Your thoughts, Mr.
23 Cashion?

24 MR. CASHION: This reminds me of
25 when my daughter would ask for a glass of

1 chocolate milk and I would say, Well, you can
2 either have regular milk or juice. And then
3 one day she got wise and she said, I want to
4 make the deal.

5 Is the deal you don't want to do
6 it tonight? My preference would be to go
7 ahead and get this case over with. If that's
8 not in the cards, then let me address the two
9 options you gave me.

10 THE COURT: I'm not saying it's
11 not in the cards. I just want to be honest
12 with you; I'm worried about concentrating
13 enough on what you tell me. That's the only
14 thing. If we're going to do it, I want to
15 take a break and come back and let you do it.
16 What do you want to do?

17 MR. CASHION: My preference would
18 be to do an oral argument, otherwise Trajan
19 has to work too much. So I would rather do it
20 like that to summarize my case. That's what
21 I'm used to doing. That would be my
22 preference, but, of course, however you want
23 to receive it. I'll do it now or I'll come
24 back. Whenever you have a moment, we'll come
25 back up here and do it.

1 THE COURT: Let's go ahead and do
2 it. Let's take a short break and then I'll
3 hear from you.

4 (A short break was observed.)

5 MR. PANTHER: We've received word
6 that Your Honor is interested in a pithy
7 closing statement, so I'll try to oblige.
8 First, my thanks for myself and on behalf of
9 Marvin Parker for the time and attention that
10 you've shown for the last several days.

11 One of the best bits of advice
12 that I've ever had as a lawyer has not come
13 from a lawyer but it came from a federal
14 marshal who spent his day sitting, watching
15 cases be tried -- and formerly was a trooper,
16 just an old country guy -- who said that when
17 you present a case to a jury or a judge, sit
18 up there, tell the truth, the good and the
19 bad, don't be hoggish and everything will work
20 out just fine. And that's stayed with me for
21 a long time.

22 Marvin Parker, Harley Ezell and
23 Ricky Tipper have probably never met Bob
24 McDonald who told me that, but I can tell you
25 that they have followed what Bob McDonald said

1 in this case. Mr. Parker, Mr. Ezell and Mr.
2 Tipper sat up there, they told the truth, the
3 good and the bad, and they're not being
4 hoggish.

5 American Excavators' claim
6 breaks down sort of on three different
7 points: entitlement, whether or not there's a
8 subcontract provision that entitles it to what
9 it seeks; second, how much unsuitable material
10 was removed under that provision; and third,
11 how much. I'm going to address each of those
12 as briefly as I can.

13 In terms of entitlement, this has
14 sort of fallen out into above subgrade and
15 below subgrade. Mr. Stover has said that
16 according to the subcontract -- and I don't
17 think RCR even disputes that according to the
18 subcontract, American Excavators is entitled
19 to \$12.50 a cubic yard for material below
20 subgrade. I don't think there's been any
21 dispute about that.

22 Mr. Parker, though, testified that
23 the provision is more than that. It's not
24 only undercut, which is below subgrade, but
25 it's the refilling, which he described as

1 applying to above subgrade. And, Your Honor,
2 there has been no testimony from RCR to refute
3 that from anybody. Not only that, but the
4 facts in the case have also borne out that
5 that was the agreement.

6 Because as the job unfolded, when
7 they were in the cut section above subgrade,
8 they found out that it was unsuitable. And
9 that's when a deal was struck between American
10 Excavators and RCR, that since we're moving
11 the cut anyway, since we planned to do that,
12 we're not going to charge you 12.50 a cubic
13 yard, we're only going to charge you \$10 a
14 cubic yard. And Mr. Stover said he remembered
15 that conversation. Mr. Orange, after I
16 reminded him from his deposition testimony,
17 remembered that conversation.

18 We have a subcontract change order
19 that Mr. Orange and Mr. Stover both approved,
20 which is not vague. It says it applies to
21 cut, and they approved it. So on the basis of
22 entitlement, we think that the proof is
23 unrefuted that American Excavators is entitled
24 to 12.50 a cubic yard below subgrade and \$10 a
25 cubic yard above grade.

1 The next question becomes one of
2 how much was removed. There are a number of
3 points that I want to make here. First, so
4 much of RCR's case has been to criticize
5 American Excavators for not doing one thing or
6 another, not contacting PSI or not keeping
7 track of the loads that were hauled out or not
8 documenting what was occurring on site by
9 writing letters or why didn't you put
10 something in your meeting minute about this or
11 you should have submitted a change order in
12 advance.

13 And may it please the Court,
14 it is easy for RCR to play Monday morning
15 quarterback and sit there and say, after the
16 fact, these are the things that you ought to
17 have done. Well, what occurred on site
18 deviated from what the procedure was that was
19 in the contract between the county and RCR.
20 What happened between American Excavators and
21 RCR is on a much more expedited basis.

22 As Mr. Tipper testified, he would
23 bring the unsuitable material to Mr. Orange's
24 attention; Mr. Orange would tell him to remove
25 it or told him to wait, let me get PSI in

1 there; and then he told him to keep track of
2 the number of loads. Now, Mr. Orange's
3 testimony does, in some respects, contradict
4 Mr. Tipper's testimony, and unfortunately it's
5 your job to resolve that factual dispute. I
6 would suggest to you that Mr. Tipper's
7 demeanor in how he presented his testimony is
8 very, very different from Mr. Orange.

9 Mr. Tipper sat up there, spoke
10 loudly, emphatically, unabashedly, without any
11 reservations at all to say both what he did
12 wrong and what he did right. Mr. Orange, on
13 the other hand, was very nervous. He changed
14 his testimony in some ways. At one point he
15 testified that he did not approve Change Order
16 No. 2. On another point he testified that he
17 did approve Change Order No. 2 and then went
18 back and said he didn't approve Change Order
19 No. 2. Although Mr. Orange testified that
20 there are only just these few occasions where
21 he directed American Excavators to remove
22 unsuitable material, his daily reports belie
23 that. His daily reports have multiple days
24 where he's discussing with Ricky Tipper the
25 fact that there's unsuitable material on

1 site. It's also confirmed by Harley Ezell.

2 Harley Ezell also testified that
3 yes, there were occasions where American
4 Excavators brought it to their attention that
5 there was unsuitable material and they told us
6 to remove it. Do I, Harley Ezell, know
7 whether it was to keep track of the truck
8 tickets? No, I don't know that. But Ricky
9 Tipper did. And if Ricky Tipper can be
10 faulted for anything, he can be faulted for
11 being too trusting, for not getting something
12 in writing from Anthony Orange when he was
13 directing him to do all this work.

14 But there is no doubt that all
15 these truckloads of fill were being brought to
16 the site. There have been no witnesses who
17 have testified that one load of those
18 truckloads that either Ricky Tipper or one of
19 the on-site people signed was diverted
20 anywhere. And what Mr. Tipper testified to is
21 that before he or anybody with his company
22 signed a truck ticket, he verified that it was
23 accurate through his own memory, through his
24 own observations, but he was satisfied that it
25 was accurate. He readily admitted that he's

1 human, that he may have made a mistake, but he
2 doesn't know of any mistakes, and RCR hadn't
3 pointed out any mistakes either.

4 So for that reason, since you are
5 called upon to make a decision regarding whose
6 testimony is more credible, that of Ricky
7 Tipper or that of Anthony Orange, we
8 respectfully submit that it was Ricky who
9 behaved much more like a very forthright, a
10 very honest witness than did Mr. Orange.
11 Ricky Tipper, by the way, is no longer
12 employed with RCR. Mr. Orange isn't either.
13 He testified to that. But Mr. Tipper had no
14 reason, no reason at all to misstate anything,
15 no reason at all to say I admit that I didn't
16 get it in writing. That was him saying the
17 good and the bad.

18 Now, with regard to how you
19 calculate the amount -- and there is some --
20 the testimony is a bit varying on this point.
21 Mr. Parker testified that when he first
22 calculated how much he was due, he used 15
23 cubic yards per load. He made a mistake.
24 Later on, in the throes of the litigation, he
25 mistakenly used the number 12 cubic yards per

1 load rather than 15, and unfortunately that
2 was contained in his deposition and it was
3 carried out into his affidavit. But he
4 readily admits that he made a mistake, again,
5 saying the good and the bad.

6 Mr. Ezell seemed to think that a
7 compacted volume of 12 cubic yards is what you
8 get in one of these trucks, but that's not
9 what Mr. Tipper said. And it was Mr. Tipper
10 who was there every day, watching all these
11 loads, signing all these truck tickets, who,
12 Mr. Ezell even admits, is in more of a
13 position to know how full these trucks were
14 and how many loads were delivered to the
15 site. So according to Mr. Tipper, he says
16 that yes, some did get 12, but some got more
17 than that. These are 18 cubic yard trucks,
18 and so on average, in his estimation, it would
19 be between 14 and 15 cubic yards per truck.

20 THE COURT: How did he -- can you
21 run through -- I hate to make you do it, but
22 to come up with 13,500 cubic yards, show me
23 the math.

24 MR. PANTHER: I will. This that
25 I'm looking at is Exhibit No. 9. The way

1 Mr. Parker did it was this: He had the total
2 truck count which he obtained from the truck
3 tickets that are Exhibit 6.

4 THE COURT: Okay.

5 MR. PANTHER: And when you add up
6 all of these loads, the total loads of truck
7 tickets, mind you, is 1,132 loads that are
8 ticketed. Now, remember, Mr. Tipper testified
9 that old blue hauled, I think he said about
10 150 or more loads. That's not included in
11 this Exhibit No. 9. So what Mr. Parker did
12 was took the 1,132 loads. To convert that
13 from loads to cubic yards, he input 15 cubic
14 yards per load for a total of 16,980 cubic
15 yards. Now, what Mr. Parker then did was back
16 out 3,000 cubic yards from that 16,980. And
17 the reason he did that is because when he bid
18 the job, he bid it planning to bring in 3,000
19 cubic yards. He's not entitled to get paid
20 twice for that, so he deducts 3,000 cubic
21 yards to come up with 13,980, and he rounded
22 down to 13-5.

23 THE COURT: Gotcha.

24 MR. PANTHER: Now, I think what
25 we discovered is that American Excavators made

1 an accounting error. And I think Your Honor
2 could tell that that came as much of a
3 surprise to me and to Mr. Parker, on the
4 stand, as it did to anybody, but that needs to
5 be addressed. And rather than do it by dollar
6 amount, the way that it ought to have been
7 done is to take the total cubic yardage, to
8 back out the cubic yardage in the cut section,
9 which was 2,898 cubic yards in the cut, to
10 also back out the amount that they were
11 submitting under Change Order No. 3, 1,310.
12 And when you do that subtraction, the balance
13 is 9,292 cubic yards. And that's what they
14 should have multiplied by 12.50. And when you
15 do that, you come up with 116,150, not the 123
16 that was in Change Order No. 4. RCR, though
17 -- did you have a question on that?

18 THE COURT: No. I was just going
19 to say the 2,000 was for the geo testing.

20 MR. PANTHER: Right. That's what
21 I was going to say. And so Change Order No. 4
22 ought to have been in the amount \$114,150. I
23 submit in Exhibit 12, which was the summary of
24 the amount due, that's now been adjusted as a
25 result of the adjustments that I just

1 mentioned on Change Order No. 4. When you use
2 114,150, that brings the revised contract
3 amount to 401,445. Subtracting the payments,
4 that means the total principal amount is
5 144,310. And then I simply performed the same
6 interest calculation with the new numbers that
7 I did with the old numbers. And I'm happy to
8 run through that with you if you'd like.

9 THE COURT: That's okay.

10 MR. PANTHER: Suffice it to say
11 that the total interest, when you recompute
12 it, is \$34,967.91, for a total that American
13 Excavators is requesting of \$179,277.91.

14 THE COURT: All right. One
15 question. If you take the two change orders,
16 2 and 3, on Application No. 2 it looks like
17 the total -- I think the total was 53,355.

18 MR. PANTHER: Right.

19 THE COURT: Then you at one point
20 received a payment of 44,257 on those change
21 orders; is that right?

22 MR. PANTHER: On Change Order --
23 I'm sorry?

24 THE COURT: You were paid a late
25 payment that you later accepted, right?

1 MR. PANTHER: Yes.

2 THE COURT: How much was that,
3 44,000?

4 MR. PANTHER: It was \$46,589. And
5 that's reflected in these total payments, you
6 see.

7 THE COURT: All right.

8 MR. PANTHER: This \$257,135 number
9 reflects all of the money that American
10 Excavators has been paid to date as of right
11 now. And so rather than back it out and do it
12 that way, which we can do -- and I'm glad to
13 submit that in writing if you'd like, but what
14 we did was take the total adjusted contract
15 sum and subtract that from total contract
16 payments. We did account for that in
17 calculating interest, because the balance was
18 adjusted September 27, 2001, when that payment
19 was made.

20 THE COURT: All right.

21 MR. PANTHER: And so where at one
22 time the balance was 190,899, that was the
23 balance before that payment was made. Once
24 that payment was made, it reduced the total
25 balance to 144,310, which is that total

1 (indicating).

2 THE COURT: Okay. The reason I
3 was asking that is we did -- you could look at
4 your claim, and it might be important to kind
5 of break down the different elements of your
6 claim. You know, you've got Change Order No.
7 4, the biggy, and you've got Change Orders 2
8 and 3. Is 1 at issue? 1's at issue for
9 \$1,100.

10 MR. PANTHER: Right.

11 THE COURT: You've got Mr. Stover
12 approving 1, 2 and 3 but not approving No. 4.

13 MR. PANTHER: That's right.

14 THE COURT: So that's a different
15 set of facts as we go through each one of
16 these claims. That's why I was interested in
17 what claims were paid and what claims were not
18 paid. And it looked to me -- am I right about
19 adding up 2 and 3 to come up with 55,000?

20 MR. PANTHER: I think that's --

21 MR. CASHION: 1, 2 and 3.

22 MR. PANTHER: 1, 2 and 3 is
23 53,355.

24 THE COURT: All right. I may have
25 made a mistake on my math, but if I considered

1 those claims as one and applied the payment,
2 you're short how much, 8,000, \$9,000? Does
3 that sound about right?

4 MR. CASHION: If I can interject.

5 THE COURT: Sure.

6 MR. CASHION: There's a contract
7 payment in there, so you're mixing apples and
8 oranges. I think if you just look at this,
9 Change Order 1, they're asking for 8. This is
10 what we've paid. Change Order 3 we've paid.
11 Change Orders 2 and 4 have not been paid.

12 THE COURT: 2 and 4 have not been
13 paid. 3 was paid.

14 MR. CASHION: So that's why the
15 issue's in my pretrial brief. That's the
16 numbers you need to wrestle with.

17 THE COURT: I made a mistake,
18 then, because I was mixing apples and
19 oranges. Forget what I said.

20 MR. PANTHER: Any other
21 questions?

22 THE COURT: No.

23 MR. PANTHER: Thank you, Your
24 Honor.

25 MR. CASHION: He took 25 minutes,

1 Your Honor.

2 THE COURT: I know he did, but,
3 again, I'm partially to blame.

4 MR. CASHION: Your Honor, I want
5 to also thank you for your attention in this
6 on behalf of me and the firm RCR. Let me say
7 on the outset, this is a dirt case. The
8 critical element of a dirt case -- when you
9 strip everything out, what are you looking
10 for? Both claims, Change Order 2 and 4, hinge
11 upon a finding by you of unsuitable soils.
12 Now, we can argue about whether it's above
13 grade or below subgrade, but the first thing
14 you have to find in this case is that the soil
15 was unsuitable. If you don't find that, they
16 are not entitled to anything. Forget what the
17 contract says -- I mean, I'll address that --
18 but you've got to make an affirmative finding
19 they're unsuitable. And in that kind of case
20 that we've got, they didn't give you an
21 expert, so what are you going to rely on? You
22 don't have anywhere to go. You've got two
23 soils engineers that come in here and say, No.
24 1, the stuff above grade was suitable and, No.
25 2, they didn't see anything unsuitable except

1 what PSI said take out.

2 So if you make a finding against
3 RCR on 2 and 4, you've got to back it up with
4 an unsuitable soil finding, and the plaintiff
5 has not given you an opinion upon which to
6 make that. I was shocked they didn't bring
7 Southern in to put some thread on there of a,
8 you know, two-hour visit, whatever that was
9 worth. They didn't give you anything. So
10 your record will not have any expert testimony
11 on that fact. Their linchpin to their whole
12 case falls apart at that point.

13 THE COURT: I have one question on
14 that. And you may be right. What if I find
15 that Mr. Orange told them to take it out
16 anyway and they took it out? Do I have to
17 worry about whether it was suitable or
18 unsuitable?

19 MR. CASHION: It's got to be
20 unsuitable. Did Anthony Orange say it was
21 unsuitable? You've got two instances where --
22 you know, we've calculated both of them.
23 One's in the 1,800 and the other one's 25
24 loads. We've got those quantified that he
25 said take out, and I'll address those. But

1 other than that, that's all you've got.

2 Now, they want to say Anthony
3 Orange, you know, said everything, and I'll
4 address that as a practical matter. But
5 factually, no, it has to be unsuitable.
6 That's their burden of proof in order to get
7 them into their 12.50 unit price. It has to
8 be unsuitable.

9 THE COURT: I'm with you there.
10 To get to the 12.50, it has to be unsuitable.
11 I guess as a quantum meruit type theory, where
12 they don't get 12.50, does it have to be
13 unsuitable if Orange told them to take it
14 out?

15 MR. CASHION: You could go that
16 direction, but I'd just remind the Court of
17 your previous ruling.

18 THE COURT: I'm not saying I
19 would; I'm asking you if you think that's
20 wrong, too, in terms of suitable or
21 unsuitable.

22 MR. CASHION: Well, quantum meruit
23 equitable, I think you've got more leeway.
24 But they're asking under the contract for
25 12.50, and I think you've got to go with the

1 contract.

2 THE COURT: Right.

3 MR. CASHION: If you go with
4 quantum meruit, I think you just released the
5 party that had the benefit. RCR has no
6 benefit. So since you let those guys out,
7 then we certainly didn't benefit from this
8 stuff being put on there. It was none of our
9 benefit. In fact, we'd have passed it on to
10 them if they would have ever come up with a
11 change order that we could have got.

12 THE COURT: Do you agree with Ms.
13 Carson that there was no proof of quantum
14 meruit anyway?

15 MR. CASHION: Right. Plus they
16 didn't put the actual cost on. I think
17 quantum meruit failed when the county got out,
18 because RCR cannot be held. But that's their
19 first big problem: No expert testimony to
20 give you for unsuitable soils.

21 The second is you have to --
22 they've got a total cost approach to their
23 quantity. They say every truck ticket. Now,
24 that assumption must be accurate. And the
25 cavernous gap in their proof there is

1 everybody on their side, mainly, I guess,
2 Ricky Tipper and Harley Ezell, said that when
3 Ricky Tipper went in there, he stripped one
4 foot, one and a half foot, two feet, two and a
5 half feet off that whole site. That's why
6 Anthony Orange didn't know about the garden
7 area, because he took it out, for the most
8 part. He was taking out everything.

9 And so if you're going to start
10 looking at their total cost, it's like an all
11 or nothing. We know they overstripped the
12 site. How much of that material they hauled
13 back was because they overstripped? And the
14 proof is very clear. Now, the proof's not
15 clear on how much, because nobody shot it,
16 nobody tried to measure it, nobody did
17 anything on their side. So we don't know how
18 much they stripped, but we know they went
19 overboard on it. But they haven't taken that
20 into account in asking for everything.

21 I think that's where the
22 material's going, is they stripped the site
23 way too much and they had to build it back
24 up. That's where the material is. It's in
25 the building pad, down two foot -- they tried

1 to -- they exaggerate conversations; they
2 minimize. They both testified that they
3 stripped one to two and a half feet. In court
4 they're trying to make it that little area up
5 at the top, but then I reminded Mr. Ezell he
6 had two feet on the other side.

7 They both, in their depositions,
8 were stripping a lot more than when they came
9 to court. But you don't know what that amount
10 is and they didn't measure it. So when you
11 start talking about total cost, you have to be
12 convinced that all of that material was for
13 stripping, for undercut that, under their
14 theory, Anthony Orange approved. And Anthony
15 wasn't there when he stripped the site. So I
16 think you've got a big load of material that
17 you cannot account for, and, again, they're
18 not helping you account for that at all.

19 And you also have to decide if
20 their bid is reasonable. And their bid fails
21 horribly on the garden area. You know, if you
22 look at that diagram and you look at where the
23 garden area is, that's a big garden area.
24 That's 43,000 square feet. Ryan Reeves says
25 it's actually 55,000 square feet.

1 They come into court and they go,
2 oh, yeah, the garden area. Marvin Parker:
3 After six inches, it's good. We can build on
4 it after six inches. Harley Ezell: Yeah,
5 well, after six inches, it's good. But if you
6 look at what they were stripping out in the
7 PSI report, part of that's in the garden
8 area. And you know from common sense that in
9 a garden that's been there for years and
10 years, you don't have to strip six inches and
11 go down.

12 They misbid the job when they
13 forgot the garden area. They put in their
14 proposal that the undercut was included, and
15 now they come to court and they're trying to
16 whitewash that by saying, oh, there was no big
17 deal in the garden area, when on the other
18 hand they want to tell you over and over again
19 how much bad stuff they were stripping out.
20 It was like all this bad stuff was everywhere
21 but the garden area. And that's the one area
22 that the geotechnical engineer told them how
23 to deal with because that was identified.
24 And, again, they don't bring you a
25 geotechnical engineer to refute the first

1 soils report. So their bid is not reasonable
2 and they overstripped the site, and you can't
3 ignore that, because they've taken the all-or-
4 nothing approach to it.

5 The other thing is, the one
6 story you have here is the contemporaneous
7 documentation. It's a very clean story. Went
8 out there, overstripped, said we're sorry, we
9 won't charge you, put a procedure in place for
10 PSI, submitted a change order from PSI, they
11 got paid, and then we made a mistake on the
12 payment but approved it and that's it. The
13 only dispute we have is the \$28,000 going back
14 and forth, and it's their misunderstanding of
15 how that was going to apply. That's it.
16 That's the contemporaneous correspondence
17 story.

18 The second story is so oral, is so
19 fluid you cannot even get your hands on it.
20 It's all this oral direction. They didn't
21 keep up with anything. They didn't do proof
22 rolling. They don't have a geotech for all
23 this other undercutting. The owner didn't
24 approve it. They didn't measure it the right
25 way. This is the reason you have notice

1 provisions in contracts. What they want to do
2 is throw the whole contract out and say feel
3 sorry for me, pay me because I put some dirt
4 out here, and you've got to keep it in context
5 of the contract.

6 And if you remember, Harley Ezell
7 testified the area we're talking about, where
8 Anthony Orange allegedly told them, was the
9 size of this piece of paper or a little
10 smaller (indicating). Well, look here, you
11 can't get this paper on the parking lot
12 without getting it into the garden area. Big
13 problem here, the overstripping here
14 (indicating). If you assume that and their
15 extra 8,000 cubic yards, they've got to dig
16 this mound out 11 feet to get what they're
17 talking about. The math, the geometry does
18 not work. They've got way too much cut to be
19 talking about in a small parking lot area.
20 That's what we've said from the start.

21 These truck tickets -- the only
22 thing that's accurate is they took this out
23 about two to three feet, then they may have
24 that much material to go back in, but they ,
25 didn't document it. He went in there and

1 stripped it -- gorged it is what Harley Ezell
2 called it, gorged it out and had to replace
3 it, and now they're trying to exaggerate the
4 small parking area that was last. Again,
5 they're going all or nothing. Do you believe
6 that much went in that parking lot as they've
7 testified? Physically, mathematically, from a
8 geometry standpoint it's impossible to put
9 that much stuff in there.

10 I would point out to the Court
11 that on the \$10/\$12, there are no -- the
12 proposal language on the undercut looks just
13 like the contract language. His argument that
14 refilling -- undercutting and refilling is
15 somehow a term of art that entitles him to be
16 paid for the cut above grade is not founded.
17 It's a consistent specification, undercutting
18 and refilling, undercutting, replacing. So he
19 didn't change what he proposed from the first
20 time to what he ended up signing.

21 THE COURT: I note that it doesn't
22 say undercutting or refilling.

23 MR. CASHION: Right. You undercut
24 -- that means you take it down -- and you
25 refill it and put it back in, just like the

1 specifications. That's why I went through all
2 those specs. Excavate, remove, refill,
3 replace, they're used in the same context. He
4 did not have some different conversation,
5 because that's exactly what his proposal says
6 and what is in his contract.

7 So when you go to the Change Order
8 No. 2 issue, you've got to decide first,
9 legally does that contract allow him to be
10 paid for excavation above grade? First
11 decision. We say no, undercutting and
12 refilling does not entitle him to be paid for
13 unsuitable soil. And then you have to
14 incorporate the specification as part of his
15 contract. Legally it's unclassified and it's
16 at his expense to take it out.

17 Then we get to this \$10 thing. My
18 first argument on that is we didn't have an
19 obligation to pay him, so there's no
20 consideration to make an agreement for \$10.
21 Now, I acknowledge that both my men sat up
22 there and said, I vaguely remember and I did,
23 you know, something, so they're thinking yeah,
24 \$10 was mentioned. They're not real clear on
25 it. But the second part of that equation is

1 -- okay, let's say \$10. We said it. It was
2 the wrong thing to say. No legal obligation
3 to pay them. We said it.

4 The next part of that equation is
5 what's unsuitable? No proof. \$10 just gets
6 you the first unit price. Nobody from our
7 side said everything on that site was
8 unsuitable above subgrade, nobody. They
9 charged us for every shovelful that they
10 estimated above grade, every one of them. We
11 know from the daily reports, especially the
12 July 27 daily report, PSI came out there and
13 told them that their big excavation was the
14 detention pond. And on the detention pond,
15 they didn't even try.

16 They took all that material out
17 and did not use it when they said they could
18 use it. Ricky Tipper said, Well, they said we
19 could use it over here on the pad, but that
20 was all. You didn't get any expert testimony
21 on unsuitable soils above subgrade. And,
22 also, he was supposed to cut all this
23 (indicating) and he never did. He didn't try
24 to use the material. He wasted all the
25 material.

1 And so if you go with the \$10 per
2 cubic yard as an agreement, you then have to
3 find how much of the material above subgrade
4 was unsuitable, and you're stuck in the same
5 place; no expert testimony that it was
6 unsuitable, no direction from Anthony Orange
7 saying yeah, go take it all out. Don Stover
8 didn't say go take out all the subgrade. PSI
9 says it was suitable. You're in the same
10 box. They want to emphasize the \$10, but they
11 don't tell you that we ever approved the
12 amount.

13 Now, what we did approve was Pay
14 Application No. 2. And what they're asking
15 you to do, Judge, is they're going to say if
16 you don't execute a change order but you
17 approve a pay application where it's
18 referenced, then you approve the pay
19 application. If that's true, we need to
20 reorganize the construction business, because
21 they -- Anthony Orange says he did not approve
22 that change order. It was a part of that pay
23 application.

24 So you need to wrestle with
25 legally, if you approve it, are we hung

1 because we paid a pay application without a
2 signed change order, because we did not sign a
3 change order. When does it become legally
4 binding, when you approve an amount as an
5 interim pay application or when you sign a
6 change order? We submit it's when you sign a
7 change order, which in this case never
8 occurred.

9 We could have got hung a little
10 deeper if we would have signed that \$28,000
11 change order, but in this case we just
12 approved the pay application. There was no
13 conscious yes, these things you're entitled
14 to, because our subcontract says you don't get
15 paid these change orders until we receive
16 payment from the owner. The conditions of the
17 subcontract control, and the only thing they
18 have to hook on to is that the pay application
19 was paid to them.

20 Later, the next one, we
21 straightened it out, because then they were
22 over requesting, but they were still counting
23 it. But like I say, for you to find the
24 \$28,000, you've got to find that every
25 shovelful of topsoil -- I mean of soil cut was

1 unsuitable, and there's no proof on that.
2 Because even Mr. Parker admitted, Yeah, some
3 of it was suitable, but I was doing you a
4 favor by just calculating all of it. Well,
5 no, let's take each claim by itself. How much
6 was unsuitable? He said, I don't know. I
7 didn't calculate it. They don't have any
8 proof for the second part of the equation,
9 which is the quantity that you have to
10 multiply.

11 On Change Order No. 4, that's, I
12 guess, the big fiction. The only thing you
13 have is that one direction for the haul road
14 that Anthony Orange quantified for you, and
15 I'll even maintain it's their responsibility
16 to maintain the haul road. They did not
17 undercut unsuitable soil. They undercut soil
18 that had been beat to death by the trucks.

19 But the one point I wanted to
20 make with the Court on the accounting of the
21 truckloads -- I think this spells out what
22 I've been talking about. Let's look at their
23 numbers. The accounting of the numbers goes
24 like this: He originally said 1,132 loads
25 times 12 cubic yards per load is 13,584, and

1 then he rounded to 13,500. Now, my big
2 problem with them and their veracity, if you
3 don't mind, is when they realized that they're
4 supposed to take out their import material of
5 2,942, they went back and recalculated it.
6 The first time we ever heard this should have
7 been 15 was the day of trial.

8 They made this claim almost two
9 years ago, and their claim was so bad, one
10 sheet of paper, but they're not nailed down on
11 anything. They never told us. I took his
12 deposition. He said, This is everything going
13 out. That's what he said. And so if it's
14 everything going out, you wouldn't have to
15 take off this material. Then later they came
16 back and said nope, nope, nope, everything
17 going in. Well, if it's everything going in,
18 you have to subtract the import material
19 because it was contracted for anyway. So
20 there's a big credibility issue there because
21 they just upped it to 15 because they thought
22 about it probably about a week before trial
23 and they realized they've got to take out this
24 number.

25 If you take what they say they

1 hauling under their cubic yard of 12, you
2 subtract out Change Order No. 3, which we
3 paid, you subtract out the import material and
4 you left the cut -- because the cut material,
5 PSI and GT&E both said it was suitable. It
6 was used as fill in the 7/27 daily report of
7 Mr. Tipper. And they performed the cut after
8 the fill, therefore the cut had to be
9 removed. He did this project backwards. As
10 Ryan Reeves told you, he should have cut it
11 first to use it and then proceeded. Instead,
12 he was cutting it last and he wasted it. So
13 this number has to come out (indicating),
14 because that should have gone into the fill.

15 Next is the big garden area.
16 They forgot it. They didn't bid it. They put
17 it in their proposal, but you have to take out
18 -- and I'll give you three different
19 calculations -- Harley Ezell said it was three
20 feet. If it's three feet, it's 4,800 cubic
21 yards. If you take the AEP area times two, a
22 two-foot strip, that's 4,000. Or if you say
23 an acre times two and a half, that's 4,000.
24 So there's a huge quantity here of material
25 for the garden area that they have not

1 accounted for, which gives you 1,600 cubic
2 yards of balance. That's what they're
3 fighting over. But they stripped more than
4 six inches away from it instead, you know --
5 in the building pad, we know they stripped
6 more there, in addition to the garden area.
7 The trucks could be hauling away from the
8 site, and the estimate of American Excavators
9 is in error.

10 If you compare what Ryan Reeves
11 had on his quantity with them, they're off.
12 They're off by a big factor on the cut. They
13 did not understand the cut. They didn't
14 understand how much material they had that
15 they didn't cut up there. If you look by your
16 -- you should be impressed, that's pretty
17 high up there. You wouldn't leave it that
18 high if you were having to bring a lot of fill
19 in. So this is why the accounting of the
20 truckloads does not support their total
21 truckload approach to this. They do not take
22 into account the obvious things. And it was
23 never a 15. It was a 15 when they realized
24 they made a mistake on the import.

25 THE COURT: And what becomes of

1 the balance of 1,602 --

2 MR. CASHION: That's what I'm
3 saying, is that on -- I think that probably
4 the 1,602 goes right here where everybody said
5 they stripped too much (indicating). That's
6 where it goes. That's why I said probability
7 is, stripped more than six inches. We know
8 they stripped -- when you take the garden
9 area, that doesn't account for this extra
10 stripping. So 1,600 cubic yards can go into
11 -- you know, Harley knew they stripped two
12 foot too much here and two and a half over
13 here (indicating). He didn't take any other
14 measurements. So they stripped a lot more
15 than six inches. Tipper said he couldn't
16 strip it six inches. He was gouging more.

17 So I think that's what happens to
18 this (indicating). And that's why you can
19 explain what happens, because they didn't
20 follow the specifications for the garden area
21 and they stripped it too much. So we can
22 account for everything, and they ignore those
23 factors each and every time when they go
24 through it to get to their number.

25 The frustrating part of this is if

1 we'd have known they were going to make a
2 claim in July after they stripped two feet,
3 two and a half feet, we could have measured
4 it. They never told us. Instead of saying
5 we're not going to make a claim for anything,
6 if they had said we're going to make a claim
7 for everything we just took out, we can go out
8 there and measure it. If they tell us after
9 the fact, we can go out there and core and see
10 how much fill they've got. If they've got
11 five feet of fill and they should have had
12 three, we know that they stripped too much.

13 They wait eight months after the
14 project is finished, after asphalt's on the
15 pavement and they tell us then that it's too
16 much, they want all this money. So the notice
17 has a reason to be in a contract, in which
18 they didn't follow. We could have
19 investigated their claim if they told us
20 within three days after it happened as
21 required by our subcontract.

22 So a legal linchpin is they've got
23 to tell us timely so we can look at it. As it
24 is, this is what I'm forced to do. I'm forced
25 to say, Well, you didn't take the garden area,

1 it looks like you overstripped. And their
2 story is exaggerate a point, minimize a point
3 and all you're left with is this oral
4 testimony without any documentation, and the
5 reason is because they didn't give us notice.

6 That's why we could have responded
7 in June if he'd have said, I'm going to charge
8 you for all this, you might as well get ready,
9 because we had something there to work with.
10 But instead, Harley said he didn't measure
11, any of this, he didn't shoot it, he didn't
12 quantify, and he backs away and says that 600
13 is just up in the top corner.

14 And it's also interesting that
15 even in the material that PSI took out, it was
16 not unsuitable, it was not uncompactable
17 material. And really part of this argument is
18 just the blame shifting. We are somehow
19 responsible for them to make an extra work
20 claim. If they believe they're entitled to
21 extra compensation, they have to do the things
22 they need to do to make it. They want to act
23 like they're the victim and they don't know
24 how to go out there and make a claim, and they
25 get the liberty of waiting eight months before

1 saying a claim and they get the liberty of
2 waiting until discovery before they give us
3 their truck tickets. They need to be held
4 responsible.

5 If they're going to make a claim,
6 they better put it together. They better give
7 it to us at the time, with notice, so we can
8 respond. You don't just ignore the contract.
9 Instead, they don't give us any of the
10 documentation. They don't give us analysis
11 which allows them now to say 15 instead of
12 12. They don't give us a narrative explaining
13 that, quote, Anthony Orange said all this
14 stuff. They don't give us the letter. They
15 give us nothing. All we get is one page
16 saying 13,500. And then by the time we get
17 it, the evidence is gone, the grading's gone,
18 the stockpile's gone. We don't find out about
19 the 15 until this week.

20 So in summary, Your Honor -- well,
21 one other point. On the small issues, they've
22 conceded to the 2,000 for testing in their
23 narrative, so when you get that issue, you
24 know, we were asking for at least what we had
25 in it. They said, Well, we didn't use it, so

1 you award us 2,000 on that. I think for all
2 practical purposes, without the county here,
3 I'm going to have to -- you're going to award
4 \$1,180 for that pipe that Andy directed, so I
5 think that's a given. So on the smaller
6 issues, you give them 1,180 and you give us
7 2,000, so we can clear up two of the four
8 issues, anyway -- or the five issues that you
9 have to award. But I think on Change Order
10 No. 4 --

11 THE COURT: On the 2,000, do I
12 take that into account only if I get to Change
13 Order No. 4, or it comes into account --

14 MR. CASHION: No, it comes in
15 anyway. He just put it on 4. It's because
16 they didn't use the geotech testing that they
17 had set up. And if you remember, in their pay
18 app they had \$2,000. I asked Mr. Parker; he
19 said he used very little of it. I said, How
20 much? He said, About 1,800, and they conceded
21 2,000. So 2,000 is the number that we get as
22 a credit for that little issue.

23 THE COURT: So what you're saying
24 is it's a wash.

25 MR. CASHION: Just about.

1 THE COURT: So you don't owe them
2 anything under those two?

3 MR. CASHION: Under those two.
4 And on the Change Order No. 2 and 4, they
5 didn't give you enough proof. You don't have
6 a record saying it's unsuitable. You've got a
7 record, I think, in it's most favorable light,
8 that we agreed to something we shouldn't have
9 as far as the \$10. We weren't obligated to
10 pay that, but agreed to it. But you have no
11 record that every piece of soil out there --
12 that all-or-nothing approach they take to
13 this, they don't break it down is where their
14 downfall is on their burden of proof. Nothing
15 will support an award of 2,898 cubic yards to
16 be paid to them for that. Just like on Change
17 Order No. 4, they get zero. They haven't done
18 anything for it. They only have a very long,
19 lengthy narrative without any contemporaneous
20 documentation to back up anything.

21 And, again, the fatal point is
22 they don't have an engineer saying that the
23 soil report was invalid or that the soil that
24 they took out was unsuitable, so that's where
25 the case is. And give us our attorneys' fees

1 that we submitted to you since we've been
2 forced to come in here and enforce our
3 contract rights. Thank you very much for your
4 patience.

5 MR. PANTHER: May I have a final
6 word?

7 THE COURT: I think I'll let it
8 go. I've had enough. I want to tell all
9 three of you gentlemen that as boring as this
10 case has been, I've enjoyed watching you
11 work.

12 MR. PANTHER: Thank you.

13 THE COURT: You-all have a good
14 weekend.

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12 MR. PANTHER: Thank you.

13 THE COURT: You-all have a good
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15 (Proceedings were concluded.)
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FILING ATTORNEY'S CERTIFICATE
OF FILING AND NOTICE

The undersigned hereby certifies that he
has lodged the foregoing Record on Appeal with
the Clerk of the trial court within the time
allowed by law and has sent an exact copy of
this certificate and notice of such filing to
all other interested parties and/or their
attorneys, all pursuant to Tennessee Code
Annotated, Section 27-100 as amended.

Done this_____ day of_____, 2002.

Todd E. Panther
Attorney at Law

1 JUDGE'S CERTIFICATE

2
3 On the trial of this case the foregoing
4 was all the evidence submitted to the Court,
5 and no written objections as to the accuracy
6 or authenticity of the Record on Appeal having
7 been filed within 15 days of lodging of the
8 said Record on Appeal with the Clerk of the
9 trial court, I hereby certify approval of said
10 Record on Appeal and authentication of the
11 attached exhibits pursuant to Rule 24(b),
12 Tennessee Rules of Appellate Procedure.

13
14 Witness my signature this_____ day
15 of _____, 2002.

16
17
18 _____
19 Robert E. Lee Davies
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